REPORT OF THE 2014 STATUTORY REVIEW

Access to Information *and* Protection of Privacy Act

NEWFOUNDLAND AND LABRADOR

VOLUME I: EXECUTIVE SUMMARY
VOLUME II: FULL REPORT

Clyde K. Wells, Chair | Doug Letto | Jennifer Stoddart

Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act*

VOLUME II | FULL REPORT

Committee Members
Clyde K. Wells, Chair
Doug Letto
Jennifer Stoddart

March 2015

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Independent Statutory Review Committee
Access to Information and Protection of Privacy Act
Newfoundland and Labrador

March 2015

The Honourable Steve Kent
Minister Responsible for the Office of Public Engagement
Executive Council
Government of Newfoundland and Labrador
P.O. Box 8700
St. John's, NL
A1B 4J6

Dear Minister Kent,

In accordance with the terms of reference, the *ATIPPA* Review Committee is pleased to present the Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act*.

The report has been produced in two volumes – an Executive Summary (Volume I) and the full Report (Volume II), which provides detailed findings and recommendations, including a draft bill for your consideration.

We are grateful to the many citizens and stakeholders who submitted their views to us and who took the time to make presentations before the Committee at the public hearings.

We submit this report and draft bill for your attention and trust that the recommendations of the Committee will be accepted as being responsive to former Premier Marshall's expressed desire that the province have "a strong statutory framework for access to information and protection of privacy, which when measured against international standards, will rank among the best."

Sincerely,

2014 Review Committee
Clyde K. Wells, Chair
Doug Letto and Jennifer Stoddart

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ABBREVIATIONS AND ACRONYMS

ATIPP	Access to Information and Protection of Privacy
ATIPPA	Access to Information and Protection of Privacy Act (Newfoundland and Labrador)
ATI	Access to Information
BC	British Columbia
CAPA	Canadian Access and Privacy Association
CAPP	Canadian Association of Petroleum Producers
CBC	Canadian Broadcasting Corporation
CFIB	Canadian Federation of Independent Business
CIPM	Certified Information Privacy Manager
CIPP	Certified Information Privacy Professional
CIPT	Certified Information Privacy Technologist
CLD	Centre for Law and Democracy
CMPA	Canadian Medical Protective Association
CNA	College of the North Atlantic
C-NLOPB	Canada-Newfoundland and Labrador Offshore Petroleum Board
DNA	DeoxyriboNucleic Acid
ECJ	European Court of Justice
EITI	Extractive Industries Transparency Initiative
FIPPA	Freedom of Information and Protection of Privacy Act
FOI	Freedom of Information
FOIA	Freedom of Information Act
FOIP	Freedom of Information and Protection of Privacy Act
FOIPOP	Freedom of Information and Protection of Privacy (Nova Scotia)
GiC	Governor in Council
GPS	Geo-positioning system
HIROC	Healthcare Insurance Reciprocal of Canada
HOA	House of Assembly
HOC	House of Commons
IAPP	International Association of Privacy Professionals
ICCPR	International Covenant on Civil and Political Rights
ICO	Information Commissioner's Office
IPC	Information Privacy Commissioner
IMCAT	Information Management Capacity Assessment Tool
IMSAT	Information Management Self-Assessment Tool
LA	Legislative Assembly (of another province)
LGiC	Lieutenant-Governor in Council
LPP	Legal Professional Privilege
MHA	Member of House of Assembly
MOI	Management of Information Act (Newfoundland and Labrador)
MRI	Magnetic Resonance Imaging
NA	National Assembly (Quebec)
NDP	New Democratic Party

NL	Newfoundland and Labrador
NLVMA	Newfoundland and Labrador Veterinary Medical Association
NSW	New South Wales
NTV	Newfoundland Broadcasting Company
OAS	Organization of American States
OCIO	Office of the Chief Information Officer
ODI	Open Data Institute
OECD	Organization for Economic Co-operation and Development
OIC	Office of the Information Commissioner
OIPC	Office of the Information and Privacy Commissioner (Newfoundland and Labrador)
OPE	Office of Public Engagement
PDF	Portable Document Format
PHIA	Personal Health Information Act (Newfoundland and Labrador)
PIA	Privacy Impact Assessment
PIPEDA	Personal Information Protection and Electronic Documents Act (Canada)
RCMP	Royal Canadian Mounted Police
RTI	Right to Information
SEC	Securities and Exchange Commission
SMS	Short Message Service (text message)
UDHR	Universal Declaration of Human Rights
VCPR	Veterinarian-Client-Patient Relationship

INTRODUCTION

The Introduction will explain

- how the report is organized
- how the Committee was created, and its purpose
- how the Committee interprets the directions it has been given
- the Committee's structure and methods of operating
- the public consultation process the Committee put in place and the response
- the public hearings and the people we heard from
- the kind of research we did

Organization of the report

This report will begin with an explanation of the Committee's organization, a description of the approach to exercising its mandate, and an account of the Committee's work up to the completion of the public hearings. The report will then be divided into sections based on topics.

This report has been structured so that all matters relevant to a given topic are addressed in one section. For example, all aspects of the role and responsibility of the Commissioner are dealt with in a single section. Other topics are dealt with in the same manner. Occasionally the same or a similar recommendation may appear in more than one part of the report. This is a consequence of the same issue occasionally arising under different topics.

All recommendations appearing throughout the report are also listed in a summary of the recommendations. As required by the Terms of Reference, there is an executive summary for those who do not wish to wade through the full detail in order to understand what the Committee has recommended and why it made those recommendations.

The Committee also concluded that it would be useful to explain the nature of its mandate, the circumstances in which it arose, and how it was carried out.

Mandate

Section 74 of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*" or the "*Act*") requires the periodic appointment of a review committee:

> After the expiration of not more than 5 years after the coming into force of this *Act* or part of it and every 5 years thereafter, the minister responsible for this *Act* shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operations of this *Act* or part of it.

This is the only provision of the *Act* that deals with review of the legislation. Consequently, statutory guidance for the Committee is limited to the words "undertaking a comprehensive review of the provisions and operations of this *Act*."

The current review was established little more than three years after the report of the last review was filed. It appears that the review was called before the five-year requirement because of widely expressed concern about amendments to the legislation. These were implemented in 2012 by the statute commonly referred to as Bill 29. The Committee concluded that this would not be a routine five-year review of the *Act*. In fact, the Committee's

first consideration, at its initial meeting on 9 April 2014, was to consider carefully the nature of its task in order to identify the principles necessary to carry out its mandate.

Between the time of the announcement in March 2014 and the commencement of the public hearings in June 2014, many people, generally and in the media, were referring to the Committee as the "Bill 29 Inquiry." While it does not correctly indicate the focus of the Committee's work, that fact does highlight the popular perception of the purpose and role of the Committee. That perception may have been driven by the reference to Bill 29 in the Terms of Reference. As a result, it became necessary for the Chair to address the issue in the course of the presentation by one of the first presenters:

> I'm just going to stop for a moment to say something to you because I'm a little concerned about your thrust so far. This Committee is not an inquiry into Bill 29 or how it came about or why it came about, or what personal information and motivation caused it. Although many in the media and other places have referred to it as the Bill 29 inquiry, it is not that. That is not within our Terms of Reference. The only mention of Bill 29 in our Terms of Reference follows the explicit direction to do an assessment, a complete and independent comprehensive review of the *Access to Information and Protection of Privacy Act*, and then there is a phrase "including amendments made as a result of Bill 29."
>
> So, we have to look at the acceptability in the overall context of access and privacy, and how it functions, what those amendments cause. A passing reference to what you think drove Bill 29, I think you've covered that, but I just want to let you know that I think spending a great deal of time on it would be in excess of what's set out in our Terms of Reference and our primary thrust should be assessment of the way the *ATIPPA* functions and how the amendments in Bill 29 altered it and how that should be revised.[1]

The Committee, then, was guided at least partly by the circumstances giving rise to its appointment two years ahead of schedule, as well as by the statutory provision. There were two other key sources of guidance. One was former Premier Marshall's news release of 18 March 2014 announcing the appointment of the Committee (see Appendix A). There, he said: "Government is committed to ensuring that Newfoundland and Labrador has a strong statutory framework for access to information and protection of privacy, which when measured against international standards, will rank among the best." Government representatives made a presentation at the public hearings in August, and nothing the Committee heard from them would indicate any weakening of that commitment.

One of the early presenters, the Centre for Law and Democracy (CLD), emphasized the Premier's statement. In its written submission, the Centre indicates that it "wholeheartedly shares this desire" but cautions that making it a reality "is not merely a question of repealing Bill 29. Rather it will require root and branch reform of the *ATIPPA* framework."[2] That assessment turned out to have a greater degree of accuracy than the Committee had initially accorded it. No other participant addressed this aspect specifically. A number expressed the view that the major issues could be addressed simply by recommending repeal of Bill 29.

Although the Committee does not view the Premier's comment as a specific direction, we have concluded that it is an appropriate umbrella objective for the Committee to apply. Making recommendations that will ensure a strong statutory framework which, when measured against international standards, will rank among the best in the world, is an objective that the Committee kept constantly in sight in the course of its review.

1 Lono Transcript, 25 June 2014, pp 13–14.

2 CLD Submission, July 2014, pp 1–2.

The more specific source that provides guidance to the Committee is, of course, the Terms of Reference under which the Committee has functioned. It is convenient to set them out here.

Statutory Review of the *Access to Information and Protection of Privacy Act*

Terms of Reference

The *Access to Information and Protection of Privacy Act*, SNL2002, c. A-1.1 (*ATIPPA*) came into force on January 17, 2005, with the exception of Part IV (Protection of Privacy) which was subsequently proclaimed on January 16, 2008. Pursuant to section 74 of the *ATIPPA*, the Minister Responsible for the Office of Public Engagement is required to refer the legislation to a committee for a review after the expiration of not more than five years after its coming into force and every five years thereafter. The first legislative review of *ATIPPA* commenced in 2010 and resulted in amendments that came into force on June 27, 2012. The current review constitutes the second statutory review of this legislation.

1. **Overview**

   The Committee will complete an independent, comprehensive review of the *Access to Information and Protection of Privacy Act*, including amendments made as a result of Bill 29, and provide recommendations arising from the review to the Minister Responsible for the Office of Public Engagement (the Minister), Government of Newfoundland and Labrador. This review will be conducted in an open, transparent and respectful manner and will engage citizens and stakeholders in a meaningful way. Protection of personal privacy will be assured.

2. **Scope of the Work**

   2.1 The Committee will conduct a comprehensive review of the provisions and operations of the *Act* which will include, but not be limited to, the following:

   - Identification of ways to make the *Act* more user friendly so that it is well understood by those who use it and can be interpreted and applied consistently;
   - Assessment of 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;
   - Examination of the provisions regarding "Reviews and Complaints" (Part V) including the powers and duties of the Information and Privacy Commissioner, to assess whether adequate measures exist for review of decisions and complaints independent of heads of public bodies;
   - Time limits for responses to access to information requests and whether current requirements are appropriate;
   - Whether there are any additional uses or disclosures of personal information that should be permitted under the *Act* or issues related to protection of privacy (Part IV); and
   - Whether the current *ATIPPA* Fee Schedule is appropriate.

   2.2 Consideration of standards and leading practices in other jurisdictions:

   - The Committee will conduct an examination of leading international and Canadian practices, legislation and academic literature related to access to information and protection of

privacy legislative frameworks and identify opportunities and challenges experienced by other jurisdictions;

- The Committee will specifically consult with the Information and Privacy Commissioner for Newfoundland and Labrador regarding any concerns of the Commissioner with existing legislative provisions, and the Commissioner's views as to key issues and leading practices in access to information and protection of privacy laws.

3. Committee processes

3.1 For the purpose of receiving representations from individuals and stakeholders, the Committee may hold such hearings in such places and at such times as the Committee deems necessary to hear representations from those persons or entities who, in response to invitations published by the Committee, indicate in writing a desire to make a representation to the Committee, and make such other arrangements as the Committee deems necessary to ensure that it will have all of the information necessary for it to fully respond to the requirements of these terms of reference.

3.2 The Committee may arrange for such accommodation, administrative assistance, legal and other assistance as the Committee deems necessary for the proper conduct of the review.

4. Final Committee Report and Recommendations

The Committee will prepare a final report for submission to the Minister. The report will include:

- an executive summary;
- a summary of the research and analysis of the legislative provisions and leading practices in other jurisdictions;
- a detailed summary of the public consultation process including aggregate information regarding types and numbers of participants, issues and concerns, emerging themes, and recommendations brought forward by citizens and stakeholders; and
- detailed findings and recommendations, including proposed legislative amendments, for the Minister's consideration.

At the outset, the Committee carefully weighed the explicit directions in the Terms of Reference and reached several major conclusions about how to properly carry out its mandate.

1. Independent review

The Committee interpreted the words, "The Committee will complete an independent comprehensive review" to mean that the Committee should complete its work entirely independent of Government, with two exceptions: Government agencies would provide the facilities, and staff and expenses would be paid at Government rates. Achieving this independence required establishing processes whereby there would be no possibility of any agency of Government monitoring the Committee's work or communications facilities and activities, and no means by which Government could interfere with or influence the work of the Committee.

This approach made it necessary to obtain email and network data management services through a private service provider, rather than the agency providing those services to government departments and agencies. Achieving this level of independence from Government presented some difficulties, but we were satisfied that the objective could be achieved with the accommodation of agencies such as the Office of Public Engagement (OPE) and the Office of the Chief Information Officer (OCIO).

The Committee felt it could maintain the necessary independence without setting up its own separate accounting and expense payment functions, which would have been costly. A process was put in place that required conformity with Treasury Board rates and procedures, approval by the Chair of expenses, and payment of approved expenses by the OPE.

In all of these matters the Committee enjoyed the full cooperation of Government.

2. Open and transparent

The Committee concluded that the direction in the Terms of Reference that the review had to be "conducted in an open, transparent and respectful manner" would require that all oral presentations be made in public hearings and all written presentations be made public. The Committee also felt that openness and transparency could best be achieved if the media had access to audio and video recordings of the hearings and if the public had access to webcasts of the proceedings, both in real time and later. (See Appendix D).

Based on the previous review, the Committee foresaw the possibility that some might wish to make private or confidential representations. The Committee decided that oral presentations would be public unless there was a reasonable basis for concern that disclosing the presenter's identity or comments could result in serious adverse consequences. Oral presentations would be in open public hearings and written presentations, with any personal information redacted, would be published and the presenter identified on the Committee's website. (See Appendix B)

3. Engagement of citizens and stakeholders in a meaningful way

The Committee was required to make every reasonable effort to facilitate and encourage the fullest possible "engage[ment of] citizens and stakeholders in a meaningful way." As a result, the Committee resolved to promote participation by advertisement, news interviews, and any other reasonable means.

4. A more user-friendly Act

The Terms of Reference give the Committee specific direction to "make the *Act* more user friendly." The Committee treated this as a second umbrella objective, and it informed all recommendations the Committee made. The Committee concluded that this meant creating recommendations that would make the process of requesting information simpler, cheaper, and faster, and that would provide a convenient, speedy, and less costly review and appeal process.

5. Right of access and exceptions to access

The Committee is required by the Terms of Reference to assess existing provisions of the *Act* providing for the "Right of Access" and "Exceptions to Access" to determine

whether those provisions support the purpose and intent of the *Act*. The purposes of the *Act* are expressed in subsection 3(1). It reads as follows:

> 3.(1) The purposes of this *Act* are to make public bodies more accountable to the public and to protect personal privacy 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 limited exceptions to the right of access;
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
>
> (e) providing for an independent review of decisions made by public bodies under this *Act*.

Those values would dictate adopting the presumption that all records must be released on request, except for the limited exceptions recommended by the Committee. The Committee also concluded that the specific direction in the Terms of Reference invited us to make recommendations that would foster within public bodies a culture more conducive to achieving the stated purposes of the *Act*. That required the Committee to identify and express the stature that the right to access information and the right to protection of personal privacy should have in our society. Otherwise, it would have been extremely difficult to settle upon recommendations for legislative changes that would properly balance the interests of these rights and the many competing rights and interests.

This approach also required the Committee to decide on a standard by which limited exceptions could be specified. Ordinarily, a comprehensive review of the *ATIPPA* would include all amendments without specific reference to any one amendment. However, all of the circumstances under which the Committee was appointed, together with the direction to include in its comprehensive review "the amendments made as a result of Bill 29," would require it to consider the exceptions not only as they now are in the *Act*, but also as they were prior to Bill 29.

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

6. Reviews and complaints

A further specific direction is to examine the "Reviews and Complaints" provisions, "including the powers and duties of the Information and Privacy Commissioner." The stated purpose of that review is to ensure that "adequate measures exist for review of decisions and complaints independent of heads of public bodies." The Committee also concluded that this responsibility must be carried out in the context of the mandate to make the *Act* more user friendly. That calls for procedures that are effective while requiring the least possible time, cost, and complexity.

7. Time limits

The Committee was directed to consider time limits for response to access to information requests and whether current requirements are appropriate. The Committee concluded that it must consider procedures that would result in quicker responses and ensure adherence to the time limits. Without such measures, it would be difficult to make the *Act* "more user friendly."

8. Additional uses or disclosures of personal information

Most of the directions in the Terms of Reference and submissions by participants focused on access rather than privacy. Nevertheless, the Committee concluded it had a specific responsibility to consider legislative amendments that could improve both access to information and protection of personal privacy.

9. Fees and costs

A direction in the Terms of Reference specifically requires the Committee to consider "whether the current *ATIPPA* Fee Schedule is appropriate." This is related to making the *Act* "more user friendly," but there are other considerations as well, so the Committee views the fee schedule as a distinct concern. It was addressed as such by a significant number of participants, and is treated separately in this report.

Establishing the Committee's operations

Facilities and staff

The Committee was able to put staff and facilities in place at the time of its initial meeting. The Government had unoccupied space under lease at 83 Thorburn Road in St. John's, and was able to make it immediately available to the Committee.

The Committee was fortunate that Virginia Connors, who had served the Cameron Inquiry and other inquiries as a highly competent and experienced administrative officer, was available to start work almost immediately. She has been largely responsible for the efficient creation of the office, the organization of the public hearings and related recording and webcasting services, and the smooth running of the entire operation. The Committee expresses its sincere appreciation to her.

The Committee was also fortunate to engage the services of a skilled lawyer with significant research and legislative drafting experience. Tracy Freeman's dedication and skills have greatly enhanced the Committee members' research and legal analysis. The Committee acknowledges its indebtedness and expresses gratitude for her dedication and efforts.

The Committee was able to complete the staff complement quickly by engaging Jeanette Fleming, an experienced retired office administrator, as information management coordinator. Tina Murphy joined the team on a work term to meet the graduation requirements for her training program. Her skills and dedication during that brief period were so impressive that she was asked to stay on as the office assistant. The Committee is indebted to both Jeanette and Tina for their faithful and dedicated efforts.

After the drafting of the report was well underway it was necessary for the Committee to retain the services of an editor to ensure that its report was presentable and easily readable. We were fortunate to obtain the services of Dr. Claire Wilkshire. The Committee is grateful for the superb quality of her work and the most pleasant manner in which she performed it, as well as her overall ability to bring together in a single document the separate writings of the Committee members.

The staff were largely responsible for marshalling the factual material and submissions received to make them accessible to the members, assisting with or carrying out most of the research that was done, managing the shape and structure of the report, editing and arranging

the material written by the members to be presented in a reasonably reader-friendly form, and attending to all administrative issues. The members of the Committee express their deepest gratitude to all for their most competent work and their loyal and dedicated service.

Information management and communications

The challenge of establishing adequate information management and communications facilities could have delayed the start of the Committee's work considerably. However, the deputy minister and staff at the Office of Public Engagement helped arrange for prompt telephone and information management services through Bell Aliant and the OCIO.

With the cooperation of the OCIO and Bell Aliant, the Committee was able to establish email and network services that were entirely independent of Government. Although the Committee originally contemplated that website services would also be independently provided, it became obvious that because of the public nature of a website, independence from Government was not an issue.

The Committee expresses appreciation for the extensive efforts of all involved at the OPE, the OCIO, and Bell Aliant.

Process

Directed consultation with the Office of the Information and Privacy Commissioner (OIPC)

The Terms of Reference direct that the Committee "will specifically consult with the Information and Privacy Commissioner" as to any concerns the Commissioner may have with the existing legislative provisions and as to key issues. The Committee concluded that this approach was particularly appropriate, considering the OIPC's knowledge of access to information and protection of privacy issues, and the role of the Commissioner under the *Act*. It was agreed that representatives of that office would appear as the first presenters, to provide foundational information and information as to the manner in which operations had been carried out under the *Act*.

It was also agreed that it would be beneficial to have representatives of that office appear as the final presenters, to add any comments they desired to make after reading and hearing the submissions of the other presenters during the review. The OIPC also agreed to prepare a supplementary written submission that addressed topics raised by the Committee during their second oral presentation and to respond to matters raised in written submissions the Committee received following the hearings.

The Committee expresses appreciation to Commissioner Ed Ring and to the Director of Special Projects, Sean Murray, for their ready acceptance of the Committee's approach. The Committee was encouraged by the OIPC's constant presence at all of the public hearings and grateful for the information they provided.

Engaging citizens and stakeholders in a meaningful way

The Committee interpreted the direction set out in the Terms of Reference to "engage citizens and stakeholders in a meaningful way" as requiring that it promote participation by citizens and stakeholders in the Committee's work.

The Committee used various means to generate responses from a broad cross-section of the public. This started with a news release and a media interview with the Committee at the end of its original three-day meeting. Advertisements were placed in newspapers throughout the province in late April and early May 2014 to ask people and organizations wishing to make a presentation to notify the Committee. The Committee took advantage of every possible media opportunity to promote public interest. The Committee facilitated easy

online participation by the public by using its website to pose several questions on each of five topics:

- accessing information under the *ATIPPA*
- protection of privacy
- the role and powers of the Commissioner
- making the *ATIPPA* user friendly
- *ATIPPA* fees

There was not a significant response by members of the public to this online effort to engage them.

Expressions of interest

The Committee received a total of sixty-nine expressions of interest from persons or organizations interested in making representation on the provisions and operations of the *Act*. Ultimately, eight of those were withdrawn.[3]

The Committee was disappointed that there were only 12 expressions of interest from people living outside the St. John's area, and ultimately 3 of those were withdrawn. Of the remaining 9, 3 provided formal written submissions and indicated they did not wish to attend public hearings. Five wished to make only the comments set out in their expressions of interest. Only 2 people from outside the St. John's area spoke at the hearings. They came from 2 different communities in widely separate areas of the province. None were from Labrador.

Table 1 indicates the areas from which expressions of interest were received and what resulted from them.

Establishing hearings in two widely separated areas of the province to hear one representation in each would have been inordinately expensive. At an early stage the Committee explored alternatives with those from outside the St. John's area who had expressed interest in presenting. The Committee offered to reimburse the cost of their travel to St. John's to present. The Committee thanks them for their ready acceptance of this alternative. The Office of Public Engagement approved, and the Committee arranged for reimbursement of the expenses of 2 presenters.

Table 1: Summary of Expressions of Interest (By Location)

Location	Interest (Total)	Public Presentation	Written Submission	Withdrawn
St. John's	44	15	17	12
Conception Bay South	2		1	1
Mount Pearl	4		4	
Portugal Cove–St. Philip's	2	2		
Carbonear	1		1	
Clarke's Beach	1		1	
Chapel Arm	1		1	
Ramea	1		1	
Bell Island	1	1		
Marystown	1			1
Botwood	1		1	
Glovertown	2	1		1
Pasadena	1		1	
St. Barbe	1			1
Stephenville	1		1	
Outside NL	5	2	3	
Total	69	21	32	16

Prepared by the ATIPPA Review Committee Office

Table 2 indicates the general nature of the segments of society from which the representations originated.

Table 2: Summary of Expressions of Interest (by Stakeholder Group)

Groups	Interest (Total)	Public Presentation	Written Submission	Withdrawn
General Public	30	7	18	5
Academia/ Researcher	5		3	2
Media	7	3	3	1
Legal	1	1		
Public Body	15	6	3	6
Business	2	2		
Interest Group	7		5	2
Political Party	2	2		
Total	69	21	32	16

Prepared by the ATIPPA Review Committee Office

3 Four of the eight that were withdrawn came from government departments whose deputy ministers appeared before the Committee with the Minister responsible for the Office of Public Engagement.

Despite the fact that 89 percent of the population lives in the 276 incorporated municipalities in the province, and all of the municipalities are public bodies under the *Act*, the Committee did not receive an expression of interest from any municipality, and nothing from the organization that represents municipalities. A council member from one municipality and a town clerk from another made representations on one or two matters of particular concern to them. The mayor of the council member's municipality and three citizens commented in response to the council member's submission. A journalist also focused most of her comments on the practices of that particular municipality, as they relate to access to information and protection of privacy.

Hearing from those responsible for providing the information

The Committee wanted to hear from a broad cross-section of the public, but also from those responsible for providing access to information in the possession of public bodies and protecting the personal information Government collects from citizens. The Committee looked to two such groups. One was the 343 ATIPP coordinators in departmental offices, municipalities, and other public bodies throughout the province. The other group included the Minister responsible for OPE, and other senior officials of Government departments.

The Committee sent questionnaires to all ATIPP coordinators, asking questions as to the manner in which their offices managed ATIPP requests, the kind of support they received, and the attitude of their superiors towards meeting the requirements of the *Act*. To avoid any coordinator concerns about possible adverse consequences of responding to the questionnaires, the Committee put in place special measures to ensure that coordinators could complete and return the documents without the possibility of being identified. Some 122 of the 343 people to whom we sent the questionnaires responded. Collectively, the responses provided valuable information about how Government offices and other public bodies have responded to requests for information and shed some light on attitudes prevalent within Government, municipalities, and other public bodies.

The Committee also asked the deputy minister in the Office of Public Engagement to advise all deputy ministers, and any other public servants who might be interested, that the Committee was interested in hearing from them. The Minister responsible for the Office of Public Engagement and several deputies and officials made presentations and answered the Committee's questions. The Committee appreciated their participation.

The public hearings

The Committee held three sets of hearings (Appendix B), one from 24 to 26 June, another from 22 to 24 July, and the third from 18 to 21 August. 36 people were involved in presentations at the hearings. Table 3 indicates who the presenters were, the name of any organization they represented, and the capacity in which they appeared before the Committee.

The hearing room could accommodate a modest number of observers. An adjacent room with electronic audio and video feed provided accommodation for the media. On the whole, the hearings went smoothly, with only an occasional technical glitch interrupting the real-time webcasting of the proceedings. Except for the opening morning and the day when the Minister responsible for the Office of Public Engagement and other Government representatives appeared, there were never more than a handful of persons present, and for some sessions only one or two were present. However, the Committee was advised that for several sessions the electronic tracking indicated a fairly significant audience watching the webcast. Based on that information and the processes outlined above, members of the Committee are satisfied that the direction that the review be conducted in an open and transparent manner was fully satisfied.

Table 3: *ATIPPA* Review Committee Public Hearings		
Hearing Dates	Presenters	Organization
24 June 2014	Ed Ring, Information and Privacy Commissioner	Office of the Information and Privacy Commissioner
	Sean Murray, Director, Special Projects	Office of the Information and Privacy Commissioner
25 June 2014	Vaughn Hammond, Director of Provincial Affairs (NL)	Canadian Federation of Independent Business
	Simon Lono, Private Citizen	St. John's, NL
	Ed Hollett, Private Citizen	St. John's, NL
	Kathryn Welbourn, Publisher	*Northeast Avalon Times*
	Emir Andrews, Private Citizen	Portugal Cove–St. Philip's, NL
26 June 2014	James McLeod, Reporter	The *Telegram*
	Gerry Rogers, Member of House of Assembly	New Democratic Party
	Ivan Morgan, Researcher	New Democratic Party
	Sean Murray, Director, Special Projects	Office of the Information and Privacy Commissioner
	Ed Ring, Commissioner	Office of the Information and Privacy Commissioner
22 July 2014	Dwight Ball, Member of House of Assembly	Leader of Official Opposition
	Joy Buckle, Director of Research and Policy	Official Opposition Office
23 July 2014	Gavin Will, Municipal Councillor	Portugal Cove–St. Philips, NL
24 July 2014	Michael Karanicolas, Lawyer	Centre for Law and Democracy
	Barry Tilley, President	Dicks & Company Ltd.
	David Read, Vice-President	Dicks & Company Ltd.
	Terry Burry, Private Citizen	Glovertown, NL
18 August 2014	Suzanne Legault, Federal Information Commissioner	Office of the Information Commissioner of Canada
	Jacqueline Strandberg, Policy Analyst	Office of the Information Commissioner of Canada
	Peter Gullage, Executive Producer	CBC News, NL
	Sean Moreman, Senior Legal Counsel	CBC/Radio-Canada, Toronto
	Dr. Nicole O'Brien, *ATIPPA* Committee Representative	Newfoundland and Labrador Veterinary Medical Association
	Dr. Kate Wilson, President	Newfoundland and Labrador Veterinary Medical Association
19 August 2014	Hon. Sandy Collins, Minister	Responsible for Office of Public Engagement
	Rachelle Cochrane, Deputy Minister	Office of Public Engagement
	Victoria Woodworth-Lynas, Director	ATIPP Office, Office of Public Engagement
	Ellen MacDonald, Chief Information Officer	Office of the Chief Information Officer
	Genevieve Dooling, Deputy Minister	Department of Child, Youth and Family Services
	Alastair O'Rielly, Deputy Minister	Department of Innovation, Business and Rural Development
	Paul Noble, Deputy Minister and Deputy Attorney General	Department of Justice
20 August 2014	Rosemary Thorne, University Privacy Officer	Memorial University
	Morgan Cooper, Associate Vice-President (Academic), Faculty Affairs	Memorial University
	Shelley Smith, Chief Information Officer	Memorial University
	Lynn Hammond, Private Citizen	St. John's, NL
	Jim Keating, Vice-President, Nalcor, Oil and Gas	Nalcor Energy
	Tracey Pennell, Legal Counsel & ATIPP Coordinator	Nalcor Energy
21 August 2014	Ed Ring, Commissioner	Office of the Information and Privacy Commissioner
	Sean Murray, Director, Special Projects	Office of the Information and Privacy Commissioner
Total	36 Presenters	
Prepared by the ATIPPA Review Committee Office		

The Terms of Reference required the Committee to consider standards and leading practices in other jurisdictions and, in particular, specified that the Committee would conduct an examination of leading international and Canadian practices, legislation, and academic literature. That requirement involved significant research. The research is summarized in the following paragraphs; the specific elements will be addressed in detail in the Committee's analysis of each of the topics under consideration.

Legislative provisions in other jurisdictions

The Committee examined legislative provisions and practices in the other Canadian jurisdictions and in a number of international jurisdictions. The focus was on jurisdictions with cultural, linguistic, historical, political, and legal traditions similar to those of this province, including a Westminster-style process of parliamentary government. That meant, chiefly, practices in Australia and its states, New Zealand, the United Kingdom, and Ireland. While the United States and its individual states have similar traditions, their access to information practices have developed somewhat differently from those in the Commonwealth countries. The Committee also looked, in a more cursory manner, at practices in other international jurisdictions, particularly Mexico. While that was informative, we are satisfied that our emphasis should be on practices in the Commonwealth countries mentioned above.

Counsel for the Committee has carried out much of the research respecting legislative provisions in comparable jurisdictions. However, the Office of the Information and Privacy Commissioner provided helpful research respecting other Canadian provinces.

The Committee benefitted greatly from a presentation by the Information Commissioner of Canada, Suzanne Legault, who also provided the Committee with detailed comparative legislative research her office had completed. It included the federal legislation, as well as legislative provisions from several of the Canadian provinces and a variety of international jurisdictions including Australia, Mexico, New Zealand, the United Kingdom, and the United States. The research also included the provisions of the *Model Inter-American Law on Access to Public Information.* It encompassed information as to legislative provisions respecting virtually all of the topics that are of concern to the Committee. The Committee greatly appreciates that assistance from the Information Commissioner of Canada.

The Committee expresses appreciation to the Privacy Commissioner of Canada for making the effort, so quickly after his appointment, to communicate with the Committee. The list of reading materials promptly provided by Melissa Fraser-Arnott, Librarian at the Office of the Privacy Commissioner of Canada, was very helpful.

Not surprisingly, for the reasons noted above, the Committee found the legislation of the Commonwealth countries to be of the greatest assistance. As a result, in the course of considering each topic, the Committee referred primarily to the legislative provisions from the Commonwealth jurisdictions for guidance.

At the time of writing this report, Australia is debating changes to its information rights legislation. The outcome is uncertain, but the Committee believes the Australian experience remains valuable.

Leading international and Canadian legislation and practices

The Committee examined in detail the Canadian federal access to information and protection of privacy legislation and practices as well as the legislation and practices in the other provincial jurisdictions. It found the laws and practices in place in British Columbia, Alberta, Ontario, and Nova Scotia to be most helpful in general, but has benefitted from examining the practices in all of the Canadian jurisdictions. The Committee also learned from its consideration of the approach taken in the United Kingdom, where the practices that have been developed are a significant supplement to the legislated

regime. These benefits will be clear from the Committee's analysis of each of the topics.

Academic literature related to access to information and protection of privacy

Canadian and international scholarship, now accessible on the Internet, provided the Committee with a virtually unlimited source of academic papers and other treatises, from all parts of the world, dealing with the relevant topics. The bibliography attached will indicate those sources most relied upon in preparing this report. The Committee also examined a number of international treaties, some of the provisions of which pertain to the issues under consideration.

Our experience demonstrated that the Internet provides a superb facility for proactive government disclosure of information.

By far the most intense and challenging portion of the Committee's work was the period of research, assessment of representations, and preparation of the report that started in early September. The Committee members shared the writing responsibilities and each contributed in full measure to the overall result, with significant assistance from the diligent efforts of the staff.

Recommended statutory changes

Early in the course of its work, the Committee realized that the basic observation of the Centre for Law and Democracy was accurate. It would be necessary to undertake an overhaul of the existing *ATIPPA*, in order to address the various issues raised by citizens and organizations, as well as the Commissioner.

It might not be the "root and branch" reform urged by the Centre for Law and Democracy but it would be sufficiently extensive that the task could not be completed by simply recommending amendments to existing provisions.

It led the Committee to conclude that the more practical approach would be to draft a revised statute.

As a result, the Committee agreed that reporting to the Minister and the public could be best achieved by these means:

- outlining each issue, the relevant legislative provisions and any other legal factors
- describing and assessing the views expressed by participants and the Commissioner
- identifying comparable legislation and practices in other jurisdictions
- analyzing these factors and explaining the basis for the Committee's conclusions
- identifying its recommendations on each issue and expressing them generally in descriptive terms but not necessarily in legislative form
- ultimately, expressing the Committee's precise legislative recommendations by drafting a revised statute to give effect to the recommendations described in general terms throughout the report

Taking this approach had two significant benefits:

- First, it enabled the Committee to express its recommendations in more user-friendly language instead of the more difficult-to-follow language of legislation.
- Second, it enabled the Committee to express its specific recommendations for statutory change in the context of the statute as a whole, thereby making it much easier for readers to assess the overall effect of the statutory changes being recommended.

In this way the Committee was able to identify and retain without change the many provisions of the existing *ATIPPA* that work well and add to those the newly

drafted provisions necessary to give full effect to those recommendations in the report that would require new or revised legislative expression. The provisions were then rearranged into orderly related groupings, renumbered, and presented in the last chapter of this report as the bill by which the Committee proposes to achieve a revised *ATIPPA*.

The reader's attention is drawn to the fact that all references in these recommendations to section numbers of the *ATIPPA* are to the existing *ATIPPA* and not to sections of the draft bill.

In the recent past the law firm with which the Chair is associated has acted for both Memorial University and the College of the North Atlantic. Although those matters were not in any manner connected with this review, the Chair took no part in Committee determination of any issue in respect of which Memorial University or the College of the North Atlantic made recommendations.

Chapter One

THE STATURE OF THE RIGHT TO ACCESS INFORMATION AND THE RIGHT TO PROTECTION OF PERSONAL PRIVACY

> "In a democracy, all citizens are eligible to participate in the process of governing. Since this is not practical…all citizens should have the right to access any and all information produced during the governing process."
>
> —Frank Murphy, Submission to the Committee

This chapter will

- assess and describe the importance that citizens place on
  - the right to access information respecting public affairs
  - the right to protection of their personal information relative to the importance of other rights
- describe how courts evaluate and apply these rights
- assess the approach in other jurisdictions
- summarize the views we heard from citizens who made representations
- identify the standard that the Committee will use to recommend legislative provisions appropriate to provide for these rights
- explain our conclusions and how they should be expressed in the *ATIPPA*

General

The stature of the right to access information, in the context of democratic life in the province, pervades a great portion of the Committee's considerations. By "stature" we mean the level of priority to be attributed to the right by reason of its inherent nature. "Status" is used to refer to the classification into which a right is grouped (e.g., statutory, constitutional, quasi-constitutional, etc.). The issues before the Committee are not being considered in a vacuum. Factors relevant to access to information must be weighed in the context of the potential impact any recommendations could have on other entitlements and rights of citizens and institutions.

The right of access will frequently conflict with other rights, including the right of citizens to have public bodies keep their personal information private, and the right of public bodies to refuse disclosure of several other kinds of information, including solicitor-client privileged documents, Cabinet confidences, and, in certain circumstances, confidential business information of third parties. A degree of certainty as to the stature of the right of access is critical. It is central to the discussion about whether it is useful to protect certain records from access to information legislation, and how decisions might be made as to whether the public interest is best

served by disclosure of a record or refusal to disclose it.

The Committee had to resolve this matter before being able to address many of the issues before it. It was also important for the Committee to keep in mind its two umbrella objectives: to make recommendations that will result in a statute that will, when measured against international standards, rank among the best; and to make the *Act* more user friendly.

Present stature of access to information and protection of privacy

Legislative provisions

While the whole of the *ATIPPA* is relevant to either access to information or the protection of personal privacy, three sections in particular provide the information that determines and defines the nature of a citizen's right to access information held by the government of this province. It is convenient to consider first the stated purpose of the *Act*. The Legislature has expressed the purpose in section 3(1):

> 3. (1) The purposes of this *Act* are to make public bodies more accountable to the public and to protect personal privacy 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 limited exceptions to the right of access;
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
>
> (e) providing for an independent review of decisions made by public bodies under this *Act*.

Section 7 refers to a person who makes a request under section 8, but that section is really only procedural and describes how a person may access a record. Section 7 confers the right of access in subsection (1) and indicates the existence of exemptions in subsection (2):

> 7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> (2) The right of access to a record does not extend to information exempted 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.

Other provisions in the *ATIPPA* limit and qualify the right to access in respect of specific documents, but it is those subsections of sections 3 and 7 that define in general terms the nature of the right of access to information held by public bodies. The report will address these other sections when commenting on the specific topics to which they relate. No provision of the statute gives specific direction as to the relative importance to be accorded to the right.

Public concern about the impact of Bill 29 changes in the legislation on the right to access information appears to have led to the Committee's establishment in 2014. Understandably, submissions before the Committee focused on provisions that removed certain types of documents from public scrutiny, and on the limitation of the powers of the Commissioner to fully review a public body's decision to withhold information. However, Bill 29 also contained major additions and amendments dealing with protection of privacy.

Some of the amendments had their genesis in the January 2011 report of John Cummings, Q.C. He noted that Part IV of the *Act*, which deals with protection of privacy and had only come into force on 16 January 2008, caused "frustration and anxiety" on the part of

public bodies, although less than that caused by access to information provisions.[1] He made no reference to other opinions on the handling of personal information except to those offered by public bodies.

In the years preceding the Cummings report, the House of Assembly passed the *Personal Health Information Act* (*PHIA*). It came into force in April 2011, just after the Cummings review had concluded. With the experience of defining how personal information was to be used in the health sector, public bodies must have gained added familiarity with the many uses of personal information.

In his report, Mr. Cummings made several recommendations to broaden the protection of different types of personal information and to bring practices in line with other Canadian jurisdictions (for example, he recommended the introduction of a harms test).

From 2012 onwards, public attention focused on the parts of Bill 29 that made access to many types of government records more difficult. Changes to those parts of the *Act* dealing with personal information went largely unnoticed. They seemed to fill a gap in privacy protection and attracted little sustained criticism.

The personal information amendments in Bill 29 were significant and did two main things. They resolved some difficult debates about what constituted personal information. This had been a particular problem in the post-secondary educational environment. The amendments also provided for a harms test to be used by a public body releasing personal information. The harms test assessed what constituted an unreasonable invasion of a third party's privacy. Much more detailed guidance about when disclosure of personal information would constitute an unreasonable invasion of a third party's privacy was given in the revised *Act*. This reflected the need for a clear standard in some of the most difficult cases (such as, for example, evaluative opinions given in the course of competitive processes).

These amendments follow trends in personal information protection in Canadian society generally. Many factors in a particular context can create a reasonable expectation of privacy for an individual. These factors must be considered in the delicate task of weighing what is or is not to be publicly available. What is private in one context may not be private in another. For example, information collected for one purpose becomes a privacy concern if it is allowed to be used for another purpose. This complex set of realities is a challenge for those who must interpret the *Act*.

One scholar described the methods courts should use to determine what is a reasonable expectation of privacy by saying that "prevailing social norms are important markers … community mores help identify private information and activities at a conceptual level."[2] The Bill 29 changes respecting protection of privacy brought the content of the *ATIPPA* more into line with prevailing social norms.

For example, a person's tax, financial, and health information, and religious or political beliefs are considered in our society to be personal information, the release of which would be an unreasonable invasion of that person's privacy. Personal information about attendance at a public event or receipt of an award is not an unreasonable invasion of a person's privacy unless the person involved opposes the disclosure. Some changes brought by Bill 29 reveal contemporary sensitivities and values—the term "assistance levels" was changed to "income or employment support levels." "Remuneration" was changed to "salary range." Post-secondary institutions are allowed to use the personal information of their former students to contact them for fundraising.[3]

Administrative practicalities were reflected in new sections,[4] which now allowed a public body to disclose personal information to a surviving spouse or relative or to allow for the delivery of common programs or services.

An entire new section was created to cover evaluations or opinions made in the context of a competitive process. This includes awarding of contracts or benefits by a public body, admission criteria for an academic program, evaluation of tenure at a post-secondary educational body, the determination of an award recognizing

1 Cummings Report (2011), p 17.

2 Hunt, Privacy in the Common Law, *Queen's LJ* 683-684.

3 *ATIPPA* ss 30 and 38.1.

4 *Ibid* s 39(1)(u)-(v).

achievement or service, and assessing teaching materials or research (section 22.1). Similarly, a new section (22.2) required that workplace investigations remain largely confidential and personal information be unavailable to third parties not participating in the investigation. Finally, the definition of what constitutes personal information was qualified in one case. An individual's opinions remained personal information. But a new exception was added: "except where they are about someone else."[5]

As discussed above, few of these changes attracted much public comment either at the time of their adoption or since, with some exceptions that are dealt with elsewhere in this report.

Other relevant law

In addition to consideration of the statutory provisions, understanding fully the nature of the right of access requires consideration of provisions of the *Canadian Charter of Rights and Freedoms* (the Charter) and relevant jurisprudence. The right of access to information held by governments is not explicitly designated as a constitutional right by the Charter. That is a significant factor in determining and defining the nature of the right. A second but related factor is the fact that including it as a Charter right was considered in 1982 when the Charter was drafted, but the idea was rejected by the Special Joint Committee of the Senate and House of Commons.[6] Nevertheless, decisions of the Supreme Court of Canada have resulted in the right of access to information in Canadian jurisdictions being accorded a stature of special significance, even though it is not a constitutional right.

There are many differences among statutory provisions in the various Canadian jurisdictions, but the nature of the right of access does not vary greatly from one Canadian jurisdiction to another. That results primarily from the commonality of democratic values in all jurisdictions of the country. However, in part at least, it results from the fact that the Supreme Court of Canada is the ultimate appellate court for all Canadian jurisdictions. As a result, in its role as the final interpreter of diverse laws from all of the Canadian jurisdictions, the court applies the same principles of law and democracy to appeals from all jurisdictions in the country. The Supreme Court of Canada's decisions constitute the most reliable description of the nature of the right of access to information, as it has evolved in Canada through statutory provision and judicial interpretation.

That court's initial views on legislation of this kind and on the nature of the right to access information and the right to privacy were expressed in the 1997 decision in *Dagg v Canada (Minister of Finance)*.[7] Although the majority of the court disagreed on the application of the principles to the facts of that case, they endorsed Justice LaForest's exposition of relevant principles. The whole of his judgment is a scholarly analysis of the competing principles: the public right of access to information held by government on the one hand, and the right to protection of personal information held by government on the other. Obviously, the court was interpreting the specific provisions of the statutes concerned. In the course of interpreting such statutes, courts rely upon long-accepted principles of law and on the broader principles under which our democracy functions. That was accepted by the court in the *Reference re Secession of Quebec,* where the court, speaking of the principles implicit in our constitutional structure, expressed these views:

> Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act*, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.
>
> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of

5 *Ibid* s 2(o)(ix).

6 Klein & Kratchanov, Government Information (2014) ch 1 at 1-1.

7 [1997] 2 SCR 403 [*Dagg*].

> constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.[8]

It seems likely that in commenting on the nature of the right to access information in the hands of government in the *Dagg* decision, Justice LaForest was employing principles implicit in our constitutional structure:

> As earlier set out, s. 2(1) of the *Access to Information Act* describes its purpose, *inter alia*, as providing "a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public". The idea that members of the public should have an enforceable right to gain access to government-held information, however, is relatively novel. The practice of government secrecy has deep historical roots in the British parliamentary tradition…
>
> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them…
>
> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.[9]

With respect to the nature of the right to privacy, he wrote:

> The purpose of the *Privacy Act*, as set out in s. 2 of the Act, is twofold. First, it is to "protect the privacy of individuals with respect to personal information about themselves held by a government institution"; and second, to "provide individuals with a right of access to that information". This appeal is, of course, concerned with the first of these purposes.
>
> The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions…
>
> Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*.[10]

In later decisions such statutes are described as quasi-constitutional. In *Lavigne v Canada* (*Office of the Commissioner of Official Languages*), Justice Gonthier confirmed the quasi-constitutional status of those statutes:

> The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having.[11]

8 [1998] 2 SCR 217 at paras 51–52.

9 *Dagg*, *supra* note 7 at paras 59–61.

10 *Ibid* at paras 64–65.

11 2002 SCC 53 at para 25, [2002] 2 SCR 773 [*Lavigne*].

The values described by Justice LaForest continue to inform interpretation of Canadian access to information and protection of privacy laws. This is clear from the decision of the Supreme Court of Canada in a more recent case, *Ontario (Public Safety and Security) v Criminal Lawyers' Association*. In that decision Chief Justice McLachlin and Justice Abella wrote:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.
>
> Both openness and confidentiality are protected by Ontario's freedom of information legislation, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*" or the "*Act*"). The relationship between them under this scheme is at the heart of this appeal. At issue is the balance struck by the Ontario legislature in exempting certain categories of documents from disclosure.[12]

Further comments in that case support the conclusions as to the inherent nature of the right to access information that the Committee drew in the course of making its recommendations. One of the parties in that case had argued that entitlement to access information held by a public body is a right protected by section 2(b) of the Charter. That section guarantees "freedom of thought, belief, opinion and expression." The court concluded:

> Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.
>
> The first question to be addressed is whether s. 2(*b*) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(*b*) does not guarantee access to all documents in government hands. Section 2(*b*) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.[13]

It is clear that in Canadian jurisdictions the right of access does not, by itself, enjoy the status of being or being equivalent to a constitutional right. In only one circumstance can it acquire the enforceability of a constitutional right. That circumstance is where access to the information is "a necessary precondition of meaningful expression on the functioning of government."

The most recent comment from the Supreme Court of Canada on these matters comes from its 2014 decision in *John Doe v Ontario (Finance)*. There Justice Rothstein, writing for the court, wrote:

> Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.
>
> However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information. [14]

Those comments indicate that there has been little if any change in the general view of the Supreme Court of Canada as to the nature of the right to access information, in the course of its interpretation of relevant statutes in the various jurisdictions of Canada. As noted above, however, it must be borne in mind that in all of those cases the court was not declaring what the law should be. Rather, it was interpreting what the legislature expressed the law to be. The court commented on this factor in *Canada (Information Commissioner) v*

12 2010 SCC 23 at paras 1–2, [2010] 1 SCR 815.

13 *Ibid* at paras 5, 30.

14 2014 SCC 36 at paras 1–2 [*John Doe*].

Canada (Minister of National Defence).[15] There, Justice Charron, speaking for the majority, wrote:

> The Commissioner relies heavily on the quasi-constitutional characterization of the *Access to Information Act*. (See *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, where the Court affirmed this status in respect of the *Official Languages Act* and the *Privacy Act* (paras. 23-25)). She argues that, as such, the purpose of the Act becomes of paramount importance in the interpretative exercise, and that the legislation should be interpreted broadly in order to best promote the principles of responsible government and democratic accountability. While I agree that the *Access to Information Act* may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation. The fundamental difficulty with the Commissioner's approach to the interpretation of the term "government institution" is that she avoids any direct reference to the legislative provision at issue**. The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.**[16] [emphasis added]

The specific provisions of the *ATIPPA* and relevant Canadian jurisprudence are of primary significance to our conclusion as to the stature of the right to access information. However, the Terms of Reference direct the Committee to take into account the views of citizens and stakeholders and of the province's Information and Privacy Commissioner, as well as leading international and Canadian practices and legislation. We believe that requirement applies to any conclusions we draw as to the stature to be accorded to the right to access, as well as our recommendations respecting the content of the legislation. We shall start with what we heard from citizens and stakeholders.

15 2011 SCC 25, [2011] 2 SCR 306 [*Information Commissioner v Minister of National Defence*].

16 *Ibid* at para 40.

What we heard

From organizations

A number of participants commented on the importance of the "right" or "entitlement" of citizens to access information having a bearing on public affairs. Many expressed views on the level of priority that should be accorded to the right to access information vis-à-vis other competing rights such as those mentioned in the preceding paragraph. As one might expect, there was a great deal of agreement that the right of access to information respecting public affairs is an important entitlement, if the citizen is to have an opportunity to participate fully in the democratic process. Access to information in a timely manner is fundamental to exercising political rights in a democracy.

The Federal Information Commissioner

Suzanne Legault, the Federal Information Commissioner, quoted the excerpt from the *John Doe* decision that is set out above and then observed that

> In reviewing any freedom of information legislation, the key issue is: does the legislation achieve the right balance between the confidentiality required to conduct the business of government while ensuring citizens have access to information under the control of the government so they can hold their governments to account.…My review of the current *ATIPPA* leads me to conclude that it does not achieve this balance.[17]

17 Information Commissioner of Canada Submission, 18 August 2014, p 3.

The Centre for Law and Democracy

The Centre for Law and Democracy (CLD) would also give the right of access to information the highest possible priority. Michael Karanicolas, the representative who elaborated on their written submission, asserted that "responding to access requests should be considered a core part of an institution's mandate with adequate resources allotted."[18]

He also expressed, very strongly, the Centre's view that the present *ATIPPA* is inadequate, and referred to former Premier Marshall's comment when he announced the *ATIPPA* Review Committee. He was referring to the comment the government's purpose was to ensure that the province had "a strong statutory framework for access to information and protection of privacy, which when measured against international standards, will rank among the best." While he lauded the objective, Mr. Karanicolas observed that to make Newfoundland and Labrador a world leader would require more than repealing Bill 29, and expressed the view that it would require "root and branch reform of the access to information framework and a core cultural shift within the public sector away from traditionally skeptical attitudes towards openness and transparency."[19]

Later in his comments, he also said:

> And what we're hoping to see is that this committee will take a global context and a broader context and want to make recommendations that will make Newfoundland and Labrador an actual global leader on this, rather than just doing well within the Canadian context which is rather dismal all around.[20]

From individuals

The views expressed by the Centre found strong support among some who made personal representations.

Ken Kavanagh

Ken Kavanagh supported the positions expressed by both the Federal Information Commissioner and the Centre for Law and Democracy.

1. I am an ordinary citizen who believes that the very essence of true democracy is an informed, engaged and participatory citizenry;
2. I believe that the highest degree of "access to information" is an essential and fundamental element of such a democracy;
3. As an ordinary citizen, I am extremely concerned and upset at this government, both for the process and intent of Bill 29 and for its stance and attitude towards true openness, transparency and accountability.[21]

Frank Murphy

Frank Murphy expressed the following perspective:

> [S]ince ALL citizens have the right to govern, then all citizens should have the right to access any and all information produced during the governing process. Why should such information suddenly become privileged, able to be accessed by the few chosen by election?
>
> … [T]o cite privacy to withhold salary information of government employees, or the cost of establishing a new department, or the cost of any aspect of government programs, seems as inappropriate as the owner of a business not knowing what he pays his own employees.[22]

Scarlett Hann

Ms. Hann wanted to ensure that citizens of the province would enjoy the same rights to access information as their fellow Canadians:

> It is not good enough for us as citizens to accept a decision that denies us access when the same information requests would be honoured in so many other provinces in the country. Accepting less transparency than provided to other jurisdictions is to allow flawed legislation to negatively impact our human rights as Canadians.[23]

18 CLD Transcript, 24 July 2014, pp 5–6.
19 *Ibid* 17.
20 *Ibid* 58.
21 Kavanagh Submission, August 2014, p 2.
22 Murphy Submission, 24 July 2014, p 1.
23 Hann Submission, 27 July 2014, p 1.

Alex Marland

Dr. Marland, a Memorial University political science professor, observed that freedom of information has the potential to act as an important counterbalance to this province's democratic fragilities, some of which he listed. He then wrote:

> However, the Government of Newfoundland and Labrador does not exist to finance the provision of information to its critics. Opposition parties, the media, interest groups and other government critics use access to information to obtain evidence to improve their own position vis-a-vis their competitors, rather than purely in the democratic interest. There must be reasonable constraints on their demands. Otherwise, the information that could present a public or private harm could be publicly discussed, and if requests are too frequent then the government will be required to divert excessive public funds to subsidize an insatiable appetite for information searches.[24]

From the media

Canadian Broadcasting Corporation

Only CBC/Radio Canada made representations as a media entity, but several individuals associated with the media made personal representations. With respect to the nature of the right, the only comment of CBC/Radio Canada was that "access to information legislation plays a vital role in informing the public, and in exposing government waste, corruption and other matters of fundamental public interest."[25]

Ashley Fitzpatrick of the Telegram

Ms. Fitzpatrick suggested that the *ATIPPA* should be written to reflect the fact that "there has been, at times, a push for secrecy and even corruption in our province." She wrote:

> The Act must also reflect the fact that the smallest and most innocent of actions—delayed responses to access to information requests or overreaching redactions within responses, as two examples—are able to produce and foster a culture of secrecy, with or without there being any intent to create one.[26]

From political parties

Representatives of political parties also expressed views as to what should be the stature of the right to access information.

The Liberal Party, Leader of the Official Opposition, Dwight Ball

The leader of the Liberal party commented:

> The *ATIPPA* is a *means* to a well-functioning democracy. The *ATIPPA* facilitates the critical roles that the opposition, the media, as well as the general public, play in a democracy. In order to be effective in *our* role as the opposition, as MHAs representing the people who elected us, access to information is essential.[27]

The New Democratic Party, Gerry Rogers, MHA

The submission of the New Democratic Party observed:

> Review Commissioner John Cummings said in his 2010 report the purpose of the Act is not to make things easier for civil servants. He also noted that providing information to the public is as much a part of a civil servant's responsibility as everything else they do.[28]

In general

Virtually all participants acknowledged that the right to access information in the possession of government is vital to democracy. While there was some agreement on what should be the relative stature of the right of access, there was also a significant variety of opinion.

No participant was more forceful or presented stronger views about this issue than the Centre for Law and Democracy. That organization was insistent that the citizen's right to access information in government's possession had to be accorded the character of a "human right." In the course of the oral presentation, it was clearly implied, if not suggested directly, that the

24 Marland Submission, 15 July 2014, p 2.
25 CBC/Radio-Canada Submission, 18 August 2014, p 8.
26 Fitzpatrick Submission, 25 July 2014, p 2.
27 Official Opposition Submission, 22 July 2014, p 1.
28 New Democratic Party Submission, 26 June 2014, pp 4–5.

Committee's recommendations for legislative amendments should keep that stature in mind. Mr. Karanicolas' oral representations, taken together with the Centre's written recommendations, would result in very little, if anything, being subordinate to the right to access information.

Other Canadian and international legislation and practices

Statutes in other Canadian jurisdictions

Like the *ATIPPA*, the access legislation in all other Canadian jurisdictions, with the possible exception of Quebec, does not indicate a special stature or even express provisions from which a special stature should be inferred. Section 2(1) of the federal *Access to Information Act* is similar to the corresponding *ATIPPA* provision:

> The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

The language used in the statutes varies, but there is little variation in the essential principles set out in the legislation of the other provincial and territorial jurisdictions of Canada. There is no obvious basis for a stature to be accorded to the right to access information in any of those statutes that is significantly different from the conclusion to be drawn from the provisions of the *ATIPPA*.

Commonwealth countries

The legislation of the United Kingdom, Australia, and New Zealand makes similar provision but does not specify the nature of the right. Commentary on the enactment or reform of access legislation does, however, indicate the perception of the stature of the right. For example, the Government of New Zealand, in its response to the Law Commission review of that country's legislation, said:

> The government recognises that the *Official Information Act 1982* is an Act of constitutional importance that provides the necessary checks and balances to ensure New Zealanders can participate effectively in government and the democratic process.[29]

The United Kingdom

There is nothing specific in the UK *Freedom of Information Act 2000* to indicate that the right is to be accorded superiority as a human right, a constitutional or quasi-constitutional right, or any status beyond a statutory right. The fact that it is subject to some twenty exemptions suggests status as a statutory right.

Australia

Australian legislation provides little assistance in identifying the nature of the right to access information. A publication intended to guide the exercise of rights in Australia contains the following comments:

> The democratic purpose of FOI legislation in Australia is to confer a legal right on members of the public to access information held by the government. When FOI legislation was first being considered by the Australian Parliament in the 1970s, the Senate Standing Committee on Constitutional and Legal Affairs set out three broad reasons why FOI legislation is important. Those reasons are as relevant today.
>
> First, FOI provides a mechanism for individuals to see what information is held about them on government files, and to seek to correct that information if they consider it wrong or misleading.
>
> Second, FOI enhances the transparency and accountability of policy making, administrative decision making

29 NZ Government Response to Law Commission Review (2013).

and government service delivery. For example, FOI enables individuals to understand why and how decisions affecting them are made and, armed with that knowledge, question or support the decisions made by government. Transparency in decision making can also lessen the risk of inefficient and corrupt practices.

Third, a community that is better informed can participate more effectively in the nation's democratic processes.

More recently, a fourth reason for FOI legislation has emerged. There is greater recognition that information gathered by government at public expense is a national resource and should be available more widely to the public. This is due in considerable part to developments in information technology use in the government and non-government sectors since the *FOI Act* was enacted. This reason was summarised by the Government 2.0 Taskforce that examined how Web 2.0 technology could be used to achieve more open and responsive government. [30]

Other international legislation and practices

In its written submission, the Centre for Law and Democracy referred the Committee to a variety of international instruments and authorities, and suggested that international practice should guide the Committee in its recommendations respecting the stature of the right to access information. Using the abbreviation "RTI" to mean "right to information," the Centre said this in its written submission:

> The right to access information held by government has been recognized internationally as a human right and is also explicitly protected in dozens of constitutions around the world. International recognition is reflected in decisions of the Inter-American Court of Human Rights and the European Court of Human Rights, as well as in the UN Human Rights Committee's 2011 General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Canada is a party. In 2010, the Supreme Court of Canada found that the right to information is protected under section 2(b) of the Constitution, as a derivative of the right to freedom of expression. The scope of this was not absolute; the Court noted that it "includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance". However, this clearly covers an important percentage of all RTI requests. **To ensure that the processing of those requests meets constitutional standards, the rules relating to all requests must do so (i.e. RTI regimes overall must meet these standards).**[31] [emphasis added]

The Centre asserted that, notwithstanding the "global recognition of the fundamental importance of RTI as a human right [and] the Supreme Court's ruling," access to information systems in Canada remain stuck in a rut and a Canadian jurisdiction needs to take steps to change this. Specifically the Centre wrote:

> Unfortunately, neither global recognition of the fundamental importance of RTI as a human right nor the Supreme Court's ruling have had an impact on attitudes towards RTI in Canada, where access systems remain stuck in the same rut they have occupied for decades. To break out of this rut, Canada needs one jurisdiction that is prepared to think outside of the (Canadian) box and be prepared to take bold steps to put in place a truly effective RTI regime. There is enormous resistance to this, based largely on accumulated attitudes and biases. To counter this will take forward looking vision. But the experience of a growing number of countries around the world clearly demonstrates that the risks feared by naysayers simply do not exist. Radical reform of *ATIPPA* to bring it into line with better global standards and the wider information realities of the modern world will neither impose massive costs on taxpayers nor undermine the effective functioning of government.[32]

The Centre urged this Committee to recommend the changes it outlined:

> CLD hopes and believes that *ATIPPA* Review Committee can play a critical role in spurring Newfoundland and Labrador to assume a mantle of Canadian, and indeed global, leadership in government transparency. This Submission outlines the main changes that are required to transform *ATIPPA* into a world class law. We urge the Committee to show the leadership that is required not only to reform and improve RTI in Newfoundland and Labrador, but to show the whole country the way forward.[33]

30 Australia ICO, *Guide to the Freedom of Information Act, 1982*.

31 CLD Submission, July 2014, pp 3–4.

32 *Ibid* 4.

33 *Ibid*.

The Committee was also provided with a copy of a document titled *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions* prepared by the Centre and published in September 2012. It purports to be a ranking by the Centre of the strengths and weaknesses of access to information laws of the 14 jurisdictions in Canada. In the Centre's view, every jurisdiction in Canada performed poorly from an international perspective. The Centre asserts that Canada's federal access to information laws would place 55th in the world, behind those of the Slovak Republic, Colombia, Mongolia, and most provincial jurisdictions. British Columbia's law, which the Centre ranks number 1 in Canada, would rank 25th of 93 national laws, and be grouped with those of Uganda, Indonesia, and Peru. The Centre ranks this province 3rd in Canada but 34th internationally. It observes:" It should be abhorrent to Canadians to know that their country rates 55th in the world in a vital human rights indicator."[34]

The Centre's written and oral presentations both emphasized the high priority that should be accorded to the right of access simply because it was recognized as a human right by the international authorities to which it referred. The oral presentation emphasized this statement from the written submission:

> While the precise formulation of exceptions varies around the world, the "harm test" is a uniform feature of strong RTI legislation. In addition to being firmly entrenched in international standards, it is intuitive to the notion of the right to information as a human right, which should not be infringed without a pressing reason. If information would not cause harm through its disclosure, it should surely be released. **In many cases, *ATIPPA* instead stipulates class exceptions which apply to categories of information rather than protecting interests against harm. This cannot be justified when considered through the lens of access as a human right**.[35] [emphasis added]

The thrust of the Centre's submission seemed to be that because access to information was characterized, at least by some organizations, as a human right, the significance of that characterization ought to be the dominant factor in the Committee's considerations. Based largely on that reasoning, and asserting that accepting "categories" of information cannot be justified, the Centre argues that the right to access information should be given a stature that would see everything released unless it was established that doing so would cause harm.

34 CLD, *Failing to Measure Up*, p 4.

35 *Supra* note 31 p 5.

Issues

The only issue respecting access to information to be determined in this part of the chapter is: what stature should be accorded to citizens' right to access information held by public bodies?

Analysis

As the comment in the excerpt from *Information Commissioner v Minister of National Defence* makes clear, when courts apply statutes about access to information or other issues, they seek to determine what the legislature intended. The courts cannot rely on generally accepted principles of law and democracy to draw a conclusion as to what they think should have been the intention of the legislature, and then base their interpretation of the statute on that conclusion. This Committee does have that kind of responsibility, but it is circumscribed by the directions

given in the Terms of Reference and described in the Introduction to this report. Faithfully carrying out those directions require that the Committee analyze the factors described in this chapter and base its recommendations as to the stature that should be accorded to the right to access information on that analysis.

A sound starting point is the conclusion of the Supreme Court of Canada in the *Lavigne* decision (quoted above) that rights to access and privacy are quasi-constitutional. At the very least, if we are to reflect the values of Canadian law and democracy, we cannot justify treating the right to access information as anything less than a quasi-constitutional right. The question is whether the Committee should recommend it be accorded a stature beyond that.

According that stature to the right would be consistent with virtually all of the representation we heard, with the possible exception of that of the Centre for Law and Democracy. Dr. Alex Marland and Lynn Hammond[36] stated that sound freedom of information practices are important, and both expressed the view that the right must be appropriately constrained. In the words of Dr. Marland, the imperative that Newfoundland and Labrador must be a leader in freedom of information practices must also "be contextualized with the understanding that the Government of Newfoundland and Labrador does not exist to finance the provision of information to its critics."[37]

The more difficult proposition to reconcile is the assertion of the Centre for Law and Democracy that the right must be accorded a higher stature because certain international organizations view it as a human right. The Centre argues that any exceptions to the right to access information must be "viewed through the lens of access as a human right." Effectively, the Centre is asserting that any exception to access must be of such a nature to warrant overriding a human right. The Committee appreciates the enthusiasm of the Centre, and indicated to its representative that its submission expressed some very good ideas. However, for the reasons that follow, the Committee cannot agree with the Centre's assertions as to the stature the Committee should accord to the citizen's right to access information held by public bodies.

Whether the right is classified as a "political right," a "civil right," a "human right," a "statutory right," or any other classification may be largely a matter of semantics. The critical factor is what the phrase is intended to mean in the context in which it is used. However, most people would view a right that was classified simply as a "human right" to be superior to every other classification of right simply because it is assumed to be derived from being human. Therefore, insisting that the simple expression "human right" be the basis for determining the stature to be accorded the right to access information held by public bodies makes it necessary to consider the qualities properly attributable to the term in the various contexts in which it may be used.

We acknowledge that the right to access has, in some international circumstances, been described as a "human right" but do not agree that those references or descriptions necessarily require that it be treated as superior to other substantial rights and entitlements in a democratic society. We do not interpret the international authorities the Centre mentions, nor the comments in the decision of the Supreme Court of Canada to which they refer, nor any of the other international authorities considered by the Committee, as offering justification for according to the right of access the stature the Centre recommends.

The Centre refers to two international decisions: *Claude Reyes et al v Chile*[38] and *Tarsasag A Szabadsagjogokert v Hungary*[39] as support for its assertion that the right to access should be accorded a superior recognition as a result of being recognized as a human right.

In the first, the case involving Chile, the court was dealing with Article 13 of the *American Convention on Human Rights* (to which Canada is not a signatory), the relevant portion of which provides:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of

36 Hammond Transcript, 20 August 2014, pp 20–24.

37 Marland Submission, 15 July 2014, p 1.

38 (2006) Inter-Am Ct HR (Ser C) No 151[*Chile*].

39 No 373 74/05 (14 April 2009) [*Hungary*].

> frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

The issue was whether Chile had breached the article by refusing the requested information. The court found that,

> by expressly stipulating the right to "seek" and "receive" "information", Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.[40]

It is obvious that paragraph (1) of Article 13 does not explicitly include a right to access state-held information. However, by interpolation, the court concluded that a right of access was also protected. While it is difficult to discern the exact inference to be drawn from that interpolation by the Inter-American Court of Human Rights, it would not be consistent with Canadian jurisprudence to conclude that the right to "seek and receive" information means the right to "access" publicly held information. In *Canada (Privacy Commissioner) v Blood Tribe Department of Health,* the court concluded that

> [t]he authority to *receive* a broad range of evidence cannot be read to empower the Privacy Commissioner to *compel production* of solicitor-client records from an unwilling respondent. The language of s.12 is simply incapable of carrying the Privacy Commissioner to her desired conclusion.[41]

Notwithstanding this, the Centre for Law and Democracy not only accepts the interpolated conclusion of the Inter-American Court of Human Rights that the right of access is also protected, it carries it further. The Centre argues that, effectively, it is a conclusion that the right to access information is itself a human right. The Committee cannot accept the Centre's assertion that the Inter-American Court of Human Rights was thereby expressing the view that the right to access government-held information was itself a "human right."

In the second case, involving Hungary, the European Court of Human Rights was dealing with Article 10 of the European Convention on Human Rights, the relevant portion of which reads as follows:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference of public authority and regardless of frontiers.

Quoting an earlier decision,[42] the court observed that "it is difficult to derive from the Convention a general right of access to administrative data and documents." It then commented that "the court has recently advanced towards a broader interpretation of the notion of freedom to receive information […] and thereby towards the recognition of a right of access to information." In any event, the court noted that "the right to freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him." It then decided that it considered that "the present case essentially concerns an interference…rather than a denial of a general right of access to official documents."[43] Those views are much more consistent with the approach of the Supreme Court of Canada, referred to above.

They are also more consistent with the approach taken by the Organization of American States (OAS). In a resolution instructing its Department of International Law to draft a model law on access to public information, the General Assembly of the OAS did not treat "access" as being inherent to the right to "seek and receive" information. Paragraph 1 of the resolution affirms that "everyone has the right to seek, receive, access and impart information." The same paragraph continues the affirmation by saying "**that access to public information is a requisite for the very exercise of democracy**"[44] (emphasis added). This indicates the real nature of the right and provides clear guidance for the stature it ought to be accorded.

40 *Supra* note 38 at para 77.

41 2008 SCC 44 at para 21, [2008] 2 SCR 574 [emphasis in original].

42 *Leander v Sweden*, [1987].

43 *Supra*, note 39 at paras 35–36.

44 OAS, General Assembly, Resolution AG/RES. 2514 (XXXIX-O/09).

In support of its position as to the stature that should be accorded to the right to access information, the Centre also relies on General Comment 34 of the UN Human Rights Committee,[45] which is that committee's commentary on Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The relevant portion of Article 19 of the ICCPR provides that

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

What the UN Committee actually wrote is that "Article 19, paragraph 2, **embraces** a right to information held by public bodies" [46] (emphasis added). The wording of Article 19 is very similar to the wording at issue in both the *Chile* and the *Hungary* cases. Like the court in the *Hungary* case, this Committee finds it difficult to derive from Article 19 a general right of access to records held by government.

A brief review of the international literature and conventions dealing with the subject disclose that there are human rights and then there are rights that are also described as human rights. For example, article 53 of the Vienna Convention on the Law of Treaties provides:

> A treaty is void if, at the time of conclusion, it conflicts with a peremptory norm of general international law. For purposes of the present Convention, a peremptory norm of international law is a norm accepted and recognized in the international community of States as a whole as **a norm from which no derogation is permitted** and which can be modified only by a subsequent norm of general international law having the same character. [emphasis added]

The same convention specifically permits states to withdraw from or suspend the operation of treaties in whole or in part but specifies that those provisions do not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character."[47] It creates a clear priority of stature for rights related to the protection of the human person. These are recognized as "peremptory norms of international law." In common parlance, they would be referred to as "human rights."

Consistent with the principle expressed in article 60 of the Vienna Convention on the Law of Treaties, Article 4 of the ICCPR expressly permits derogation from the obligations under the Convention in the kinds of circumstances specified, but expressly prohibits derogation from "articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18." These are the articles that prohibit

- arbitrary deprivation of the right to life
- genocide
- death sentences for persons under 18
- torture
- cruel, inhuman or degrading treatment or punishment
- slavery
- forced or compulsory labour
- imprisonment for failure to complete a contract
- conviction for an offence that was not an offence at the time it was committed
- arbitrary interference with privacy, family or home
- interference with freedom of thought, conscience and religion

Again, this is special recognition of those human rights as peremptory norms from which no derogation is permitted. Such rights have a character that is of greater significance than that accorded to freedom of expression, provided for in Article 19. Although included as a "human right" in the International Covenant on Civil and Political Rights and in the Universal Declaration of Human Rights, freedom of expression is not a peremptory norm of international law and is not required to be accorded protection from derogation by a state. That is because freedom of expression is not related to the "protection of the human person."

45 General Comment No. 34, [2011], para 18.

46 *International Covenant on Civil and Political Rights*, [1966] 999 UNTS 171.

47 *Vienna Convention* art 60.

The UN publishes, for the benefit of UN staff, a pamphlet dealing with human rights. After posing the question "What are human rights?" the pamphlet provides the following answer:

> Human rights are commonly understood as being those rights which are inherent to the human being. The concept of human rights acknowledges that every human being is entitled to enjoy his or her human rights without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[48]

The pamphlet then provides an explanation of the distinction between "human rights" and "human rights law" in the following paragraph:

> Human rights are legally guaranteed by *human rights law,* protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. They are expressed in treaties, customary international law, bodies of principles and other sources of law. Human rights law places an obligation on States to act in a particular way and prohibits States from engaging in specified activities. However***, the law does not establish human rights***. Human rights are inherent entitlements which come to every person as a consequence of being human. Treaties and other sources of law generally serve to *protect* formally the rights of individuals and groups against actions or abandonment of actions by Governments which interfere with the enjoyment of their human rights.[49] [emphasis added]

The pamphlet also identifies the most important characteristics of human rights as: respectful of the dignity and worth of each person; universal; inalienable; and indivisible, interrelated and interdependent. A right to access information held by a government does not have any of these characteristics. Such a right is, however, "expressed in treaties, customary international law, bodies of principles and other sources of law" and it "places an obligation on States to act in a particular way," but it "does not establish human rights."

The provision in the OAS model law that sets out the scope and purpose of the law, describes the nature of the right to access information:

> This Law establishes a broad right of access to information, in possession, custody or control of any public authority, based on the principle of maximum disclosure, so that all information held by public bodies is complete, timely and accessible, subject to a clear and narrow regime of exceptions set out in law that are legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system.[50]

While there is nothing in the model law itself that would suggest that the right of access to public information has the status of a "human right," the covering document under which the group that drafted the model law presented it to the OAS states:

> That access to information is a fundamental human right and an essential condition for all democratic societies.

No one would dispute that the right to access information is an essential condition for all democratic societies. However, its stature as a human right will depend entirely on whether that term is being used to mean "a requisite for the exercise of democracy" or "an essential condition for all democratic societies" or a "peremptory norm of international law from which no derogation is permitted". That it is certainly not such a peremptory norm is clear from the description of expected derogation from the right:

> Public authorities shall release public information which affects a specific population in a manner and form that is accessible to that population, **unless there is a good legal, policy, administrative or public interest reason not to**.[51] [emphasis added]

In considering the stature to be accorded to the right of access, it is more useful to use terms such as "essential condition" or "requisite" for the exercise of democracy than the term "human right," the meaning of which can vary greatly depending on the context. As well, those two terms, "essential condition" or "requisite" for the exercise of democracy, seem to fit more readily with the stature accorded by the Supreme Court of Canada, that of a quasi-constitutional right.

48 OHCHR, *Human Rights*: *A Basic Handbook for UN Staff*.
49 *Ibid* 3.
50 *Model Inter-American Law on Access to Public Information*, s 2.
51 *Ibid* s 14.

When these factors are considered, the wording of Article 19 in each of ICCPR and UDHR is closely examined, the comments in General Comment 34 are weighed in context and, most importantly, the distinction between "human rights" and "human rights law" drawn by the UN High Commissioner for Human Rights is taken into consideration, it becomes clear that the Committee cannot justify rejecting the attributes that the Supreme Court of Canada accords the right to access information in Canada and accepting those urged by the Centre.

On the other hand, the views expressed by Dr. Marland and Ms. Hammond would not justify the Committee's coming to a conclusion that the right should be treated as anything less than quasi-constitutional. They were, however, the only presenters to emphasize that it is, in the words of Dr. Marland, "important for a government to withhold information when it is in the public interest to do so. Democratic realists recognize that there are times that some information is sensitive and confidential." We view that as also being consistent with the conclusions of the Supreme Court in *John Doe* where the court observed that "as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information."[52]

52 *John Doe*, *supra* note 14.

Conclusion respecting treatment of access to information rights

The Committee concludes that according quasi-constitutional status to the right to access information is consistent with the status accorded to that right in all other Canadian jurisdictions, reflects the views of the Supreme Court of Canada, is consonant with the views expressed in the overwhelming majority of the submissions presented to the Committee, and parallels the stature accorded to the right in international jurisdictions generally.

Evaluating protection of privacy

The importance of privacy in Newfoundland and Labrador

The province was ahead of its time in creating a statutory tort of violation of privacy in 1981. Not all provinces have done the same. Only in 2012 did the Ontario Court of Appeal, in the absence of such a statutory provision, find that the common law includes a privacy tort of intrusion upon seclusion.[53] Newfoundland and Labrador was even more innovative when it decided that a lawsuit could be undertaken by an individual without proof of damage.

Newfoundland and Labrador's *Privacy Act* is broad and identifies several potential violations of individual privacy:

- surveillance
- eavesdropping
- exploiting the likeness of an individual
- using someone's personal documents

These are violations when they occur without consent, wilfully, and without claim of right. How much privacy an individual is entitled to, and what kind, is complex and depends on what is reasonable in the circumstances. The circumstances may include the lawful interests of others; the nature, occasion, and

53 *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241.

incidence of the act alleged to be invasive of privacy; and the relationship between the parties.

Privacy is not considered to have been violated in these circumstances:

- where there is consent for the invasive act
- where it is a matter of public interest
- where it is authorized by law
- where it occurs in defence of person or property

Broad powers are given to the Trial Division to award damages, grant an injunction, or generally grant the relief necessary in the circumstances.

The few recorded cases show that this privacy law has often been found not to apply to the circumstances brought forward as alleged privacy violations. This is a summary list of what the Newfoundland and Labrador courts have found *not* to be a privacy violation:

- an employer keeping a file about conditions of work of a contractual employee
- an employer documenting ongoing incidents in a workplace dispute
- an employer photocopying the outside of envelopes addressed to an employee at the workplace, where the envelopes' addresses seem to suggest the employee is violating contractual obligations[54]
- examination on discovery of and production of documents by a parent where both parents are claiming custody and access rights to a child (The parent's privacy interest must yield before the best interests of the child.)[55]
- surveillance of a person in a public place by a licenced private investigation firm (In this case, the person had made personal injury claims and two insurance companies were investigating the claims. The person did not have a reasonable expectation of privacy pertaining to her actions in public.)[56]
- making two calls to the workplace of a tenant alleged to be in arrears of rent[57]

But the *Privacy Act* has been accepted as a basis for certification of a class in an application required to bring a class action. In this case, gynecological instruments were improperly sterilized in a hospital for two and a half years, putting at least 333 patients at risk of exposure to infections. The hospital sent a registered letter to these patients, informing them of the risks. The applicant argued her privacy had been breached by this manner of communication in a small community and that she should have been informed in the context of the physician-patient relationship.[58]

Likewise, in 2014, the Trial Division concluded that more than 1,000 people had a cause of action based on, among other things:

- breach of privacy based on statutory tort established under the *Privacy Act*
- breach of privacy based on common law tort ("intrusion upon seclusion")

The facts giving rise to this action were the unauthorized action of an employee of a public body who accessed personal health files without a valid reason.[59]

Some highlights of the development of privacy rights

Concern about privacy predates recent technological advances. American legal scholar Jeffrey Rosen points out in his book *The Naked Crowd*[60] that notions of privacy stretch back in time and cross cultural divides. Jewish communities in medieval Europe observed rules of cohabitation that decreased the possibility of staring into another's dwelling in crowded ghettos. In their five-volume book on the history of privacy, French historians Philippe Ariès and Georges Duby[61] document how

54 *Hagan v Drover*, 2009 NLTD 160.

55 *Hollett v Hatfield*, 2006 NLUFC 20.

56 *Druken v R.G. Fewer and Associates Inc. (1998)*, 171 Nfld & PEIR 312 (NLTD).

57 *Dawe v Nova Collection Services (Nfld) Ltd.* (1998), 160 Nfld & PEIR 226 (NL Prov Ct).

58 *Rideout v Health Labrador Corp.*, 2005 NLTD 116.

59 *Hynes v Western Regional Integrated Health Authority*, 2014 NLTD(G) 137.

60 Rosen, *The Naked Crowd* (2005).

61 Ariès & Duby, eds, *Histoire de la Vie Privée* (1999).

modern notions of privacy have followed earlier notions of domesticity, group intimacy and exclusion, segregation by gender or status, and the nineteenth-century development of the bourgeois home as a social ideal.

In the late nineteenth century in the United States, a leading legal thinker who was soon to be a Supreme Court Justice, Louis Brandeis, wrote an influential article with Samuel Warren entitled "The Right to Privacy."[62] It set forth the case for what had been referred to as "the right to be left alone." The article reacted to the impact of a new and intrusive invention, the camera, and of mass circulation newspapers, which spread previously private information and images without consent across society.

Meanwhile, in English public law, a long-held tradition of individual liberties had developed the notion of the inviolability of the home, protected against intrusion where the appropriate legal process had not been followed. This is today's concept of spatial privacy. The inherited understanding of a private place, where the state's reach was authorized only under certain circumstances, has influenced recent approaches to privacy in Canada. Common law protection of personal writings and correspondence would become the foundation for today's concept of informational privacy.[63]

The development of codes and laws of privacy and data protection

In the post–World War II climate of reconstruction, the Universal Declaration of Human Rights acknowledged the increasingly important place of privacy in the newly recognized constellation of rights and fundamental freedoms. In this early articulation of international privacy rights, privacy is linked to familial relationships, the domestic space, and personal communication:

> **Article 12**: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

By the mid-twentieth century, forward thinkers could see that computers, which allowed for faster analysis and processed more and more data every year, had created a new kind of unequal world. This was a world where knowledge increasingly meant power and wealth. Computers allowed governments and powerful organizations to collect, use, and even alter personal information about individuals, all without their knowledge.

The most compelling perspective with respect to privacy legislation outside the Criminal Code in the common law provinces of Canada is that of the American scholar Alan Westin. His hugely influential 1967 book, *Privacy and Freedom,*[64] warned that individuals risked losing control of their own identity in the new information society. He defined privacy as individuals' ability to control the use of information about themselves.

In the mass consumer age, it soon became evident that guidelines were needed to regulate information use by the private sector. The *Fair Information Practice Principles* were developed in the United States in the 1970s. They listed the permissible conditions for obtaining, using, and disposing of personal information about individuals. Consent was the cornerstone for collecting the information, and subsequent uses had to be similar to the purposes that originally justified asking for the information. But the principles were not enshrined in law and remained a code of practice. They are now increasingly used by the powerful US Federal Trade Commission to regulate information practices that are deceptive or misleading.

The Organization for Economic Co-operation and Development (OECD), which includes most of the more prosperous and democratic countries, incorporated many of the *Fair Information Practice Principles* in its influential 1980 guidelines on protecting personal information. Concern had been mounting about the absence of internationally accepted guidelines for handling personal information as increasing volumes of data crossed international borders.

62 Warren & Brandeis, The Right to Privacy, *Harv L Rev*.

63 Richards & Solove, Privacy's Other Path, *Geo LJ*.

64 Westin, *Privacy and Freedom* (1967).

The OECD guidelines have played an important role in the development of informational privacy principles in Canada and they merit attention. These guidelines presented below were revised in 2013.[65]

65 OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (2013).

OECD Privacy Principles 2013

The Privacy Principles

Part Two of *Annex to the Recommendation of the Council of 23rd September 1980: Guidelines Governing The Protection of Privacy and Transborder Flows of Personal Data*, OECD

Collection Limitation Principle
7. There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

Data Quality Principle
8. Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

Purpose Specification Principle
9. The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

Use Limitation Principle
10. Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except:
    a) with the consent of the data subject; or
    b) by the authority of law.

Security Safeguards Principle
11. Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

Openness Principle
12. There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

Individual Participation Principle
13. An individual should have the right:
    a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;
    b) to have communicated to him, data relating to him
        i) within a reasonable time;
        ii) at a charge, if any, that is not excessive;
        iii) in a reasonable manner; and
        iv) in a form that is readily intelligible to him;

c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and
d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.

Accountability Principle
14. A data controller should be accountable for complying with measures which give effect to the principles stated above.[66]

66 *Ibid.*

European Union initiatives and their impact on Canada

Within the European Union, Convention 108 was adopted by the Council of Europe about the same time as the OECD directive and reiterated the same principles. It, too, reflected growing anxiety about transborder data flow and the possibility of personal information being exported to countries with lower data protection standards. However, unlike the OECD Guidelines, it is legally binding on its signatories. Canada has not signed this international convention which, by 2014, had been signed by some 46 countries.

But the next information protection initiative of the European Union did have a great impact on Canada. The European Directive on the Processing of Personal Data of 1995 has been the most important development in private-sector privacy law. This Directive abandoned the voluntary approach of the *Fair Information Practice Principles* and made privacy protection in the commercial sector part of applicable law, enforced by a Commissioner who has the power to halt the export of personal information outside the European Union unless the jurisdiction to which it was destined met the European Union's own privacy standards. It was a message to countries outside Europe to improve the protection of personal information if they wished to participate in the constant global information flow. By 1995, the Internet had become the new communications highway.

The European Union Directive of 1995 directly inspired the creation, in the same year, of a law for personal information rights in the private sector in the province of Quebec, a civil law jurisdiction like continental Europe.

The Canadian public sector

In the 1970s and 1980s concern was growing in Canada about the sheer amount of information gathered and stored by the federal and provincial governments.[67] One aspect of privacy became the subject of sustained attention: data protection, or the right to control information about oneself.

The same concerns about the possible misuse of personal information by governments had led to the emergence of a series of federal and provincial privacy laws. The federal government chose to create the *Privacy Act* and the *Access to Information Act* in 1982, each with its own commissioner. These two acts have barely changed since that time, in spite of numerous calls for reform from Parliamentary Committees and the Information and Privacy Commissioners.[68]

The provinces all chose to combine public sector privacy rules with rules for access to information into one law and created one Commissioner, or Ombudsman, to administer it. Throughout the l980s and 1990s and on into the 21st century, all the provinces and then the territories followed suit, with variations depending on local traditions and the size of the jurisdiction.

Quebec, with its civil law tradition, recognized privacy as a fundamental right in 1975, when it adopted its own Quebec Charter of Human Rights and Freedoms. Quebec's Charter applies to all Quebec legislation.

This right was strengthened in the new Civil Code

67 Canada, *Privacy and Computers: A Report of a Task Force* (1972).

68 Canada, *Open and Shut* (1987); Canada OPC, *Government Accountability for Personal Information* (2006).

of Quebec, where articles 35–41 made privacy and personal information protection part of everyday law. As a result, people can take breaches of privacy directly to the Quebec Small Claims Court, claiming, by the beginning of 2015, up to $15,000 in damages.

While Newfoundland and Labrador had enacted the *Freedom of Information Act* in 1981, it was slow to enact privacy legislation respecting information collected, used, and disclosed by the provincial government. That occurred following the 2001 statutory review of access to information and protection of privacy in the province. The first version of the *ATIPPA* came into force in 2005, with respect to access provisions only. Privacy provisions came into force in 2008. Ed Ring was named in December 2007 as the province's first full-time Information and Privacy Commissioner in an acting capacity. He was appointed Commissioner in June 2008 and subsequently reappointed in 2010, June 2012, and June 2014.

The Canadian private sector

Canada's economy is heavily dependent on trade with other countries. By the end of the last century it became apparent that meeting the European Union standards for data processing and transborder data flows was important for the smooth continuance of international trade. The Canadian Standards Association drew up a model code for the protection of personal information that was acceptable to a wide array of stakeholders. A new law was created in 2000, the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*), which applies to the use of personal information by commercial organizations in the federally regulated sector. Alberta and British Columbia followed suit with their own private sector laws, administered by their respective Commissioners. Quebec, as mentioned, already had such a law since 1995. How all these laws fit together is a complex subject, one that is not necessary to explore here. In the majority of provinces, such as Newfoundland and Labrador, that have not chosen to regulate the collection, use, and disclosure of personal information in the private sector, commercial organizations abide by *PIPEDA*. In Newfoundland and Labrador this does not prevent an individual from taking an action under the *Privacy Act* against a commercial organization for an alleged breach of personal privacy.

Privacy and data protection under the *Canadian Charter of Rights and Freedoms*

During the same decade when many Canadian jurisdictions adopted access to information and data protection laws, the *Canadian Charter of Rights of Rights and Freedoms* came into force, creating a new measuring stick for federal and provincial legislation. The Charter both reflected and consolidated Canada's tendency to identify itself as a rights-based society.

Although the right to privacy was not enumerated as such in the new Charter, one concept in particular formed the basis for interpreting the extent and nature of Canadian privacy rights over the next 30 years. It is expressed in section 8:

> Everyone has the right to be secure against unreasonable search or seizure.

This principle has been inherited from centuries of English common law. In interpreting section 8, the Supreme Court of Canada has created a firm notion of privacy rights for Canadians, including a right of informational privacy. Generally speaking, the court has defined

> three broad types of privacy interests — territorial, personal, and informational — which, while often overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations: see, e.g., *Dyment*, at pp. 428-29; *Tessling*, at paras 21-24. These broad descriptions of types of privacy interests are analytical tools, not strict or mutually-exclusive categories.[69]

It has accordingly recognized different forms of privacy, such as a right to bodily integrity[70] and the right to choose the location of one's own home.[71]

Contemporary notions of privacy rights in Canada have mainly arisen out of criminal cases, pitting the individual against the power and, increasingly, the surveillance

69 *R v Spencer*, 2014 SCC 43 at para 35 [*Spencer*].
70 *R v Dyment*, [1988] 2 SCR 417.
71 *Godbout v Longueil (City)*, [1997] 3 SCR 844.

technology of the state. As the Supreme Court decided, section 8 of the Charter protects "people, not places."[72] In order to enjoy constitutional protection against the actions of the state, a person has to establish a reasonable expectation of privacy in the place and the circumstances where this claim is being made.

For example, in the case of *R v Cole*[73] it was found that there was a reasonable expectation of privacy in the workplace, where personal use of an employer's computer is an accepted practice.

Privacy interests of individuals and their reasonable expectations of privacy have to be assessed in relation to the government's interest in advancing its goals.[74] These government goals vary widely and may include protection against terrorism, the apprehension of child pornographers, or the enforcement of prohibitions against the drug trade.

The components of information that may be shielded from the state have been carefully defined. There should be "**a biographical core of personal information** which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual"[75] (emphasis added). Using these criteria, the Supreme Court found using heat detection imagery to locate grow-ops was not a violation of privacy because it revealed only heat patterns on a house, not intimate details, and by itself gave no insight into the private life of an individual.[76]

The totality of the circumstances must be examined, according to the court. That means, for example, examining subjective expectations of privacy (what the person in question is really expecting) and objective expectations of privacy (what a reasonable person would have expected in the same situation). Another element to be considered is what the information the individual wishes to keep confidential would reveal if it were disclosed.[77]

Reasonable expectations of privacy can vary with the technology being used. Recent technologies can be used lawfully to gather information from seemingly non-personal phenomena, like heat patterns on a house. But these patterns can indicate the presence of a grow-op. Does a person's reasonable expectation of privacy extend to not having personal luggage nosed by a sniffer dog for possible drugs in an airport terminal? It would seem not.

How do privacy concepts developed mostly in the cases of contested search and seizure actions by law enforcement officials fit in with a statute like the *ATIPPA*? The *ATIPPA* and other similar legislation depend for their interpretation on the evolving jurisprudence of the Supreme Court. Recently, the court has summarized the components of informational privacy:

> To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.
>
> Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician: see, e.g. McInerney v. MacDonald, [1992] 2 S.C.R. 138, at p. 149.
>
> Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others"... Even though the information will be communicated and cannot be thought of as secret or confidential, "situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected"…
>
> There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s.8 must include this understanding of privacy.
>
> The notion of privacy as anonymity is not novel. It appears in a wide array of contexts ranging from anonymous surveys to the protection of police informant identities. A person responding to a survey readily agrees to provide what may well be highly personal information. A

72 *Hunter et al v Southam Inc*., [1984] 2 SCR 145 at 159.
73 *R v Cole,* 2012 SCC 53, [2012] 3 SCR 34.
74 *Supra* note 72 at 159–160.
75 *R v Plant*, [1993] 3 SCR 281 at 293.
76 *R v Tessling*, 2004 SCC 67, [2004] 3 SCR 432.
77 *Spencer*, *supra* note 69 at para 27.

police informant provides information about the commission of a crime. The information itself is not private — it is communicated precisely so that it will be communicated to others. But the information is communicated on the basis that it will not be identified with the person providing it. Consider situations in which the police want to obtain the list of names that correspond to the identification numbers on individual survey results or the defence in a criminal case wants to obtain the identity of the informant who has provided information that has been disclosed to the defence. The privacy interest at stake in these examples is not simply the individual's name, but the link between the identified individual and the personal information provided anonymously…"maintaining anonymity can be integral to ensuring privacy."[78]

The definitions of privacy adopted by the Supreme Court of Canada, which develop most often in the context of criminal law cases, are nevertheless central to the interpretation of other privacy legislation, such as data protection laws. The *ATIPPA* is Newfoundland and Labrador's data protection statute.

How is privacy protected in the *ATIPPA*?

The recent *Spencer* decision demonstrates how protection for personal information in the *ATIPPA* corresponds to the three recognized aspects of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity.

The *ATIPPA* states that there is presumed to be an unreasonable invasion of privacy when information on an individual's medical or psychiatric history is disclosed without consent.[79] This provision recognizes that sometimes privacy means keeping some information secret.

The *ATIPPA* states in its purpose clause[80] that one of the purposes of the *Act* is to protect personal privacy by (a) giving the public a right of access to records and (b) giving individuals a right of access to and a right to request correction of personal information about themselves. This clause recognizes that informational privacy is also about individuals' control of their own personal information.

When the *ATIPPA* provides for situations where the individual has the right to remain anonymous, it recognizes that anonymity is a traditional way of protecting one's informational privacy. And it has become an essential tool for functioning in the online world, where everything is traceable. For example, the *ATIPPA* provides that an individual who has received an honour or award through a public body has the right to request that their information not be disclosed, that is, that the individual remain anonymous in the circumstances.[81]

78 *Ibid* at paras 38–42.

79 *ATIPPA* s 30(4)(a).

80 *Ibid* s 3(1).

81 *Ibid* s 30(2)(n) and 30(3).

Conclusion respecting treatment of privacy rights

It is against an international background that Canadian privacy rights, and more particularly, informational rights have slowly evolved. While the recognition of privacy rights and information rights generally is an important first step, the real challenge is how to respect and enforce them. In this report we will examine how privacy rights and access rights can best be made available for use by a broad range of citizens.

The Committee's first recommendation is to recast the purpose of the *ATIPPA* and identify the manner in which it is to be achieved.

Recommendations

The Committee recommends that

1. The purpose of the *ATIPPA* set out in the existing version of section 3 be recast to read:

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, and 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 set out in subsection (1) 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,
    (e) preventing the unauthorized collection, use or disclosure of personal information by public bodies,
    (f) providing for an oversight agency having duties to:
        i. be an advocate for access to information and protection of privacy,
        ii. facilitate timely and user friendly application of the *Act*,
        iii. provide independent review of decisions made by public bodies under this *Act*,
        iv. provide independent investigation of privacy complaints,
        v. make recommendations to government and to public bodies as to actions they might take to better achieve the objectives of the *Act*, and
        vi. educate the public and public bodies on all aspects of the *Act*.

Chapter Two

HOW THE *ATIPPA* IS ADMINISTERED

> "The legislation is about access to **records**. It is not up to the body, other than already provided for in the Act, to edit or limit the information contained in such records."
>
> —Wallace McLean, Submission to the Committee

The administration of the *ATIPPA* was a source of much dissatisfaction, according to the submissions the Committee received and the comments made at the hearings. Many of the causes for complaint are central to the functioning of the *Act*, such as fees, time limits, and political staff involvement. These matters are dealt with separately in this chapter as well as in other parts of the report. This part of the report concentrates on other aspects of the access process and pays particular attention to the role of ATIPP coordinators.

2.1 Role of the ATIPP coordinator

The law refers to the head of a public body as the person in charge of the *ATIPPA* process. The definitions section of the *Act* provides that the head of a government department or crown corporation is the minister or the chief executive officer. But it is usually not this person who actually receives the requests and determines whether the information can be released, wholly or in part. The actual process is carried out by the coordinator, to whom is delegated the processing and tracking of requests.[1]

The ATIPP coordinator is at the centre of the process to gain access to information while ensuring personal information is kept confidential. This person coordinates both the processing of the request to a public body and the ensuing response. The coordinator's key role affects the quality of the requester's experience and the consistency with which the *ATIPPA* is followed.

In the OPE submission Minister Collins gave a useful overview of the role and functions of ATIPP coordinators in government departments. In August 2014 four government departments had full-time coordinators: Advanced Education and Skills, Environment and Conservation, Health and Community Services, and Transportation and Works.[2] There were 20 part-time coordinators, who had ATIPP responsibilities as well as other duties in areas such as information management, information technology, and policy and research.

ATIPP coordinators' questionnaire

Early in its work, the Committee sought the opinions of the 353 persons identified as ATIPP coordinators in public bodies, including municipalities. The Committee agreed to provide anonymity, and we received 122 replies. A summary of their opinions on different questions is attached as Appendix E.

The answers to the questions reveal several significant

1 *ATIPPA* s 67.

2 Government NL Submission, 22 August 2014, p 24.

views on the process of administering the *Act*. The group is about evenly divided as to whether the *Act* is easy to use, as they are divided on the reasonableness of the current application and processing fee structure. A slight majority thought applicants were satisfied with the time taken to process requests.

Questions on support for and understanding of the *ATIPPA* in the public body they worked for showed the coordinators concede they enjoyed general support but experienced problems with the training of civil servants generally, as well as with communicating access and privacy principles to other employees.

A slight majority of coordinators said their superiors emphasized the 30-day timeline for response. And a clear majority said their superiors were unhappy with the changes brought by Bill 29.

About two-thirds of the public bodies were supportive of the role played by the Commissioner and encouraged discussion with his Office to facilitate release of information. However, according to the coordinators, about a third of these public bodies would welcome increased powers for the Commissioner. When asked about their personal views, a slight majority stated they would welcome giving the Commissioner power to order the release of information in certain circumstances.

Most respondents said that access requests in their workplace were attended to speedily and that their superiors were concerned when timelines were not met. Almost all stated that the public body they worked for supported them fully, cooperated in access requests and supported their position. Nearly 60 percent noted this support was reflected in their pay and position.

Almost all said they had someone they could turn to for help. Nearly two-thirds identified the Commissioner's Office, and about 40 percent said they would also turn to the Office of Public Engagement and to their superior for help.

Questions about political involvement portrayed a varied landscape. About 80 percent of the overall respondents said that ATIPP requests were dealt with only by the officials involved. The questionnaire showed that in about half of the government departments, there was an expectation or requirement to consult the minister or political staff on access requests. In a quarter of the government departments, coordinators said political staff and ministers have input or the final say as to whether information is released.

The prevalence of political participation and direction may account for many of the criticisms the Committee heard about delays, a high rate of rejection of access requests, exorbitant fees, and lack of assistance. These are discussed elsewhere in the report.

What we heard

While we heard many criticisms of the current access to information system, no one seemed to hold the ATIPP coordinators responsible for the failures that were noted. Rather, the criticisms seemed to be about the changes wrought by Bill 29, delays and charges imposed in certain cases, and anxiety about who might interfere in the process.

There were, however, a few exceptions to the general appreciation of the ATIPP coordinators. There was criticism of the seeming lack of training of persons administering the *Act* in some municipalities.[3] Another criticism was that some coordinators did not give enough attention to their statutory duty to assist. Wallace McLean thought coordinators needed to be reminded that they were only the custodians, and not the owners, of the data generated by public bodies.[4]

3 The government responded almost immediately: the OPE announced that training was to take place in the fall of 2014, and by the end of October two sessions had been held with municipal officials and administrators, and draft guidelines had been assembled.

4 McLean Submission, August 2014, p 15.

Scarlett Hann expressed sympathy for the hurdles faced by the coordinators, who, she believed, were unsure how to interpret the *Act* and concerned about possible mistakes, and who might be withholding more information than necessary. This, she said, does not instill confidence in citizens expecting service from an expert who has the authority to influence a fair outcome.[5]

The OIPC offered an evaluation of its experience in dealing with ATIPP coordinators across public bodies. It concluded that not all coordinators operate at the same level:

> We find that our experience with ATIPP Coordinators varies from department to department within government. Some seem to function at a low level within the departmental hierarchy. They appear to be delegated very little responsibility and are essentially carrying messages back and forth from someone higher in the organization, and often cannot explain the rationale for positions adopted by the department. On the other hand, we also deal with departmental access coordinators who are knowledgeable and experienced, and who are clearly fully engaged with senior decision makers within the department and can therefore speak to all aspects of a matter when it comes under review by our Office.[6]

The OIPC believes an important step in addressing this variability in coordinators' roles and positions would be to require them to be professionally certified:

> There must be a way to ensure that ATIPP Coordinators are given a greater role in the process, and allowed to bring their knowledge and experience to bear in a leadership role in the ATIPP process. There are nationally and internationally recognized professional certifications available to those who work in that area, and this is something which could be further investigated. We believe this can be accomplished without revamping the entire ATIPP structure within government.[7]

Making a request

The *ATIPPA* provides for requests to be made in writing, except for persons with disabilities or those unfamiliar with English.[8] However, several persons pointed out that moving the whole process online would be more efficient—the request, response, and payment.

The process of making a request is regarded as ponderous and somewhat antiquated. James McLeod of the *Telegram* pointed out in his written submission that just about the only place he used a chequebook was in the *ATIPPA* process and he wondered why all transactions would not now be done online:

> There should be some other way of submitting the $5 request fee other than by cheque. This is a small point, but it's an example of the bureaucratic barriers that exist which dissuade regular people from filing *ATIPPA* requests. I order cheques from the bank and I know that literally the only thing I will use them on is *ATIPPA* requests.[9]

Both he and Terry Burry decried the fact that requests are often referred to other public bodies that may have information, and this inevitably delays the process. Both wondered if a centralized ATIPP office, staffed by people trained in access to information and protection of personal information, might provide more efficient service and be less open to political interference. As James McLeod expressed it:

> And within an office that's specialized in that as opposed to peppered throughout the public service where each one is working on their own in the natural resources building or in the, you know, West Block Transportation and Works office space or whatever. I think centralizing in one place and making it finally like the final call up to, say the director of the office…the ATIPPA office within OPE would be better than leaving the final decision on all of the severing up to a cabinet minister given that a lot of the information that I'm looking for at least, is politically problematic for cabinet ministers to have published in the newspapers.[10]

Terry Burry voiced this view:

> Firstly, I said that the government should staff a single office. When I made an application in 2008 I was told I had to make one application to the Department of Mines

5 Hann Submission, 27 July 2014, p 2.
6 OIPC Supplementary Submission, 29 August 2014, p 4.
7 *Ibid*.
8 *ATIPPA* s 8.
9 McLeod Submission, June 2014, p 4.
10 McLeod Transcript, 26 June 2014, pp 48–49.

> and Energy, another application to Department of Health and Community Services, and another application to the Premier's Office, I think it was. So I think that should be eliminated and there should be one office set up such that the person can coordinate the requests coming from an applicant and can gather the information and then pass it on to the applicant when he received that information. And probably even be anonymous. He doesn't necessarily have to reveal to Department X or Y who it is that's applying for the information. And also, this would have the benefit of only having one fee; whereas, if you got to make four or five applications you got to pay four or five different fees. [11]

At the end of the hearing process, the Commissioner offered some helpful insight regarding the concept of a single ATIPP office for coordination of requests to public bodies. He had investigated the decision in British Columbia to centralize all access functions in response to the BC Commissioner's criticism about the lengthy delays in responding to access requests. Sean Murray of the Commissioner's Office in Newfoundland and Labrador cautioned against treating the centralization of ATIPP functions as a magic solution. He warned that even a centralized agency such as the one in BC often has to refer to a department to obtain precise information:

> So again, I would think that there are situations where the central agency needs to contact the department and then get back to the applicant and perhaps the same thing may happen within the review process. But what they found is that—and this has only been in place for three years and what they found was that in the first year there was an improvement in the timeliness of responses but as time has moved on and they have a necessity each year but I think there is an assessment underway right now, and it appears that the timelines are now worse than they were before this particular year ... there's been a hiring freeze in the central agency so they don't know what they can attribute it to.[12]

Sean Murray stated that over those three years, there have been many changes in the structure and processes of the BC government, including changes in the Commissioner's office, all of which may have affected the functioning of the access to information system.

> And as time has moved on, some of the departments have been reorganized and divisions moved from one department to another, the personnel have changed, there's been natural attrition both within the departments and within the central agency itself. There have been changes in the way records are stored, in terms of different electronic systems have come into play. So even within three years they've noticed that the benefits that they noted at the beginning in terms of efficiency, were beginning to be lost over time to the extent that some departments have now created a position within the deputy minister's department to be the full time permanent liaison with the centralized agency in order to establish some ... continuity there. So well the result is that there's an additional bureaucracy has been created ... maybe three years is not long enough to assess and there's a lot of factors that go into it.
>
> It was not the silver bullet for resolving the timeliness issue and it may have complicated the process somewhat unintentionally.[13]

The Commissioner added that the access system in BC is now thought to be less responsive because of the loss of knowledge of how information is stored. Perhaps partly because of this, some departments have created a full-time position to be a permanent liaison with the BC central agency.[14]

11 Burry Transcript, 24 July 2014, pp 12–13.

12 OIPC Transcript, 21 August 2014, pp 69–70.

13 *Ibid* 71–72.

14 *Ibid* 71.

As a keen observer of the functioning of the *ATIPPA* system over the last seven years, the Commissioner put his finger on one of the central issues. Coordinators are not accorded the status and respect they should have, bearing in mind their central place in the fair and efficient treatment of the requests for information. The minister's submission stated that their work is often combined with other tasks. This may be because of relatively few requests within some public bodies. But it may also be due to an undervaluation of the role of treating requests as compared to other work. Some of the current delays in administering the *ATIPPA* may be due to the fact that most coordinators must juggle several tasks.

This relaxed approach to assigning *ATIPPA* responsibilities was mirrored in the lack of emphasis on training and the acquisition of professional qualifications. Only recently does the Office of Public Engagement seem to have been concerned with the training of staff across public bodies, including municipalities.

Across Canada and indeed internationally, access to information and privacy protection are increasingly seen as distinct fields of learning, attested to by objectively defined professional qualifications. At least three relatively accessible paths to the recognition of ATIPP knowledge exist currently in English-speaking Canada.

The University of Alberta Extension Program has built up an accredited university-level program that has received wide recognition throughout Canada. Courses are available online, leading to a certificate in information rights. This course has received awards from the information rights learning community.[15]

The Canadian Access and Privacy Association (CAPA), a well-respected non-profit organization based in Ottawa, monitors issues likely to affect the work of those in the information rights field, as well as taking positions on emerging issues. It also administers a certification program, based on the obtaining of formal qualifications or years of practical experience or both. Certification levels, in addition to the basic level, include a Professional certification and a Masters certification. The University of Alberta program is the recognized professional certification for this organization although others may be submitted.[16]

In the area of personal information protection and privacy issues generally, the umbrella organization which specializes in training members is the International Association of Privacy Professionals (IAPP). Founded in the United States in 2000, it offers individual, corporate, and group memberships. Although it conducts research and holds conferences in the US, Canada, and Europe, its primary focus is on training people who work in data protection to internationally recognized standards. It has a Canadian branch which holds a yearly conference in Toronto. The conference is usually followed by a testing session for certification of Canadian members.

The IAPP is responsible for developing and launching the only globally recognized credential programs in information privacy: the Certified Information Privacy Professional (CIPP), the Certified Information Privacy Manager (CIPM) and the Certified Information Privacy Technologist (CIPT).The CIPP, CIPM, and CIPT are the leading privacy certifications for thousands of professionals around the world who serve the data protection, information auditing, information security, legal compliance and/or risk management needs of their organizations.[17]

With these available training options, the upgrading of the professional qualifications of ATIPP coordinators is a realistic goal.

Overall, the knowledge of ATIPP coordinators appears to be undervalued, and their autonomy to apply the law to the requests is limited by both their superiors and the minister's political staff. There is no more telling

15 http://www.extension.ualberta.ca/study/government-studies/iapp/.

16 http://www.capa.ca/.

17 https://privacyassociation.org/about/.

indication of the control exercised over the administration of the ATIPP system than the fact that the final communication with the requester, either to send the information or to explain the reasons for the refusal, comes, in the case of government departments, from the deputy minister's office and is signed by the deputy minister.

The manual directs the coordinator to protect the identity of a requester by limiting disclosure of the requester's identity to those who have a legitimate need to know.[18]

Despite the directive to limit the disclosure of the requester's identity, the coordinator must complete a form before processing the request which identifies the requester as belonging to one of the following categories:

- Academic/Researcher
- Business
- Individual
- Interest Group
- Legal Firm
- Media
- Other Public Body
- Political Party

The manual also directs that coordinators consult communications staff concerning all requests from the media. This suggests that it is actually encouraged to analyze the request through the filter of the identity of the requester. Of particular interest is the guidance regarding requests from the media:

> Communications management should be consulted on all requests from media and some public bodies may choose to include communications consultation on every request it receives.[19]

Communications staff are presumably not specialists in the interpretation of the *ATIPPA*. A logical deduction would be that communications staff are well placed to advise on the consequences for media reporting of the release of the requested information, rather than on what information should be disclosed under the *Act*.

This type of involvement by staff impairs the fair operation of the access to information system. It suggests the motivation for this involvement has much to do with the image of the government of the day in news coverage. Nowhere in the *ATIPPA* is it stated that a valid reason for withholding information is how the government might be affected by media coverage of information disclosed through the *Act*.

This process of focusing on the identity of the requester rather than the merit of the request may account for the delays experienced by the media and opposition parties. On the one hand, the Office of Public Engagement pointed to the relatively speedy treatment of a majority of requests. Yet the submissions and the statements made at the hearings constantly referred to delays and rejections that seemed unreasonable.

Two observations can be made here. The first is that the time spent on certain categories of requesters perceived as problematic through prior identification adds to delays and negates the duty to assist.

The second observation is that the current system, where requests are scrutinized by staff, the deputy minister, and often the minister, facilitates the interpretation of *ATIPPA* in a partisan political way rather than in a fair, principled way.

18 NL *Access to Information Policy and Procedures Manual* (2013), p 29.

19 *Ibid* 39.

Conclusion

ATIPP coordinators assure the efficiency and the credibility of the entire process on a day-to-day basis. Although the public does not hold them to account for the functioning of the whole system, it is clear from some of the comments that requesters for information are often skeptical about the responses they receive.

Not only does the administrative system for the *ATIPPA* need to be shielded from political pressure, as discussed above, but the coordinators themselves need a surer platform from which to work. They need to be professionally trained and situated high enough up in the organization where they work to command automatic respect for their functions.

In structured, hierarchical organizations, which most public bodies are, senior staff positions are respected for their decision-making authority. Respect for the ATIPP process suggests situating the ATIPP responsibilities at the director level. This might be only one of many responsibilities of the director, but the authority of the position would benefit the administration of the *ATIPPA*.

A significant change should be made to the current approach to the administration of the *ATIPPA* to give more importance to the role and knowledge of the ATIPP coordinator. That person may consult others, but only to receive advice on the interpretation or application of the *Act*, or to receive assistance in locating and obtaining the information to respond to the request at hand.

Requests for information should be anonymized (except in the case of requests for personal information or where the identity of the requester is necessary to respond to the request) before they leave the hands of the coordinator. The coordinator should be the only person to communicate with the requester, and therefore needs delegated authority from the head of the public body. Administrative sanctions should be envisaged for those who attempt to interfere in the integrity of the ATIPP process.

Recommendations

The Committee recommends that

2. The *Act* be amended to give delegated authority for handling a request solely to the ATIPP coordinator.

3. No officials other than the ATIPP coordinator be involved in the request unless they are consulted for advice in connection with the matter or giving assistance in obtaining and locating the information.

4. The *Act* be amended to anonymize the identity and type of requester upon receipt of the request and until the final response is sent to the requester by the ATIPP coordinator, except where the request is for personal information or the identity of the requester is necessary to respond to the request.

2.2 The duty to assist

Section 9 of the *ATIPPA* spells out the duty of public bodies to assist an applicant who makes a request for information. The provision reads as follows:

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

The law sets out three principles. The public body must make a reasonable effort to assist the applicant, the response must be made in a timely manner, and the search must be thorough so as to return as complete a set of records as possible. The amendments made as a result of Bill 29 did not change this section of the *Act*.

What we heard

Private citizen Terry Burry recounted his experience in making requests, and concluded it "is not very user friendly…in terms of what seems sometimes the arrogant attitude."[20] Wallace McLean commented that "there are far too many ATI co-ordinators, and others within public bodies, who need to be reminded of this legislative provision, and of the fact that they are the mere custodians, not the owners"[21] of public records.

The CBC discussed the duty to assist in the context of delays and extensions. Peter Gullage advanced the view that "in a perfect situation" where a public body wanted to extend the time frame for responding to a request, "there would be a conversation with the requester to talk about that."[22] He added, "and then maybe we can narrow it (the request) down." CBC senior legal counsel Sean Moreman stated that the duty to assist could come into play with respect to requests for records that extend over a year or several years. He suggested that instead of receiving thousands of pages at once, and after a substantial delay, the public body might work with the requester and process the request monthly so that "you'll be getting your information as we move along."[23]

Official Opposition Leader Dwight Ball took issue with the content of the letters public bodies write to requesters. He said a refusal should be accompanied by an explanation of the reasons for the refusal, not just the decision and a quotation from the relevant section of the *Act*: "If you are going to say no to somebody, at least give the courtesy of saying why you're saying no to it."[24]

Nalcor Energy provided a 5-page ATIPPA Timeline document that sets out all the steps to be taken in meeting the request for information, including communicating with the requester and numerous internal processes. Vice President Jim Keating stated the strength of such an approach is that it "provides certainty and clarity to all the folks that we have to engage" in responding to the request.[25]

Newfoundland and Labrador practices

There is substantial guidance for provincial public bodies with respect to what is meant by the "duty to assist." Several Commissioners' reports give an in-depth treatment of this issue, including a report issued in February 2014. There, the Commissioner underscored three separate points about fulfilling the duty to assist:

- the public body must assist the applicant in the early stages of making a request
- it must conduct a reasonable search for the requested records

20 Burry Transcript, 24 July 2014, pp 40–41.
21 McLean Submission, August 2014, p 15.
22 CBC/Radio-Canada Transcript, 18 August 2014, pp 65–66.
23 *Ibid* pp 66–67.
24 Official Opposition Transcript, 22 July 2014, p 65.
25 Nalcor Energy Transcript, p 14. (*ATIPPA* Timelines chart is Appendix 'B' of submission, 20 August 2014).

- it must respond to the applicant in an open, accurate and complete manner[26]

In that report, the Commissioner also pointed to another source of information to help guide public bodies in assisting the requester: the policy and practices manual compiled by the ATIPP Office of the OPE.

In a report in 2011, the Commissioner commented on the duty the public body has in the early stages of a request. As an example, he took a public body to task for misinterpreting the type of information an applicant requested, and instead of taking the time to clarify the request, it made "its all too prompt reply" just two days later, and rejected the request. He concluded, "in failing to contact the Applicant to seek clarification, Executive Council failed in its duty to assist the Applicant."[27] The Commissioner has also described a "reasonable search" for records on the part of the public body as one that is carried out "by knowledgeable staff in locations where the records might reasonably be located."[28] In a report involving a seven-month delay in response to a request to the Department of Natural Resources, the Commissioner commented on the duty of the public body to keep contact with the applicant throughout the process:

> [23] … the duty to assist under section 9 to "respond without delay" and to "respond in an open, accurate and complete manner" requires the Department to keep an applicant informed as to the progress of their request. In this case (as it was in Report A-2012-12) all communications with respect to the status of the request were initiated by the Applicant. As stated in that Report, "this does not help to foster a cooperative and respectful relationship between an applicant and a public body".[29]

The duty to assist carries through until the request is disposed of, either with full or partial disclosure or with an outright refusal. The Commissioner's comments in a case involving a request to a municipality in 2007 underscored this point.

> When deciding to deny access to a record or part of a record outside of the *ATIPPA* process, as described in recommendation number 2, the Town must provide a complete and accurate explanation to the applicant, including an indication that the response is being given outside the scope of the *ATIPPA* and that the applicant will not have the ability to seek a review of the Town's decision by the Office of the Information and Privacy Commissioner.[30]

Other Canadian and international practices

The "duty to assist" is a standard requirement in Canadian access and protection of privacy laws, and the word "reasonable" is commonly used to describe the effort the public body must make to assist the applicant. Nova Scotia defines "reasonable" as "what a fair and rational person would expect to be done or would find acceptable and helpful in the circumstances."[31] It further states that "duty to assist" involves:

- a timely response to a request
- being open with a requester about a refusal, a fee, or why a decision was made
- clarifying with the applicant what they are actually requesting
- providing a comprehensive response to the applicant's request

There is similar guidance from the federal Office of the Information Commissioner. However, the Commissioner states that "duty to assist" goes beyond helping a requester through the process, and "implies a commitment to a culture of service and underscores the importance of access to information as a service to Canadians." It reminds officials in public bodies that the duty extends through the entire access process, from interpreting the request and searching the responsive records to responding to the requester. The document references the United Kingdom experience, which it summarizes as involving a "wide-ranging duty to assist and to provide advice."[32]

26 OIPC, *Report A-2014-004*, 6 February 2014, para 25.
27 OIPC, *Report A-2011-002*, 22 March 2011, para 25–26.
28 OIPC, *Report 2013-002*, 30 January 2013, para 11.
29 OIPC, *Report A-2013-001*, 25 January 2013.
30 OIPC, *Report 2007-007*, 26 June 2007.
31 NS FOIPOP, *What is Duty to Assist?*
32 Information Commissioner of Canada, *Access to Information and Duty to Assist*.

The United Kingdom provides general guidance for public bodies in a Code of Practice, which includes a section on providing advice and assistance to requesters. The starting point in the guidance for officials is to work with the requester "to enable him or her to describe more clearly the information requested," for the purpose of "clarify[ing] the nature of the information sought, not to determine the aims or motivation of the applicant." The Code recognizes that a timely response is important, and recommends requesters be contacted "as soon as possible" to seek clarification on a request, "preferably by telephone, fax or email." Once officials have followed these steps, they are deemed to have met their legal duty to provide assistance, even if the requester fails to "describe the information requested in a way which would enable the authority to identify and locate it."[33]

There is additional guidance for public bodies in the UK, and this comes from the Information Commissioner's Office (ICO).[34] The ICO describes the importance of the duty: "The provision of advice and assistance is how a public authority interacts with an applicant in order to discover what it is that the applicant wants and, where possible, assist them in obtaining this."

The ICO recommends officials treat the Code as "a minimum standard," and lists several examples of "good practice:"

- make early contact with the applicant and maintain a dialogue with them throughout the process
- a public authority's customer service policies should facilitate their advice and assistance duties
- properly record and document all communications related to clarification and handling of the request
- be sensitive to the circumstances of the applicant when considering the appropriate method of contact
- if the information cannot be provided in the format requested, discuss with the applicant how it might be provided in another acceptable format
- be prepared to provide advice and assistance to an applicant when their request has been refused on the basis of an exemption or exception[35]

33 UK *Code of Practice on the discharge of public authorities' functions*, at paras 8, 9, 12.

34 UK ICO, *Good practice in providing advice and assistance* (2008), pp 2–3.

35 *Ibid* pp 2–3.

Conclusion

The essence of the duty to assist is to exhibit the qualities that are inherent in good customer service. The contact should start with a positive attitude, continue with ensuring there is clarity about what information is being asked for, and work toward satisfying the requester. If the information cannot be provided, or only some of it will be disclosed, the official needs to explain why.

The legal duty to assist has been legislated, but a good attitude cannot be a function of the law; that will depend on the personal qualities of the official who receives the request and their interaction with the requester until the end of the process.

The *Access to Information Policy and Procedures Manual* comments in detail on the duty to assist. It states the importance of the duty and its legal underpinning. The document adequately spells out the process, but it should go further and state that the key to successfully carrying out the duty is to practise good customer relations. That means providing the kind of assistance and service that would be provided if the objective were

to cause the applicant to return to seek more of the good service. In that respect, it would be useful if training that is already in place for ATIPP coordinators emphasized such an approach.

Recommendations

The Committee recommends that

5. The head of each public body provide the designated ATIPP coordinator with instructions in writing as to the positive duty to provide to a requester the maximum level of assistance reasonable in the circumstances.

2.3 Fees and charges

The fees and charges collected under Newfoundland and Labrador's *ATIPPA* do not come close to the cost of administering the *Act*. In his comments before the Committee, the Minister responsible for the Office of Public Engagement (OPE), the Honourable Sandy Collins, agreed, "it's not cost recovery in any sense of the term."[36]

In 2013–14, there were 450 access requests to departments and other public bodies for general information, and applicants were required to pay a $5 application fee. The application fees totaled $2,190 and public bodies levied an additional $4,518 in processing charges. This brought the average cost for fully processing each of the 450 requests to $14.90.[37]

Several submissions advised the Committee to recommend doing away with fees and charges. The OIPC said: "it is clear that the time and effort involved in estimating, assessing, and processing fees by public bodies is more of a burden than a boon."[38] Others, including Dr. Alex Marland of Memorial University's Political Science Department, recommended keeping fees, arguing that a "nominal application 'nuisance fee' (say $5) is an important principle to require that applicants consider whether a request is really necessary."[39] The Minister of OPE suggested the $5 application fee "shows the level of commitment by the person that's putting the inquiry forward."[40]

Pre–Bill 29

Before December 2012, it cost $5 to make an access request under the *ATIPPA*. Applicants were provided with two hours of free processing time and charged $15 an hour after that. The processing charge applied to locating, retrieving, and producing a record. Applicants were required to pay half of the cost estimate up front, and the remainder once the request was completed. Public bodies had the authority under the regulations to waive fees and charges where the cost would "impose an unreasonable financial hardship on the applicant" or where the request related to the applicant's personal information and waiving the fee would be "reasonable and fair."

The Cummings report (2011)

Fees and charges were given significant attention in the last legislative review of the *ATIPPA*. Commissioner John Cummings ultimately concluded fees should stay as they were, and government should not consider implementing

36 Government NL Transcript, 19 August 2014, p 183.
37 Office of Public Engagement, *ATIPPA* Annual Report 2013-14.
38 OIPC Supplementary Submission, 29 August 2014, p 5.
39 Marland Submission, July 2012, p 3.
40 Government NL Transcript, 19 August 2014, p 183.

new ones. Most interesting, however, were the widely varying views from within public bodies. Some public bodies thought that for various reasons, fees and charges were not useful in the administration of the *Act*:

- they were applied inconsistently
- cost recovery was impossible
- they did not apply to requests for personal information (except for the application fee)
- they were too low to deter applicants from making unreasonable requests[41]

Other public bodies believe that fees deterred applicants from making unreasonable requests and helped them narrow the focus of their requests. Mr. Cummings concluded most public bodies wanted fees to be increased, but they could not decide what the increase should be.

Post–Bill 29

The ministerial fee schedule in the wake of the Bill 29 amendments continued the $5 application fee for general access and personal information requests, while the processing of personal requests continued to be provided for free. However, the fee schedule brought changes to the access to information fee structure and how the calculation was made. Applicants had their free processing time doubled to four hours. But after the four hours, the processing charge was increased to $25 an hour. In addition, public bodies could now include the cost for considering the use of various exemptions under the *ATIPPA*. As with the pre–Bill 29 fee schedule, there were additional costs for making copies, producing electronic copies, and shipping. There was also a new method of calculating how processing charges were to be paid by applicants. The public body had to provide a cost estimate to the applicant. If charges were estimated to be $50 or more, an applicant who wanted the work to continue had to pay half the cost estimate before the work commenced. The second half of the charge was to be paid before the public body started working on the remaining 50 percent of the work. The regulation regarding the waiving of fees remained unchanged.

The law and practice in Canada

All Canadian jurisdictions except New Brunswick charge for providing information to requesters once they have made a formal request under access laws. Several provinces and the federal government charge both a $5 application fee and a further amount for processing the request, while other provinces, including Saskatchewan, Quebec, and British Columbia, have no application fee. British Columbia allows an applicant three free hours of processing time and cannot charge an applicant for the time spent severing information from a record.

Since New Brunswick is the only Canadian province without fees for access to information, it is useful to discuss the policy decision that eliminated them. New Brunswick's *Right to Information Act* was implemented in 1978 and replaced by a new Act in 2009. In the following year, the matter of fees for access requests had become an election issue. Progressive Conservative Leader David Alward promised to eliminate all fees for applicants, and later, as Premier, announced the decision to do so. The policy decision did away with the $5 application fee, the $15-an-hour processing charge, and additional charges for copying, computer time, and delivery. Mr. Alward said the decision was vital for New Brunswick democracy:

> Free access to information is vital for a healthier democracy and a more effective government. A more open and transparent public sector will help us grow a stronger New Brunswick.[42]

All Canadian jurisdictions give public bodies the authority to waive fees in certain circumstances. However, not all provinces and territories do it in the same way. Ontario, for example, allows the head of a public body the discretion to waive a fee if it would cause financial hardship to the applicant, if it would benefit public health and safety, and if the actual cost varies from the

41 Cummings Report (2011), p 30.

42 NB Press Release, 26 August 2011.

initial estimate. The head of a public body in British Columbia can agree to an applicant's request to waive fees if release of the information requested is in the public interest or if "the applicant cannot afford the payment or for any other reason it is fair to excuse payment." The territory of Nunavut has a fee-waiving provision similar to that of several provinces:

> The head of the public body may waive all or a portion of your fee if, in their opinion, you cannot afford to pay the fee or for any other reason they feel it is fair to waive that fee.[43]

International law and practice

Internationally, Australia, New Zealand and the United Kingdom do not charge an application fee. However, all three jurisdictions impose charges. The United Kingdom has the most generous cost structure, and the result is that only a small percentage of requesters are actually charged for their information request.[44]

UK authorities are obliged to fulfill requests if the cost of doing so comes within "the appropriate limit,"[45] set at £600 for the central UK government and £450 for other public bodies.[46] Requests that fall below the threshold are to be charged only "communication costs," which include copying, postage, and other fees tied to complying with how an applicant wishes to receive the information. If the request does not exceed the appropriate limit, public bodies cannot charge for processing time, and they may not add a "handling" or "administrative" fee.[47]

> When calculating the time taken to respond to a request authorities can include searching for the information and drawing it together but not reading it to see if exemptions apply, redacting data or deciding whether it can be released. Few public authorities use the charging mechanism.[48]

In New Zealand, the first hour of search time is free for access to information requests, while each subsequent half hour or less costs $38.[49] Australia charges $15 an hour for searching and retrieval and $20 an hour for decision making with respect to the request.[50]

New South Wales has a variety of fee regimes, but all information requests must be accompanied by a $30 application fee. Requesters applying for general government information are charged $30 for each hour of search time, with no free processing time. An applicant requesting personal information receives 20 hours of free processing time, and is charged $30 an hour for the remaining time of a search. New South Wales applies a different fee regime to people who can demonstrate financial hardship (defined as pensioners, full-time students, and non-profit organizations). People in this category pay the $30 application fee and, like the person requesting personal information, they receive the next 20 hours for free. They are charged $30 an hour for the remaining processing time, but receive a 50-percent discount on all charges, including the application fee. New South Wales also has a public interest provision—officials can provide a 50-percent processing fee discount "if the agency is satisfied that the information applied for is of special benefit to the public generally."[51]

43 NU *ATIPP Fees.*

44 UK *Post-legislative scrutiny of the FOI Act 2000* (2012), para 25.

45 This term is used in section 12 of the UK FOI Act.

46 *Supra* note 44 at para 24 *(The standard cost is £25 an hour, which translates to 24 hours for the central UK government and 18 hours for other public bodies, including local bodies).*

47 UK ICO, *Fees that may be charged,* p 4.

48 *Supra* note 44, p 25.

49 NZ *Charging Guidelines.*

50 Australia ICO, *Freedom of Information – Charges.*

51 NSW IPC, *GIPA Act fees and charges* (2014).

Many of the submissions to the Committee addressed the issue of fees and charges, and while views were strongly expressed, there was no common theme. The most significant development was the position of the Commissioner, who initially accepted that fees should be part of the *ATIPPA*. However, after hearing and reading the various submissions before the Committee, the Commissioner's office did further study. In his supplementary submission in August, the Commissioner recommended all fees and charges be eliminated.

He suggested that any concerns public bodies have about becoming "overburdened through limitless access-to-information requests" can be addressed through section 43.1, which outlines the grounds on which public bodies can disregard requests.

The OIPC commented on the New Brunswick decision to eliminate fees, and stated that while that province has not experienced an appreciable increase in the number of access requests since fees were eliminated, "anecdotal evidence" suggests "the breadth of requests is starting to become problematic."[52]

Although the Commissioner has recommended fees and charges be eliminated, it is useful to describe his earlier perspective when he addressed the existing *ATIPPA* provisions. One of his chief complaints was that as a result of the fee changes in 2012, public bodies can charge applicants for the time spent determining if exemptions should apply:

> It seems wrong to charge the applicant a fee for time spent determining why the applicant cannot have access to a record or part of a record.[53]

He was concerned that poorly maintained and organized public records and complex requests can lengthen searches. The Commissioner cited the hypothetical example of two searches involving 100 pages of responsive records.[54] One case may take an hour because the records are easily located, with limited redaction required. The other case may be more complex, and require the involvement of legal counsel and senior executive officials to discuss the issues and harms involved in release. The Commissioner stated that the applicant "will not necessarily know or appreciate the difference in terms of the fee." The Commissioner recommended that the OIPC should be able to investigate a fee complaint as part of a review where he can issue a report and recommendations, rather than the current system where he has only the authority to "investigate and attempt to resolve complaints."

The Centre for Law and Democracy recommended eliminating application and processing charges, while allowing public bodies to recoup direct costs such as those associated with photocopying and mailing. It objected to the current practice, which allows public bodies to charge for search and processing time:

> Essentially, this forces requesters to pay for poor record management practices or excessive caution in deciding whether exceptions apply.[55]

The Centre argued "direct employee time" spent in responding to access requests should be regarded as "part of the institution's general mandate."[56]

Official Opposition Leader Dwight Ball objected to the fee changes following Bill 29 and the addition of "activities now factored into the cost of labour," such as the time spent determining which exemptions to apply. Mr. Ball contended the changes have made the *ATIPPA* "more cost-prohibitive, and thus, less accessible." He also addressed the need for common standards in administration and information oversight:

> *ATIPPA* fees are rather arbitrary, subject to the discretion of the person processing the request, and dependent upon any number of factors, including their experience level, their familiarity with the *Act*, or the information management capabilities of that particular department.[57]

52 OIPC Supplementary Submission, 29 August 2014, p 2.
53 OIPC Submission, 16 June 2014, p 82.
54 *Ibid.*
55 CLD Submission, July 2014, p 12.
56 *Ibid.*
57 Official Opposition Submission, 22 July 2014, p 29.

The OPE provided insight into the issues encountered by ATIPP coordinators trying to fulfill requests in the time since the amended ministerial fee schedule. They are feeling the impact of the changes described above concerning the fee structure and how the processing cost calculation is made. The OPE explained that the process can lead to delays:

> The current payment schedule can result in delays in responding to requests as coordinators are unable to complete the processing of a request until all fees are paid. In addition, it can be impractical for coordinators to determine at which point 50 percent of the request has been completed.[58]

Nalcor Energy recommended that the Committee review the $5 application fee, as such a fee is "only useful if it deters unreasonable requests."[59] Nalcor Energy told the committee it does not cash the $5 cheques that are sent with requests for records. It stated if the application fee is to be maintained, it should be "meaningful."

Several private citizens commented on how they thought fees and charges can sometimes be deliberately inflated to discourage applicants from seeking information. Terry Burry of Glovertown recommended there be no increase in the application fee, and that photocopying costs be held at 5 cents a copy, "not the $115.00 I was ripped off in 2008."[60] Mr. Burry also suggested the government release requested information as a PDF if the applicant can access electronic files. He also recommended there be no charge for files sent electronically.

Adam Pitcher suggested fees for access be "lower overall," and that they be standardized for all public bodies.[61] Scarlett Hann commented briefly on the time and cost involved in the initial access process, as part of a longer discourse on how costly the access to information system can become if a case goes all the way to court. She referred specifically to the "initial application review process by ATIPP staff and ATIPP departmental coordinators."[62]

Journalist James McLeod remarked that it is time for the *ATIPPA* access and payment system to go online. He referred to the troublesome practice of having to prepare, write, and mail a cheque for each access request. He prefers to do this online, and to be able to make a payment electronically.

58 Government NL Submission, August 2014, p 18.
59 Nalcor Energy Submission, August 2014, p 7.
60 Burry Submission, July 2014, p 10.
61 Pitcher Submission, 27 December 2013, p 1.
62 Hann Submission, 27 July 2014, p 4.

Issues and analysis

Most of the submissions to the Committee assumed that gaining access through the *ATIPPA* will involve a charge. But many were of the view that if fees and charges are to be maintained, they must be fair. Several expressed the opinion that public bodies should not charge for deciding what information should be withheld. Others pointed to the need for a consistent approach to estimating costs. It was pointed out, for example, that officials handling access requests might not all have the same level of administrative skills, and that this can significantly affect estimates. The quality of information management may vary from one public body to another, making it easier to access information from one organization and more difficult from another. This can also affect cost estimates.

The Committee has also heard that seemingly simple matters, such as the change in the method for estimating charges, can have an impact on the public body's ability to respond quickly to a request. And the Committee was advised there is a need to revisit the *ATIPPA* application and payment system. It remains paper- and cheque-based, as it was when the *Freedom of Information Act* was enacted in 1981.

The *Access to Information Regulations* have a provision that allows the public body to waive fees where they would "impose an unreasonable financial hardship" or where doing so would be "fair and reasonable" in relation to an applicant's own personal information. There is no provision for waiving fees when it is in the public interest to disclose the requested information.[63]

Any change related to fees and charges should facilitate, not frustrate access. Changes should make the *Act* more, rather than less, user friendly. And any change in the fee and charge structure should not lead to more problems, such as the current problems associated with estimating charges.

No one who appeared before the Committee, including government representatives, contemplates a future *ATIPPA* system with full or even near cost recovery. As a point of information, it was estimated that Canada's federal access to information system cost $47 million to administer in 2009–10, and that less than one percent of the cost was recovered through fees.[64]

The Constitution Unit at University College London concluded from its research with local authorities in the UK that close to 70 percent of them did not charge applicants in the first five years of the *Freedom of Information Act 2000*, from the time it came into effect in 2005 to 2009. The remainder of local authorities said they charged requesters in fewer than 5 percent of requests.[65]

Two reasons are given to support charging fees—cost or partial cost recovery, and deterring nuisance requests. The latter reason was expressed in the 2008 review of the *Right to Information Act* in the state of Queensland, Australia. The University of Southern Queensland commented on the purpose of user fees:

> Whilst the University does not recommend increasing the charges, neither does it wish to see the charges removed as they do act as a deterrent to uncommitted, nuisance making or vexatious applicants.[66]

During the ongoing review of Alberta's *Freedom of Information and Protection of Privacy Act,* Commissioner Jill Clayton recommended that the province's fee structure be reviewed to ensure that fees are appropriate and do not create a barrier to access, and that they are clear and understandable. But she did not recommend doing away with them. She stated: "In my view, while it is reasonable to charge a nominal fee to provide access—this helps to prevent frivolous requests—it is important that fees not be a deterrent to access."[67]

As discussed above, the Committee studied cost systems in place in other jurisdictions, including the United Kingdom. The UK model provides for 18 hours of free processing time for a request to local public bodies such as municipalities and schools, and 24 hours for central government. This appears to provide a realistic amount of time to fulfill requests. It could also act as an incentive for an applicant to make requests that are specific and that would have a reasonable chance of being fulfilled free, apart from the direct costs described above. Broad-ranging and ill-defined requests and those made in bad faith would remain subject to the provision

63 BC IPC, Order F14-42, 24 September 2014. This recent case decided by the BC Information and Privacy Commissioner may be instructive. A journalist requested documents about an internal review of purchase card expenses by employees of BC Housing. The subsequent story stated there was widespread mismanagement of taxpayer-funded credit cards for items and services of low value. The journalist asked BC Housing for expense claims involving five employees, covering an 11-year period, and later narrowed the request to a period of nearly six years. BC Housing sent a fee estimate of more than $10,000 for the initial request, and an updated estimate of $3762.50 for the narrowed request. The journalist narrowed the request further to include just two employees. The third and final fee estimate was $2010. The journalist asked that the fees be waived under *s. 75(5)(b) of FIPPA,* which, upon a request, allows the head of the public body to waive fees if the information being sought relates to a matter of public interest. The Commissioner decided the credit card records in the 10-month period prior to the Credit Card Review were in the public interest, as were the records for the 22 months after the review was completed, as they would allow the journalist to compare credit card spending before and after the review. She ordered that fees be waived for that period.

64 Globe and Mail, *Feds eye access-to-information fee hike,* 11 March 2011.

65 *Supra* note 44, p 25.

66 Queensland, Solomon Report (2008), p 186.

67 Alberta IPC, *Becoming a Leader in Access and Privacy* (2013), p 5.

that is at present section 43.1, and should, in concert with additional powers for the Commissioner to review all aspects of the *ATIPPA,* provide the oversight and confidence that the public demands.

Conclusion

The quick and easy solution to fees and charges would be to adopt the New Brunswick system. And despite the fact that the Commissioner has recommended this approach, his caution is instructive. The New Brunswick experience with no fees is in its early days. More evidence will be needed to determine its strengths and weaknesses. It would be premature to adopt such a system in Newfoundland and Labrador without understanding a myriad of issues, including the effect it will have on the workload of public officials and on the staff in the Commissioner's Office.

The current cost recovery system under the *ATIPPA* lacks credibility with many users. There has been an especially strong negative reaction against the policy to count as processing time the effort public officials use to determine what exemptions might apply to a given access request.

People seem not to object to paying fees and other charges. But they do object to some cost estimates that can appear overstated and punitive. As well, the *ATIPPA* does not allow for the fact that some applicants request information that it would be in the public interest to disclose. This feature exists in the British Columbia legislation.[68] In such cases, even if the volume of information is large, and the attendant processing costs would be high, the public interest would be served by releasing the information with no charge.

The Committee sees little merit in retaining the application fee. It makes sense to lengthen the "free search" period from 4 hours to 15 hours for government departments and other agencies, including health boards and school boards, and to 10 hours for municipalities. The only time that would count toward processing charges would be the direct searching time for the records. Time spent narrowing the request with an applicant would not count toward the free time allotment, and neither would the time spent to determine if exemptions should apply. Direct costs would be recouped, such as photocopying and mailing. However, the applicant would not be charged for time spent creating an electronic copy of the record, such as a PDF or a dataset.

Applicants could request a waiver of charges, either because of their personal financial circumstances, or because they believe the disclosure would be in the public interest. The public interest would not be limited to certain types of documents, such as those involving public health or safety or the environment.

This approach aims to remove barriers to access in most cases, requiring charges only for requests that involve extensive searches. And even in those cases, the public interest provision can guide a public body to release the information without imposing a charge. In the event of an extensive search where the waiver does not apply, public bodies are required to work with the applicant to define or narrow their request.

As a final safeguard, disputes over charges, including a refusal of a public body to waive a charge, could be reviewed by the Commissioner, whose determination would be final.

68 BC *FIPPA,* s 75(5)(b).

Recommendations

The Committee recommends that

6. The *Act* be amended to
- (a) eliminate the application fee for any information request
- (b) eliminate the processing charges for the first 10 hours of search time for municipalities and the first 15 hours for all other public bodies
- (c) include only search time in the cost estimate
- (d) charge applicants whose search comes within the free period only for direct costs, such as photocopying and mailing
- (e) ensure that where processing charges are to be levied, they are modest
- (f) eliminate direct costs for electronic copies, such as a PDF or a dataset
- (g) provide for the waiver of charges in circumstances of financial hardship or where it would be in the public interest to disclose the information
- (h) enable a dispute respecting charges or waiver of charges to be reviewed by the Commissioner, whose determination would be final

7. The Office of the Information and Privacy Commissioner develop guidelines such as those provided by the United Kingdom Information Commissioner, to guide public bodies on how to process requests where the time estimate is greater than the free time allowed.

8. Provision should be made for an online application and payment system, where practicable.

2.4 Disregarding requests

The *ATIPPA* places the onus on public bodies to act appropriately and to release information quickly and in the spirit of the *Act*. There are two sections of the *Act*, however, that allow public bodies to disregard requests made in bad faith and those that are frivolous or vexatious.

Pre–Bill 29

Prior to the Bill 29 amendments, the *ATIPPA* allowed public bodies to refuse to disclose records if a request was repetitive or incomprehensible or if the information had already been provided to the applicant (section 13).

Origin of the Bill 29 changes

In his report in 2011, Commissioner John Cummings stated there was "widespread agreement among public bodies" that section 13 of the *ATIPPA* did virtually nothing to deter requesters regarded as "abusers" of the system. Public officials described some abusive practices to Mr. Cummings:

- the re-wording of an earlier request, necessitating another search, even though it was unlikely additional documents would be found
- repetitive requests intended to interfere with the operations of the public body, rather than to obtain information
- vague requests covering a long time period

He stated that officials suggested Newfoundland and Labrador adopt wording from access laws in other provinces. The Department of Justice recommended public bodies be permitted to disregard requests where the head of the public body was of the view that the request was frivolous or vexatious.

Mr. Cummings was convinced by the argument, and concluded that some requests "are made in bad

faith; have no legitimate value; are confusing, repetitive or constitute an abuse of process."[69] However, he added an important condition—in all instances, the heads of public bodies should be able to disregard a request only with the prior approval of the Commissioner.

The Bill 29 amendments incorporated all the grounds Mr. Cummings recommended as the basis for being able to disregard a request. But in a significant departure, Bill 29 left the decision to disregard up to the head of a public body, not the Commissioner, as Mr. Cummings had recommended. The Commissioner was to retain his role in determining whether a request was excessively broad.

Post-Bill 29

Bill 29 left section 13 in place and added an entirely new section that allows public bodies to disregard requests on other grounds.

Section 43.1(1), enacted as a result of Bill 29, outlines situations in any of which the head of a public body can unilaterally disregard a request:

- The request is "repetitive or systematic"; it would "unreasonably interfere with the operations of the public body or amount to the abuse of the right to make those requests."
- It is "frivolous or vexatious."
- It "is made in bad faith or is trivial."

There is an additional provision that comes into play when, despite the requests being neither repetitive nor systematic, the head of a public body feels they are excessively broad. In that situation, the head must obtain the approval of the Commissioner to disregard the request.

Practices

There are two places to find guidance on how public bodies in Newfoundland and Labrador use these sections of the *ATIPPA*. One is the online reports of the OIPC; the other is the *Access to Information Policy and Procedures Manual* produced by the ATIPP office of the OPE. The manual provides guidance for application of various terms such as "repetitive or systematic requests" and "frivolous or vexatious requests," and provides some general guidance about applying these terms in the context of access to information. It relies primarily on decisions from the Ontario and Alberta Information and Privacy Commissioners, which outline factors to be considered in disregarding requests, such as what constitutes a vexatious request:

- a request that is submitted over and over again by one individual or a group of individuals working in concert with each other
- a history or an ongoing pattern of access requests designed to harass or annoy a public body
- excessive volume of access requests[70]

The Newfoundland and Labrador manual provides some additional advice and recommends officials go beyond the strict meaning of words such as "trivial":

> It is important for a public body to consider, however, that information which may be **trivial** from one person's perspective may be of importance from another's. [71]

Public bodies have made seven decisions to disregard requests since the Bill 29 amendments.[72] There are no Commissioner's reports on appeals related to the use of section 43.1 by public bodies, but there are reports respecting section 13 of the *ATIPPA*.

69 Cummings Report (2011), p 35.

70 NL *Access to Information Policy and Procedures Manual* (2013).

71 *Ibid* 52.

72 Six of the decisions were made by Nalcor Energy, based on similarly worded requests from one applicant, with respect to interests the corporation holds in various offshore oil licenses. The requests were considered "very broad" and "repetitive," and "the various requests overlapped." Nalcor Energy was unsuccessful in working with the applicant to narrow the requests. In the other case, the English School District was asked to provide personal information for a nearly four year period, involving email or other correspondence to or from 56 named people. The School District subsequently worked with the applicant to narrow the request, and was then able to respond. (Information obtained from ATIPP Completed Requests website, File OPE/2/2014, 17 April 2014).

The law and practice in Canada

There is no consistent pattern in Canadian access laws regarding the power to disregard requests. Neither federal law nor Nova Scotia law has any mechanism to allow a public body to disregard a request, while in British Columbia, Alberta, and Quebec, the head of a public body may apply to the Commissioner for authorization to disregard a request. Like Newfoundland and Labrador, both Manitoba and Ontario allow the head of a public body to determine whether an access request is frivolous or vexatious. Ontario has added regulations to assist public bodies in making this determination:

> 5.1 A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

British Columbia and Ontario adjudicators have decided many complaints where frivolous, vexatious, and trivial sections have been used by public bodies to disallow requests. A useful starting point is a recent British Columbia matter where the Securities Commission rejected an applicant's "misguided and vexatious" request for information related to an action the Securities Commission had commenced against the requester. The adjudicator acknowledged that while section 43 (*frivolous or vexatious*) is an "important remedial tool to curb abuse" under right of access legislation, its use by public authorities requires "careful consideration," since invoking it "curtails or eliminates the rights of access to information created by the legislature through FIPPA." She wrote that a frivolous or vexatious request must be one that represents "an abuse of the rights conferred under the Act," and an official who makes a determination "must keep in mind the purpose of the Act." The adjudicator found for the requester and determined he was seeking the information to defend himself in an action the Securities Commission had taken against him, matters which could not be regarded as trivial or an abuse of rights.[73]

Adjudicators of "frivolous or vexatious" cases have also determined that requesters have a responsibility to be reasonable. The Saskatchewan Information Commissioner was asked to review the refusal on the part of several government departments and agencies to provide records to a requester. In ruling that the agencies should release some of the requested records and not others, the Commissioner commented on the actions of the requester:

> Throughout the associated course of the Reviews under consideration, the Applicant has never made mention of the requests of government institutions to clarify or narrow his access requests, nor has the Applicant made any mention of fees. The example above is demonstrative of how the Applicant has, on some occasions, when requesting a Review misrepresented to this office the circumstances of his outstanding access requests.
>
> In the matter at hand, I am satisfied that the numerous instances in which the Applicant has, with apparent intent, misrepresented facts and circumstances concerning ongoing Reviews effectively demonstrate that the Applicant is not using the access provisions of FOIP in good faith.
>
> I find that when an applicant refuses to cooperate with a government institution in the process of accessing information one might conclude that the applicant is not acting in the spirit of the legislation, and thus not acting in good faith. [74]

The British Columbia Information and Privacy Commission reports a handful of cases where public bodies have made a frivolous or vexatious declaration: six cases in 2011–12, eight in 2012–13, and seven in 2013–14.[75] Alberta has similarly low numbers. In 2010–11, the Alberta Commissioner authorized public authorities to disregard six requests; in 2011–12, there were

73 BC *Securities Commission* (24 July 2014), F14-24.

74 *Ministry of Advanced Education; Employment and Labour; Minister of Executive Council; Ministry of Justice and Attorney General; Saskatchewan Labour Relations Board; Saskatchewan Workers' Compensation Board* (17 May 2010), F-2010-002, at paras 101–102, 103.

75 BC IPC, *Annual Report 2013–14,* p 16.

four authorizations, and in the most recent reporting year, 2012–13, there were three authorizations.[76]

Ontario reports frivolous or vexatious requests by focusing on cases under appeal to the Commissioner after a declaration by a public body. In 2013, there were 17 such declarations under appeal.

The practice in other jurisdictions

In the United Kingdom, the Commissioner's Office (ICO) advises public officials to apply their decision to the request itself, and not the requester.[77] Further, public officials are told to focus on the nature of the request, rather than the consequences. The advice from the ICO outlines 13 indicators (not an exhaustive list) to help officials identify potential vexatious cases, including

- abusive or aggressive language
- burden on the authority
- personal grudges
- unfounded accusations
- intransigence

The UK Commissioner cautions that these are indicators only, but they do allow officials to understand the nuances of applying section 14(1) of the UK FOI Act and to take the full picture into account before disregarding a vexatious request. The ICO also advises officials to use conciliatory approaches before invoking the section, or to write an outline of their concerns, in an attempt to have requesters change their behaviour.

New Zealand and Australia interpret the *vexatious* clauses in their legislation in a manner similar to the United Kingdom. New Zealand acknowledges that "past experience" with a requester can be taken into account in a request for information, but it reminds officials "the Act does not permit requests to be refused simply on the grounds that a requester has already made numerous, possibly time consuming requests which, in the eyes of the organization dealing with the requester, appear to serve no practical purpose."[78]

The Australian guidelines require officials to prove vexatious requests in the context of abuse of process or unreasonable requests:

> **12.2 Before declaring a person to be a vexatious applicant the Information Commissioner must be satisfied that:**
>
> a. the person has repeatedly engaged in access actions that involve an abuse of process
>
> b. the person is engaging in a particular access action that would involve an abuse of process, or
>
> c. a particular access action by the person would be manifestly unreasonable[79]

76 Alberta IPC, *Annual Report 2012-13,* p 26.

77 UK ICO, *Dealing with vexatious requests,* p 3.

78 NZ Ombudsman, *Frivolous and Vexatious Requests*, Part 2A, p 12.

79 Australia OIC*, Vexatious applicant declarations*.

What we heard

The Commissioner affirmed that the use of section 43.1 by public bodies has been "exceedingly rare." But he did see a significant issue because of the power it gives to the head of the public body to unilaterally disregard requests. The Commissioner noted the authority given the head of a public body to disregard becomes a matter of bad "optics,"[80] and stated in his 16 June written submission that "the language…has resulted in fears from some quarters that public bodies may use this provision to disregard legitimate requests as a way of avoiding the accountability purpose of the *ATIPPA*."[81]

80 OIPC Transcript, 24 June 2014, p 38.

81 OIPC Submission, 16 June 2014, p 37.

The OIPC offered the remedy of having the Commissioner approve all such requests, in order for the public body to disregard them. However, they acknowledged that such a practice raises an issue in the appeal process. In any case where the Commissioner gave the public body approval to disregard a request, the applicant can no longer appeal to the Commissioner to have the decision reviewed. In that situation, the Commissioner suggests the appeal would have to go straight to the Trial Division of the Supreme Court.

The Information Commissioner of Canada spoke of the "discipline" that exists in the *ATIPPA,* in reference to the number of exemptions in the *Act*, and other qualities such as fees and the power to disregard requests. She referred to her own role in overseeing the Canadian freedom of information system, and noted that of the 9,000 or so files she has seen, "there may be one case where I would have considered whether that would be frivolous or vexatious."[82]

Several other submissions made reference to the power to disregard requests, and specifically focused on the description "frivolous or vexatious." Simon Lono stated that, "on principle, a public body should not be able to decide that on its own."[83]

Wallace McLean agreed public bodies need a mechanism to deal with requests that might fit into the category of those outlined in section 43.1. But he cautioned the ability to disregard those requests should be undertaken "with restraint." He further stated that "this power should not be easy for a [public] body to use, and the exercise of the power must be transparent and accountable."[84] He also made several recommendations with respect to section 43.1:

- delete reference to requests of a "systematic and repetitive nature"
- make the entire power to disregard requests subject to prior approval of the Commissioner
- allow the applicant to respond and rebut the decision to disregard *before* the Commissioner makes a decision
- upon concluding a public body's request to disregard, and in order to enhance transparency and accountability, authorize the Commissioner to publish a report providing all the details of the matter

The CBC was especially critical of the section allowing public bodies to disregard requests. They raised questions about the interpretation of terms such as "frivolous," "vexatious," "bad faith," or "trivial." The CBC stated there was no guidance in the *Act* about what any of those terms meant, and argued that embarrassed officials could be tempted to use this section of the *Act* to hold back records "that cannot otherwise be properly withheld under the *Act*." The CBC also argued that the duty to assist in the *ATIPPA* (section 9) "includes a requirement to work with the requester to narrow his or her request to make it more manageable."[85] They also suggested public bodies use "all reasonable means to narrow the request" before asking permission to disregard.

The CBC also took issue with giving the head of a public body the authority to "disregard one or more requests." They believe this section allows the head of a public body to "ignore all requests by a particular requester simply because any one of them at any time is deemed to be offside."[86]

The New Democratic Party raised points similar to those identified by the CBC, and suggested terms such as "frivolous or vexatious" must be defined if they are to remain in the *Act*. Otherwise, the NDP recommends section 43.1(1)(b) be repealed.

Two public bodies recommended keeping the current section 43.1 intact. Nalcor Energy argued that "the public body is best situated" to understand how a request would affect its operations, where such requests "are intended to annoy, disrupt or have a disproportionate impact on a public body." It opposes allowing the Commissioner the authority to rule on whether the public body can disregard a request. Nalcor Energy also

82 Information Commissioner of Canada Transcript, 18 August 2014, p 30.

83 Lono Transcript, 25 June 2014, p 45.

84 McLean Submission, August 2014, p 10.

85 CBC/Radio-Canada Submission, 18 August 2014, p 11.

86 *Ibid* p 9.

recognizes that while "frivolous or vexatious" are common legal terms, they may not be so well understood by the public. They recommended that the OIPC develop guidance documents on this section of the *ATIPPA*, as the Information Commissioner does in the United Kingdom.

Nalcor Energy cautioned the Committee that putting the power to disregard a request in the hands of the Commissioner raises an important concern. It argued such a scenario would leave the requester with no choice but to submit an appeal to the Trial Division of the Supreme Court: "The role of the Commissioner as an independent investigator of the public body will be lost."[87]

The College of the North Atlantic also recommended keeping section 43.1 as it is. They suggested adding a definition for "frivolous or vexatious."

87 Nalcor Energy Submission, August 2014, p 7.

Issues

All submitters recognized that some access requests are problematic, because of their breadth, because of multiple requests from the same person, or because of a refusal on the part of the applicant to work with the public body to define or narrow the request. There is a recognition that the public body must be able to respond in such circumstances, up to and including the power to disregard the request.

Key questions focus on the role the public body plays in disregarding the request. Should it have the power to take this action unilaterally? Or should it be subject to oversight by the Commissioner, so that the process is transparent? If the Commissioner takes on this role, what impact will that have on the OIPC's status as independent investigator of public bodies?

The written and oral submissions revealed confusion, and even mistrust, about the meaning of the various terms in section 43.1. There were suggestions to define terms such as "frivolous" and "vexatious" and to produce guidance documents so that all parties, including public bodies, have the same understanding of what is meant by those sections of the *ATIPPA*.

Analysis

The power to disregard requests was expanded in the Bill 29 amendments. It came about because of concerns that the existing power in section 13 was inadequate. The Minister appeared to have a sense that there would be some apprehension over what the new sections meant as he opened debate on the amendments in the House of Assembly on 11 June 2012:

> Mr. Speaker, in terms of guiding a public body in determining what is frivolous or vexatious there is an amount of information available that will help advise and inform direction with respect to this. There are a lot of Commissioner reports from other jurisdictions that we can draw on, there is case law that we can draw on, and there are policy manuals provided which will provide guidance on what constitutes a request that is frivolous or vexatious. Mr. Speaker, over time as we build up our own collection of decisions and material, that will help inform us as to refine this process even further.[88]

It is obvious from the Minister's comments during the Bill 29 debate that there was a need for guidance on the new sections of the *ATIPPA*. And that is the concern that was expressed to the Committee during our hearings, and in written submissions. There was widespread

88 NL *Hansard,* 11 June 2012.

worry that terms such as "frivolous or vexatious" and "in bad faith" or "trivial" could be interpreted and applied broadly, perhaps so as to withhold information that should be disclosed. At the same time, those are common legal terms and their meaning has been well established. It would be reasonable to assume that the guidance the Minister referred to was available in 2012, and that it could have been made available to the public at that time.

Several of the submissions spoke to the need for strong oversight whenever a public body is vested with the authority to unilaterally disregard a request. The British Columbia Commissioner, quoted above, says oversight is especially important when the public's right to access is being curtailed or eliminated.

The Information Commissioner of Canada drew the Committee's attention to the rarity of situations where the terms "frivolous" or "vexatious" might have to be applied to a request for information. Information provided to this Committee by both the Commissioner and the Office of Public Engagement also demonstrated that it has been applied infrequently in Newfoundland and Labrador since the Bill 29 amendments.

Because of the confusion and mistrust caused by some of the terms in section 43.1, the Commissioner should provide detailed guidance as to their application in the *ATIPPA*. The Committee deals in detail with this matter in chapter 7.

Conclusion

The power to disregard requests provides public bodies with a tool to deal with situations where applicants are working against the spirit of the *Act*. The *ATIPPA* clearly states that the harm to be considered is where such requests would "unreasonably" interfere with the operations of the public body or amount to the "abuse of the right" to make requests.

It may be that the language at the start of section 43.1 is problematic. Most access guidance emphasizes two fundamental points—that it is the request that is being assessed, not the requester, and that a request should be dealt with on its own merits. It is possible the current wording in this section of the *ATIPPA* may encourage officials to overlook those basic requirements and focus on the requester, especially if a particular requester has a history of being troublesome, or if the information sought could be embarrassing if it is released.

The public body always has a clear interest in determining whether information should be released under the *ATIPPA*. Even if the meaning of section 43.1 were readily apparent to everyone, there is a perception issue any time the public body decides on its own to disregard a request.

The public must be assured there is transparency around decision making by public bodies. Nowhere is this more important than in decisions arising from the *ATIPPA*. The *Act* guarantees access to information with limited exceptions, and in cases where information is withheld, the *Act* provides for an independent review of decisions made by public bodies. It does not conform with the purpose of the *Act* to have oversight only where it seems convenient.

There is one other point to consider. Sections 43.1 and 13 of the current *Act* cover much of the same ground. Section 13 allows the head of the public body to "refuse to disclose a record or part of a record where the request is repetitive or incomprehensible or is for information already provided to the applicant." The Committee concludes that while these two sections address somewhat different circumstances, there is enough similarity that the provisions should be included in the same section of the *Act*.

The Committee concludes that a decision to disregard should happen only after an application by the head of the public body results in approval of the Commissioner. Where the Commissioner approves the

decision of the public body to disregard, the person who has made the request for information would have recourse to the Trial Division to appeal the decision of the head of the public body.

Recommendations

The Committee recommends that

9. Sections 13 and 43.1 of the *Act* be replaced with a provision along the following lines: The head of a public body may, within 5 business days of receipt of a request, apply to the Commissioner for approval to disregard a request on the basis that:

(a) the request would unreasonably interfere with the operations of the public body; or

(b) the request would amount to an abuse of the right to make the request because it is:

i. trivial, or frivolous or vexatious,

ii. unduly repetitious or systematic,

iii. excessively broad or incomprehensible, or

iv. it is otherwise made in bad faith; or

(c) the request is for information already provided to the applicant.

Chapter Three

ACCESS TO INFORMATION PROVISIONS

3.1 Public interest override in access legislation

> The public interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested about it.[1]
>
> — Information Commissioner, United Kingdom

The public interest override in access laws recognizes that even when information fits into a category that deserves protection, there may be an overriding public interest in disclosing it to an applicant or to the public at large. In that respect, the public interest test is a kind of lens that public officials must look through in order to make a final determination about disclosure. The United Kingdom Information Commissioner's Office argues that, by necessity, the public interest should be broadly focused:

> The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. For example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes.[2]

The public interest override in the *ATIPPA* and most other Canadian access laws typically applies to public health and safety and the environment, and is conditional on the risk of harm being significant, or on the presence of a compelling public interest. By contrast, the public interest override in access laws in the United Kingdom, New Zealand, and some of the Australian states covers more topics and is less restrictive in its application.

Newfoundland and Labrador legislation and practices

The public interest override in the *ATIPPA* is narrow in its application, and it applies only to "information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest." The Bill 29 amendments did not affect the wording of the public interest provision.

The Commissioner has assessed the application of the public interest override in three cases since the access provisions of the *ATIPPA* came into effect in 2005. In each case, the Commissioner referred to the "significant" harm that must be shown in order to engage the public interest override and in all three cases, the Commissioner concluded the test was not met by the applicant. This is how he commented in a 2007 report reviewing a request to the College of the North Atlantic on whether four students were admitted to the college with proper documentation:

1. UK ICO, *The Public Interest Test.*
2. *Ibid* 6.

> If there is a matter of public interest here, of which I am not convinced despite the Applicant's comments in this regard, the *ATIPPA* sets a very high standard to override an exception and require disclosure.[3]

The decision to release information in the public interest can be made only at the highest level. The Office of Public Engagement ATIPP Office *Access to Information Policy and Procedures Manual* stipulates "this approval must not be delegated below the deputy minister or equivalent level."[4] This section of the *Act* also implies that a decision to release will be done suddenly, in order to respond to an urgent event.

> 31.(1) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

In such circumstances, notice to an affected third party is "less formal" than that required for business interests, and accordingly, the public body may give the notice by phone rather than in writing.[5]

3 OIPC, *Report 2007-006,* 23 May 2007, at para 36.

4 NL, *Access to Information Policy and Procedures Manual,* p 126.

5 *Ibid* 126.

What we heard

The public interest override took on the characteristic of a current that ran through several submissions, rather than the dominant stream. In nearly every case where participants discussed the override, however, they felt the public interest must have a more significant place in the legislation, so that matters beyond public health and safety and the environment are captured. James McLeod of the *Telegram* felt a broader application of public interest would make the *Act* more effective:

> I think having that specific provision that says disclosure for any reason is clearly in the public interest and having that reviewable by the access commissioner and having him be able to rule and say that, "Yes this was withheld on the grounds that it's commercially sensitive but it's clearly in the public interest for it to be released all the same," would make our *Act* much stronger.[6]

The CBC said all discretionary decisions on access ought to consider the public interest. It advised that such analysis should "encourage the government to disclose more information rather than less."[7]

Private citizen Adam Pitcher felt that any record created by a publicly funded entity, including the government or a body that fulfills "public interest functions," should be covered by access to information. He also argued all exemptions should be discretionary and subject to public interest override.[8]

The Office of the Information and Privacy Commissioner, then, has concluded the *ATIPPA* "sets a very high standard" for applicants who demand access under the public interest provision of the *Act*. In his supplementary written submission, the Commissioner recommended Newfoundland and Labrador adopt the approach contained in section 23 of Ontario's *Freedom of Information and Protection of Privacy Act (FIPPA):*

> 23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The Ontario Act omits the "significant harm" and urgency requirements of the *ATIPPA,* and in the words

6 McLeod Transcript, 26 June 2014, p 35.

7 CBC/Radio-Canada Submission, 18 August 2014, p 3.

8 Pitcher Submission, 25 April 2014, p 1.

of the Commissioner, such an approach "has value for this jurisdiction."[9]

The Commissioner's conclusion about the "high standards" in the *ATIPPA* for invoking the public interest override is shared by the Centre for Law and Democracy (CLD). The Centre was critical of "the narrow applicability" of the public interest override in the *Act*, and argued there are important public interest concerns apart from environmental harm and health and safety, including "democratic accountability, or exposing public waste, corruption or abuses of human rights." It also recommended the public interest override apply to both discretionary and mandatory exceptions, and suggested the best approach is to "apply the public interest override whenever, on balance, the public interest would be served by disclosure." [10]

The Centre for Law and Democracy commented on the 2010 Supreme Court of Canada decision in *Ontario (Public Safety and Security) v Criminal Lawyers' Association.*[11] The Centre concluded that while that decision "effectively required" the public interest be considered whenever public bodies consider access requests on discretionary matters, it is necessary to go further. The Centre argued "an explicit public interest test is still important both because many exceptions within *ATIPPA* are not discretionary and to make it clear how the Supreme Court decision is to be implemented."[12]

This point was further addressed during the oral presentation by Michael Karanicolas of the Centre for Law and Democracy on 24 July 2014, in connection with the limited public interest test in the *ATIPPA:*

> The main focus of that sentence [reference to page 8 of July 24 written submission] is on the exceptions. The fact that public interest override applies to certain exceptions but not others…. I mean, we prefer to have the public interest override apply to all exceptions, recognizing that personal privacy will very, very rarely, if ever, be overriden by a public interest.[13]

Nalcor Energy explained that it considers the public interest test "a best practice," and takes it into account in dealing with requests where it has the discretion to release information:

> A public body can only withhold information if the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest often requires a balancing test so that any number of relevant public interests may be weighed one against the other when considering the release of information.[14]

9 OIPC Supplementary Submission, 29 August 2014, p 7.
10 CLD Submission, July 2014, p 8.
11 2010 SCC 23, [2010] 1 SCR 815 [*Criminal Lawyers' Association*].
12 *Supra* note 10.
13 CLD Transcript, 24 July 2014, pp 110–111.
14 Nalcor Energy Submission, August 2014, p 4.

Issues

While the public interest override was not a dominant issue in either the written or oral submissions, the current language was seen as weak. The main criticism is that section 31(1) of the *ATIPPA* requires "a risk of significant harm" before the section can be invoked. Nalcor Energy's contribution to the discussion was useful as it underlined that it is good practice to consider the broader public interest, even when an exception applies. The OIPC suggested following the recommendation of the British Columbia Information and Privacy Commissioner, who suggested adopting an approach similar to that in the Ontario Act. The Centre for Law and Democracy, meanwhile, advocated a broader provision that would apply the public interest test to all sections of the *Act*.

It is also worth noting that the *Access to Information Policy and Procedures Manual* makes no reference to

any good practices that might be undertaken by public bodies, and it does not include any commentary relating to the Supreme Court of Canada decision in the *Criminal Lawyers' Association* decision.

Analysis

It is necessary to trace some history in Newfoundland and Labrador before drawing conclusions as to the appropriate basis for application of the public interest override in the *ATIPPA*. The province's first access act was the 1981 *Freedom of Information Act.* The Act did not have a public interest override, just a provision that allowed the Premier to release information for unspecified reasons. The public interest override was first recommended by the Freedom of Information Review Committee, in its report to the government in July 2001. The committee explained the necessity of such a provision:

> Situations arise where it is in the public interest to disclose information which would otherwise be protected by an exception from disclosure under the Act. Issues of public health, safety, and environmental protection, for instance, may arise where there is an overriding need for the public to have certain information. Under these circumstances it seems clear that the public's right to be informed should outweigh Cabinet confidences and other exceptions, including an individual's right to privacy.[15]

This description suggests the committee was thinking the public interest override would be used in urgent circumstances. Its use of terms such as "situations arise" and "under these circumstances" suggest extraordinary circumstances and situations. The three specific issues identified by the committee were adopted by the government and placed in the *Act*.

The public interest override was not addressed in the Cummings review, nor was it affected by the Bill 29 amendments. However, as we discussed above, it is clear from the OIPC's reports regarding the public interest override that it is difficult for applicants to make a case for release of information under this section of the *Act*.

Like other jurisdictions in Canada, Newfoundland and Labrador has been reluctant to embrace a broadened application of the public interest override. The failure to do this, together with restrictions imposed in the Bill 29 amendments, has put the *ATIPPA* out of step with progressive access regimes around the world.

Governments everywhere are under increased pressure to release information that formerly was kept under wraps.[16] People are demanding more government information, in the hope of furthering public transparency and accountability. The current worldwide movement toward open government and open data will likely encourage people to ask for even more information. It may be that governments will choose to broaden the public interest provisions of Acts like the *ATIPPA* now, or be forced to do it later.

The Commissioner agrees with a recommendation from his British Columbia colleague[17] that the approach taken to the concept of public interest in Ontario is "a useful guide as to how a new approach to public interest might work" in Newfoundland and Labrador. While the wording in the Ontario Act has broader application than that in the *ATIPPA,* it remains quite limiting. The provision in the Ontario Act requires that the public interest in disclosure be "compelling"; it must not merely outweigh the purpose of the exception, but must "clearly" outweigh the case for keeping the information secret.

It must be recognized that the public interest cuts both ways. For example, in cases such as law enforcement, solicitor-client privilege and policy advice to ministers there are compelling reasons to protect the

15 *Striking the Balance (*2001), p 26.

16 See section of Extractive Industries Transparency Initiative in Chapter 11 of this report.

17 BC IPC, *Investigation Report F13-05,* 2 December 2013, p 33.

records. In those cases, there is a strong public interest in not disclosing the information.

Governing principles in other jurisdictions

The Committee reviewed laws governing freedom and access in several jurisdictions (countries and states/provinces) that share the English common law experience:

- Canada (Ontario, Alberta, Manitoba, and British Columbia)
- Australia (Queensland and New South Wales)
- United Kingdom
- Scotland[18]
- New Zealand

The Committee also considered the Organization of American States Model Law. Generally, Canadian access laws provide a narrow definition of public interest. Section 31(1) of the *ATIPPA* is typical.

The public interest provision in Manitoba pertains only to business interests of third parties. There are three areas in which third party business information may be disclosed, if the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure. Those areas are:

- public health or safety or protection of the environment
- improved competition
- government regulation of undesirable trade practices[19]

British Columbia and Alberta have a specific public interest test that is nearly identical to that of the *ATIPPA's* environmental, public health and safety clause, as well as a more general provision. British Columbia's section 25 is worded this way:

> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

Another part of the British Columbia law, section 22(2)(a) and (b), is identical to the *ATIPPA,* section 30(5)(a) and (b), where the head of a public body must consider the following public interest factors in order to determine if the release of certain information is an unreasonable invasion of a third party's personal privacy:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment

In their comparative study of the public interest in access to information laws for the Constitution Unit at London's University College in 2006, authors Megan Carter and Andrew Bouris commented on the challenge of meeting the public interest test in the British Columbia law:

> The principles concerning section 25 in the BC Act and the very high threshold which must be met to justify disclosure are set out in a most comprehensive Order of the Commissioner in 2002. The very high threshold means that section 25 will rarely be invoked successfully.[20]

BC's Information and Privacy Commissioner drew the same conclusion in a report filed in December 2013. Elizabeth Denham stated "there has not been a single instance where my office has ordered a public body to disclose information under this section," a fact that did not surprise the Commissioner, "given the requirement that disclosure under [the section] be both in the public interest and urgent."[21] She recommended BC amend their *FIPPA* and remove the requirement that urgent circumstances be necessary to invoke the public interest override. Denham recommended an approach similar to that in the Ontario Act:

18 Scotland has its own *Freedom of Information (Scotland) Act*. Wales and Northern Ireland are covered by the *Freedom of Information Act 2000*, passed by the United Kingdom Parliament.

19 Manitoba *FIPPA*, s 18.

20 Carter and Bouris (2006), p 310.

21 *Supra* note 17.

> In order to give effect to the intent of s. 25(1)(b), I believe that that the public interest disclosure provision should not require urgent circumstances. That is the approach taken in Ontario, where s. 23 of their *Freedom of Information and Protection of Privacy Act* ("Ontario *Act*") addresses public interest disclosure. That section does not require that there be urgent circumstances, only that the public interest in disclosure outweighs the purpose of the exemption being overridden.
>
> The Ontario Act allows for the disclosure of records to an applicant where it is in the public interest, by overriding provisions of the Act which would otherwise exempt the record from disclosure. Unlike in British Columbia, this is not a proactive obligation on a public body. Instead, the public body is obligated to consider the obligation in response to an access to information request.[22]

Origin of Ontario's public interest override

Ontario's *Freedom of Information and Protection of Privacy Act (FIPPA)* came about during the Liberal minority government in 1985. The Progressive Conservative party won the largest number of seats in the election, and could have governed with the support of the New Democratic Party. But the NDP refused and instead supported David Peterson's Liberals. The basis of the deal was a promise from David Peterson that a number of NDP priorities would be passed into law and there would be no election for two years.

The NDP wanted to see the *FIPPA* passed, and proposed a general public interest override. The Liberals initially refused. Attorney General Ian Scott stated his objections to a standing committee of MPPs that studied the Bill in the spring of 1986:

> What we cannot live with is this so-called override.... What we are doing here is we are following precisely what Professor Carlton Williams, after three years of studying this, said, that notions of override run by a commissioner are not going to work, generally speaking, because there are no standards. You are just saying to them, ignore the standards of the *Act* that the Legislature has set up and do what you please by looking at the public interest. What he says is, when you appoint a person for five years or 10 years and say, "When the appeals come to you, do what you please with regard to the public interest," it is great if he is a great guy, but what if he is a disaster, you have 10 years when nothing gets out.[23]

With the government's hold on power hinging on NDP support, the politicians reached a compromise. The public interest override would apply to only some parts of *FIPPA:*

- section 13: Advice to Government
- section15: Relations with other governments
- section 17: Third party information
- section 18: Economic and other interests of Ontario
- section 20: Danger to safety or health
- sections 21 and 21.1: Personal privacy and species at risk

The override would expressly not apply to other sections:

- section 12: Cabinet records
- section 14: Law enforcement
- section 16: Defence
- section 19: Solicitor-client privilege

As in British Columbia, it is not easy to make a successful public interest argument for disclosure. Carter and Bouris made this comment on section 23:

> The [Ontario] Commissioner's view is that although the issue is frequently raised by requesters and appellants, the threshold for its application is very high, and carefully applied on appeal. A very small proportion of public interest claims are upheld.[24]

A further point should be made regarding the role of the Information Commissioner in interpreting section 23 in the Ontario Act. Goodis and Price agree that while the threshold for applying the override is high, "the interpretation of section 23 has been held by the courts to fall within the Commissioner's area of expertise."[25]

22 *Ibid.*

23 Ontario Assistant IPC speech, *'Public Interest' and Ontario's FIPPA*, 16 February 2001.

24 Carter and Bouris, *supra* note 20, p 305.

25 Goodis and Price, Public Interest Override and Ontario's FIPPA, *Can J Admin L & Prac*, p 52.

The recent Supreme Court of Canada decision in *Criminal Lawyers' Association* concluded the law requires a public official exercising discretion under access to information legislation to weigh all relevant consideration for and against disclosure, including private and public interests. The case involved a request for disclosure of material, including two legal opinions, from a police investigation into allegations of abusive conduct by two police forces and the Crown Attorney in a murder case. Ontario's Minister of the Solicitor General and Correctional Services refused to disclose the records, claiming exemption under two sections that were not subject to the public interest override—section 14 (law enforcement) and section 19 (solicitor-client privilege). The Court commented on the necessity that the head of a public body consider all relevant interests, including the public interest, in reaching a decision on disclosure:

> As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.[26]

One of the factors public officials must consider when they decide whether to disclose information subject to discretionary exceptions is the public interest. The Supreme Court decision makes it equally clear that solicitor-client privilege and law enforcement have a built-in public interest test.

The federal government

There are two public interest override provisions in Canada's *Access to Information Act*, described by Canada's Information Commissioner as "limited public interest overrides."[27] One override applies to third party information. Third party information may be disclosed where the public interest in public health, public safety, or protection of the environment "clearly outweighs in importance any financial loss or gain to a third party."[28] The second reference is in section 19, a discretionary provision that allows disclosure of personal information where the public interest in disclosure "clearly outweighs" the resulting invasion of privacy.[29]

International jurisdictions

Access to information laws in the other jurisdictions in this comparison tend to have more broadly defined public interest provisions. For example, the public interest provisions in the United Kingdom, Scotland, New South Wales, and New Zealand apply to all discretionary exemptions.

Organization of American States model law

The model law developed for the Organization of American States (OAS) would apply a general public interest override to all records, with only a few exceptions:

- right to privacy, including life, health, or safety
- legitimate commercial and economic interests
- patents, copyrights, and trade secrets

The relevant public interest clause is Article 44:

> Public Authorities may not refuse to indicate whether or not it holds a record, or refuse to disclose that record, pursuant to the exceptions contained in Article 41, unless the harm to the interest protected by the relevant exception outweighs the general public interest in disclosure.

Unless there is harm in disclosing information, the public interest test requires that it be released.

26 *Criminal Lawyers' Association*, *supra* note 11 at para 66.

27 Canada Information Commissioner, *Comparative Research Materials,* 18 August 2014 Section 9, p 1.

28 *Access to Information Act*, s 20.

29 *Ibid* s 19 and *Privacy Act* (Canada), s 8(2)(m).

Information not subject to the override

Jurisdictions with a public interest override do not confer *absolute* status on the override provision. That means there are limits, even when a public interest override is in place.

The UK is an example. Section 2(3) lists several subjects that have absolute protection, including security matters, court records, communications with the Sovereign, and parliamentary privilege.[30] If an absolute exemption applies "then there is no obligation under the Act to release the requested information."[31]

New South Wales' law has a *conclusive presumption against disclosure* in 13 areas, including Cabinet and Executive Council information, information subject to legal professional privilege, documents affecting law enforcement and public safety, and information and reports involving adoption and the care and protection of children. According to the Information Commissioner of New South Wales, the public agency does not have to apply the balancing approach to the public interest test as set out in the override provision when dealing with information in these 13 areas.[32]

The New South Wales *Government Information (Public Access) Act 2009* actually includes a public interest statement in its purpose section, where it states access is restricted "only when there is an overriding public interest against disclosure."[33]

It further requires that the Act be interpreted and applied "so as to further the object of this Act, and that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information."[34]

Guiding principles

Canadian access laws have limited scope for a public interest override. In a paper prepared for the Canadian Parliamentary and Research Service in 2008, the authors discussed the public interest character of federal Canadian law in the context of the public interest in other countries. They concluded Canada was at the "weaker end of the spectrum," while the United Kingdom, Ireland, and New Zealand were at the other end, where "more exemptions are subject to the public interest override than are not."[35]

The discussion that took place during the debate in 1986 over the Ontario public interest override demonstrates the unease some politicians and public officials feel applying such a standard to their decisions about disclosure. A similar concern was raised in more recent times during debate over the UK's *Freedom of Information Act 2000*. The government insisted on including a ministerial veto in the Act, in order to stop release of information by order of the Information Commissioner or a court. During the UK Justice Committee's review of the Act in 2012, former Home Secretary Jack Straw explained the rationale for such a power:

> The inclusion of the veto was something that I pursued vigorously, with the support of Mr. Blair [the prime minister]. Without the veto, we would have dropped the Bill. We had to have some backstop to protect Government.[36]

During debate, the government struck a deal with the Bill's opponents. The veto "was to be used sparingly," and only after it was subject to "proper discussion in cabinet."[37] The ministerial veto has been used seven times, with the most recent in January 2014.[38]

30 *Freedom of Information Act 2000* (UK), c 36.

31 UK *"Public Interest Test" Guidance note.*

32 NSW IPC, *What is the public interest test?*

33 *Government Information (Public Access) Act 2009* (NSW), s 3(1)(c).

34 *Ibid* s 3(2)(b).

35 Douglas and Davies, *Access to Information Legislation in Canada and Four Other Countries* (2008), p 28.

36 UK *Post-legislative scrutiny of the FOI Act* (2012), para 169.

37 *Ibid.*

38 UK *FOI and Ministerial Vetoes* (2014).

Wording of public interest override clauses

The value of a public interest override is determined by how it is worded. As discussed in the Canadian examples, the use of qualifying words and phrases such as "compelling," "significant harm," and "clearly outweighs" can limit the application and usefulness of the public interest override.

New Zealand

New Zealand's *Official Information Act 1982* directs that there is good reason for withholding information in the list of discretionary exemptions, "unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."[39]

New South Wales

New South Wales interprets discretionary exceptions through the public interest test, which favours disclosing information unless there is an explicit reason to do otherwise:

> There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.[40]

The Act further states how the public interest test is to be applied in cases where public bodies wish to withhold information:

> There is an ***overriding public interest against disclosure*** of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.[41]

As was discussed above, New South Wales also has a public interest statement built into the purposes of its Act.

39 NZ *Official Information Act 1982*, s 9.

40 *Supra* note 33 s 5.

41 *Ibid* s 13.

Australia

We have discussed elsewhere the changes that are under discussion with respect to Australia's legislation and the uncertainty as to the outcome. However, it is worth discussing aspects of the existing law, which were established through major reforms in 2010. Of particular interest is the public interest test and its application.[42]

> The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.[43]

The Act then lays out reasons that help make the case for disclosure in the public interest, including whether disclosure would add to the debate on a matter of public importance, whether it promotes effective oversight of public expenditure, and whether it would allow people access to their own personal information.[44] Officials are also advised to consider the purposes of the Act:

- promoting representative democracy
- increasing public participation in order to promote better-informed decision making
- increasing scrutiny, discussion, comment, and review of the government
- increasing recognition that government information is managed for public purposes and is a national resource
- making sure that the functions and powers given by the Act are performed and exercised, as far as

42 *Australian Information Commissioner.* Discretionary exemptions include Commonwealth-State relations, internal working documents used for deliberative processes, Commonwealth state or property interests, certain operations of agencies, personal privacy, business affairs, research by specified organizations, documents affecting Australia's economy. Excluded documents include those relating to national security, defence or international relations, cabinet, law enforcement and protection of public safety, secrecy provisions, legal professional privilege, material obtained in confidence, contempt of Parliament or court, trade secrets or commercially valuable information, and personal information on electoral rolls and related documents.

43 Australia *Freedom of Information Act 1982,* s 11A(5).

44 *Ibid* s 11B(3).

> possible, to promote public access to information promptly and at the lowest reasonable cost[45]

The Act also lists a number of factors that are to be considered irrelevant and "must not be taken into account"[46] in making a decision about disclosure. The Act states it does not matter that disclosure could embarrass or cause a loss of confidence in the government, that it might cause people to misrepresent or misunderstand the document, that the author of the document was or is "of high seniority" in the agency, or that disclosure could result in confusion or unnecessary debate.

United Kingdom

The law in the United Kingdom positions the public interest in disclosure above the reasons for non-disclosure in determining access requests in light of discretionary exceptions, except in cases where the Cabinet approves a ministerial veto. The UK Information Commissioner's Office (ICO) offers this advice to officials:

> When considering whether you should disclose information, you need to weigh the public interest in disclosure against the public interest in maintaining the exemption. You must bear in mind that the principle behind the Act is to release information unless there is a good reason not to. To justify withholding information, the public interest in maintaining the exemption would have to outweigh the public interest in disclosure.[47]

The UK Commissioner explains how the public interest test is to be applied. First, the public body must determine if the information requested is subject to an exemption, and whether the exemption is absolute, or if it is qualified (discretionary in the case of the *ATIPPA).* If the exemption is absolute, the request is refused and there is no application of the public interest test. If, however, the requested record is subject to a qualified exemption, the public body must then apply the public interest test. Only after that step can the public body determine if the records can be released. The UK Commissioner has produced the following diagram that explains the steps in applying the public interest test:[48]

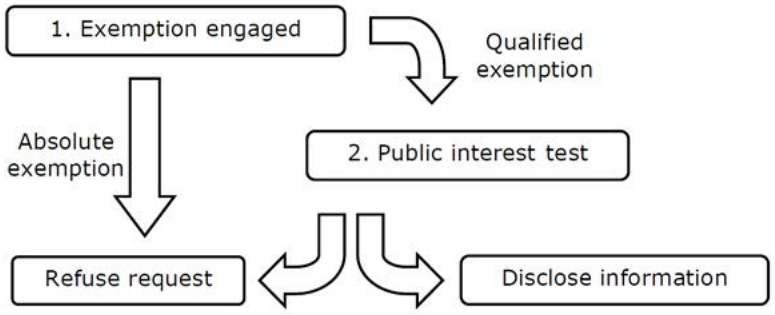

Figure 1: UK Information Commissioner: Steps in Applying the Public Interest Test

45 *Ibid* s 3.
46 *Ibid* s 11B(4).
47 UK ICO, *The Guide to Freedom of Information*, p 48.
48 *Supra* note 1.

Generally speaking, more progressive legislation favours disclosure, unless there is a strong interest in non-disclosure, such as in the area of law enforcement. To continue with the United Kingdom as an example, certain aspects of national security, defence, international relations, relations within the UK, and information related to the economy do not have absolute exemption and are subject to the public interest test. With respect to qualified or discretionary exceptions, information is released if it is decided that the public interest in favour of disclosure "overrides" the exemption.[49]

The legal professional privilege in the United Kingdom (which is called *solicitor-client privilege* in the *ATIPPA*) is a qualified exemption. It is not merely a matter of finding that the public interest in disclosure outweighs the privilege being protected. The Information Commissioner states that "the general public interest in this exemption will always be strong due to the importance of the principle behind LPP" (legal professional privilege), including protecting open communications between client and lawyer in order that the client has access to "full and frank legal advice."[50] Similarly, the Supreme Court of Canada described the special status of solicitor-client privilege in *Criminal Lawyers' Association*, when it declared "the purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship."[51]

The UK Information Rights Tribunal hears appeals from notices issued by the Information Commission, and it made this declaration in a case in 2008 about the legal professional privilege:

> What is quite plain, from a series of decisions beginning with *Bellamy*…is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.[52]

The Commission further states "additional weight may be added" to maintaining the legal professional privilege if the advice is recent, is live, and protects the rights of individuals. On the other side of the ledger are the reasons that favour disclosure, such as the overriding need for accountability, transparency, and public debate. The UK Commissioner put forward several factors that may add extra weight to disclosing information subject to legal professional privilege:

- large amount of money involved
- large number of people affected
- lack of transparency in the public authority's actions
- misrepresentation of advice that was given
- selective disclosure of only part of advice that was given.[53]

Queensland

Concern has been raised that in certain instances, the public interest test may be regarded as an afterthought by officials in public bodies. The Solomon panel, which carried out a review of Queensland's *Freedom of Information Act* in 2008, pointed to this issue. Since the public interest test is typically applied *after* a determination of whether a particular exemption applies, the panel felt there is a tendency to view the public interest in the shadow of the exemption, and perhaps to subjugate it to the exemption:

> Yet another problem in Queensland…is the way the role of the public interest test has been downgraded by assuming that if a document can be classified as falling within the bounds of an exemption, there is a case against disclosure under a public interest test. That does not give the public interest a fair chance in the balancing exercise, contrary to the original intention of the legislation.[54]

It would seem logical, then, that proper training be provided to public bodies so that the public interest override would be applied as an integral part of a recast *ATIPPA*, and not as the afterthought that was a concern of the authors of the Queensland Report.

49 Carter and Bouris, *supra* note 20, p 3.

50 UK ICO, *The exemption for legal professional privilege (section 42),* p 13.

51 *Criminal Lawyers' Association*, *supra* note 11 at para 53.

52 *Supra* note 50, p 14.

53 *Ibid* 15.

54 Queensland, Solomon Report (2008), p 1.

Conclusion

International best practices allow for a broad definition of what constitutes the public interest. They typically do not qualify the test as the legislation in Canadian jurisdictions frequently does, by requiring that the need to release information in the public interest be "compelling" or requiring the presence or risk of "significant harm." They do not insist that the public interest test apply only in limited circumstances.

In considering this topic, the Committee took its direction both from the terms of reference for the statutory review and from the comments of former Premier Tom Marshall, when he announced the Committee's formation and mandate. The Terms of Reference directed the Committee to examine leading international and Canadian experiences, and to include in the final report "leading practices in other jurisdictions." Former Premier Marshall said he wanted an access to information system that would rank among the best in the world.

With respect to concerns about solicitor-client privilege, it is reasonable for the Committee to assume that any weighing of the public interest in relation to solicitor-client privileged records will be guided by the comments of the Supreme Court of Canada in the C*riminal Lawyers Association* decision quoted above and particularly that court's comment in *R v McClure*[55] and in *Goodis v Ontario (Ministry of Correctional Services)*.[56]

The approach to the public interest override in the *ATIPPA* is in need of an overhaul. It applies to few areas of public interest, and the wording suggests it is intended mainly for urgent matters. The existing section 31(1) is useful for the purpose for which it is intended, where it places a positive duty on the head of a public body to release information related to a risk of significant harm to the environment or to public health and safety even in the absence of a request for the information. The Committee concludes that in a modern law and one that reflects leading practices in Canada and internationally, it is necessary to broaden the public interest override and have it apply to most discretionary exemptions. This would require officials to balance the potential for harm associated with releasing information on an access request against the public interest in preserving fundamental democratic and political values. These include values such as good governance, including transparency and accountability; the health of the democratic process; the upholding of justice; ensuring the honesty of public officials; general good decision making by public officials. Restricting the public interest to the current narrow list implies that these other matters are less important.

The Committee concludes that in addition to retaining the current section 31(1), the *Act* should also contain a new section. It would provide that where a public body can refuse to disclose information to an applicant under one of the exceptions listed below, the exception would not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception:

- section 19 (local public body confidences)
- section 20 (policy advice or recommendations)
- section 21 (legal advice)
- section 22.1 (confidential evaluations)
- section 23 (disclosure harmful to intergovernmental relations or negotiations)
- section 24 (disclosure harmful to the financial or economic interests of a public body)
- section 25 (disclosure harmful to conservation)
- section 26.1 (disclosure harmful to labour relations interests of public body as employer)

55 2001 SCC 14 at paras 4, 31, 34–37, [2001] 1 SCR 445 [*McClure*].

56 2006 SCC 31 at paras 14–15, 20–21, [2006] 2 SCR 32 [*Goodis*].

Recommendations

The Committee recommends that

10. With respect to disclosure in the public interest:
   a) The provisions of section 31(1) be retained; and
   b) The *Act* also provide that where the head of a public body may refuse to disclose information to an applicant under one of the following discretionary exceptions in Part III of the *Act*, that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception:
      - section 19 (local public body confidences)
      - section 20 (policy advice or recommendations)
      - section 21 (legal advice)
      - section 22.1 (confidential evaluations)
      - section 23 (disclosure harmful to intergovernmental relations or negotiations)
      - section 24 (disclosure harmful to the financial or economic interests of a public body)
      - section 25 (disclosure harmful to conservation)
      - section 26.1 (disclosure harmful to labour relations interest of public body as employer)

11. The Office of the Information and Privacy Commissioner provide training for public bodies, as well as general guidance manuals on the public interest test, including how it is to be applied.

3.2 Ministerial briefing records

"Who out there cares about what is in the minister's briefing book?"

—Felix Collins, Minister of Justice, 12 June 2012[57]

Few people in the general public knew that the minister's briefing books existed, let alone cared about them, until the debate about the Bill 29 amendments to the *ATIPPA* in June 2012. Journalists and the opposition knew of the books, and had routinely been given access to portions of them prior to the Bill 29 amendments in 2012.

The briefing books are compiled for ministers taking on a new portfolio, and for ministers preparing for a new sitting of the House of Assembly. There are two main types of information in the books: a list of detailed subject areas and issues that a minister needs to be aware of, and policy advice and recommendations on those matters. The two types of information are often interwoven, and in order to make portions of the briefing books available prior to the 2012 legislative changes, ATIPP coordinators would do a line-by-line review and delete parts that contained policy advice.[58]

57 NL *Hansard,* 12 June 2012.

58 Government NL Submission, 19 August 2014, pp 5–6.

Pre–and Post–Bill 29 legislation

Prior to Bill 29, the *ATIPPA* made no special reference to materials intended to brief ministers in preparation for a new ministry or for a sitting of the legislature. While Commissioner John Cummings reported on "widespread concern" among officials about protection for the advice and recommendations they provided in the context of briefing material for ministers and the heads of agencies, he did not recommend the changes that eventually made their way into section 7 of the *ATIPPA*.

Section 7 covers the right of access on the part of requesters, as well as stating that the right to access material does not extend to information specifically exempted from disclosure. In addition, the section provides that in the event it is "reasonable" to sever some information from a record, an applicant has the right to the remainder of the record. Section 7 also stipulates that the right of access is subject to a fee required under a separate fee schedule. These provisions made up the pre–Bill 29 wording of section 7, and were retained in the 2012 amendments. But the Bill 29 amendments added two new exemptions and a time limit.

A new subsection specifically exempted access to briefing materials prepared for a minister "assuming responsibility for a department, secretariat or agency" and access to records "created solely for the purpose of briefing a [minister] in preparation for a sitting of the House of Assembly."[59] The 2012 amendments protected both classes of records for five years.

Section 7 is one of many provisions of the *ATIPPA* that protect advice to ministers:

- Section 18 (Cabinet confidences) protects advice that might become part of an official Cabinet record
- Section 20 (policy advice and recommendations) captures "advice, proposals, recommendations, analyses or policy options" developed by a public body for a minister
- Section 23 (intergovernmental relations or negotiations) covers advice given in the context of relations with other governments
- Section 24 (financial or economic interests of a public body) applies to information, plans, research, positions, procedures, criteria, or instructions that could cause harm
- Section 26.1 (labour relations interests of public body as employer) covers information that could, among other things, harm the negotiating position of the public body as an employer

The provision of advice to ministers also has strong protection because of Supreme Court decisions, including the recent *John Doe*[60] case. In that decision, the court held that the reference to advice and recommendations in the Ontario legislation would include policy options and these were therefore exempt from disclosure to the public. In doing so, the justices accepted the guidance of the *Williams Commission Report,*[61] as it related to the purpose of section 13(1) of the Ontario Act, which gives the head of a public body the authority to refuse to disclose "where the disclosure would reveal advice or recommendations of a public servant":

> The purpose of exempting advice or recommendations within government institutions…is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice. The report discussed the concern that failing to exempt such material risks having advice or recommendations that are less candid and complete, and the public service no longer being perceived as neutral.[62]

The changes resulting from Bill 29 have precluded any briefing records being released. The OPE stated there have been seven requests for briefing books since the amendments, and "all have been withheld in their entirety." By comparison, in the four years prior to the *ATIPPA* amendments, there were 48 requests for briefing books, of which nearly three-quarters resulted in partial disclosure.[63]

59 *ATIPPA* s 7(4).

60 *John Doe v Ontario* (*Finance*), 2014 SCC 36 [*John Doe*].

61 The Williams Commission's three-volume report presented to the Ontario government in 1980 became the foundation for that province's *FIPPA*.

62 *Supra* note 60 at para 43.

63 Government NL Submission, 19 August 2014, pp 5–6.

Nearly without fail, the submissions made to the committee recommended repealing the sections that put briefing books off-limits to requesters and protected those records from disclosure for five years. The media was especially concerned about the 2012 amendments and the impact of those changes on their ability to discern policy approaches and positions on public issues.

Michael Connors, who reports on politics for NTV, provided the Committee with examples of information that had been available prior to the Bill 29 amendments. The material concerned a request he made in November 2011 for briefing materials for the new minister when government created the Intergovernmental and Aboriginal Affairs Secretariat. He was provided with documents that gave the "state of play" on various intergovernmental affairs matters, including the then-lively issue of proposed Senate reform. The documents were accompanied by a list of redactions under various sections of the *ATIPPA*, including Cabinet confidences, policy advice or recommendations, and legal advice/solicitor-client privilege. Despite the information that was withheld, Mr. Connors felt he still received good value for his request. With respect to the document on Senate reform, he stated: "the note was more forthcoming about the provincial government's views of Bill C-7[64] than political leaders had been under public questioning."[65]

Journalists admitted to the futility of even asking for the briefing books, now that they are categorically excluded. James McLeod of the *Telegram* said briefing books are among the information "we don't bother to request anymore."[66]

The CBC's lawyer, Sean Moreman, addressed the motive for barring access to ministerial briefing records when other provisions of the *ATIPPA* already protect policy advice: "We assume the records intended to be captured by [the current section 7 of the *ATIPPA*] are much broader in scope" than the existing Cabinet confidences identified in section 18. The CBC also argued the courts have "routinely said any restrictions on right of access should be viewed narrowly and applied sparingly."[67]

Simon Lono told the Committee briefing books are valuable because (i) they are factual, (ii) they provide background, and (iii) they include issue analysis. In a written submission, businessman Martin Hammond stated: "government should not have any right to hide information on the business that they are conducting on behalf of the people they are representing."[68]

The Liberal and New Democratic parties recommended the section 7 provisions dealing with briefing materials be repealed. Both parties argued there is significant value to having access to factual material prepared for the ministerial briefing books. "The disclosure of these facts allows the opposition to compare their research findings with that of the public service,"[69] stated Liberal Leader Dwight Ball.

The NDP said this about the briefing books: "They provide invaluable information to opposition members, the media and the general public. It is a chance to see how government is performing." The NDP suggested that, as an alternative to repeal, section 7 could be redrafted to protect "sensitive information contained in the briefing papers, while allowing the bulk of the information to be released."[70]

The OIPC made both written and oral presentations to the Committee, and commented negatively on the changes made to section 7 in the 2012 amendments. The Commissioner referred to the "great concern" he

64 Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits,* 1st Sess, 41st Parl, 2011. The Bill was introduced by the government in 2011. In October 2013, the Quebec Court of Appeal declared the bill unconstitutional. The Government of Canada asked the Supreme Court to rule on such questions as whether it can unilaterally make Senate changes such as term limits for senators, the constitutional rules for abolition, and property requirements for senators.

65 Connors Submission, August 2014, p 3.

66 McLeod Transcript, 26 June 2014, p 14.

67 CBC /Radio-Canada Transcript, 18 August 2014, pp 3–5.

68 Hammond Submission, 20 August 2014.

69 Official Opposition Party Submission, 22 July 2014, p 32.

70 New Democratic Party Submission, June 2014, pp 4–5.

felt about the provisions added to the *ATIPPA* "based on 'uncertainty' on the part of senior government officials," including the protection for ministerial briefing records.[71] He noted John Cummings did not believe the added sections were necessary to "ensure the integrity of the ministerial briefing process," and accordingly, the section dealing with briefing records should be repealed.

The Commissioner also posed a question that the Committee is unable to answer: were the new parts of section 7 added to the "Right of Access" part of the *ATIPPA* so that a refusal of the records "would not be subject to appeal or review by the Commissioner"? An aspect of this matter was taken up by the Information Commissioner of Canada, Suzanne Legault, in her presentation to the Committee. She did not question the motive for including this section, but she commented on the effect.

Ms. Legault expressed concern that the 2012 changes to the *ATIPPA* "expanded the scope of key exceptions" and that "it has in some circumstances curtailed the ability of the Commissioner to review disclosure decisions." She mentioned ministerial briefing records specifically, and stated that, taken with the other expanded exclusions, this exclusion has "tipped the balance in the *ATIPPA* excessively in favour of nondisclosure of government information to the detriment of Newfoundlanders and Labradorians' ability to hold their government to account." She further stated that the 2012 changes were "inconsistent with the principles of the government's Open Government initiative, which are transparency, accountability, participation and collaboration."[72]

71 OIPC Submission, 16 June 2014, p 24.

72 Information Commissioner of Canada Transcript, 18 August 2014, p 5–7.

Issues

The additions to section 7 raise a single important question—were the Bill 29 amendments necessary to protect the policy advice that is contained in ministerial briefing books? As indicated in the discussion above, there is substantial protection for various types of advice in at least five other sections of the *ATIPPA*. It is highly likely that any advice tendered to a minister would be protected by the wording of those sections.

Analysis

There was a 17-month lapse from the time the Cummings review was completed in January 2011 to the passage of the Bill 29 amendments. He reported "widespread concern" and a "chilling effect" on the part of senior officials in respect of preparing briefing materials. Mr. Cummings recommended enlarging on the types of records that could be protected under section 20 (policy advice or recommendations), but he did not recommend that ministers' briefing books be protected as a separate category of records.

However, that is not how the government interpreted his report. In introducing the Bill 29 amendments, the minister of Justice categorically said the change had been recommended by Mr. Cummings:

> Bill 29 also amends section 7 to protect for five years a record created for the purpose of briefing a minister assuming a new portfolio and a record created for preparing a minister for sittings in the House of Assembly. Again, this is modeled after Alberta's legislation. As I mentioned, Mr. Speaker, and to repeat, Mr. Cummings felt that had to be amended to ensure the proper func-

tioning of government when addressing public policy issues.[73]

Every person who commented on the issue agreed that ministerial briefing records covered by section 7 contain both factual information and policy advice. Under questioning from the Committee, the minister responsible for the Office of Public Engagement (OPE) responded to the Committee about whether it made sense to divide ministerial briefing books in sections, where factual material could be kept separate from policy advice:

> I don't see a reason why it can't be done because by the very nature, it's already being done. So this would just be through another way it would be done. So, certainly something we could consider.[74]

The deputy minister of the OPE told the Committee she had prepared numerous briefing books, and also acknowledged it would be possible to organize briefing materials in a way that made it possible to release some information:

> I think that we can find a way to organize it along the lines so that section 3, for example, can be just withheld in its entirety and the rest of it can be made public.[75]

Other Canadian jurisdictions

The Newfoundland and Labrador provision with regard to briefing materials was modelled on Alberta law. In the closing debate on the Alberta amendments on 17 May 2006, MLA Mary Anne Jablonski of Red Deer-North explained the need for changes:

> Mr. Speaker, another amendment clarifies the existing limits on access to ministerial briefing materials.… This amendment will clarify that briefing books prepared for a new minister and session briefing books for ministers can be disclosed after five years.... The five-year period was chosen to coincide with the life of a Legislature, which is five years at most.[76]

The Yukon has similar provisions in its *Access to Information and Protection of Privacy Act,* with an additional clause protecting briefings to the Premier when a new government is being formed.[77] Prince Edward Island does not allow access to records "by or for a member of the Executive Council, or a member of the Legislative Assembly."[78]

None of the remaining provinces or territories, or the Government of Canada, has provisions similar to those in Newfoundland and Labrador, Alberta, or the wording of the Prince Edward Island statute. The Yukon is the only Canadian jurisdiction that protects information used for briefing a premier assuming office.

73 NL *Hansard*, 11 June 2012.
74 Government NL Transcript, 19 August 2014, p 56.
75 *Ibid* 61.
76 Alberta *Hansard,* 17 May 2006, at para 1652.
77 Yukon *ATIPP Act*, s 5.
78 PEI *FIPPA*, s 4.

Conclusion

The section 7 changes repeated protection that already existed in the *Act* for policy advice and recommendations. Several sections of the *ATIPPA* provide significant protection for advice from public officials to their ministers. Any lingering doubts about the usefulness of such protection, such as that outlined in section 20, have been erased by the recent Supreme Court of Canada decision in *John Doe*, which acknowledged the credible basis for broad protection for policy advice and recommendations.

With the law being clearly established in this area, the only remaining matter is the briefing records themselves. Nearly all submissions to the Committee, including those from journalists, recognized the importance of policy advice and recommendations in the functioning of Canada's

system of government. The Committee has been asked to understand that factual material in briefing records has important uses both for journalists who report on public issues and for the general public, who stand to gain new understanding of the programs and services their tax dollars pay for. When the Committee suggested that it must be possible to compile briefing books so as to separate factual material from policy advice and recommendations, we were told it could be done.

If that is so, it seems unnecessary to prohibit categorically the disclosure of briefing materials under section 7 of the *Act*.

Recommendations

The Committee recommends that

12. Sections 7(4),(5), and (6) of the *Act*, respecting briefing books prepared for ministers assuming responsibility for a new department or to prepare for a sitting of the House of Assembly, be repealed.

13. Public bodies change the manner in which briefing books are assembled, so that policy advice and Cabinet confidences are easily separable from factual information.

3.3 Cabinet confidences

> "I suggest that the Committee include in its report a thorough review of the tradition of Cabinet secrecy, setting out both the rational basis for the tradition and also its limits in today's world. Such a review might also serve as the basis for a common understanding of the matter, an understanding that seems presently to be lacking."[79]
>
> —Richard Ellis, Submission to the Committee

It is important that all citizens, as potential users of the right to access information, understand the basis on which the legislation exempts documents relating to government's decision making in jurisdictions with historical, governmental, and cultural traditions similar to ours. The Committee agrees with Mr. Ellis' suggestion.

79 Ellis Submission, 27 August 2014.

Cabinet confidence and the basis for it in Canada

Historical background

The renowned authority on Cabinet government, as it evolved in Britain and as it has been adopted in the developed nations that were once colonies of Britain, is Sir Ivor Jennings. His *Cabinet Government,* originally published in 1936, has been described as the standard and indispensable work on its subject. In it he explains the origins of and basis for continuing the principle of Cabinet secrecy. He writes:

> The Cabinet deliberates in secret; its proceedings are confidential. The Privy Councillor's oath imposes an obligation not to disclose information; and the Official Secrets Acts forbid the publication of Cabinet as well as other documents. But the effective sanction is neither of these. The rule is, primarily, one of practice. Its theoretical basis is that a Cabinet decision is advice to the Queen, whose consent is necessary to its publication. Its practical foundation is the necessity of securing free discussion by which a compromise can be reached, without the risk of publicity for every statement made and every point given away.[80]

Sir Ivor Jennings also notes that the secrecy principle was carried so far as to require that the Cabinet papers of previous governments be locked in a government strong room and not be available to a successor government. He notes, however, that there comes a time when Cabinet proceedings pass into history and, after a significant period, full information becomes available. He also observes that it is difficult to prevent revelation of Cabinet discussions when they relate to politically controversial matters.

Canada and its provinces adopted the British parliamentary and Cabinet systems to legislate and govern in this country. The fundamental practices and conventions as they evolved in the United Kingdom became the founding practices and conventions adopted in Canadian jurisdictions.

One of the most thorough and prolific early researchers of Canadian governmental development was W. P. M. Kennedy. He was a professor of modern history at the University in Toronto when his first book, identifying documents related to Canadian constitutional development, was published.[81] In 1922 he published a work on the development and law of the Canadian constitution. With the documents available to him, and writing during the first half century of Cabinet government in Canada, he made observations that are particularly valuable in responding fully to Mr. Ellis' suggestion. Amongst other pertinent comments, Professor Kennedy wrote:

> As soon as a cabinet has taken the oaths of office they act with the governor-general as the executive government of Canada. They are responsible for all orders in council, for the finance bill, for all governmental measures. All arrangements for the administration of Canada are made at cabinet meetings, and in so far as these are accepted and acknowledged as government measures the cabinet acts as a unit and must stand or fall as such. A member who cannot support his colleagues in these matters once they are before parliament usually resigns according to constitutional convention. He has the privilege of explaining his resignation in parliament, and his first statement must be made there so that the [prime minister] can reply. The governor-general's permission is necessary for exercising the privilege, as proceedings in the cabinet cannot be made public without his leave first obtained; but such permission is never refused…
>
> In provincial government the executives are modelled on the British type and follow the lines of cabinet administration. The functions of the provincial cabinets, the theories and conventions governing them, and the relationship between the executives and the lieutenant-governors are so similar to those in the federal sphere that they do not call for separate treatment.[82]

Those comments of Professor Kennedy make clear that, from the beginning, British Cabinet government practices were implemented in Canada, both at the federal

80 Jennings, *Cabinet Government*, 3rd ed (1959), p 267.

81 Kennedy, *Documents of the Canadian Constitution: 1759-1915*, (1918).

82 Kennedy, *The Constitution of Canada* 2nd ed (1931), pp 381–383.

and provincial governmental levels. R. MacGregor Dawson, the distinguished University of Toronto professor of political science of the mid-twentieth century, also emphasizes the similarity between the Canadian version of Cabinet government and its British antecedent. He comments on the role of secrecy in the unifying of a Cabinet:

> The miracle of cabinet solidarity, as suggested above, is frequently no miracle at all, for the simple reason that it may have no existence save as a common bulwark against an aggressive enemy. The fiction can be successfully maintained primarily because no information on what is proposed or discussed or decided in the meetings of the Cabinet can be released, even in confidence, until the moment arrives for the announcement or implementation of a decision. The deliberations of the Cabinet, in short, are held in the strictest secrecy. All members are Privy Councillors and as such are bound under oath to "keep close and secret all such matters as shall be treated, debated and resolved on in Privy Council, without publishing or disclosing the same or any part thereof, by Word, Writing or any otherwise to any Person out of the same Council, but to such only as be of the Council". The consequences of this secrecy are far reaching. Relying on this protection, Cabinet members are free to voice their opinions without reserve on all subjects which come up for discussion; the motives which have influenced the Cabinet in coming to its decision will not be disclosed; the dissentients can support the corporate policy without being themselves singled out for special attack or having their motives impugned; and the Cabinet derives no inconsiderable strategic advantage in being able to reveal hitherto undisclosed proposals at the most opportune moment.[83]

Following those observations, Professor Dawson quotes from the famous 1916 *Spectator* commentary on Cabinet government:

> Unless secrecy exists and is maintained in its most rigid form, the Cabinet system will never work satisfactorily, will tend, rather, to prove a source of weakness and distraction. It will breed hate and temper, dissolve agreements, and give rise to a sense of treachery where there should be confidence, and of restlessness where there should be security. The reason why secrecy should be preserved, not from fear of penal regulations, but in accordance with the strictest code of personal honour, is not far to seek. Men in a Cabinet must be loyal to one another, to their chief, and to the Committee as a whole, or they will be undone. By loyalty we do not mean that they are merely to refrain from backbiting or from undermining each other's position, or, again, from trying to better their own positions by pushing a colleague down. We mean something a good deal more elemental. When a matter has been decided upon in the Cabinet, then the men who opposed the course ultimately adopted must make their choice either of resigning or else of whole-heartedly adopting the will of the Cabinet as their own. If their choice is in favour of remaining in the Cabinet, then both in public and in private they must defend the action of the Government exactly as if their own private wishes had been accepted. The will of the whole must become the will of each.[84]

In the more than 65 years since Professor Dawson expressed the views quoted above, there has been some evolution in thinking in Canadian jurisdictions. Traditionally Cabinet confidences were protected by the common law. In cases involving refusals to disclose documents in respect of which Cabinet confidence was claimed, jurisprudence has applied the common law and produced some changes. Nationally, several provisions of the *Canada Evidence Act* protect international relations, defence, and other matters where they arise in court proceedings. Section 39 of that Act provides similar protection specifically for federal Cabinet confidences. In more recent times, freedom of information statutes and their successors, access to information regimes, have produced further changes.

The traditional common law treatment of Cabinet confidences and the transition to statutory provisions in the federal jurisdiction in Canada were discussed by Justice Barry Strayer of the Federal Court of Appeal.[85] His decision dealt with an appeal of a decision refusing a declaration that section 39 of the *Canada Evidence Act* was unconstitutional. Section 39 is the provision that provided protection for Cabinet confidences in the context of use in court proceedings. Justice Strayer described the

83 Dawson, *The Government of Canada* 2nd ed (1956), p 219.

84 *Ibid* 219–220, quoting from article in *The Spectator* (London), 29 April 1916.

85 *Singh v Canada (Attorney General),* [2000] 3 FCR 185 [*Singh*].

transition from common law to statutory provisions under Canadian federal law:

> While it [section 39] applied the principles of *Conway v. Rimmer*[86] to most documents it provided absolute immunity without examination by the Court for documents whose disclosure was claimed to be injurious to international relations, national defence or security, or to federal-provincial relations or constituting a confidence of the Queen's Privy Council. In 1982 that position was modified so as to limit the absolute claim for non-disclosure, without examination by the Court, to confidences of the Queen's Privy Council. In mitigation of the denial of a right of review by the Court, however, for the first time there was a statutory definition adopted of "a confidence of the Queen's Privy Council for Canada", and, again for the first time, a time limit was placed on the continuation of that status. The general rule is that such confidences are protected for only 20 years. In the case of discussion papers, where they have led to a decision that has been made public they need no longer be kept secret. The same applies to many discussion papers where decisions have not been made public, if four years have elapsed since the paper was prepared. That result is that a minister or the Clerk of the Privy Council is precisely limited as to what documents he or she can characterize as confidences of the Queen's Privy Council and the period for which documents are free from disclosure without court examination is defined.[87]

In a 2002 decision[88] the Supreme Court of Canada was also dealing with the effect of section 39 of the *Canada Evidence Act*. That section is nearly identical to the provisions of section 69 of the federal *Access to Information Act*, which closely parallels the relevant provision of section 18 of the *ATIPPA*. Thus, the comments of the court in that case provide sound guidance for the Committee respecting Cabinet confidences. The Supreme Court applied several of the principles identified by Justice Strayer in the *Singh* decision and in the Supreme Court's earlier decision in *Carey v Ontario*[89] and made further comments, including the following:

> Cabinet confidentiality is essential to good government. The right to pursue justice in the courts is also of primary importance in our society, as is the rule of law, accountability of the executive, and the principle that official actions must flow from statutory authority clearly granted and properly exercised. Yet sometimes these fundamental principles conflict. How are such conflicts to be resolved? That is the question posed by this appeal.
>
> The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect…
>
> At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see *Carey*, *supra*. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey*, *supra*.
>
> If the Clerk or minister chooses to certify a confidence, it gains the protection of s. 39. Once certified, information gains greater protection than at common law.

86 [1968] AC 910 (HL (Eng)), an English House of Lords decision ruling that the court could review cabinet documents, but also concluding that cabinet documents as a class should not be disclosed.

87 *Supra* note 85 at para 22.

88 *Babcock v Canada (Attorney General),* 2002 SCC 57, [2002] 3 SCR 3 [*Babcock*].

89 [1986] 2 SCR 637. Justice LaForest provides a detailed assessment of changing attitudes of providing access to Cabinet documents where access is required in the connection with the administration of justice (see paras 43-85).

> If s. 39 is engaged, the "court, person or body with jurisdiction" hearing the matter must refuse disclosure; "disclosure of the information shall be refused". Moreover, this must be done "without examination or hearing of the information by the court, person or body". This absolute language goes beyond the common law approach of balancing the public interest in protecting confidentiality and disclosure on judicial review. Once information has been validly certified, the common law no longer applies to that information.
>
> A third requirement arises from the general principle applicable to all government acts, namely, that the power exercised must flow from the statute and must be issued for the *bona fide* purpose of protecting Cabinet confidences in the broader public interest. The function of the Clerk under the Act is to protect Cabinet confidences, and this alone. It is not to thwart public inquiry nor is it to gain tactical advantage in litigation. If it can be shown from the evidence or the circumstances that the power of certification was exercised for purposes outside those contemplated by s. 39, the certification may be set aside as an unauthorized exercise of executive power: see *Roncarelli*, *supra*.[90]

All Canadian jurisdictions have now formalized a specific level of protection from disclosure for Cabinet related records. This has been achieved through exceptions from statutory provisions providing for access to information regimes. However, the historical practices described above still underpin most statutory provisions in Canadian jurisdictions.

An even more modern description of the legal stature of Cabinet confidences at the national level in Canada is to be found in an article by Professor Yalkin of the University of Ottawa Law School and Michelle Bloodworth that was published in the *National Journal of Constitutional Law*:

> An evaluation of the relevant legislation, jurisprudence, and administrative materials demonstrates that while the government's power to limit the disclosure of information on the basis of Cabinet confidence appears on the surface to be exceedingly broad, this power is in fact limited both by the courts and by the government's own administrative practices. Thus, while the government has the ability to significantly restrict the release of information deemed a Cabinet confidence, this power is not absolute and must be exercised in accordance with established legal principles.
>
> The root of the protection of Cabinet confidences is found in the essence of the Canadian system of government. Canada's Westminster-style of government operates based on the fundamental notion of Cabinet responsibility: ministers of the Crown are individually and collectively responsible for the decisions of Cabinet. Ministers meet to establish broad government policy and direction and must publicly defend any decisions that result. Cabinet confidences are thus essentially the political secrets of ministers, both individually and collectively, and, as the Department of Justice explains, disclosure of this information would "make it very difficult for the government to speak in unison before Parliament and the public." The fear is that if Cabinet discussions were made public, ministers would censor themselves, refraining from stating unpopular opinions or making politically incorrect comments, thus compromising the value of the discussions.
>
> Protections of Cabinet confidentiality are found in both common law and statute. The Supreme Court of Canada explains that "the process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly." The common law doctrine of public interest immunity (which includes the protection of Cabinet confidences) is a form of Crown privilege based on the notion that "the public interest is paramount and must therefore override any private right to production or disclosure." While the common law has long recognized the importance of Cabinet confidentiality, Canadian courts have also affirmed that this protection is not absolute: there must, at the very least, be a means for the court to determine that the information in question in fact relates to Cabinet deliberations and that it has been properly withheld. The result is that, under the public interest immunity doctrine, alleged Cabinet confidences must be inspected by the judge, who will balance the public interest against disclosure of confidential information with the public interest in disclosure of information pertinent to prove a legal claim.[91]

The Supreme Court of Canada expressed its opinion on this issue when it rendered a decision in *John Doe*

90 *Babcock*, s*upra* note 88 at paras 15, 18, 19, 23, 25.

91 Yalkin & Bloodworth, Cabinet Confidential, *Nat'l J Const L,* pp 86–87.

v Ontario (Finance). Justice Rothstein, writing for a full court, made the following comments:

> The purpose of exempting advice or recommendations within government institutions was addressed in the Williams Commission Report and later jurisprudence. It is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice. The report discussed the concern that failing to exempt such material risks having advice or recommendations that are less candid and complete, and the public service no longer being perceived as neutral. Although the report suggested that some of these concerns were exaggerated, it acknowledged that "it is difficult to weigh accurately the force of these arguments and predict with confidence the precise results of greater openness with respect to the deliberative decision-making processes of government" (pp. 289-90). Although I would not give the report much weight in defining the scope of s. 13(1), I accept that its discussion of the purpose of s. 13(1) is accurate.
>
> In my opinion, Evans J. (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1994] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:
>
> > To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
> >
> > It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. [paras. 30-31]
>
> Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.
>
> Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.[92]

The situation is similar in other Commonwealth countries. That is clear from comments made in a report by a committee headed by Dr. David Solomon that reported on the right to information in the state of Queensland, Australia. When addressing the necessity for protection of Cabinet confidences, the panel wrote:

> Cabinet and the doctrine of ministerial responsibility are at the heart of the Westminster system of Government. The system relies on secrecy to protect its central tenet: the unity of the executive government. Every country and every sub-national government that subscribes to the Westminster system has included within their freedom of information laws special exemption for Cabinet documents.
>
> The doctrine of collective ministerial responsibility requires that all ministers subscribe to policies determined by (or on behalf of) the Cabinet, irrespective of their personal views. This means that material of any kind that indicates a Minister made a submission to Cabinet at odds with the view finally determined by the Cabinet, or that he or she dissented from a Cabinet decision either during debate or when a decision was taken, must not be publicly revealed. In most Westminster-system governments, official records of Cabinet decisions and submissions are kept secret for around 30 years. Records of what

92 *John Doe*, *supra* note 60.

was actually said in Cabinet, as recorded by public servants, are kept secret for an even longer period–50 years in the case of the Commonwealth Government.

Yet most Cabinet decisions are made public shortly after they are taken. These days in many jurisdictions Cabinet submissions will include a draft statement to be issued to the media shortly after the decision is taken. The timing of any announcement will depend on a variety of circumstances: including, whether other parties have to be first informed of the decision, whether legislation must first be prepared, and whether political circumstances dictate there should be some delay.

Cabinet does not operate in a vacuum. No discussion of the operation of Cabinet and of ministerial responsibility can avoid consideration of the advice received by Cabinet collectively and ministers individually that contribute to the deliberative processes of the Cabinet. This advice also needs to remain confidential in order to preserve Cabinet's protective blanket. Collective ministerial responsibility could be undermined if documents that revealed the advice given to Ministers in preparation for Cabinet meetings was to be made public. The argument is that such information would, by inference, involve the disclosure of deliberations that may or probably did occur in Cabinet.[93]

93 Queensland, Solomon Report (2008), p 106.

The conclusion to be drawn from all of the foregoing is that Cabinet confidences or Cabinet secrecy has been a fundamental principle of the parliamentary and Cabinet system of governing in Canada and its provinces from its beginnings in 1867. Highly regarded political scientists regard Cabinet secrecy as indispensable and express the view that unless it is maintained, the Cabinet system of government will never work. Although the legislature can enact laws enabling government to severely restrict access to documents that are Cabinet confidential, as the Supreme Court decided in the *Babcock* decision, "the courts have the power and the responsibility, when called upon, to determine whether the certifying official has exercised his or her statutory power in accordance with the law."

The Committee believes that the foregoing provides the thorough review of the tradition of Cabinet secrecy, the rational basis for it and its limits in today's world that Mr. Ellis suggested the Committee provide.

Legislative provisions

The discharge of the Committee's mandate in the manner directed by the Terms of Reference meant that we needed to consider the *ATIPPA* as it was both prior to and after passage of Bill 29, and consider whether each version was reasonably consistent with statutory provisions for access to information in other jurisdictions. By doing so, the Committee was in a better position to draw conclusions as to the merits and justification, if any, for the changes implemented as a result of the passage of Bill 29.

Pre–Bill 29

Prior to the adoption of Bill 29, access to documents involving Cabinet confidences was governed by section 18:

18. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet.
(2) Subsection (1) does not apply to
(a) information in a record that has been in existence for 20 years or more; or
(b) information in a record of a decision made by the Cabinet on an appeal under an Act.

As well, section 43 of the *Act* entitled a person who was refused access to the information requested, including a refusal on the basis of Cabinet confidence, to ask

the Commissioner to review the refusal, or to appeal the refusal directly to the Trial Division of the Supreme Court. If the Commissioner were asked to review the refusal, the Commissioner could, under section 52, require that the document claimed to involve Cabinet confidence be produced to him for examination to determine if the claim had been properly made.

There are no decisions of the courts in Newfoundland and Labrador interpreting the phrase "substance of deliberations" in section 18. Two approaches to "substance of deliberations" have been expressed in courts of appeal in Canada respecting Cabinet confidences. The British Columbia Court of Appeal put forward this test: "Does the information sought to be disclosed form the basis for Cabinet deliberations?"[94] If so, then it should not be disclosed. The Nova Scotia Court of Appeal poses the test more narrowly: "Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations?"[95]

The British Columbia Court of Appeal provides these reasons in *Aquasource* for its statement of the test:

> Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted…". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.
>
> It is my view that the class of things set out after "including" in s.12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications.[96]

Furthermore, the BC Court agrees with the approach of the BC Commissioner, who previously expressed the following view

> The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would 'reveal' the substance of Cabinet deliberations because it would permit the drawing of accurate inferences with respect to the deliberations."[97]

In *O'Connor*, the Nova Scotia Court of Appeal examined the unique statement of purpose in Nova Scotia's Act in coming to a conclusion that a different test for "substance of deliberations" would be appropriate in that jurisdiction.

> In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure that public bodies are *fully* accountable to the public; so too does it stand apart in that in no other province is there anything like s.2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute that being:
>
> b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> i) facilitate informed public participation in policy formulation,
>
> ii) ensure fairness in government decision-making,
>
> iii) permit the airing and reconciliation of divergent views;
>
> Thus the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".
>
> I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision-making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.
>
> I see s.13(1) as exempting the whole concept of Cabinet confidentiality, a discrete concept, limited and specific,

94 *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, BCCA 1998 CanLii 6444 at para 48 [*Aquasource*].

95 *O'Connor v Nova Scotia*, 2001 NSCA 132 at para 92 [emphasis in the original] [*O'Connor*].

96 *Aquasource*, *supra* note 94 at paras 39, 41.

97 *Ibid* at paras 92-93.

> from the general duty of disclosure. The provisions from the purpose section to which I have just referred simply make it clear that in order to achieve the Act's stated objectives, any exemptions or exceptions to the obligation upon a fully accountable government to provide its citizens with government information, must be limited and specific. Logic would dictate that any limitations upon the stated objective of insuring that public bodies are fully accountable, must be few and tightly drawn. They must be clearly identified and the basis upon which such a request for information might be refused must be clearly stated.[98]

The Nova Scotia Court of Appeal expressed the view that the test in *Aquasource* would "in practical terms, be very difficult to answer, or ever prove." Instead of focusing on the phrase "forms the basis for Cabinet deliberations" in the quotation of the British Columbia Commissioner referred to in *Aquasource*, the Nova Scotia court focused on the words "it would permit the drawing of accurate inferences with respect to those deliberations."[99]

Moreover, the Nova Scotia Court of Appeal was not inclined to find that the chain of words in the Cabinet confidences provision would extend the meaning of the phrase "substance of deliberations"; those words simply provide examples of information that is included in the accurate inferences test.

The legislation in the other Canadian provincial jurisdictions contained a variety of alternatives. While legislation in British Columbia, Alberta, and Ontario provided for more detailed direction, the fundamental right of access was not substantially different. The head of a public body was required to refuse to disclose where disclosure would reveal the substance of Cabinet deliberations. In Nova Scotia, the head of a public body was permitted to refuse disclosure where the disclosure would reveal the substance of deliberations of Cabinet. In New Brunswick and Manitoba, the substance of deliberations test was used. Where the substance of deliberations would be revealed, refusal to disclose was mandatory. In Prince Edward Island, the legislation was identical to that in this province. In Saskatchewan, the head of a public body was required to refuse disclosure, and in Quebec, the head was prohibited from releasing documents specified in a list set out in the statute, all of which clearly related to the operations of the provincial Cabinet.

The federal legislation took a slightly different approach. It provided that the legislation "does not apply to confidences of the Queen's Privy Council for Canada."[100] In the UK, Australia, and New Zealand there are a variety of provisions, in some respects less restrictive and in others more so.

Clearly, prior to Bill 29, the Cabinet confidence provision in the *ATIPPA* was substantially similar to the legislation in seven of the other nine provinces.

Legislative provisions after Bill 29

The passage of Bill 29 changed the *ATIPPA* provisions substantially. The substance of deliberations test was removed entirely. The provision now defines a "cabinet record" as any one of nine classes of records listed in the provision. It further classifies those records into three groups: a "discontinued cabinet record," an "official cabinet record," and a "supporting cabinet record." An official Cabinet record is one that has been prepared for **and** considered in a meeting of the Cabinet. Certification by the Clerk of the Executive Council, or his delegate, of a record as an official Cabinet record is conclusive.

The head of a public body must refuse to disclose all three groups of Cabinet records. A person seeking access can appeal the refusal to disclose a requested Cabinet record other than an official Cabinet record to the Commissioner or the Trial Division. The Commissioner can require production for his review of any Cabinet record except one that has been certified to be an official Cabinet record. A person refused access to an official Cabinet record can appeal directly to the Trial Division.

In stark contrast to the simplicity and more user-friendly character of the old section 18 quoted above, the new section 18 now reads as follows:

98 *O'Connor*, *supra* note 95 at paras 55–57, 82.

99 *Ibid* at paras 92-93.

100 Canada *Access to Information Act*, s 69.

18. (1) In this section

(a) "cabinet record" means

(i) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet,

(ii) draft legislation or regulations submitted or prepared for submission to the Cabinet,

(iii) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet,

(iv a discussion paper, policy analysis, proposal, advice or briefing material, including all factual and background material prepared for the Cabinet,

(v) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet,

(vi) a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy,

(vii) a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet,

(viii) a record created during the process of developing or preparing a submission for the Cabinet, or

(ix) that portion of a record which contains information about the contents of a record within a class of information referred to in subparagraphs (i) to (viii);

(b) "discontinued cabinet record" means a cabinet record referred to in paragraph (a) the original intent of which was to inform the Cabinet process, but which is neither a supporting Cabinet record nor an official Cabinet record;

(c) "official cabinet record" means a cabinet record referred to in paragraph (a) which has been prepared for and considered in a meeting of the Cabinet; and

(d) "supporting cabinet record" means a Cabinet record referred to in paragraph (a) which informs the Cabinet process, but which is not an official cabinet record.

(2) The head of a public body shall refuse to disclose to an applicant a Cabinet record, including

(a) an official Cabinet record;

(b) a discontinued Cabinet record; and

(c) a supporting Cabinet record.

(3) The commissioner may review the refusal of a Cabinet record by the head of a public body under subsection (2) except where the decision relates to a Cabinet record which has been certified as an official Cabinet record by the Clerk of the Executive Council or his or her delegate.

(4) Where a question arises as to whether a Cabinet record is an official Cabinet record, the certificate of the Clerk of Executive Council or his or her delegate stating that the record is an official Cabinet record is conclusive of the question.

(5) The delegate of the Clerk of the Executive Council referred to in subsections (3) and (4) shall be limited to the Deputy Clerk of the Executive Council and the Secretary of the Treasury Board.

(6) An applicant may appeal a decision of the head of a public body respecting Cabinet records referred to subsection (2), except an official Cabinet record, to the commissioner or the Trial Division under section 43.

(7) An applicant may appeal a decision of the head of a public body respecting a Cabinet record which is an official Cabinet record directly to the Trial Division.

(8) This section does not apply to

(a) information in a record that has been in existence for 20 years or more; or

(b) information in a record of a decision made by the Cabinet on an appeal under an Act.

The pre–Bill 29 subsection 43(1) allowed an individual to ask the Commissioner to review that person's access request if it were refused. The subsection was changed to add the following words:

> except where the refusal by the head of the public body to disclose records or parts of them is
> (a) due to the record being an official cabinet record under section 18; or
> (b) based on solicitor and client privilege under section 21.

Before Bill 29, the Commissioner could require production of any record for examination, and the head of a public body was required to produce such a record to the Commissioner. This was also altered as a result of Bill 29. Official Cabinet records and solicitor-client privileged records are now excepted. The Commissioner can no longer require their production for examination.

Provisions in other Canadian and international jurisdictions

Canada (federal)

The federal legislation provides that the Act does not apply to confidences of the Queen's Privy Council for Canada, including without restricting the generality of the foregoing:

> (*a*) memoranda the purpose of which is to present proposals or recommendations to Council;
> (*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
> (*c*) agenda of Council or records recording deliberations or decisions of Council;
> (*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
> (*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*);
> (*f*) draft legislation; and
> (*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*).

That list is similar but not identical to the list placed in the *ATIPPA* as a result of the amendments brought about through Bill 29. It should also be noted that, like the ATIPP Commissioner, the Federal Information Commissioner cannot require institutions holding such documents to provide them for examination during an investigation. The federal statute defines "Council" as the Privy Council, the Cabinet, and committees of both. It also enables release of documents more than twenty years old and discussion papers where the related decisions have been made public or four years have passed without a decision having been made.

Canada (other provinces and territories)

Table 4 below enables a quick assessment of the level of protection accorded to Cabinet confidences in Canadian jurisdictions.

International jurisdictions

Australia

Under existing Australian law, Cabinet documents that fall within the classifications spelled out in the statute are exempt and are protected from release. However, information in a document that falls within one of the classifications is not exempt if the information consists of purely factual matter and its disclosure would not reveal a deliberation or decision of Cabinet.[101]

New Zealand

New Zealand has perhaps the least restrictive of any of the Westminster-style parliamentary and Cabinet systems of governing. There is an override where the withholding of the information is outweighed by other considerations that render it desirable in the public interest to make the information available.[102]

Table 4: Cabinet Confidences: Statutory Provisions in Canada

	Jurisdictions	Mandatory or permissive	Can consent be given to release by the Executive Council for, or in respect of which, the record was prepared?	Information or a record that would reveal the substance of deliberations?	Information or a record that discloses a confidence of the Executive Council?	Timeline for release (after the following date)	Exception for background information, where the decision has been made public, the decision has been implemented, or 5 or more years have passed since the decision was made or considered?
1	Alberta	M	No	Yes	No	15 years	Yes
2	British Columbia	M	No	Yes	No	15 years	Yes
3	New Brunswick	M	No	Yes	No	15 years	No
4	Prince Edward Island	M	No	Yes	No	20 years	No
5	Manitoba	M	Yes	Yes	No	20 years	No
6	Ontario	M	Yes	Yes	No	20 years	See section 12(1)(c)
7	Nova Scotia	P	Section is permissive	Yes	No	14 years	Yes
8	Quebec	P & M	In some instances	Yes	No	25 years	No
9	Newfoundland and Labrador	M	No	No	No	20 years	No
10	Saskatchewan	M	Yes	No	Yes	25 years	No
11	Northwest Territories	M	No	No	Yes	15 years	No
12	Nunavut	M	No	No	Yes	15 years	No
13	Yukon	M	No	No	Yes	15 years	Yes
14	Canada	Act does not apply	No	No	Yes	20 years	See section 9(3)(b)

Prepared by the ATIPPA Review Committee Office

101 Australia *FOI Act*, s 34.

102 NZ *Official Information Act 1982*, ss 5, 6, 9.

United Kingdom

The *Freedom of Information Act 2000,* exempts matters of parliamentary privilege. It also exempts information involved in the formation of governmental policy, ministerial communications, and proceedings of Cabinet or any committee of Cabinet. It also provides for an ultimate exemption through the exercise of a ministerial veto.[103]

103 UK *FOI Act*, ss 34–36, 53.

What we heard

Everyone who made a submission to the Committee was sensitive to the existence of a historical basis for the protection of confidences of the Cabinet. All agreed with the need to maintain an appropriate level of confidentiality for government-held records related to the functioning of the Cabinet. The overwhelming majority, however, expressed the view that before Bill 29, the *ATIPPA* for the most part achieved a balance between an appropriate level of protection for Cabinet confidences and a level of access to information by citizens that would ensure government accountability. The participants almost universally maintained that the changes brought about by Bill 29 destroyed that balance.

While there were other criticisms, the strongest complaints expressed to the Committee focused on two points:

(i) The Clerk of the Executive Council could now simply certify that a record was an "official Cabinet record" and as a result disclosure was prohibited.

(ii) The Commissioner was no longer able to require that a document certified by the Clerk of the Executive Council as an official Cabinet record be produced to him. This prevented the Commissioner from determining if the claim was valid or not.

Many participants were also critical of the ability of the head of a public body to refuse to disclose any one of a lengthy list of documents without having to show that the document would reveal the substance of deliberations of Cabinet.

From organizations

The OIPC

In its initial submission, the OIPC wrote:

> In our analysis of this provision as it existed prior to Bill 29, we determined that the exception for Cabinet confidences is not meant to be simply a list of categories of records which must not be disclosed. The "substance of deliberations" test must be met in order to refuse disclosure. We reiterate that position now, and note that the first paragraph of the proposed revision to section 18 below is meant to clarify that it is only information which would meet the "substance of deliberations" test that should be withheld, regardless of the type of records involved.[104]

The OIPC also observed that although Mr. Cummings, in his 2011 *ATIPPA* Review, did recommend the list of types of records found in the *Management of Information Act* be incorporated into the exception, he was also clear that the substance of deliberation test should remain in place. That observation accurately reflects Mr. Cumming's comment that "severance of Cabinet records to determine the substance of Cabinet deliberations should continue."[105] However, his recommendation was not so explicit. It simply recommended that the list in the then-section 18 be extended to include the Cabinet records found in the *Management of Information Act.*

The new category, "Official Cabinet Record," created by the amendments brought in through Bill 29, also

104 OIPC Submission, 16 June 2014, p 14

105 Cummings Report (2011), p 40.

caused the OIPC great concern. Its submission notes that all that is required to preclude disclosure is the certification by the Clerk of the Executive Council that the record is an official Cabinet document. The OIPC acknowledges that there is an appeal to the Supreme Court but observes that would be of little value in the face of a further amendment implemented through Bill 29: subsection (4) provides that where there is a question as to whether the record is an official Cabinet record, "the certificate of the Clerk of the Executive Council … is conclusive of the question."

The OIPC also commented on the provision that Cabinet records cannot be withheld after they are twenty years old. The office suggests that while there are longer protection periods, "the most common time period found in similar provisions is 15 years." The OIPC suggests this shorter time period "should be given consideration."

The Federal Information Commissioner

Suzanne Legault's comments were not detailed but they expressed a definite viewpoint. She said, "your Cabinet confidence is very, very broad."[106]

The Centre for Law and Democracy

With respect to the nature of Cabinet confidence, Mr. Karanicolas, the spokesperson for the Centre, took issue with the view expressed by the minister at the time responsible for OPE. He said:

> Steve Kent, the Minister Responsible for the Office of Public Engagement, was quoted as saying that "cabinet secrecy is a fundamental pillar of our system of government". This is false. Unlike the right to information, which is a fundamental pillar of democratic accountability, cabinet secrecy exists to serve a particular function, namely to promote candour among public officials. This is a legitimate interest, worthy of protection. However, cabinet secrecy should only be protected to the extent that this is necessary to protect effective and candid government deliberations (or other legitimate exceptions). It is not, as the Minister's comments imply, a value to be protected for its own sake. There is no inherent right to secrecy in an official conversation between two public servants. The legitimacy of keeping an official conversation confidential depends wholly on the necessity of secrecy to smooth and effective governance.[107]

With respect to the use of a list, and application of the harms test, Mr. Karanicolas indicated he would be hesitant to say whether a long or short list was better, but he did say this:

> In terms of spelling out the specifics of it, on the one hand, as long as the specifics are legitimate, as long as they're all instances which will cause real harm to the process, that can be helpful, but the problem is that when we see these long lists they tend to bury in exceptions which are not legitimate within that.[108]

Like the Commissioner, the Centre expressed the opinion that 15 years seemed a reasonable time to provide protection from disclosure for Cabinet confidences. They did, however, acknowledge that "20 years is not bad."

Mr. Karanicolas summarized the Centre's position with the following recommendation:

> Sections 18, 19 and 20 should be rewritten to allow for non-disclosure only of actual cabinet conversations between ministers and material the disclosure of which would cause tangible harm to a legitimate interest… In terms of specific interests here, better practice is to limit these to the effective formulation or development of government policy, the success of a policy (i.e. where this would be undermined by premature disclosure of that policy) and the deliberative process (i.e. the candid or free and frank provision of advice or exchange of views).[109]

From individuals

Lynn Hammond

Ms. Hammond, a communications consultant, worked for a number of years as a communications director in several government offices, including the Executive Council office and the Premier's office. She expressed this view:

> What happens in Cabinet, what is a part of the process that we have today that I feel that must be respected, is

106 Information Commissioner of Canada Transcript, 18 August 2014, p 40.

107 CLD Submission, July 2014, p 5.

108 CLD Transcript, 24 July 2014, p 70.

109 *Ibid* 64.

> that at the end of the day Cabinet comes forward with the united voice as one as the government. And so the deliberations on those Cabinet documents, the differing opinions...that information has to be able to flow freely and directly so that all individuals who contribute can fully contribute to the process so at the end of the day government feels that it has made the right decision with the information available to it and is then able to move forward with that common voice.
>
> I do feel, though, that it is critical that public servants are able to provide their advice and recommendations to ministers openly and freely without the concern that it's then later going to have to be debated in a public sphere. It is critical that ministers have the opportunity to receive all of that information. Not for there to be a filter or a vetting before it gets to the minister.[110]

Terry Burry

Mr. Burry's comment was: "Protect Cabinet confidences… but limited only to the Cabinet exceptions."[111]

Scarlett Hann

Ms. Hann said that "the substance of deliberations test should be a minimal expectation of our citizens."[112]

From the media

James McLeod of the Telegram

Mr. McLeod considers it appropriate to withhold under "Cabinet confidences" what is said around the Cabinet table and the document that records the deliberations of Cabinet. He would include discussions in Cabinet committees and discussions between two or three ministers. The rest could be considered under other sections of the *Act*.

As for supporting documents, he comments that a report considered by Cabinet "informs the deliberations of Cabinet but does not record anything that was said in that room." With respect to the class of people who give advice and recommendations to Cabinet, he argues that their recommendations, advice, and options prepared for Cabinet should not be entitled to protection under section 18. Instead, that is already protected under section 20, which is a permissive exception, rather than a mandatory one.

From government

Minister responsible for OPE, the Honourable Sandy Collins

Minister Collins advised that there had been some confusion about exactly what a Cabinet record was. Making it consistent with the *Management of Information Act* would provide clarity. The amendment to section 18 resulted in a change of practice for ATIPP coordinators whereby a requested record that meets the definition of Cabinet record is now withheld in its entirety.

From political parties

The Liberal Party, Leader of the Official Opposition, Dwight Ball

Mr. Ball stated that the Information and Privacy Commissioner, together with government, should agree on a clear interpretation of the substance of deliberations test. Section 18 should be replaced with a version similar to the pre-Bill 29 section 18.

Mr. Ball also referred to the Cummings Report, and Mr. Cummings' concern that ministers may not be properly advised if fewer briefing materials are being written. He quoted Mr. Cummings' concern about widespread uncertainty as to what constitutes advice or recommendations developed by or for a public body. He commented that, "if there is confusion or uncertainty around the interpretation of sections such as Section 20, departmental officials have no shortage of experts to consult."

110 Hammond Transcript, 20 August 2014, pp 23–24.
111 Burry Transcript, 24 July 2014, p 32.
112 Hann Submission, 27 July 2014, p 2.

Issues

The comments identified above indicate that there are a number of issues:

(i) What standard of disclosure will best serve access to information and not impede proper functioning of Cabinet government?

(ii) If a list of records that would be accorded exemption is to be used, what records should be on that list?

(iii) Should the restrictions on release expire after 20 years, as is presently the case, or should records be released after 15 years?

Analysis

Issue (i): *What standard of disclosure will best serve access to information and not impede proper functioning of Cabinet government?*

This question reflects a classic conflict between two principles, each of which is critical to the proper functioning of our parliamentary democracy. Citizens need access to all of the information necessary to enable them to hold government to account. That has not been challenged by anybody. On the other hand, all who made representations acknowledge the absolute necessity for governments to be able to function, in certain circumstances, with a significant degree of confidentiality. It is in the public interest that government be able to operate in a manner that will result in the most efficient and productive administration of public affairs. The challenge is identifying the proper balance between the two principles.

As the committee in the Queensland review observed, "application of public interest tests has been one of the most significant weaknesses of the *FOI Act*." Having to apply a substance of deliberations test to every record in respect of which Cabinet confidence is claimed would be a waste of time and increase costs unnecessarily for all those records that are so obviously Cabinet confidences as to be beyond rational challenge.

It may be a small list but certain types of records are so clearly Cabinet confidential that it is unnecessary to have endless arguments as to whether disclosure could reveal the substance of Cabinet deliberations or as to whether the public interest would be harmed by their disclosure. Subject to one proviso, listing such documents and exempting them from disclosure would save time and money, and contribute to a more efficient and user-friendly access regime. **That one proviso is that the Commissioner would have the unrestricted right to have all records of Cabinet, bar none, produced, to verify that the exemption is valid**.

Protecting genuine Cabinet confidences from disclosure is essential to the successful functioning of the government in the public interest. The standard should accord absolute exemption to a confined list of records that are unarguably Cabinet confidences, and subject all other records in respect of which Cabinet confidence is claimed to a substance of deliberations test.

Issue (ii): *If a list of records that would be accorded exemption is to be used, what records should be on that list?*

Many of the participants who suggested a return to full application of the substance of deliberations test acknowledged that the records listed under the definition of "cabinet record" were, generally speaking, of the nature of Cabinet records. What the participants objected to strenuously was giving the Clerk of the Executive Council the unilateral right to designate any one of those records to be an "official cabinet record," and thereby place it beyond the right of anybody else, including the Commissioner, to question the designation or even to see the document in order to determine the

validity of the designation. That concern is addressed by the Committee's recommendation, elsewhere in this report, that except for a few of the classes identified in the provision that will replace existing subsection 5(1), no record be beyond the purview of the Commissioner.

The Committee would also recommend that the refusal to disclose continue to be mandatory, subject to one exception: the Clerk of the Executive Council should have the discretion to disclose any Cabinet record that he or she concluded should, in the public interest, be disclosed.

With those safeguards in place, using a basic list of records that are Cabinet confidences and according those records absolute protection from disclosure should result in more efficient management of access to Cabinet records. It should also be easier to use and reduce delays and costs for both the requester and public bodies. In short, it would help to make the *ATIPPA* more user-friendly.

The Committee concluded that the only item on the list of records in the present definition that should be altered is what is presently item (iv):

> a discussion paper, policy analysis, proposal, advice or briefing material, including all factual and background material prepared for the Cabinet.

The Committee believes that factual material included in these records should not be accorded absolute protection from disclosure. Officials preparing "a discussion paper, policy analysis, proposal, or briefing material" for Cabinet, acting in good faith, could express all the factual material in a separate section of the document that could be easily severed for release on request. The fact that any part or all of the factual material might also appear elsewhere in the document would not, in such circumstances, require that full document to be released. Factual material should be protected from disclosure only if it is shown that disclosure would reveal the substance of Cabinet deliberations.

Background material is largely factual, and unless those facts deal with earlier Cabinet consideration of the matter, background material should also be disclosed unless its disclosure would reveal the substance of Cabinet deliberations. If the factual or background material should genuinely be protected from disclosure, then that would become apparent in any review by the Commissioner after complaint about refusal to release it. For those reasons, the Committee is of the view that the word "including" should be replaced by the word "excluding" in item (iv) of the list of Cabinet records set out in of the present section 18(1).

Issue (iii): *Should the restrictions on release expire after 20 years, as is presently the case, or should records be released after 15 years?*

A couple of participants suggested that the period of absolute protection for Cabinet records should be much shorter. Most did not have strong views. They felt that a time frame of 15 to 20 years would be generally acceptable. The OIPC recommended 15 years and the Centre for Law and Democracy also suggested 15 but thought 20 was not unreasonable. Four provinces, including Newfoundland and Labrador, prohibit disclosure for a twenty-year period, two for a twenty-five-year period, two provinces and three territories for a fifteen-year period, and one province for a fourteen-year period. The period in the federal legislation is twenty years. Some international jurisdictions have periods shorter than twenty years and some longer.

The existing period of protection in this province is consistent with Canadian and international standards. None of the participants put forward a compelling argument for reduction or increase in the period; none presented serious concerns about the period. The Committee concludes that there is no credible basis for recommending that a change be made at this time.

Recommendations

The Committee recommends that

14. The *ATIPPA* contain a provision that would result in absolute protection from disclosure for the following Cabinet records:

(i) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet,

(ii) draft legislation or regulations submitted or prepared for submission to the Cabinet,

(iii) a memorandum the purpose of which is to present proposals or recommendations to the Cabinet,

(iv) a discussion paper, policy analysis, proposal, advice or briefing material prepared for the Cabinet, excluding the sections of these records that are factual or background material,

(v) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet,

(vi) a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy,

(vii) a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet,

(viii) a record created during the process of developing or preparing a submission for the Cabinet, or

(ix) that portion of a record which contains information about the contents of a record within a class of information referred to in subparagraphs (i) to (viii).

15. With respect to all other records, the *ATIPPA* require that information in those records that would reveal the substance of Cabinet deliberations not be disclosed.

16. The Commissioner have unfettered jurisdiction to require production for examination of any document claimed to be a cabinet document.

17. The Clerk of the Executive Council have discretion to disclose any Cabinet record where the Clerk is satisfied that the public interest in disclosure of the Cabinet record outweighs the reason for the exception.

18. The present provision in the *Act* requiring release of Cabinet documents more than twenty years old be retained.

The Committee also recommends that

19. Consistent with its Open Government policy, the Government should proactively release as much Cabinet material as possible, particularly materials related to matters considered routine.

3.4 Policy advice and recommendations

> "…it is critical that public servants are able to provide their advice and recommendations to ministers openly and freely without the concern that it's then later going to have to be debated in a public sphere. It is critical that ministers have the opportunity to receive all that information. Not for there to be a filter or a vetting before it gets to the minister."
>
> —Lynn Hammond, Presentation to the Committee

One of the pillars of good government is good advice. Political leaders depend on well-informed officials to brief them on all possible scenarios, in order to reach well-considered decisions. It is widely agreed that officials must be able to present this advice freely and frankly, so that its value and meaning are clear.

Prior to the development of access to information laws, officials were reasonably assured that, while their work would form the basis for public policy decisions, their views would be kept confidential. And even with the advent of access laws, many jurisdictions place strong value on protecting policy advice and recommendations with varying lengths of discretionary exemption (Saskatchewan: 25 years; Canada and Ontario: 20 years; Newfoundland and Labrador: 15 years; Quebec: 10–15 years; Nova Scotia: 5 years; United Kingdom: no time limit).

Increasingly, however, citizens demand to know more about policy decisions. They want to understand the motivation for policy, including how internal and external events affect the choices that are put in front of ministers, and why some options are preferred over others.

This push on the part of citizens has shifted the debate over control of information in public policy making. While the traditional view presupposed the official knew best what should be revealed, the current view is that the citizens know best what information should be in their control. This tug of war makes for an uncomfortable time for officials, and has led to the development of terms such as *chilling effect, verbal culture,* and the need for a *safe place* to discuss, develop, and form public policy.

Developing the concept of advice or recommendations

There have been two previous reviews of the province's access law. Prior to John Cummings' review in 2011, a committee was appointed in 2000 to review the *ATIPPA's* predecessor, the *Freedom of Information Act*. That was the first review since the implementation of that Act in 1981. The 1981 *FOI Act* had no provision regarding advice from public officials to either their ministers or other public agencies. The committee appointed in 2000 addressed that matter:

> The Committee believes that exceptions are sometimes necessary to ensure that persons acting in an official capacity (including those representing municipalities and school boards) are not hindered from giving advice candidly. These exceptions would include records of deliberations formulating that advice.[113]

That committee's recommendations led to the *Access to Information and Protection of Privacy Act*, which was passed by the legislature in the spring of 2002. The access provisions were intended to come into effect later that year, but were delayed until January 2005. The privacy provisions came into effect three years later, in 2008. In 2010, the government announced the first five-year statutory review of the *ATIPPA*. By this time, officials in government had five years' experience working under access provisions of the *Act*, and expressed their many concerns to Mr. Cummings. They told him that less briefing material was being prepared for ministers and

113 *Striking the Balance* (2001), pp 23–24.

there was "widespread uncertainty" regarding what constituted advice and recommendations under section 20 of the *Act*.

Pre– and Post–Bill 29 legislation

Prior to the changes made by the Bill 29 amendments, the *ATIPPA* protected advice or recommendations developed by or for a public body or minister, as well as draft legislation or regulations. It also included a list of the types of information that had to be disclosed, such as factual material, public opinion polls, and statistical surveys. The measures adopted by Bill 29 included those mandatory disclosure items and the protection for draft legislation, but also added extra protection for proposals, analyses, and policy options to policy advice or recommendations.

The changes to the *ATIPPA* did not end with policy advice. Bill 29 was also directed at "the contents of an incomplete formal research report or audit report." It stipulated that the head of a public body could unilaterally declare a report incomplete, and therefore off-limits to an access request, unless no progress had been made on the report for more than three years.

The Bill 29 amendments were also intended to capture other relationships beyond reports and the type of documents that might contain policy advice. A new clause was added to protect "consultations or deliberations" involving officers or employees of a public body, a minister or the staff of a minister.

Other relevant law

There is significant protection in the *ATIPPA* for policy advice, beyond the provisions in section 20 for policy advice or recommendations. Those areas have been addressed elsewhere in this report, and include advice prepared for Cabinet, advice on labour relations issues for the government as an employer, advice that might impact intergovernmental relations or negotiations, and advice on the financial and economic interests of a public body.

The Supreme Court of Canada provided clear direction on the stature of policy advice or recommendations in its *John Doe* decision on 9 May 2014. The case involved a request under Ontario's access law for the policy options that were considered during the drafting of a tax policy decision. The Supreme Court set out the issue in this way:

> The Records in question constitute drafts of policy options for purposes of a decision as to when amendments to Ontario legislation to eliminate a loophole for tax haven corporations should take effect — in particular, to what extent the amendment should have retroactive effect. The question is whether policy options such as these constitute advice or recommendations, and thus qualify for exemption from disclosure under s. 13(1).[114]

In noting that Ontario's *Freedom of Information and Protection of Privacy Act (FIPPA)* did not define advice and recommendations, the Supreme Court justices came to this conclusion about their meaning:

> The policy options in the Records in this case present both an express recommendation against some options and advice regarding all the options. Although only a small section of each Record recommends a preferred course of action for the decision maker to accept or reject, the remaining information in the Records sets forth considerations to take into account by the decision maker in making the decision. The information consists of the opinion of the author of the Record as to advantages and disadvantages of alternative effective dates of the amendments. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are "advice" within the meaning of s. 13(1).[115]

The Supreme Court decision has affirmed that "advice or recommendations" have far-reaching meaning, and are essential in "permit[ting] public servants to provide full, free and frank advice."[116] Justice Rothstein wrote for the whole court in *John Doe* and, in support of the court's view of the importance of protection for advice or recommendations, quoted Justice Evans in the Federal Court decision on *Canadian Council of Christian Charities v. Canada (Minister of Finance)* in 1994:

114 *John Doe*, *supra* note 60.
115 *Ibid* at para 47.
116 *Ibid* at para 43.

> Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.[117]

Policy advice is a broad category of information. By specifying proposals, analyses, and policy options in the amended *ATIPPA* in 2012, the Newfoundland and Labrador legislature was only identifying specific types of advice or recommendations that courts would have included in any event.

Practice around policy advice and recommendations

The Newfoundland and Labrador *Access to Information Policy and Procedures Manual* provides guidance for officials and the public in the application of the *Act*. The guide quotes the Information and Privacy Commissioner, and states that section 20 is intended to "protect the open and frank discussion of policy issues within the public service," and that "advice means an expression of opinion on policy-related matters, including proposals, recommendations, analysis, policy options and draft legislation or regulations." It further states advice "must consist of a suggested course of action, or an expression of opinion about a proposed course of action that is intended to be accepted or rejected by the recipient in the course of reaching a decision."

The *Manual* provides additional guidance for public officials once policies have been approved, announced, or implemented. In such cases, officials are "encouraged to consider release of advice and recommendations." Officials are also advised that, while they are not required to consider potential harm in making a decision, they should consider whether the disclosure "may have the potential to be harmful to the public body or the deliberative process."[118]

In the last six years for which information is available, public bodies in Newfoundland and Labrador have claimed the section 20 exemption in 276 general access requests, an average of 46 a year. In the most recent reporting year, 2013-14, the section 20 exemption was claimed 28 times, representing 12 percent of all exemptions claimed. That is both the lowest number and the smallest percentage of section 20 claims since 2008-09. Since 2005, the Office of the Information and Privacy Commissioner (OIPC) has reviewed 18 cases where the exemption has been claimed.

The OIPC has affirmed the protection inherent in policy advice and recommendations in several of its reports. In *A-2014-001*, the Commissioner upheld the right of the public body to refuse to disclose to an applicant information involving plans to not fill a position in the Department of Health and Community Services. The applicant had asked for an Executive Note and current and deleted emails in relation to that decision, as well as information about other issues around recruitment. The Commissioner concluded that "certain parts" of the records were consultations or deliberations, and therefore protected under the *ATIPPA:*

> It is clear from the wording of the Applicant's access request that certain of the responsive records would be made by or between officers or employees of a public body. It is also clear from the wording of the request that the records would involve a discussion and views on a potential action or proposal. It appears to me that the responsive records were prepared by persons who were expected to be or who were responsible for putting forward such positions. Likewise, it is clear that the information in the records was provided to a person or persons with the power to implement the action.[119]

117 *Ibid* at para 44.

118 NL *Access to Information Policy and Procedures Manual,* pp 91–92.

119 OIPC *Report A-2014-001,* 20 January 2014, p 15.

Legislation in other Canadian jurisdictions

The additional provisions in the Bill 29 amendments are similar to those in access to information laws in Alberta, Nunavut, Yukon, and the Northwest Territories. Manitoba and New Brunswick have similar provisions, but also include opinions among the protected classes of advice. Prince Edward Island does not follow the trend; instead, its legislation protects "consultations or deliberations" among public officials.

The federal access law, as well as the laws in the provinces of British Columbia, Ontario, and Nova Scotia, protect advice or recommendations, as did the wording in the *ATIPPA* prior to 2012.

Practices in other countries

In its 2012 review of New Zealand's *Official Information Act 1982,* the country's Law Reform Commission reported that while no one was questioning ministers' need to have frank and confidential discussion of ideas with their officials, nearly all submitters agreed "the provisions that protect effective government and administration…needed some redrafting." The Commission stated there was a perception among users of the Act that the grounds for withholding information from those discussions "are overused [and] lead to a lack of trust, a result at odds with the premise of official information legislation, which is about enhancing trust in government." Predictably, public officials were concerned that if the public had more access to policy advice, there would be "adverse effects on the policy-making process." Officials expressed concern that increased access to their records would induce "a reluctance to commit advice to paper and some undermining of the ability or willingness of agencies to provide free and frank advice."[120]

The Law Reform Commission was persuaded that freer access to policy advice from officials could dampen the clarity of advice and recommendations to ministers, but it also concluded the current law for officials provided the potential to use the "good government" grounds "merely to withhold embarrassing or controversial information." The Commission recommended parts of the law be redrafted to "minimise their current complexity and clarify their application." It also felt proactive disclosure would help to "remove some of the tension in this area," and that it would help to develop "robust guidance on how the grounds are to be applied."[121]

At the same time as the New Zealand Law Reform Commission published its report, the review by the UK House of Commons Justice Committee of the *Freedom of Information Act 2000* released its analysis.[122] The Justice Committee declined to suggest further protection for policy formulation and advice. The committee acknowledged it was cautious in approaching this position, largely because of conflicting evidence, including research by the Constitution Unit at University College London. The Constitution Unit concluded the *FOI Act* had a "marginal" chilling effect on public officials. The committee heard opposing views from "a range of distinguished participants" in high levels at the UK government, who claimed the *FOI Act* was problematic for "the free and frank provision of advice" and "the free and frank exchange of views for the purposes of deliberation."[123]

In light of the testimony, the UK Committee decided the proper approach was to recommend no change:

> Given the uncertainty of the evidence we do not recommend any major diminution of the openness created by the *Freedom of Information Act*, but, given the clear intention of Parliament in passing the legislation that it should allow a "safe space" for policy formation and Cabinet discussion, we remind everyone involved in both using and determining that space that the Act was intended to protect high-level policy discussions. We also recognise that the realities of Government mean that the ministerial veto will have to be used from time to time to protect that space.[124]

One of the chief challenges for the UK Committee was determining the seriousness of the threats to the "safe space":

120 NZ *The Public's Right to Know: Review of the Official Legislation* (2012), pp 52–53.

121 *Ibid.*

122 UK *Post-legislative scrutiny of the FOI Act*, [2012].

123 UK *FOI Act*, s 36.

124 *Supra* note 122 at 75.

> One of the difficulties we have faced in this inquiry is assessing how real those threats [of premature or inappropriate disclosure of information] are given the safeguards provided under the current FOI legislation and what, if any, amendments are required to ensure the existence of a 'safe place' for policy making.[125]

125 *Ibid* 154.

What we heard

Public officials told John Cummings in the last statutory review that the application of section 20 had a "chilling effect" on preparing briefing materials for ministers. The fear and "widespread concern" that Mr. Cummings reported may have been the impetus for the Bill 29 changes to section 20.

Those changes were widely condemned during the Committee's public hearings and in several written submissions. The Centre for Law and Democracy argued that the protection under section 20 is "clearly overbroad," and that documents under this section should be subject "only to harms-based redaction as necessary to protect a legitimate interest, including candour within government." Many of the other submissions followed this theme.

The OIPC recommended reverting to the pre–Bill 29 wording, which is "a close equivalent" of the Ontario provision that was the subject of the recent Supreme Court *John Doe* decision. The Commissioner stated that the "additional language…in Bill 29 may result in more information being withheld than is necessary." The Commissioner also had concerns about the withholding of draft reports, as "this could carry on indefinitely if token additions or alterations are made from time to time." He stated that the protection for draft reports "goes beyond what is necessary for section 20 to accomplish, and in fact it could be misused." The OIPC also drew attention to the fact that the head of a public body can decide to withhold the report from disclosure, and such a decision does not require "any objective evidence or analysis as to the completeness of the report."[126]

126 OIPC Submission, 16 June 2014, pp 22–23.

Another participant, Simon Lono, referred to the draft report section as an "obstructive clause" and the "forever draft." He noted there is no clear public policy purpose for "this arbitrary 3 year retention."[127]

The Official Opposition recommended repealing the section 20 amendments and reverting to the pre–Bill 29 wording. The Leader, Dwight Ball, said section 20 has been engaged 26 times in 46 access applications, making it the second-most frequently used exemption in denying access requests from the official opposition. He felt that adding proposals, analyses, and policy options to section 20 gave public bodies "a wider range in the types of information they may refuse to disclose."[128]

The New Democratic Party raised particular concerns with the language concerning audit reports and consultations or deliberations. The NDP recommended repeal of the section permitting non-disclosure of audit reports, and a narrowing of the wording on consultations or deliberations. The party felt that the current language will allow bureaucrats "to block the release of anything they want to keep secret," and that it gives the government "sweeping powers to keep any information they may find inconvenient or embarrassing secret from the public."[129] The NDP recommended that the Commissioner be given the authority to decide "whether or not the contested information should be kept secret."

Two journalists from the *Telegram* commented on section 20, albeit on different parts. James McLeod took issue with the section 20 protection for consultations or

127 Lono Submission, 24 June 2014, p 11.

128 Official Opposition Submission, 22 July 2014, p 14.

129 New Democratic Party Submission, 26 June 2014, p 9.

deliberations. He said "taken to an absurd extreme, if somebody filed an *ATIPPA* request for this submission, it could be withheld on grounds that it's part of a consultation."[130] Ashley Fitzpatrick objected to the increasing tendency for government to hold back consultants' reports because they are in "draft" form. She contended consultants' reports should be released quickly—"submissions to government should be considered complete reports—final products in response to payment."[131] She argued the public has a right to this advice, as it is paid for out of public funds.

Former government communications advisor Lynn Hammond was strongly in favour of protecting advice and recommendations between officials and ministers, and between officials themselves. She stated the protection should go beyond written advice and recommendations, and be extended to emails and texts. Ms. Hammond expressed the view that electronic communication is becoming increasingly common because of the proliferation of such devices, and their value in the busy lives of ministers and their officials. She also commented on the continuous news cycle, and how it is now possible and necessary to respond instantaneously to media reports. "The time for response and expectations have changed," she told the Committee. "And so it really is a much faster paced response in that environment."[132] Ms. Hammond argued that such communications may not fit the traditional model of policy advice or recommendations that are laid down on paper, but are advice and recommendations nonetheless.

The Office of Public Engagement did not make recommendations in their presentation, but they did engage in a question and answer discussion with the Committee. They expressed concern about draft reports being circulated to the public before they are complete. The deputy minister of the OPE recounted instances where it was necessary to ask consultants to make major changes to reports before the reports could be officially passed over to the government, including the need "to add a substantive piece on a financial implication." The deputy said many consultants are from out of province, and their understanding of local conditions such as the geography of Newfoundland and Labrador might not be complete. She gave an example of a draft report on housing that "operationally would not work for here because of our geography." The Chair asked if officials would have the same apprehension if the Commissioner could review the draft report to assess their concerns. The deputy thought that "from an advising perspective, it would be fine," but neither she nor the minister gave categorical approval to such a proposal.[133]

130 McLeod Submission, June 2014, p 3.
131 Fitzpatrick Submission, 25 July 2014, p 5.
132 Hammond Transcript, 20 August, 2014, pp 3–20.
133 Government NL Transcript, 19 August 2014, pp 118–119.

Analysis

The changes to section 20 gave public officials authority to withhold classes of documents and records that they worried were not captured by the pre–Bill 29 language. John Cummings wrote this about the concern they felt:

> A major part of the concern is the widespread uncertainty associated with determining what constitutes "advice or recommendations developed by or for a public body or a minister." Officials reported encountering difficulty when determining what information could be severed.[134]

Mr. Cummings agreed that some of the concerns were well-founded, and recommended "additional protection" for proposals, consultations, deliberations, and analysis, including analysis of policy options.[135]

134 Cummings Report (2011), pp 42–43.
135 *Ibid* 43.

The motivating factor for the changes was concern by public officials that section 20 was not broad enough to withhold what legitimately should be withheld. When Mr. Cummings referred to a "chilling effect" among those who prepared briefing materials for ministers and heads of agencies, he reported that "this concern is corroborated by a number of recent media stories which revealed that ministers have requested that no briefing material be prepared on important issues." "Anecdotal evidence," he wrote, suggests "there is significantly less briefing material in the public sector since the introduction of the *ATIPPA*."[136]

136 *Ibid* 42.

The changes to section 20 raised many questions with people who made submissions to the Committee, including concerns that the head of a public body can decide to withhold a draft report, without any possibility of oversight by the Commissioner. In addition, there is vagueness as to the protection accorded "consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister." These additions to the *ATIPPA* may have brought comfort to the officials who made suggestions to the last review, but among journalists and others who appeared before the committee, the changes raised serious concerns about transparency and accountability.

Conclusion

The changes brought about by Bill 29 considerably expanded the types of information which may be refused in response to an access to information request. The entire group is printed here, with the post–Bill 29 additions in italics:

- advice
- *proposals*
- recommendations
- *analyses*
- *policy options*
- *incomplete formal research report*
- *incomplete audit report*
- *consultations*
- *deliberations*
- draft legislation or regulations

When this list is viewed in its entirety, it is difficult to imagine any category or class of information that could not arguably be included. Clearly, the worries public officials expressed to John Cummings had found their way into Bill 29.

In light of the Supreme Court decision in *John Doe,* some of the wording added to section 20—proposals, analyses, or policy options—essentially reflects what the Court determined is already meant by policy advice or recommendations. The only effect would appear to be making the determination less difficult. There would seem to be no harm in leaving this part of the *ATIPPA* as it is.

The Committee has serious reservations about two other changes implemented as a result of the Bill 29 amendments, section 20(1)(b) and (c). While it accepts that some drafts of research and audit reports may have deficiencies that need to be addressed before they are released to the public, two aspects of this are problematic. The first is that the head of the public body alone determines if such reports are complete or not. This does not reassure the public. The second aspect is that any such report can be withheld for three years. It is unnecessary to attach a lengthy timeline to such reports. Limiting the exceptions to reports in respect of which updating has been requested within 65 business days of delivery of the report, and ensuring that the Commissioner has such access as he considers necessary, can address both aspects of the problem.

Our second reservation is with respect to "consultations or deliberations" in section 20(1)(c), involving

officers or employees of a public body, a minister, or the staff of a minister. The Committee has expressed concern about the motivation for this section, and what it was intended to accomplish. Given the Supreme Court decision in *John Doe,* such protection is already implicit under policy advice or recommendations, and we recommend this section be deleted.

Recommendations

The Committee recommends that

20. Section 20(1)(b) of the *ATIPPA* should be deleted and replaced with "the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made by the head within 65 business days of delivery of the report."

21. Section 20(1)(c) of the *ATIPPA* should be repealed. There is adequate protection for deliberations involving officials and their ministers, as it relates to the policy-making and decision process, in section 20(1)(a).

3.5 Solicitor-client privilege

Many participants criticized changes made to the *ATIPPA* in 2012 that related to solicitor-client privilege. Those changes, introduced by Bill 29, have several key consequences:

- They mean that if access to information is refused on the grounds of solicitor-client privilege, requesters can no longer ask the Commissioner to review the refusal.
- They remove the right of the Commissioner to require that a record be produced to determine that it is solicitor-client privileged.
- They remove the right of the Commissioner to enter an office of a public body to examine such a record.
- They also mean that if the head of a public body refuses to produce information to an applicant, the applicant's only recourse is an appeal to the Trial Division of the Supreme Court.

Before considering the specific statutory provisions, the submissions of participants, and other relevant material, it is important to consider what solicitor-client privilege is, why it exists, and its importance to individuals and to society.

What is solicitor-client privilege?

In *Solicitor-Client Privilege,* Professor Adam Dodek discusses the origin of the idea and the rationale underpinning it today. With respect to its origin, he writes:

> The privilege is the oldest of the recognized privileges for confidential communications—priest-penitent, doctor-patient and lawyer-client. It dates back to the 16th century. As explained by J. Sopinka in *The Law of Evidence in Canada:* "the basis for the early rule was the oath and honour of the solicitor, as a professional man and a gentleman, to keep his client's secret. Thus, the early privilege belonged solely to the solicitor, and the client benefitted from it only incidentally. This basis for the privilege became known as the Honour Theory.[137]

137 Dodek, *Solicitor-Client Privilege* (2014) para 1.4.

With respect to the evolution in thinking that has led to a significantly different underpinning for the privilege, Professor Dodek writes:

> By the early 19th century, the rationale for the privilege had shifted from the honour of the solicitor to more utilitarian justifications based on the efficacy of the justice system. While these justifications were developed in the 19th century, they continue to resonate today and continue to provide the dominant rationale for the privilege today.[138]

He also cites judicial authority to show that the privilege belongs to the client and not to the lawyer.

The Supreme Court has made more than a dozen decisions related to the issue in the last fifteen years. Some of these discussed clearly the value to society and the status in law that the solicitor-client privilege now has in Canada, and will almost certainly have for the foreseeable future.

In the earliest of those decisions, *R v Campbell*, Justice Binnie, writing for the whole court, discussed and cited judicial precedent to affirm the status of the privilege and its limits. The following excerpt thoroughly covers all the aspects of the privilege that are at issue in the submissions before us. Justice Binnie wrote:

> The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. As Lamer C.J. stated in *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289:
>
> > The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication...
>
> This Court had previously, in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 872, adopted Wigmore's formulation of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality…
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.…
>
> Cpl. Reynolds' consultation with Mr. Leising of the Department of Justice falls squarely within this functional definition, and **the fact that Mr. Leising works for an "in-house" government legal service does not affect the creation or character of the privilege.**[139] [emphasis added]

Two years later, the court was considering the scope of solicitor-client privilege and identifying circumstances in which other rights might prevail over the privilege. In *R v McClure,* Justice Major, also writing for the full court, described the issue before the court in these words:

> Solicitor-client privilege and the right to make full answer and defence are integral to our system of justice. Solicitor-client privilege is not absolute so, in rare circumstances, it will be subordinated to an individual's right to make full answer and defence. The problem is when and under what circumstances the right to full answer and defence will override the solicitor-client privilege.[140]

In describing the value of the privilege to society and the scope it has, Justice Major classified the privileges recognized in law. He identified as "class privileges" those that would be considered automatically inadmissible and as "case-by-case privileges" those that require evidence to establish them as privileges in the circumstances of the case. He concluded that "solicitor-client privilege, because of its unique position in our legal fabric, is the most notable example of a class privilege." With respect to the basis for its being accorded that status, Justice Major wrote:

> The foregoing privileges, such as communication between a doctor and his patient, do not occupy the unique

138 *Ibid.*

139 [1999] 1 SCR 565 at paras 49–50 [*Campbell*].

140 2001 SCC 14 at para 4, [2001] 1 SCR 445.

position of solicitor-client privilege or resonate with the same concerns. This privilege, by itself, commands a unique status within the legal system. The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself. The solicitor-client relationship is a part of that system, not ancillary to it. See *Gruenke*, *supra*, *per* Lamer C.J., at p. 289:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication (see: *Geffen v. Goodman Estate*, *supra*, and *Solosky v. The Queen*, *supra*). In my view, religious communications, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor-client communications surely are.

It is this distinctive status within the justice system that characterizes the solicitor-client privilege as a class privilege, and the protection is available to all who fall within the class.[141]

With respect to the scope of the privilege, Justice Major wrote:

> Despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances. *Jones*, *supra*, examined whether the privilege should be displaced in the interest of protecting the safety of the public, *per* Cory J. at para. 51:
>
> > Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.
>
> However, **solicitor-client privilege must be as close to absolute as possible** to ensure public confidence and retain relevance. **As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.**
>
> Not all communications between a lawyer and her client are privileged. In order for information to be privileged, it must arise from communication between a lawyer and the client where the latter seeks lawful legal advice. Wigmore, *supra*, sets out a statement of the broad rule, at p. 554:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.
>
> As stated, only communications made for the legitimate purpose of obtaining lawful professional advice or assistance are privileged. The privilege may only be waived by the client. See M. M. Orkin, *Legal Ethics: A Study of Professional Conduct* (1957), at p. 84:
>
> > It is the duty of a solicitor to insist upon this privilege which extends to "all communication by a client to his solicitor or counsel for the purpose of obtaining professional advice or assistance in a pending action, or in any other proper matter for professional assistance" [Ludwig, 29 C.L. Times 253; *Minet v. Morgan* (1873), 8 Ch. App. 361]. The privilege is that of the client and can only be waived by the client.[142] [emphasis added]

Clearly, the Supreme Court views solicitor-client privilege as fundamental to the justice system in Canada and, in the words of Justice Major:

> **The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.**[143] [emphasis added]

The court considered the status of the privilege in the context of access-to-information rights in *Goodis v Ontario (Ministry of Correctional Services)*.[144] There, solicitor-client privilege had been claimed in respect of certain records. The trial level judge, who was reviewing

141 *Ibid* at para 31.

142 *Ibid* at paras 34–37.

143 *Pritchard v Ontario (Human Rights Commission),* 2004 SCC 31, [2004] 1 SCR 809 [*Pritchard*].

144 2006 SCC 31, [2006] 2 SCR 32 [*Goodis*].

a decision of the Ontario Information and Privacy Commissioner, granted limited access to the records. Access was granted to counsel, but not to the requester, and it was subject to a confidentiality undertaking. The access was granted in order to enable counsel to argue whether the records in question should be disclosed.

The Supreme Court decided that "disclosure to a requester's counsel of records subject to a claim of solicitor-client privilege may only be ordered where **absolutely necessary**" (emphasis added). Justice Rothstein, also writing for the whole court, set out the principles underlying that conclusion. Amongst other views, he wrote:

> In a series of cases, this Court has dealt with the question of the circumstances in which communications between solicitor and client may not be disclosed. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875, Lamer J., on behalf of a unanimous Court, formulated a substantive rule to apply when communications between solicitor and client are likely to be disclosed without the client's consent:
>
> > 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
> >
> > 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
> >
> > 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
> >
> > 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.
>
> The substantive rule laid down in *Descôteaux* is that a judge must not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation." In *Lavallee, Rackel & Heintz v. Canada* (*Attorney General*), [2002] 3 S.C.R. 209, 2002 SCC 61, it was found that a provision of the *Criminal Code*, R.S.C. 1985, c. C-46, that authorized the seizure of documents from a law office was unreasonable within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms* because it permitted the automatic loss of solicitor-client privilege. That decision further emphasized the fundamental nature of the substantive rule. It is, therefore, incumbent on a judge to apply the "absolutely necessary" test when deciding an application for disclosure of such records.[145]

Justice Rothstein then defined what was meant by the phrase "absolutely necessary." He wrote:

> **Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case.** The circumstances in which the test has been met exemplify its restrictive nature. In *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 841, for example, it was found that subject to strict safeguards, mail received by an inmate at a penitentiary could be inspected to maintain the safety and security of the penitentiary. Similarly, in *McClure*, it was found that documents subject to privilege could be disclosed where there was a genuine danger of wrongful conviction because the information was not available from other sources and the accused could not otherwise raise a reasonable doubt as to his guilt.
>
> While I cannot rule out the possibility, it is difficult to envisage circumstances where the absolute necessity test could be met if the sole purpose of disclosure is to facilitate argument by the requester's counsel on the question of whether privilege is properly claimed. Hearing from both sides of an issue is a principle to be departed from only in exceptional circumstances. However, privilege is a subject with which judges are acquainted. They are well equipped in the ordinary case to determine whether a record is subject to privilege. There is no evidence in this case that disclosure of records to counsel for the purpose of arguing whether or not they are privileged is absolutely necessary.[146] [emphasis added]

In the end, the court concluded that "there is no justification for establishing a new or different test for disclosure of records subject to a claim for solicitor-client privilege in an access to information case."[147]

145 *Ibid* at paras 14–15.
146 *Ibid* at paras 20–21.
147 *Ibid* at para 23.

These are the general principles related to the nature and stature of solicitor-client privilege, as enunciated by the Supreme Court of Canada. They should guide this Committee in drawing conclusions that will be the foundation for its recommendations respecting legislative provisions about solicitor-client privilege in the access to information context. Ultimately, the courts will be the interpreters of the legislation, and it is reasonable to expect that the principles the Supreme Court identified in the excerpts quoted above will be applied.

To appreciate the relevant issues respecting a claim of solicitor-client privilege for a record, it is necessary to consider the *ATIPPA*'s provisions respecting that privilege, both as they were prior to the changes resulting from Bill 29 in 2012, and as they are now.

ATIPPA provisions prior to Bill 29

Section 7(1) of the *ATIPPA* grants the general right to access a record in the custody of a public body, subject to limited exceptions. Section 21 permits the head of a public body to refuse to disclose to an applicant information

> (a) that is subject to solicitor and client privilege; or
> (b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

Before Bill 29, section 43 provided for a general right for any requester who was refused access to a record to ask the Commissioner to review the decision. That section did not preclude examination by the Commissioner of records in respect of which solicitor-client privilege was claimed. Section 52(3) supported that power of the Commissioner by requiring the head of a public body to produce to the Commissioner a record requested "notwithstanding … a privilege under the law of evidence."

Prior to Bill 29, section 43(1) was simple and direct. It read:

> 43. (1) A person who makes a request under this *Act* for access to a record or for correction of personal information may ask the commissioner to review a decision, act or failure to act of the head of the public body that relates to the request.

Judicial interpretation

Until the 2008 decision of the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*,[148] which involved interpretation of the federal legislation, records in respect of which solicitor-client privilege was claimed in this province were routinely produced when the OIPC requested them. The Commissioner could then examine the record to determine the validity of the claim to solicitor-client privilege. The *Blood Tribe* decision involved section 12 of the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*). That section gives the Federal Privacy Commissioner express statutory authority to require production, "in the same manner and to the same extent as a superior court of record," of any records that the Federal Privacy Commissioner considers necessary to investigate a complaint. The Commissioner was also empowered to "receive and accept any evidence and other information…whether or not it is or would be admissible in a court of law."

On the basis of that wording, the Federal Privacy Commissioner argued that she could require production of and could review documents for which solicitor-client privilege was claimed. The Supreme Court did not agree. Justice Binnie wrote:

> The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a regulator or other statutory official to "pierce" the privilege. Such clear and explicit language does not appear in *PIPEDA*. This was the view of the Federal Court of Appeal and I agree with it. I would dismiss the appeal.[149]

148 2008 SCC 44, [2008] 2 SCR 574 [*Blood Tribe*].

149 *Blood Tribe*, *supra* note 148 at para 2.

Some months after that decision, when the OIPC required production of a record in respect of which solicitor-client privilege was claimed, the Attorney General applied to the Trial Division of the Supreme Court for an order that the *ATIPPA* did not oblige the department to produce for review the records requested. The Trial Division judge gave the requested declaration but the Commissioner brought the matter to the Court of Appeal. The Commissioner acknowledged the ruling of the Supreme Court of Canada in the *Blood Tribe* decision, that legislative intent to abrogate solicitor-client privilege must be clearly and explicitly stated, but argued that the language used in the version of subsection 52(3) of the *Act*, as it read at the time, achieved that level of clarity.

After a thorough review of the jurisprudence, including the *Blood Tribe* decision, the Court of Appeal, in October 2011, reversed the Trial Division decision and Justice Harrington, writing for the full panel, decided that:

> Subsection 52(3) of ATIPPA, in contrast to PIPEDA, does advert to issues raised by privilege. While it does not employ the words "solicitor-client privilege", I am satisfied that the words actually employed are not ambiguous and are sufficiently explicit to include that privilege…
>
> Having found that section 52 of ATIPPA authorizes the Commissioner to compel the production of responsive records subject to solicitor-client privilege, the Court must go on to determine whether the routine production of such records is absolutely necessary. The purpose of the legislation, described above, is to provide for an independent review officer which can undertake a timely and affordable first level review of all information request denials. **This access to justice rationale mandates that the Commissioner's routine exercise of his authority to review solicitor-client privileged materials is absolutely necessary.** The purpose of ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor-client privilege is claimed and was forced to resort to applications to court to compel production. [emphasis added]
>
> From the foregoing I conclude that the Legislature intended subsection 52(3) to enable the Commissioner to compel the production of responsive records that are subject to a claim of solicitor-client privilege. A practical view of the purpose of the legislation leads to the conclusion that this particular type of privilege is included in the phrase "a privilege under the law of evidence" under subsection 52(3) of ATIPPA.[150]

In contrast, the language of the *ATIPPA* respecting the Commissioner's right to review records was not ambiguous and was sufficiently explicit to include solicitor-client privilege in subsection 52(3) of the *Act*, as it read prior to Bill 29. The *Blood Tribe* decision of the Supreme Court of Canada concerned a different piece of legislation with a different purpose. While the *ATIPPA* deals with documents in the possession of government, *PIPEDA* deals with information in the hands of the private sector. The core purpose of the *ATIPPA* is accountability of public bodies, rather than the protection of consumer rights.

For a very brief period following Justice Harrington's decision, from October 2011 to June 2012, all records that the Commissioner requested were produced, including those in respect of which solicitor-client privilege was claimed. That came to an end with the passage of Bill 29.

ATIPPA provisions after Bill 29

One of the changes brought about by Bill 29 was in section 43 which, as noted above, entitled a requester to ask the Commissioner to review a decision refusing access to a record and did not specifically preclude a record in respect of which solicitor-client privilege was claimed. As a result of the amendment put in place by Bill 29, the Commissioner could no longer review a record if access was refused on the basis of solicitor-client privilege. The simple and direct power of the Commissioner to access any record to which the *ATIPPA* applies was restricted as a result of the revision of subsection 43(1) caused by Bill 29. It now reads:

> 43. (1) A person who makes a request under this *Act* for access to a record or for correction of personal information may ask the commissioner to review a decision, act or failure to act of the head of the public body that relates to the request, except where the refusal by the head of the public

150 *Newfoundland and Labrador (Information and Privacy Commissioner) v Newfoundland and Labrador (Attorney General)*, 2011 NLCA 69 at paras 75, 78-79.

> body to disclose records or parts of them is
> (a) due to the record being an official cabinet record under section 18; or
> (b) based on solicitor and client privilege under section 21.

There were other related amendments, one of which was to section 52. The right of the Commissioner to require the production of any document for his review was now constrained and he could no longer request production of a record "which contains information that is solicitor-client privileged." The Commissioner's right under section 53 to enter the office of a public body to examine any record, "notwithstanding another Act or regulation or any privilege under the law of evidence," was now also constrained by excepting solicitor-client privilege.

Previously, the Commissioner could review a decision by the head of a public body refusing to provide access to a record in respect of which solicitor-client privilege was claimed. Now, section 60 gave either the requester or the Commissioner the right instead to appeal to the Trial Division of the Supreme Court.

What we heard

From organizations

The OIPC

In his original written presentation, the Commissioner recommended amending subsection 43(1) by "reverting to the version which was in place prior to Bill 29." This, the submission explained, would restore the Commissioner's ability to review a refusal of access to information based on a claim of official Cabinet record or solicitor-client privilege.

When he appeared at the first hearing, the Commissioner advised that during the period when the issue was before the Court of Appeal, some 15 requests for information were refused on the basis of solicitor-client privilege. The requests for review on these files were all held in abeyance pending the decision of the Court of Appeal. After the Court of Appeal decision, the OIPC saw the 15 files that had been held. They discovered that 80 percent of them "had nothing to do with solicitor-client privilege whatsoever and only 20 percent of the records were properly claimed." When questioned as to whether this was "unmistakably clear," the Commissioner confirmed that to be the case, and expressed the view that it was "very disturbing" and "there was concern about abuse of that particular section." He was referring to section 21, which allows the head of a public body to refuse to disclose information that is subject to solicitor-client privilege.

Sean Murray, the Director of Special Projects in the OIPC, described a particular event:

> And during that time we had the occasion that somebody came to us with a request for a review and as we normally do one of our analysts will contact the public body and say look we've got a request for review. I notice one of the exceptions you've claimed is solicitor-client privilege. Just mention that and the person said yes we thought we'd claim that because we just heard about this court decision and we heard that you can't review claims of solicitor-client privilege so we thought we'd claim it. That is—we were flabbergasted but it's a fact that a head of a public body actually admitted to us that the reason they claim that section of the *Act* solicitor-client privilege was because we couldn't review it.

The Commissioner also advised the Committee that on no occasion prior to the passage of Bill 29, when he was reviewing records subject to solicitor-client privilege, did any concern about the handling by the Commissioner's office of solicitor-client privileged documents ever give rise to a problem or complaint. He provided the following detail:

> Prior to 2009, there were 49 cases involving section 21 solicitor and client privilege records that were ...handled by the Office of the Commissioner. At no time were there any difficulties with those files.[151]

151 OIPC Transcript, 24 June 2014, p 25.

The Federal Information Commissioner

In referring to claims of solicitor-client privilege, Suzanne Legault said, "as part of our investigation we routinely find that that exemption is misapplied."

From the Minister responsible for the OPE, the Honourable Sandy Collins

These matters were raised with the minister responsible for the Office of Public Engagement when he appeared before the Committee. The minister undertook to make inquiries and to advise the Committee of the results, which he did. His letter indicated that "Government and the Commissioner have met and discussed these files." Minister Collins also advised that seven of the fifteen files concerned government departments and the remaining eight concerned other public bodies; he provided details of how they were handled. The Commissioner has not provided further information on these matters.

When the minister appeared before the Committee, a number of deputy ministers and officials appeared with him and made themselves available to answer the Committee's questions. One was the deputy minister of Justice, who spoke in relation to the Commissioner having access to solicitor-client privileged documents:

> I think that once we hand over solicitor-client privileged materials to an outside agency, and the Commissioner's office is an administrative agency, I think some of that privilege has the potential to be compromised. …And then the other issue is: does the Commissioner's office then seek outside legal advice to assist him in reviewing those materials to determine whether the claimed privilege is appropriate? …[I]f the Commissioner seeks outside legal advice on solicitor-client privileged documents that we provided to his office, how do we know that the firm that's being engaged is not in conflict with government or on the other side of a particular file over that particular issue? So all I'm saying is that we would want to be sure that there are safeguards.[152]

The only other comment along the same lines came from the deputy minister responsible for the Office of Public Engagement. She said:

> So it is not about…whether or not we had confidence in OIPC, it was more about whether the courts had processes that we thought were the best.[153]

In its presentation, the Centre for Law and Democracy made three specific submissions:

(i) "Solicitor-client privilege exists for two reasons, to allow lawyers to plan their strategy for upcoming litigation (litigation privilege) and to promote candour between lawyers and their clients. While the first of these is clearly necessary for government lawyers, the second is not."

(ii) "Government counsel often play a range of roles in policy development, planning and administration which are functionally similar to those of their non legally trained colleagues. This advice should not be covered by a veil of secrecy just because it happens to come from a lawyer."

(iii) "The solicitor-client privilege exception as it is currently worded also provided a tremendous potential for abuse since, if government officials want particular discussions to be exempt from disclosure under ATIPPA, they need only bring a lawyer into the room."[154]

The Centre then recommends that "*ATIPPA* should be amended to provide an exception only for litigation privilege, namely information which is prepared or shared in anticipation of an impending lawsuit, and not for solicitor-client privilege more broadly."

In general

Most participants who commented on solicitor-client privilege felt that the Commissioner must be able to read *all* documents, including solicitor-client privileged documents and documents involving Cabinet confidences. They expressed the view that the statutory provision as it existed before Bill 29 should be restored.

In discussions with the Committee, participants often argued that the reason the Commissioner should be able to examine documents subject to a claim of

152 Government NL Transcript, 19 August 2014, pp 96–98.

153 *Ibid.*

154 CLD Submission, July 2014, p 7.

solicitor-client privilege is that otherwise the Commissioner will be unable to perform his duties properly. That is also the basis on which Justice Harrington concluded (above) that it was "absolutely necessary" for the Commissioner to be able to compel production of solicitor-client privileged documents.

The proponents of restoring the power the Commissioner had before Bill 29 to require production of records subject to solicitor-client privilege included the Commissioner; the Federal Information Commissioner, Suzanne Legault; the New Democratic Party; and the Centre for Law and Democracy. Several individual citizens expressed the same view.

There were no specific representations respecting records, in the possession of a public body, but subject to solicitor-client privilege of a person other than a public body. Several Canadian jurisdictions, including Alberta, Manitoba, New Brunswick, and Prince Edward Island specifically prohibit disclosure of such records.

Issues

Two separate concerns have been raised in respect of solicitor-client privilege. One is whether the Commissioner should have the right to require production to him of any document in respect of which solicitor-client privilege is claimed, so that he can determine whether the privilege has been validly claimed. This is important when he is reviewing a public body's refusal to disclose a record on the basis that it is subject to solicitor-client privilege. The second concern is whether the right of the head of a public body to refuse disclosure on the basis of solicitor-client privilege, as authorized under section 21 of the *Act*, should be limited to matters related to litigation in progress or reasonably in contemplation.

Analysis

Issue 1: *Should the Commissioner be empowered to require production of solicitor-client privileged documents for his examination?*

The Committee shares the concern of the Commissioner, the Federal Information Commissioner, the Centre for Law and Democracy, and other participants about the apparent ease with which section 21 can be used abusively. If the Commissioner is unable to examine documents in respect of which the public body claims solicitor-client privilege, he cannot possibly determine the validity of the claim. The only information as to abuse in the past is that provided by the Commissioner and the Director of Special Projects. It has not been contradicted by other participants, and the information provided by the minister does not alter the inferences to be drawn from the information provided by the Commissioner and Mr. Murray.

There are, however, valid concerns about the risks involved in permitting access on demand by the Commissioner. They were described by Justice Binnie in the *Blood Tribe* decision.

The comments of Paul Noble, the deputy minister of Justice, raise related concerns. For several reasons, the Committee does not share those concerns. To begin with, as the Commissioner confirmed, the analysts at the OIPC are all lawyers, totally familiar with the importance of solicitor-client privilege, and aware of their duties and responsibilities as lawyers in dealing with records having the benefit of that privilege. There had never been an incident giving rise to concern about the

security of the privileged documents in prior years, when the OIPC had routine access to such documents.

There is also the statutory requirement in sections 42.8 and 42.9 that the Commissioner and his staff swear oaths that they "will not divulge information received by him or her under this *Act*." Legal staff of the department of Justice swear similar oaths and are regularly entrusted with critical documents, including documents subject to solicitor-client privilege. Referring to the OIPC as an "outside agency" is not sufficient to conclude that the solicitors of that office, who have sworn an oath similar to the oaths sworn by Department of Justice solicitors, are less trustworthy or less responsible than the solicitors in the Department.

The deputy minister also raised a concern that the OIPC could engage outside counsel and there would be a possibility of a conflict. He said "how do we know that the firm that's being engaged is not in conflict with government or on the other side of a particular file over that particular issue?" The Commissioner indicated that his office has never engaged outside counsel in connection with their review of complaints about refusal of a record on the basis that it is subject to solicitor-client privilege. And, even if the OIPC sought outside legal advice, it would be done in the same manner as the Department seeking outside legal advice. The first step for lawyers in law firms, in the Department, or in the OIPC would be to do a conflict check to ensure that the problem would not arise.

As well, the Commissioner is an officer of the House of Assembly and his office, the Office of the Information and Privacy Commissioner, is no more an outside agency than the courts are outside agencies. There is no reason to infer that the faithful public servants who staff the OIPC are any less trustworthy than the faithful public servants in the Department of Justice or in the courts.

It is appropriate to comment here on a concern expressed by Sean Murray that authorized analysts from the OIPC are frequently required to sign confidentiality agreements before receiving documents in respect of which Cabinet confidence is claimed, or other sensitive documents. He thought it offensive. For the reasons expressed above, the Committee agrees with Mr. Murray's view. The Committee considers it totally inappropriate to impose such a requirement on the trusted staff of an officer of the House of Assembly.

Most participants emphasized the practical effects of eliminating the right of review. They argued that when the Commissioner's review is eliminated in favour of an appeal to the Trial Division of the Supreme Court, higher costs and delays will be unavoidable. While there was no specific evidence provided on the point, it seems clear that making direct personal representation to the Commissioner respecting review should result in considerably less cost and delay than engaging a lawyer to commence a court action to have a judge determine whether or not the claim of solicitor-client privilege was valid. Although that is not presently the case, it is anticipated that it will be so as a result of changes in practices and procedures that the Committee is recommending the OIPC implement.

Legislation in other Canadian jurisdictions

Of all the jurisdictions of Canada, only New Brunswick and Newfoundland and Labrador prevent the independent oversight body from requiring production, for its review, of records in respect of which solicitor-client privilege is claimed. There are no such restrictions on the right of the federal commissioner.

International jurisdictions

There are no restrictions on the right of the oversight body to examine a record in respect of which solicitor-client privilege is claimed under the relevant legislation of Australia, New Zealand, the United Kingdom, or Mexico. As well, the *Inter American Model Law on Access to Public Information* contains no restrictions on the Commissioner's oversight with respect to claims involving solicitor-client privilege.

Five key points have guided the Committee on this issue:

- The Commissioner cannot assist a person seeking access to a record in circumstances where solicitor-client privilege is claimed under the *ATIPPA* provisions as they now stand.

- There was no complaint about review by the Commissioner prior to the changes made by Bill 29.
- The alternative of appeal to the courts is beyond the financial resources of most requesters.
- Most other Canadian and international jurisdictions do allow the independent oversight body to review records involving solicitor-client privilege.
- There is no evidence whatsoever to support a conclusion that circumstances necessitated making the changes that were made as a result of Bill 29.

The Committee concludes that the powers of the Commissioner to deal with complaints about refusal to provide access on the basis that the records involved are subject to solicitor-client privilege should be revised to restore the Commissioner's ability to determine the validity of such a claim.

Issue 2: *Should the right to refuse disclosure be limited to litigation privilege?*

This was the proposition of the Centre for Law and Democracy, in respect of which they made the three submissions noted above. Each of the Centre's submissions is totally inconsistent with the views expressed by the Supreme Court of Canada in both *Campbell* and *Pritchard*. In *Campbell* Justice Binnie wrote:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments.
>
> Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), *per* Rehnquist J. (as he then was), at pp. 394–95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668–69:
>
> > [I]t is not sufficient for the witness to say, "I went to a solicitor's office."... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that Mr. Leising is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges. This rule is well established, as set out in *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] 2 All E.R. 353 (C.A.), *per* Lord Denning, M.R., at p. 376:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients

> have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.[155]

It is obvious from Justice Binnie's comments that the protection for confidential legal communications should not be confined to litigation privilege. It is not only in circumstances where there is existing or pending litigation that lawyers for a public body provide services that should be kept confidential to ensure the proper administration of justice. Lawyers are constantly asked to provide advice in circumstances where, if the advice sought or the advice given was disclosed, the legal or financial interest of the public body could be compromised. The Centre's view expressed in its submission (i) quoted above does not reflect reality.

In fairness to the Centre, its recommendation to confine the protection to litigation privilege may have been driven, in part at least, by its misperception as to the limits of solicitor-client privilege. Solicitor-client privilege is not the pervasive unruly creature the Centre describes in its submissions (ii) and (iii) quoted above. The criteria to establish solicitor-client privilege are, as Justice Major noted in *McClure,* "(i) a communication between a solicitor and a client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential to the parties." All three must be present. The circumstances referred to in the Centre's submissions (ii) and (iii) do not give rise to solicitor-client privilege.

155 *Campbell, supra* note 139 at para 50.

Conclusion

The Committee concludes that the privilege is vital, not only to clients entitled to its benefits but to the interests of society as a whole. The views expressed in recent decisions of the Supreme Court of Canada dealing with these issues demonstrate beyond question the critical importance of the privilege to the fair and efficient administration of justice. We should not therefore make recommendations that would jeopardize the role of the privilege in the administration of justice in the province, nor adversely affect the interest of an individual or entity entitled to claim the benefit of the privilege.

On the other hand, the Centre for Law and Democracy and the other participants are justified in calling attention to its potential for abuse. The comments of the Commissioner and the Director of Special Projects clearly demonstrate that abuse can occur if there is not a reasonably efficient and cost-effective way to evaluate objectively any claims that records cannot be released because they are solicitor-client privileged. The challenge for the Committee is to identify a means of objective evaluation that will be reasonably efficient and accessible to the average citizen, and will have minimal, if any, risk of adversely affecting the interest of the client entitled to the benefit or of society in the proper administration of justice. Maintaining the status quo does not meet these requirements.

Recommendations

The Committee recommends that

22. The revised *Act* contain a provision similar to existing section 21 respecting solicitor-client privilege.

23. The *Act* have no restriction on the right of the Commissioner to require production of any record for which solicitor-client privilege has been claimed and the Commissioner considers relevant to an investigation of a complaint.

24. The *Act* provide that the solicitor-client privilege of the record produced to the Commissioner shall not be affected by disclosure to the Commissioner pursuant to the *Act*.

25. The *Act* not contain any limitation on the right of a person refused access to a record, on the basis that the record is subject to solicitor-client privilege, to complain to the Commissioner about that refusal.

26. The *Act* contain a provision that would require the head of a public body, within 10 business days of receipt of a recommendation from the Commissioner that a record in respect of which solicitor-client privilege has been claimed be provided to the requester, to either comply with the recommendation or apply to a judge of the Trial Division of the Supreme Court for a declaration that the public body is not required, by law, to provide the record.

27. The *Act* contain provisions requiring that the application to the Trial Division for a declaration be heard by use of the most expeditious summary procedures available in the Trial Division.

28. The *Act* contain provisions prohibiting the imposition, by any public body, of conditions of any kind on access by the Office of the Information and Privacy Commissioner to a requested record for which solicitor-client privilege has been claimed, other than a requirement, where there is a reasonable basis for concern about the security of the record, that the head of the public body may require the Office of the Information and Privacy Commissioner official to attend at a site determined by the head of the public body to view the record.

29. The *Act* contain a provision that prohibits disclosure by the head of a public body of information that is subject to solicitor-client privilege of a person that is not a public body.

3.6 Business interests of a third party

"Well, I guess I can say do we have a right to know what the public body paid for a stapler. It is not the Colonel's secret that we're asking for. It is not for the components that go into manufacturing a widget…"

Barry Tilley, Presentation to the Committee

On any given day in Canada, there are thousands of active tender calls from all levels of government. The Government of Newfoundland and Labrador estimates it spends close to $2 billion a year on goods and services.[156] Most of those tenders for providing governments with goods and services will be won by private sector businesses, and by virtue of winning a bid, the contract becomes subject to federal and provincial access to information laws.

The laws in place in Canada and the other countries the Committee examined protect the same basic types of information:

- Trade secrets (industrial secrets in Quebec; commercial, industrial, fiscal, bank, or fiduciary secrets in Mexico)
- Commercial, scientific, technical, and financial information, and information related to labour relations (streamlined definitions in New Zealand and the United Kingdom protect commercial interests)

Canadian access laws generally stipulate that the protection for business interests involving third parties is mandatory, which means that a public body must apply the test that is set out in the Act. Under section 27 of the *ATIPPA*, for example, information that is "commercial, financial, labour relations, scientific or technical" must be withheld if it meets tests such as harming the competitive position of a third party or resulting in significant financial loss or gain.

The essential question is how far should protection extend to prevent harm to *legitimate* commercial interests?

Pre– and Post–Bill 29 legislation

Before the amendments resulting from Bill 29, the *ATIPPA* had a three-part test to determine whether a request for business information could be denied. In order to be held back, the information requested had to meet three conditions:

- It had to reveal a trade secret, or commercial, financial, labour relations, scientific or technical information of a third party.
- The information had to be supplied implicitly or explicitly, in confidence.
- Disclosure would reasonably be expected to result in any one of the following:
    - harm *significantly* the competitive position or interfere *significantly* with the negotiating position of a third party
    - result in similar information no longer being provided to the public body when it was in the public interest to do so
    - result in *undue* financial loss or gain to any person or organization
    - reveal information supplied to a person appointed to resolve or inquire into a labour relations dispute

The Bill 29 amendments substantially altered the landscape around third party business interests. It became easier for public bodies to withhold information. The public body could now withhold information if it concluded that any one part of the test applied. All three were no longer required. Once that was established, it could deny a request for information under section 27.

A second change in the Bill 29 amendments involved

156 NL Government Purchasing Agency *Annual Report 2012-13*, p 10.

the notice to a third party when information has been requested that might relate to section 27. Before Bill 29, the public body was required to give notice only if it **intended** to release the information in question. The Bill 29 amendment made it mandatory to give notice, even if the public body was only **considering** whether to give access.

Other relevant law

Third party business interests are among the most frequently adjudicated sections of access laws in Canada. As a result, this area of the law has come to be well understood. Third parties have to do more than simply claim they will be harmed, if they hope to oppose successfully the disclosure of information.

Canadian law and practice crystallized with a series of Federal Court decisions beginning in 2006, which culminated in a Supreme Court of Canada decision involving an access request for records involving a new drug being developed by Merck Frosst.[157] The decision highlighted the necessity of demonstrating **harm**. The Information Commissioner of Canada commented on the ruling in her Annual Report for 2011-12:

> The Supreme Court confirmed that the exemption in paragraph 20(1)(c) requires a third party to demonstrate "a reasonable expectation of probable harm." A third party relying on this exemption must show that the risk of harm is more than a mere possibility but need not establish on a balance of probabilities that the identified harm will, in fact, occur. Merck did not meet the requirements in this case.[158]

Newfoundland and Labrador public bodies are guided by three sources, the ATIPP Office *Access to Information Policy and Procedures Manual*, the reports of the OIPC, which reflect Canadian practice, and the recent decision of the Supreme Court Trial Division in *Corporate Express Canada, Inc. v The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski.*[159]

The *Access to Information Policy and Procedures Manual* produced by the Office of Public Engagement ATIPP Office stresses that there must be "a reasonable expectation of probable harm," but that it is not necessary "to demonstrate that actual harm will result or that actual harm resulted from a similar disclosure in the past."[160] The guide defines the various words and terms used in section 27, but it does not shed much light on how those words and terms are interpreted by access to information practitioners, nor does it rely heavily on Canadian judicial decisions.

A helpful approach to assessing "harm" under section 27 is contained in a May 2013 report by the OIPC, its first assessment of the post-Bill 29 version of section 27. In Report *A 2013-008*, the Commissioner relied on the definition of harm quoted in Ontario Order PO-2195:

> Under part 3, the Ministry and/or OPG must demonstrate that disclosing the information "could reasonably be expected to" lead to a specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[161]

This position was reinforced in the September 2014 decision of the Trial Division in *Corporate Express.* In stating that "the burden of proof of probable harm is on the party resisting disclosure," Justice Whalen concluded the evidence from Corporate Express was "vague and speculative and insufficient" to prove that permitting access to the documents in question (reports showing contract and non-contract office materials supplied to Memorial University) brought reasonable expectation of probable harm to the competitive position of Corporate Express, or that there would be significant financial loss resulting in damage to the company's business interests.[162]

157 *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23 [*Merck Frosst*].

158 Canada Information Commissioner *Annual Report 2011-12,* p 30.

159 2014 NLTD(G) 107 (presently under appeal), [*Corporate Express*].

160 NL, *Access to Information Policy and Procedures Manual (*2013), p 67.

161 OIPC, *Report A-2013-008,* 17 May 2013, p 8.

162 *Corporate Express*, *supra* note 159 at para 46.

Practices in Alberta and British Columbia

A recent decision from the British Columbia Information and Privacy Commissioner connects the dots in terms of a third party claim that it would be harmed by disclosure of certain records. The case involved a towing company (Jack's) in the City of Abbotsford, and a request for records. The City informed Jack's that it would release emails to the applicant, prompting Jack's to ask the Commissioner to review the City's decision on the grounds that its interests would be harmed:

> [37] Jack's submissions on harm are brief. They say that releasing the emails could reasonably be expected to harm their competitive position or interfere with their negotiating position with the City or with other potential customers. They also say that the emails could reasonably be expected to result in undue gain for a competitor, namely the applicant. This amounts to no more than an assertion that Jack's meets the s. 21 test. Without evidence in support of the assertion, Jack's falls well short of proving its case.[163]

That same decision also set out guidance for addressing an issue that has arisen in requests for access in Newfoundland and Labrador. It involves applicants asking for details in public tenders:

> [38] As to Jack's argument that revealing contract terms would affect its competitive position, this issue has been dealt with in numerous previous orders. It is clear that the disclosure of existing contract pricing and related terms that may result in the heightening of competition for future contracts is not a significant harm or an interference with competitive or negotiating positions. Having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather it is an inherent part of the bidding and contract negotiation process.[164]

Public officials can find strong guidance in decisions such as the one cited above, and in the type of document produced by the Alberta Information and Privacy Commissioner. The *FOIP Guidelines and Practice (2009)* defines the words and terms in the *Freedom of Information and Protection of Privacy Act*, and supplements that information with pithy statements that contain case examples of what the Act means:

> *Scientific information* is information exhibiting the principles or methods of science (*IPC Order 2000-017*). Applying this definition, the Commissioner decided that operating manuals forming part of a photo radar contract between a public body and a third party contained scientific and technical information (*IPC Order 2000-017*).[165]
>
> *Commercial information* includes the contract price as well as information that relates to the buying, selling or exchange of merchandise or services (see *IPC Order 96-013*). Commercial information may also include a third party's associations, history, references, bonding and insurance policies (see *IPC Orders 97-013* and *2001-021*).[166]

163 BC IPC *Order F13-20*, 2 October 2013, p 10.

164 *Ibid.*

165 Alberta OIPC, *FOIP Guidelines and Practices* (2009), p 103.

166 *Ibid* 102–103.

What we heard

There was overwhelming comment from both the oral and written submissions that the changes to the *ATIPPA* in 2012 tipped the balance toward non-disclosure. It is noteworthy that a businessman and a business advocacy group were among those calling for fewer restrictions on the release of third party business information, while two public authorities—Memorial University and Nalcor Energy—were the only groups to support keeping the law as it is.

This is somewhat similar to the situation confronting John Cummings when he carried out the previous *ATIPPA* statutory review in 2011, prior to the changes brought about by Bill 29. Mr. Cummings reported that the main push for change came from public bodies. They

expressed concern that section 27 "didn't adequately protect business information provided by third parties" and that "some businesses may avoid working with the province" unless the law was changed. Mr. Cummings accepted the concerns and recommended the *ATIPPA* be amended along the lines of Manitoba's *Freedom of Information and Protection of Privacy Act.*[167] Mr. Cummings said several agencies and departments advocated for change, including the Labour Relations Agency; the Departments of Justice, Business, Natural Resources, and Fisheries and Aquaculture; the Executive Council; and "many municipalities and other public bodies."

This Committee gained some insight into a particular concern that the *ATIPPA* provided insufficient protection for the business interests of a third party. Nalcor Energy explained that in 2007 or 2008, progress was "slowing" in their negotiations to obtain an interest in an existing offshore oil project. The large oil companies involved in the project "had serious concerns" that the language in the *ATIPPA* was not "typical of what an ongoing business concern would have." The solution at that time was not to amend the *Act*, but to add provisions to the *Energy Corporation Act,* then under development. Nalcor Energy's Vice President (Oil and Gas), Jim Keating, told this Committee he believed such a move was necessary, as "it seemed that this risk was something that was unbearable for the offshore oil and gas companies." [168]

Nalcor Energy submitted that the enhancements to section 27 in the 2012 amendments balanced the requirement for providing information to government while at the same time ensuring companies will not be harmed in the process. Memorial University similarly addressed the balance it believes is provided by the current section 27. The university said the section allowed transparency as far as public bodies are concerned, while "maintaining a degree of confidentiality for certain types of information."[169]

Those positions by the two public bodies were vigorously challenged by the Canadian Federation of Independent Business and by Barry Tilley, the president of the office supplies firm Dicks and Company. Mr. Tilley argued the changes brought about by Bill 29 affected accountability and reduced competition. He discussed his company's legal battle with Corporate Express, a subsidiary of Staples. The dispute was about Corporate Express's refusal to allow Memorial University to show Dicks and Company documents that revealed the volume, type, and prices of supplies the institution purchased from the company. Corporate Express defended its decision to bar Dicks and Company from seeing the information under section 27. Mr. Tilley concluded: "heightened competition is not the harm that should be protected by the *ATIPPA*."[170] The Supreme Court ordered release of the data under the existing law. However, Corporate Express has appealed the ruling.

Transparency and accountability were also themes that the Canadian Federation of Independent Business advocated. Vaughn Hammond, the CFIB's Executive Director of Provincial Affairs, argued for a return to the pre–Bill 29 provisions of section 27, to establish an "appropriate balance" between government accountability and business practice. He told the Committee that disclosure of information when dealing with the public sector "is a cost of doing business," and business should expect "that transactions with government bodies will be made public."[171] In a supplementary submission on August 29, Mr. Hammond stated: "As it relates to section 27, changes have made it easier for a public body, and by extension, third parties to deny information regarding business interests."[172]

Journalists expressed concern that section 27 is being used as a shield to prevent disclosure of information. Ashley Fitzpatrick, a reporter with the *Telegram*, commented that while section 27 is "often cited" in access refusal letters, "the case-specific reasons behind a claimed inability to release information are rarely

167 Cummings Report (2011), p 48.
168 Nalcor Energy Transcript, 20 August 2014, pp 27–28.
169 Memorial University Submission, 13 August 2014, p 17.
170 Dicks and Company Submission, 17 July 2014, p 7.
171 CFIB Submission, 25 June 2014, pp 6–7.
172 CFIB Supplementary Submission, 29 August 2014, p 1.

given."[173] Ms. Fitzpatrick's colleague James McLeod felt the language in sections 27 and 28 is too broad and that it "allows private corporations to help imagine reasons why information should be withheld."[174]

Both the Liberal Party and NDP advocated a return to the pre–Bill 29 language. Liberal Leader Dwight Ball argued the three-part harms test, abandoned with the 2012 amendments, is a "necessarily" high standard that "ensures appropriate access to information." Mr. Ball said the party's access requests have been denied 15 times under section 27, making it the fourth most commonly cited section in rejections.[175] The NDP contended the Bill 29 amendments "permit business to be more secretive about their dealings with government," and felt that in any event, commercially sensitive information already had strong protection under the law.

The Centre for Law and Democracy favours a strict application of section 27, so that it applies only to information whose release would harm the commercial interests of third parties.[176]

The Office of the Information and Privacy Commissioner recommended returning to the three-part test and the language in the *ATIPPA* before Bill 29. The Commissioner contended this approach "strikes the right balance" for assessing the third party business exemption claim and that it represents the "gold standard" in Canada, with five provinces currently taking that approach.[177]

In his Supplementary Submission, the Commissioner restated his support for the three-part test because it is well understood in Canada, having been interpreted by the Supreme Court of Canada as well as lower courts and Commissioners. He also cited support from the local business community in their comments before the Committee.[178]

173 Fitzpatrick Submission, 25 July 2014, p 10.
174 McLeod Submission, June 2014, p 3.
175 Official Opposition Submission, 22 July 2014, p 18–19.
176 CLD Submission, July 2014, p 9.
177 OIPC Submission, 24 June 2014, p 29.
178 OIPC Supplementary Submission, 29 August 2014, p 13.

Analysis

The discussion over section 27 is a tussle over how to properly balance the public's interest in transparency and accountability against an appropriate level of non-disclosure to prevent harm to business interests. The submissions to the Committee, both oral and written, reflected these divergent views.

Journalists regarded section 27 as being so broad that it stymied the quest for business information that should be made public, while two business interests felt the current wording of the section works against the transparency and openness that the *Act* is intended to promote. The two public bodies that advocated keeping the *Act* as it is want to ensure that the *Act* provides a proper level of comfort for business in their engagement with public bodies.

The heightened interest in section 27 arose from the amendments to the *ATIPPA* in June 2012, which reduced the threshold for proving that documents and information should be withheld. The main impact of the changes in the law was on those making access requests, including business, journalists, and the opposition political parties. They have cited several cases to the Committee where documents have been withheld, including documents of a type that were formerly available. In the only case adjudicated by the courts since the changes brought about under Bill 29, the Supreme Court Trial Division ruled that a claim to withhold documents must be accompanied by "clear, convincing or cogent evidence" either that the requested information was supplied in confidence or that release would harm its competitive position or result in financial loss.[179]

As stated above, the Trial Division's ruling in

179 *Corporate Express*, *supra* note 159, Summary.

Corporate Express followed the law that has been developing since the *Merck Frosst* decision at the Federal Court in 2006. Information Commissioners across Canada have consistently treated speculation about harm as an insufficient reason to withhold information under the exemption that protects business interests of a third party. The Supreme Court of Canada in *Merck Frosst* ruled the standard for claiming harm has to be more than possible or speculative, but need not be likely or certain.[180]

The Office of Public Engagement ATIPP Office *Access to Information Policy and Procedures Manual* incorporates the principles of this jurisprudence, and emphasizes the nuances of the concept of harm as determined by the Supreme Court of Canada, and the "one-part harms test" established under the June 2012 *ATIPPA* amendments.

Other jurisdictions

Prior to Bill 29, Newfoundland and Labrador law regarding business interests of a third party was similar to laws in Ontario, Alberta, British Columbia, Nova Scotia, and Prince Edward Island. With the changes brought about by Bill 29, the *ATIPPA* provisions on business interests of a third party are now similar to those of Manitoba, New Brunswick, Saskatchewan, and the Northwest Territories.[181]

180 *Merck Frosst*, *supra* note 157 at para 192.

181 OIPC Submission, 24 June 2014, p 29.

Conclusion

The amendments brought about by Bill 29 effectively broadened the exceptions by weakening the test to be applied to business interests of a third party. The amendments eliminated the requirement for establishing that all three factors had to be present to cause harm, and replaced it with a provision that any one of them was sufficient to invoke the exception.

It is clear from the Cummings review that public bodies played a very persuasive role in the recommendation to lessen the test in section 27. There is no indication whether the public bodies presented in public, or whether their comments and recommendations were tested by interests with different or opposing views.

Changes brought about by the 2012 *ATIPPA* amendments seemed to be primarily the result of worried public officials who were concerned that bad things might happen if changes were not made in the law. That is ironic, because Canadian judicial decisions and practice reports from Information Commissioners are based on the notion that the perceived harm to business interests must be more than speculative. That interpretation of the law does not regard "worry" or "concern" as valid reasons to withhold information.

Yet the apprehension of harm was expressed many times to Mr. Cummings:

- Many public bodies "expressed concern."
- The Labour Relations Agency indicated that many of their stakeholders did not believe section 27 adequately protects their interests.
- Several public bodies found section 27 confusing.
- The Department of Business argued that "without this protection, companies could be deterred from entering into business discussions with the Province."
- The Departments of Business and Justice were concerned about the high standards of proof applied by the Commissioner's Office.

If there are not high standards of proof for invoking the section 27 exemption, then it could appear that a major objective of the *Act* is to protect business interests of third parties. Section 27 is linked to the purpose of the *Act*, which is expressed as giving the public a right of

access, subject to the need, in limited circumstances, to withhold information.

The public has an interest in understanding the interplay between government and the businesses that provide goods and services to public bodies. Hundreds of millions of tax dollars are spent each year to build and maintain roads, to construct buildings such as hospitals and schools, and to buy supplies that include everything from paper clips to vehicles to MRI units. People have a right to know tax dollars are being spent as the legislature intended, and that their government is getting the best value. It can only be certain of that if it has maximum access to information. Otherwise, openness and transparency are a political mirage.

This Committee is satisfied that the legitimate interests of business are protected through the application of the three-part test that existed in the *ATIPPA* prior to the Bill 29 amendments. The three-part test is the law in several of Canada's biggest provinces. The Committee believes the growing body of legal decisions around business interests of third parties has brought certainty and stability to this part of the law.

Section 28 is related to section 27 in that it provides for notifying the third party when the public body is **considering** whether to provide access to information covered by business interests of a third party. Mr. Cummings made this recommendation on the suggestion of the Commissioner's Office.[182] Prior to the amendments, third parties were notified if the public body **intended** to give access to a record covered by section 27.

It is the Committee's view that the notification required by section 28 amounts to a doubling of the consideration that third parties receive under the *ATIPPA,* since they have a 20-day period to consider whether to object to a disclosure once they receive a written notice. It might also be argued that the requirement to provide notice in the consideration stage provides the third party with the opportunity to influence the public body in its initial determination on whether records should be disclosed.

The Committee concludes that it is appropriate for the public body to notify the third party when it has formed the intention to release the information, and to provide formal notice to the third party when the actual decision to release is made.

182 Cummings Report (2011), p 52.

Recommendations

The Committee recommends that

30. Section 27(1) of the *Act*, respecting third party business interests, revert to the wording that exsited prior to the Bill 29 amendments.

31. Section 28(1) of the *Act*, respecting notice to third parties, revert to the pre–Bill 29 wording of "intention" rather than "consideration."

Chapter Four

RECORDS TO WHICH THE *ATIPPA* DOES NOT APPLY

> "And I really do believe strongly and I agree with Commissioner Ring when he says whenever — whenever we want to carve out exceptions to the general application of the access Acts…there has to be a very, very strong policy case made that this is absolutely necessary in that in fact the general provisions under the *Act* cannot apply appropriately."
>
> — Suzanne Legault, Federal Information Commissioner, Presentation to the Committee

The provision that specifies that the *ATIPPA* applies to "all records in the custody of or under the control of a public body" continues, in the same sentence, also to set out exceptions. Both the broad application of the statute and the exceptions are contained in section 5(1):

> 5.(1) This Act applies to all records in the custody of or under the control of a public body but does not apply to
>
> (a) a record in a court file, a record of a judge of the Trial Division, Court of Appeal, or Provincial Court, a judicial administration record or a record relating to support services provided to the judges of those courts;
>
> (b) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;
>
> (c) a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;
>
> (c.1) records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act*;
>
> (d) a personal or constituency record of a minister;
>
> (e) [Rep. by 2002 c16 s2]
>
> (f) [Rep. by 2002 c16 s2]
>
> (g) a record of a question that is to be used on an examination or test;
>
> (h) a record containing teaching materials or research information of an employee of a post-secondary educational institution;
>
> (i) material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person, agency or organization other than a public body;
>
> (j) material placed in the archives of a public body by or for a person, agency or other organization other than the public body;
>
> (k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;
>
> (l) a record relating to an investigation by the Royal Newfoundland Constabulary if all matters in respect of the investigation have not been completed; or
>
> (m) a record relating to an investigation by the Royal Newfoundland Constabulary that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter.

It should be noted that Bill 29 made only a limited change to this provision of the legislation. The only change was to add items (l) and (m) to the list of documents to which the *ATIPPA* does not apply.

Some people who presented to the Committee questioned whether certain of those records should be exempt from the *ATIPPA*. Others suggested that, in responding to a request for a review or investigating a complaint, the Commissioner should be able to require production of a record if a public body claims it is exempt from application of the *Act*, so that the Commissioner can affirm or dispute that claim. This was an issue on which the Commissioner placed great emphasis.

The Commissioner has challenged the interpretation of section 5(1), that the Commissioner has no jurisdiction to require production of records listed in that section because the legislature has expressly stated that *ATIPPA* does not apply to the records listed in section 5(1). The Government, however, has supported that interpretation. In three separate court challenges, the Commissioner has argued that the fact that the *Act* does not apply to those records does not preclude his jurisdiction under subsection 52(2) to

> **require any record in the custody or under the control of a public body** that the commissioner considers relevant to an investigation to be produced to the commissioner **except any record which contains information that is solicitor and client privileged or which is an official Cabinet document under section 18.** [emphasis added]

All three decisions[1] have been decided against the Commissioner at the trial level. The third decision is before the Court of Appeal.

1 *Newfoundland and Labrador (Attorney General) v Newfoundland and Labrador (Information and Privacy Commissioner),* 2010 NLTD 19; *The Information and Privacy Commissioner v Newfoundland and Labrador (Business)*, 2012 NLTD(G) 28; and *Ring v Memorial University of Newfoundland*, 2014 NLTD(G) 32.

What we heard

From organizations

The OIPC

The OIPC submission referred to Justice Fowler's decision that the Commissioner could not require production of records listed in section 5(1).[2] The Commissioner told the Committee that in the first years of the Office, the OIPC conducted reviews involving records identified in section 5, as well as section 18 (Cabinet confidences) and section 21 (solicitor-client privilege). The submission mentions four OIPC reports in which section 5 was "applied or commented upon" and writes that "in some cases the Commissioner agreed that the record was covered by section 5(1). In other cases, he found it was not." The submission expresses disappointment that the government "chose to initiate this process," by which it is assumed he means the court challenge to his jurisdiction. It also emphasizes that Justice Fowler's conclusion that he did not have jurisdiction to require production of section 5 records "has had a significant negative effect on the ability of this Office to do its job."

With respect to the nature of the records involved, the submission states that "Justice Fowler appeared particularly concerned" that one of the categories section 5 purported to exclude from application of the *ATIPPA* is "judge's notes", and states that Justice Fowler "could not reconcile how the Commissioner could have the ability to conduct such a review involving judge's notes." The submission then suggests that this factor "appeared to play a significant role in his decision." However, the submission appears to resolve Justice Fowler's concern by noting that the definition section makes it clear that courts are not public bodies, and observing that it is

2 *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner),* 2010 NLTD 19.

difficult to imagine how the concern Justice Fowler had could ever arise. The submission then asserts there should be no restriction whatsoever on the ability of the OIPC to require production of any record held by a public body. It recommended legislative changes to what are now subsections (2) and (3) of section 52, to clarify that the Commissioner has the authority to compel the production of any record, including those listed in section 5(1), for the purpose of determining whether or not the Commissioner has jurisdiction over those records.

The Federal Information Commissioner

Ms. Legault observed that any exceptions to the application of access legislation are difficult to administer. She also suggested that exceptions increase the difficulty for applicants because they increase uncertainty as to what law applies. The situation results in two parallel systems making different provisions with respect to access. She also observed that exceptions are generally unnecessary:

> As I said, every time I look at these specific exemptions or exclusions in the parallel system we almost invariably find that the general regime does provide the appropriate protection.[3]

The Government, Genevieve Dooling, Deputy Minister, Child, Youth and Family Services

Ms. Dooling brought to the attention of the Committee a concern that existing reference checks done on potential parents in adoption procedures could be accessible under *ATIPPA*. She explained that such an event has not yet occurred. It could occur, she explained, only in particular circumstances: when all the detailed assessments had been completed, and only if at the last moment some factor compelled a decision that the child and the proposed adoptive parents were not a good match. In that case, the adoption could not proceed, and they would look for another child to be an acceptable match for those proposed parents.

Using the Committee chair and his wife as an example of potential adoptive parents, she explained her concern:

> We might think Mr. Wells and his wife, we still want to keep them on the list, it is just this child isn't the right child for Mr. Wells and his wife. We may continue on with the process and I may introduce you to a second child, another child, but if you have access to all of my clinical assessments and my references beforehand how you react when I present the second child to you may not be the way you would without that information and that clinical assessment. So really, I could be putting the second child at risk by giving you all the clinical assessments of you and your wife and how you behaved towards the first child. Now it is very rare. It is very rare.[4]

Ms. Dooling summarized her position by explaining that the records she was concerned about constituted personal information of the proposed adoptive parents, and that fact might entitle the parents to access the records under *ATIPPA*. She asked if the matter could be addressed in this review by the Committee. The Committee observed that, as the matter exclusively concerned adoption, it might best be addressed by asking the legislature to do so by means of the *Adoption Act, 2013*.

The College of the North Atlantic

In its written submission, the college explained its role in providing educational services under contract, and wrote:

> The college offers a broad range of full and part-time certificate, diploma and advanced diploma programs in academics, applied arts, business, engineering technology, health sciences, information technology, industrial trades, tourism and natural resources. These programs are offered at our 17 campus locations in the province, in China through partnerships with eight post-secondary institutions, and globally through distance education. The college is also currently engaged in a contract with the State of Qatar to operate a technical college located in Doha, Qatar.
>
> In addition to our main line of business of providing full and part-time academic programs, the college is also involved in other lines of business such as:

3 Information Commissioner of Canada Transcript, 18 August 2014, p 86.

4 Government NL Transcript, 19 August 2014, p 214.

- Providing contract training programs and courses to the meet the needs of business, industry or government.
- Providing continuing and community education programs and courses to encourage learning opportunities for communities and citizens.
- Conducting applied research projects that support the development and commercialization of new technologies, patents, licenses, and products.
- Conducting industry engagement projects that assist organizations with the development of innovative products, processes and business models that enable them to be competitive in a global economy.[5]

Because of its international business role, one of the recommendations the college made was to

> Amend section 5(1) of the *ATIPP Act* to exclude records where the public body is acting as a Service Provider under a contract to perform services for a third party client, or amend section 5(1) of the *ATIPP Act* to apply to only those records in the custody and under the control of a public body.[6]

Memorial University

The university made a substantial written submission. With respect to section 5(1), the university expressed general support for the exemptions from application of the *Act* in that section:

> Section 5 of the *ATIPPA* serves as recognition that the legislation is intended to apply to core government and its agencies and their role in setting priorities and public policy, overseeing the bureaucracy and in their responsibility for decisions taken. *ATIPPA*'s exclusion of the judicial and political branches and certain academic endeavours that respect faculty autonomy are appropriate. Below we discuss research which, together with teaching materials, ought to remain as an excluded category.[7]

In addition, the university addressed, in particular, the importance of excluding research:

> It is not the university that conducts research; rather, researchers affiliated with the university conduct research. The university's obligations are to support research by ensuring it is undertaken according to the standards set out in the federal Tri-Agency Agreement on the Administration of Agency Grants and Awards by Research Institutions (the Agreement) and the Tri-Agency Framework: Responsible Conduct of Research (the Framework), that research funds are utilized appropriately and subject to established accounting practices, that researchers are fully aware of their obligations and responsibilities in research, and that they have the appropriate facilities to conduct their research and to store their results safely and securely. As an illustration of one of the ways research differs from administrative functions: should a researcher employed by the university leave the university and take up a post elsewhere, the project would not usually be left behind to be taken up by a successor or otherwise re-assigned by the institution as an operating program or activity. Normally, the researcher would take her research with her.
>
> It is vital that the scrutiny of university research, and the protection of human participants in research, remain the prerogative of those authorities that are best informed and equipped to undertake such activities…
>
> Thus, it is important to emphasize the distinction between records created by Memorial University as a "public body" under the *ATIPPA* and the work created by the academic community in the course of research. The exclusion of research, like teaching materials, recognizes as noted above that academic principles and autonomy of faculty within a university are not part of the public sphere that is covered by the *ATIPPA*.[8]

Based on those submissions, the university recommended to the Committee that the provisions of section 5(1) remain unchanged.

From the media

James McLeod of the Telegram

Mr. McLeod expressed his concern that, because the Commissioner is unable to require production of the record for review, the court interpretation of section 5 leaves the public body in a position to decide on its own that the *Act* does not apply to a record. At the public hearings, he referred to an application he was involved

5 College of the North Atlantic Submission, August 2014, p 2.
6 *Ibid* 3.
7 Memorial University Submission, 13 August 2014, p 6.
8 *Ibid* 6–7.

in where section 5 was invoked and the Commissioner could not access the records:

> This went to court, this was a long drawn out process but ultimately those records fall outside of the *Act* and the only thing we've got is the minister's say so that those documents are not responsive and therefore should not be released, it cannot be independently reviewed. Which, without jumping to conclusions, no independent review does not engender any confidence in the integrity of the system….in most cases it's a government minister's final decisions whether documents should be released is a glaring inherent conflict. Because in most of the situations…I'm asking for documents that will reveal things… that will be politically awkward.
>
> And in a lot of situations there is independent review but that takes weeks and months … in the case of Section 5 where it's things that fall outside of the *Act* … we've had trouble getting those documents to be reviewed by the Commissioner which I think is deeply problematic. So a solution to that would be explicitly spelling out in legislation that the Access Commissioner has power to review absolutely any documents within the government custody in the course of his investigations, period.[9]

Pam Frampton of the Telegram

Ms. Frampton expressed concerns similar to those of Mr. McLeod and stated her agreement with his presentation.

From individuals

Scarlett Hann

In her submission to the Committee, Ms. Hann did not refer to section 5(1) specifically, but she did comment that "our Commissioner's review of all requested documents would eliminate the opportunity for abuse, incorrect interpretation and/or misrepresentation."[10]

9 McLeod Submission, 26 June 2014, pp 6–7.
10 Hann Submission, 27 July 2014, p 1.

Issues

The issues that arise from the submissions, written and oral, and from the Committee's own comprehensive review of the *ATIPPA* are:

(i) Should the *ATIPPA* apply to any of the records listed in section 5(1)?

(ii) Should the *ATIPPA* specifically provide the Commissioner with powers to require production, for examination, of records described in section 5(1)?

Analysis

Issue (i): Should the *ATIPPA* apply to any of the records listed in section 5(1)?

The most recent of the decisions dealing with section 5, which is the Trial Division decision in *Ring v Memorial University of Newfoundland*,[11] has been appealed to the Court of Appeal. The Committee will therefore make no comment on the interpretation of the legislation as it presently exists. That deference to the Court of Appeal does not, however, mean that the Committee can avoid its mandate to make recommendations as to what a revision of the *ATIPPA* ought to provide. The Committee will therefore proceed with consideration of the recommendations it ought to make. That consideration will include identification of

11 2014 NLTD(G) 32.

those records to which the Committee considers the *Act* ought not to apply, and will include the role, if any, that the Committee considers the Commissioner ought to have in respect of records to which the *Act* does not apply.

Of the few participants commenting on the documents exempted by section 5, most were concerned about the Commissioner's inability to require production of records in order to ensure that the exemption was properly claimed. The Commissioner noted the three cases that have gone before the Trial Division dealing with his claim to the right to require production of such documents for his review. He also noted that in each of those decisions the courts decided that the only jurisdiction the Commissioner has under the *ATIPPA* is in respect of matters to which the *ATIPPA* applies.

The Committee has considered the description of records to which the *Act* is not to apply. It is understandable that no participant has identified any particular record that should be deleted from the list in section 5(1). Each record is clearly of a type to which the right to access information should not apply.

Judges' notes and other court documents of the kind described in paragraphs (a) and (b) are clearly off limits. Besides, it is a fundamental principle that all court proceedings are open to the public. The public can request to see and obtain copies of all court records relating to those proceedings. In special circumstances a judge may order that certain information, such as names of juveniles or victims of sexual assault, not be disclosed. Generally, proceedings and all records relating to proceedings are open to public viewing. Judges' notes, of course, are not.

Our political system has become ever more competitive. Political parties and politicians survive, in part at least, by keeping their intentions, strategies, and tactics confidential from their competitors. It is understandable that the *ATIPPA* should not apply to such records as those specified in paragraphs (c), (c.1), and (d).

The submission of Memorial University clearly establishes the basis on which the records in paragraphs (g) and (h) are excluded from the application of the *Act*. The fundamental strength of a university is academic freedom. Without it, the immense contribution universities have made to society over the centuries would never have been possible.

Records placed in a public archive by a person, agency, or organization that is not a public body must be subject to the direction of the person placing the record, not the exercise of rights to access under the *ATIPPA*. Items (i) and (j) must therefore remain excluded from the *ATIPPA*.

The remaining three items, (k), (l), and (m), are all records related to ongoing police investigations or prosecutions. Such records cannot be subject to the *ATIPPA*, for the obvious reason of the need to maintain the integrity of the administration of justice.

There is, however, one category of police investigation record that ought to be on the list and is not there. During a normal police investigation of crime, investigators may express suspicion that an individual, or several individuals, may be responsible for the crime. Frequently, reports are prepared expressing those suspicions. As the investigation continues, the police narrow the list of suspects, and ultimately charges are laid and the guilt or innocence of the charged person is decided by court processes. Those records that expressed suspicion of guilt of persons whom the investigation determined to be innocent, to the extent that they are retained in police or prosecution files, can never be disclosed, even after prosecution and conviction of the person ultimately charged. Such documents may express suspicion of totally innocent persons, usually with detailed reasons for that suspicion. No principle of access could ever justify making such records accessible to any person who might make a request under the *ATIPPA*. It would seem appropriate, therefore, to add another category:

> A record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

Issue (ii): Should the *ATIPPA* specifically provide the Commissioner with powers to require production, for examination, of records described in section 5(1)?

The Commissioner recommended that he have

unrestricted access to all records listed in section 5(1), with no exceptions. He was not asserting that the records should be made subject to the *ATIPPA* and, therefore, subject to disclosure. His position is that he should be able to examine the records to determine independently that they are indeed exempt from application of the *Act*. The only other comment we heard along the same lines came from two participants associated with the media, and from one individual in a written submission.

No participant put forward an argument as to why any specific item should be subject to examination by the Commissioner. The thrust of all arguments favouring review by the Commissioner was that the Commissioner should be able to determine his own jurisdiction. This, the Commissioner argues, means that he must be able to examine the record in order to determine whether it is, in fact, of a kind that is listed under section 5(1) and, therefore, the Commissioner does not have jurisdiction.

The Commissioner and the other three individuals who submitted that the Commissioner should be able to examine all records argue that unless the Commissioner is able to review such a record, it will be easy for a public body to falsely claim that it is a record to which the *Act* does not apply. The lack of independent review, in James McLeod's words, "does not engender any confidence in the integrity of the system."[12]

Undoubtedly, the Commissioner should not have the right to seek production of records related to courts and judges under item (a), and the notes, communications, and draft decisions of a person acting in a judicial or quasi-judicial capacity under item (b). Such powers in the Commissioner would offend the integrity of the administration of justice. For similar reasons, items (k), (l), and (m), relating respectively to incomplete prosecution proceedings, incomplete police investigations, and identity of confidential sources and information provided by such sources, should not be accessible to the Commissioner. Indeed, knowledge that the Commissioner had such information or might access it could, in some circumstances, place the Commissioner or his staff at risk.

Records of a kind listed in items (g), (h), (i), and (j) do not involve the risk to the integrity of the administration of justice that characterizes court, judicial, prosecution, and police investigation records. They are: (g) a question to be used on an examination or test, (h) teaching or research material in a post-secondary institution, (i) material placed in the Provincial Archives by a person other than a public body, and (j) material placed in the archives of a public body by other than a public body. It is difficult to imagine that harm could be caused by allowing the Commissioner to examine any such record to ensure that it falls into the category claimed.

Items (c), (c.1), and (d) are somewhat more problematic. Since they are at least connected to political interaction with the process of government, and frequently intermingled with governmental documents to which the *ATIPPA* would apply, the opportunity for abuse and the perception that such abuse occurs are genuine concerns. Making them subject to examination by the Commissioner, solely for the purpose of confirming that the claim to exemption under section 5(1) is valid, would not expose such records as are validly of the character claimed to loss of the exemption that the section presently provides.

The foregoing conclusions produce, with respect to Issue (ii), the following result:

1. The Commissioner should not be empowered to require production of records described in items (a), (b), (k), (l), and (m) of existing section 5(1). The Committee also concludes that the Commissioner should not be empowered to require production of "a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation."
2. The Commissioner should be granted express authority to examine records relating to disputes regarding records described in items (c), (c.1), (d), (g), (h), (i), and (j) of existing section 5(1), to determine whether those records fall within his jurisdiction or are properly claimed to be exempt from application of the *ATIPPA*.

12 McLeod Transcript, 26 June 2014, pp 6–7.

The Committee recommends that

32. The *Act* provide for all items listed in existing section 5(1) of the *ATIPPA* remaining on a list of items to which the *ATIPPA* does not apply.

33. One further item be added to the list of items in section 5(1) to which the *ATIPPA* does not apply, namely:

- a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

34. The *Act* provide for specific direction that the Commissioner is not empowered to require production of records presently described in items (a), (b), (k), (l), and (m) of existing section 5(1) of the *ATIPPA*, as well as the proposed new item referred to in Recommendation 33.

35. The *Act* provide for the granting to the Commissioner of express authority to require production of records relating to disputes regarding records described in items (c), (c.1), (d), (g), (h), (i), and (j) of existing section 5(1) of the *ATIPPA*, to determine whether those records fall within the Commissioner's jurisdiction or are properly claimed to be exempt from application of the *ATIPPA*.

36. Changes be made to section 53 of the *Act* that correspond to the changes in Recommendations 34 and 35 respecting the right of the Commissioner to enter offices of public bodies and to access and review records.

Chapter Five

LEGISLATIVE PROVISIONS THAT PREVAIL OVER THE *ATIPPA*

Several participants referred to the long list of statutory and regulatory provisions that prevail over the *ATIPPA*. Generally, this discussion did not deal with a specific statutory or regulatory provision prevailing over the *ATIPPA*. It was more an expression of apprehension about the possibility of access to information being prevented under any provision on that long list.

A second basis for criticism is the fact that under the existing legislative structure, government is permitted to add to that list at will through the confidential discussions of Cabinet, without any public notice or discussion until after the addition is made.

Some parties having an interest in certain provisions did, however, make representations respecting the justification for the provisions with which they were concerned prevailing over the *ATIPPA*.

Present legislative structure

Section 6(1) of the *ATIPPA* accords to the *ATIPPA* general priority over other statutes but section 6(2) allows for the designation of specific legislative provisions that will, nevertheless, prevail over the *ATIPPA*:

> 6(1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.
>
> (2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.

Section 73 confers power on the Lieutenant-Governor in Council to make regulations in respect of an extensive list of matters. The portion of it relevant to this issue is:

> 73. The Lieutenant-Governor in Council may make regulations ...
>
> (q) designating a provision of an Act or regulation to prevail over this Act or a regulation made under this Act;

Exercising that power, the Lieutenant-Governor in Council put in place the *Access to Information Regulations*. A portion of those regulations, as amended, identifies provisions that take precedence over the *ATIPPA*:

> **5.** For the purpose of subsection 6(2) of the Act, the following provisions shall prevail notwithstanding another provision of the Act or a regulation made under the Act:
>
> (a) sections 64 to 68 of the *Adoption Act, 2013*;
>
> (a.1) section 29 of the *Adult Protection Act;*
>
> (b) subsection 9(4) of the *Aquaculture Act*;
>
> (c) subsections 5(1) and (4) of the *Aquaculture Regulations*;
>
> (d) section 115 of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*;
>
> (e) sections 69 to 74 of the *Children and Youth Care and Protection Act*;
>
> (e.1) section 5.4 of the *Energy Corporation Act*;
>
> (f) section 8.1 of the *Evidence Act*;
>
> (g) subsection 24(1) of the *Fatalities Investigations Act*;
>
> (h) subsection 5(1) of the *Fish Inspection Act*;
>
> (i) section 4 of the *Fisheries Act*;
>
> (j) sections 173, 174, 174.1 and 174.2 of the *Highway Traffic Act*;
>
> (k) section 18 of the *Lobbyist Registration Act*;
>
> (l) section 15 of the *Mineral Act*;
>
> (m) section 16 of the *Mineral Holdings Impost Act*;
>
> (n) section 15 of the *Mining Act*;

(o) subsection 13(3) of the *Order of Newfoundland and Labrador Act*;
(p) sections 153, 154 and 155 of the *Petroleum Drilling Regulations*;
(q) sections 53 and 56 of the *Petroleum Regulations*;
(q.1) section 21 of the *Research and Development Council Act*;
(r) sections 47 and 52 of the *Royalty Regulations, 2003*;
(s) section 12 and subsection 62(2) of the *Schools Act, 1997*;
(t) sections 19 and 20 of the *Securities Act*;
(u) section 13 of the *Statistics Agency Act*; and
(v) section 18 of the *Workplace Health, Safety and Compensation Act*.

What we heard

From organizations

The OIPC

The OIPC made several points about the provisions that prevail over access to information legislation:

> It should be a standard feature of any review of the *ATIPPA* that regulations designating provisions in other legislation as taking precedence over the *ATIPPA* be reviewed to ensure their continued necessity. The *ATIPPA* itself has changed, and in some cases the specific legislation and its implementation may have changed, which may affect the necessity of designating each particular law. Any time a law is designated in the *ATIPPA* Regulations for this purpose, two criteria should be met — 1) it is essential for the purpose of the particular piece of legislation that certain information described therein not be disclosed, and 2) no existing provision in the *ATIPPA* is capable of providing the necessary assurance that such protection can be relied upon. The onus should be on each public body whose legislation is listed in section 5 of the *ATIPPA* regulations to make a convincing case for their continued inclusion in the regulations during each statutory review of the *ATIPPA*.[1]

The OIPC made three recommendations on the subject:

1. The *ATIPPA* should be amended to include a sunset clause ensuring that each provision designated as taking precedence over the *ATIPPA* will automatically expire unless the necessity of such precedence is reviewed in conjunction with each statutory *ATIPPA* review and renewed.
2. The *ATIPPA* should be amended to require that the Commissioner be consulted at least 30 days in advance of a decision to designate any further provisions from other laws as taking precedence over the *ATIPPA*.
3. The provisions currently listed in section 5 of the Regulations should be reviewed to determine whether it is necessary to continue to include each one.[2]

Nalcor Energy

Nalcor Energy is a provincial Crown-owned corporation that, in the words of its written submission, "acts on behalf of the people of Newfoundland and Labrador" with a mandate "to ensure the province obtains maximum benefits from Newfoundland and Labrador's natural resources." It is the corporation through which the province holds and manages its investment in the "generation, transmission and sale of electricity; the exploration, development, production and sale of oil and gas; industrial fabrication; and energy marketing."[3]

In its written submission Nalcor Energy expressed strong support for the *ATIPPA*, and stated its position to be that a "public body can only withhold information if the public interest in maintaining the exemption outweighs the public interest of disclosure."[4] The corporation's legal counsel fills the role of ATIPP coordinator,

1 OIPC Submission, 16 June 2014, pp 84–85.

2 *Ibid* 86.
3 Nalcor Energy Submission, August 2014, p 1.
4 *Ibid* 4.

and oversees the ATIPP process and timelines.

At the public hearing, Tracey Pennell, Legal Counsel and ATIPP Coordinator, and James Keating, Vice President (Oil and Gas), explained the corporation's position with respect to section 5.4 of the *Energy Corporation Act*. It gives the chief executive officer (CEO) of the corporation the right to declare a record to be commercially sensitive to the corporation or a third party. Such a declaration, when it is ratified by the board of directors, would entitle the corporation to refuse to disclose a record. They also explained the corporation's view of the need for section 115 of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* to prevail over the *ATIPPA*.

Mr. Keating gave an example to demonstrate his view that Nalcor Energy needs the protection offered by section 5.4:

> We had taken negotiations on two large offshore oil and gas projects. We had progressed to a point where progress was now slowing largely on the notion that if Nalcor Energy — which we are today, we were Energy Corporation then — were to be a minority interest partner, five percent or ten percent partner in a joint venture, the review both that we undertook with our external and internal counsels plus, of course, the review that our future partners took on the existing legislation as it was then — I think it was 2005 provisions — they had serious concerns that we wouldn't have found the protection, that typical of what an ongoing business concern would have, either in relation to their information, third party, or in relation to any other learnings we would have of our own on that and so they felt at risk. So this was in a time when, again, if you can imagine we were inserting ourselves into existing commercial documents amongst existing co-venturers on an ongoing project. Challenging. And as we went through the list of things that we needed to achieve to gain entry and of course to get benefit for the people of Newfoundland and Labrador, it seemed that this risk was something that was unbearable for the offshore oil and gas companies. So what we sought to do was look at that Act and say, well, where is it deficient. And I believe in section 27, in particular, the test was different. It was three parts of a test…
>
> And why this is important is because at that time when we were drafting these agreements there were notions of sovereign immunity. There were notions of legislative stability. So commercial companies, when they do a deal with state-owned enterprise, especially on 30-year oil developments, they want to know that the relationship that we're going to enjoy from here today, they can bank on, quite frankly. They have certainty in. And one would say that if you had, either where you're a Crown agent or Crown corporation and a government and even an arm's length body, which were given the responsibility to oversee an Act, that wasn't enough for the private sector partners to ensure protection of their information. So, that's why they wanted to make sure there is a clear line of sight to the head of the corporation body in case there was breach, intentional or accidental. So that's, I guess, some of the formulation.[5]

Mr. Keating argued that section 5.4 does not prevent the Commissioner from expressing his disagreement with the determination of the CEO and board of directors.

With respect to section 115 of the *Atlantic Accord Implementation Act,* in response to questions by the Committee, Mr. Keating explained the circumstances that make it necessary to provide security for the information involved.

> Obviously a single oil and gas project in Newfoundland and Labrador has the ability to provide 30, 40 billion dollars of nominal value over its lifetime. So for half a million people that's a big thing. Seismic data, seismic information is the cornerstone, the foundation by which all that ancillary activity is derived. And what we had faced for the last 20 or 30 years is basically chilling for that type of activity, in some ways due to the litigation of this particular applicant, number one. Number two, is market forces and what have you but it was incumbent on Nalcor to be an actor and to cure that.[6]

Canadian Federation of Independent Business (CFIB)

In addition to their initial written submission and their comments at the public hearings, the CFIB sent a letter to the Committee on 29 August 2014. In it, the CFIB commented on the sections of other statutes that prevail over the *ATIPPA* as listed in the *Access to Information Regulations*:

5 Nalcor Energy Transcript, 20 August 2014, pp 27–32.
6 *Ibid* 48.

For clarity, it should be understood that the provisions in the *ATIPPA* should prevail over sections in other Acts. There should be no reason for other legislation to make reference to provisions in the *ATIPPA*. If Government is to have access to information legislation, it is necessary to have the *ATIPPA* as the overarching umbrella legislation for these purposes. Further, Cabinet can make any amendments to the regulations to ensure provisions in another Act prevail. As a result, there is access to information legislation, but it is possible that these do not apply because the head of a body can rely on special sections in another piece of legislation. This leads potentially to different treatment on how information can be released and even if it is released at all.[7]

As a result, the CFIB recommended:

Re-consider the number of legislative exceptions provided in the regulations. Small business owners do not have the time and resources to understand fully what is required of them under the legislation that affects them. Currently, the legislative exceptions identified in the regulations bring confusion as to how information is treated. Reducing the number of exceptions in the regulations may contribute to a solution.[8]

From individuals

Dr. Gail Fraser, Faculty of Environmental Studies, York University

Dr. Fraser expressed concern about section 115 of the *Atlantic Accord Implementation Act* prevailing over the *ATIPPA*:

This particular section of the Atlantic Accord and its federal counter-part (section 119) represents a significant obstacle in understanding the environmental impacts of offshore oil and gas in waters off NL. Over the past decade, my colleagues and I have placed various requests for environmental data, specific to the offshore oil industry in NL, under the federal Access to Information and Privacy Act. Some of these requests have been successful, others have not, what is important is that the current legislation allows industry to decide what information is disclosed while operating in public waters. The regulator, the Canada-Newfoundland and Labrador Petroleum Board is bound by Atlantic Accord legislation, thus they do not appear to have much maneuverability in what is disclosed. In 2013, the Auditor General recommended greater transparency and the C-NLOPB agreed while acknowledging legislative constraints. While there was a recent change to the federal Atlantic Accord Act in transparency, it did not appear to include environmental data. Thus, the deferral of *ATIPPA* to the Atlantic Accord is problematic and is an obstacle to disclosure and transparency.[9]

Terry Burry

Mr. Burry said that Nalcor Energy should be treated no differently from Eastern Health Authority or the Department of Health and Community Services. It was his understanding that the only person who can release information about Nalcor Energy is the CEO. He recommended that should be changed and that Nalcor Energy should be treated the same as any government department or agency.

7 CFIB Submission, 29 August 2014, p 1.
8 *Ibid* 2.
9 Fraser Submission, 16 August 2014, p 1.

Issues

(i) Should the criteria proposed by the Commissioner be adopted as the standard by which to determine whether specified provisions of certain statutes and regulations should prevail over the *ATIPPA*?
(ii) Should any of the sections of the statutes and regulations listed in the *Access to Information Regulations* be removed?
(iii) Should the list of legislative provisions that prevail over the *ATIPPA* be decided by the legislature and become part of the *Act*, or by the Lieutenant-Governor in Council as a regulation

alterable at any time without reference to the legislature?

(iv) Should every committee conducting a review of the *ATIPPA* assess each statute to determine whether it should stay on the list of those that prevail over the *ATIPPA*?

Analysis

Issue (i): *Should the criteria proposed by the Commissioner be adopted as the standard by which to determine whether specified provisions of certain statutes and regulations should prevail over the ATIPPA?*

The Commissioner's proposed changes are detailed above. In summary, he claims the list of provisions should be re-examined with every five-year review of the *ATIPPA*, and continuation on the list should automatically expire unless it is renewed by that process. He suggests that the onus should be on each public body concerned "to make a convincing case for their continued inclusion in the regulations during each statutory review of the *ATIPPA*." The Commissioner also proposed two criteria to help determine whether a provision should appear on the list:

> any time a law is designated in the *ATIPPA* Regulations for this purpose, two criteria should be met — 1) it is essential for the purpose of the particular piece of legislation that certain information described therein not be disclosed, and 2) no existing provision in the *ATIPPA* is capable of providing the necessary assurance that such protection can be relied upon.[10]

The Committee agrees that it would be good practice to review the list in conjunction with each five-year review. We do not agree that it is desirable to expressly state that an onus is on each public body concerned to make a convincing case for continued inclusion of provisions for which that public body had responsibility. That would be tantamount to automatic exclusion unless somebody from each public body concerned appeared and made a convincing case every five years, whether or not it was obvious that the provision should remain. A better approach would be for a committee doing a five-year review to indicate which provisions, if any, it believed should be considered for removal from the list. In that way the public body concerned would be forewarned and take steps to make a convincing case for continued inclusion at the next five-year review.

The Commissioner did not say so explicitly, but it seems reasonable to conclude that he would expect continued inclusion of a provision to be determined on the basis of the same criteria as he suggested for original placement of a provision on the list, but applied to then current circumstances. The Committee agrees with the first of the two criteria suggested by the Commissioner, but sees the second as too narrow in its focus. Access to information is important, but it is not the only important aspect of the process of government, or necessarily the most important. Priorities in government cannot be determined by viewing issues only through the lens of access to information. The second of the two criteria is more appropriately expressed as: whether the nature of the activity that is regulated by the statute controlling access to the records at issue is such, that the public interest is best served by control of access to related records being regulated under provisions of the statute that provides comprehensively for all other aspects of that activity, or by the *ATIPPA*.

With respect to this five-year review, no public body has been forewarned and so none, with the exception of Nalcor Energy, has had an opportunity to express its views to the Committee. The Committee will, nevertheless, review each provision on the list, taking account of the importance of the *ATIPPA* provisions and the nature and importance of the activities regulated by the legislative provisions on the list that prevail over the *ATIPPA*.

10 OIPC Submission, 16 June 2014, p 84.

The *ATIPPA* is the legislation by which the House of Assembly enables people to access the information necessary to hold government to account. It is inconsistent with transparency in government and the other principles underpinning the *ATIPPA* for government (Cabinet) to circumvent the desired transparency and accountability by the simple action of "prescribing," in a regulation, information to be "confidential" and thereby placing it beyond the normal *ATIPPA* tests for disclosure of information.

In the absence of either specific designation by the House of Assembly that the legislative provision is to prevail over the *ATIPPA*, or it being obvious from the nature of the activity regulated that the public interest is best served by control of access to related records being regulated under provisions of the statute that provides comprehensively for all other aspects of that activity, that provision should not be on the list.

The Commissioner also suggested that the *ATIPPA* be amended to require that "the Commissioner be consulted at least 30 days in advance" of government deciding to place statutory or regulatory provisions on the list. Two recommendations of the Committee make further discussion of this suggestion unnecessary. Those are the recommendations that the legislature determine the list, and that government provide the Commissioner with a copy of the draft bill no later than the date on which it gives to the House of Assembly notice of its intention to introduce the bill.

Issue (ii): *Should any of the sections of the statutes and regulations listed in the Access to Information Regulations be removed?*

The Committee can determine whether legislative provisions should prevail over the provisions of the *ATIPPA* only by examining each provision individually. The Committee considers this a necessary part of a comprehensive review of the *ATIPPA*. In preparing its recommendations, the Committee will apply the criteria[11] it adopted in the above discussion of Issue (i).

Sections 64 to 68 of the *Adoption Act, 2013*

***Access to Information and Protection of Privacy Act* does not apply**

64. Notwithstanding the *Access to Information and Protection of Privacy Act* and the *Privacy Act* (Canada), the use of, disclosure of and access to information in records pertaining to adoptions, regardless of where the information or records are located, shall be governed by this Act.

Disclosure in the interest of adopted child or person

65. (1) The provincial director may disclose identifying or non-identifying information to a person where the disclosure is necessary for

(a) the health or safety of an adopted child or adopted person; or

(b) the purpose of allowing an adopted child or adopted person to receive a benefit.

(2) Where identifying information is disclosed under subsection (1), the provincial director shall, where possible, notify the person being identified.

Contact by provincial director

66. In circumstances affecting a person's health or safety, the provincial director may contact the following persons to provide to or obtain from them necessary identifying or non-identifying information:

(a) a birth parent;

(b) where a birth parent cannot be contacted, a relative of a birth parent;

(c) an adopted person; and

(d) an adoptive parent.

Provincial director's right to information

67. (1) The provincial director has the right to information that is in the possession of or under the control of a public

11 Here again are those two criteria: (i) it is essential for the purpose of the particular piece of legislation that certain information described therein not be disclosed, and (ii) whether the nature of the activity that is regulated by the statute controlling access to the records in issue is such, that the public interest is best served by control of access to related records being regulated under provisions of the statute that provides comprehensively for all other aspects of that activity, or by the *ATIPPA*.

body as defined in the *Access to Information and Protection of Privacy Act* that is necessary to enable the provincial director to perform the duties or to exercise the powers and functions given under this Act or the regulations.
(2) A public body referred to in subsection (1) that has possession or control of information to which the provincial director is entitled under subsection (1) shall, upon request, disclose that information to the provincial director.
(3) This section applies notwithstanding another Act.

Disclosure of information

68. (1) The provincial director may disclose information to an adoption agency, including information obtained by him or her under section 67, where the disclosure is necessary to enable the agency to perform the duties or to exercise the powers and functions given to the agency under this Act or the regulations.
(2) The provincial director may disclose information to an authority responsible for adoptions or adoption records in another province, including information obtained by him or her under section 67, where the disclosure is necessary to enable the authority to perform the duties or to exercise the powers and functions given to the authority under an Act or regulations of that province.
(3) An adoption agency or authority shall not use or disclose information provided under subsection (1) or (2) except for the purpose for which it was provided.

Discussion

On even superficial examination it would seem that protection for such records is more appropriately provided for in the *Adoption Act, 2013*, the statute that provides for all aspects of adoption, than by provisions of the *ATIPPA*, a statute providing generally for the exercise of public rights to access information and the protection of privacy. In any event, the legislature has enacted, apart from the *ATIPPA*, a provision that specifies that the records concerned are to be governed by the *Adoption Act, 2013,* notwithstanding the *ATIPPA*. This Committee has jurisdiction to recommend changes that would improve the legislation respecting matters covered by the *ATIPPA*. It would be inappropriate for the Committee to question the legislature's judgement, taken in the course of enacting another statute, that its provisions should apply to records dealing with the subject matter of that statute, notwithstanding the *ATIPPA*. Doing so would run counter to the legislature's specific decision as to the relationship between that Act and the *ATIPPA*.

In those circumstances, the Committee concludes that sections 64 to 68 of the *Adoption Act, 2013* are to remain on the list, unless and until the legislature alters those provisions of the *Adoption Act, 2013*.

Section 29 of the *Adult Protection* Act

Confidentiality

29. (1) A person employed in the administration of this Act shall maintain confidentiality with respect to all matters that come to his or her knowledge in the course of that person's employment and shall not communicate the matters to another person, including a person employed by the government, except

(a) with the consent of the person to whom the information relates;

(b) where the disclosure is required by another Act of the province;

(c) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information;

(d) where, in the opinion of a director, the disclosure is in the best interests of the person to whom the information relates;

(e) where the disclosure is necessary to the performance of duties or the exercise of powers under this Act;

(f) where the disclosure is to the next of kin of the adult in need of protective intervention, where that disclosure is, in the opinion of a director, in the best interests of the person to whom the information relates;

(g) where the disclosure is for research approved by a research ethics body; or

(h) for another purpose authorized by the regulations and the information released under this section shall only be used for the purpose for which it was released.

(2) The department or an authority is not liable for damages caused to a person as a result of the release of information under subsection (1).

(3) A person shall be denied access to information where

(a) there are reasonable grounds to believe that the

disclosure might result in physical, emotional or financial harm to that person or another person;

(b) where the disclosure would identify a person who made a report under section 12; or

(c) the disclosure could reasonably be expected to jeopardize an investigation under this Act or a criminal investigation.

(4) Where information excepted from disclosure under this section can reasonably be severed, a person who is otherwise permitted to receive information under this section shall be given the remainder of the information.

(5) A person has a right of access to information or records created or maintained respecting that person in the course of the administration of this Act except where

(a) that information would identify a person making a referral under section 12; or

(b) there are reasonable grounds to believe that the disclosure might result in physical, emotional or financial harm to that person or another person.

Discussion

This is a statute that deals, comprehensively, with a special subject matter. Because of the nature of the *Adult Protection Act,* and the matters for which it makes provision, it is clear that the level of access to or protection of records in connection with the matters with which the Act deals, is best provided for in that Act, rather than being governed by the provisions of the *ATIPPA* dealing with access in general. The public interest would be best served by section 29 of the *Adult Protection Act* remaining on the list of provisions that prevail over *ATIPPA*.

Subsection 9(4) of the *Aquaculture Act* and Subsections 5(1) and (4) of the *Aquaculture Regulations*

The overall impact of these provisions can only be fully appreciated and the appropriate conclusions can only be drawn if the provisions of the statute and the regulations are considered together.

The whole of section 9 of the *Aquaculture Act* reads as follows:

Registrar

9. (1) The minister may designate a person in the department to be Registrar of Aquaculture.

(2) The registrar shall keep copies and records of aquaculture licences, leases of land granted for aquaculture purposes under the *Lands Act,* environmental preview reports and environmental impact statements prepared under the Part X of the *Environmental Protection Act* and other documents that the minister may direct or that may be prescribed.

(3) The records kept by the registrar under subsection (2) shall be open for inspection by members of the public during office hours upon payment of a prescribed fee.

(4) Notwithstanding subsection (3), information prescribed as confidential shall not be available to the public.

(5) The registrar may carry out a function or perform a duty delegated to him or her under an Act or regulation of Canada.

The whole of section 5 of the *Aquaculture Regulations* reads as follows:

Confidential Information

5. (1) The Registrar of Aquaculture shall regard as confidential and refuse access to members of the public to information which

(a) describes unique trade practices or technology used by a licensee, unless those trade practices or technology are protected by patent, copyright or industrial design; or

(b) describes information concerning the financial backing, obligations or performance of an aquaculture facility or an aquaculture enterprise.

(2) The Registrar of Aquaculture shall only regard information as confidential and refuse access to members of the public to that information if a request for a designation of confidentiality is made in writing by the licensee with the submission of the information.

(3) The Registrar of Aquaculture shall only regard information concerning unique trade practices or technology as confidential for 3 consecutive calendar years.

(4) The Registrar of Aquaculture shall release information referred to in subsection (1) to a person who is authorized to receive the information by the written consent of the licensee.

Discussion

It is clear from those provisions that section 9 of the Act chiefly concerns the making public of records that the registrar is required to keep. The exception is subsection (4), which may well be appropriate protection for the kind of confidential information involved. If it is, such information can be readily protected by section 27 of the *ATIPPA*. One cannot imagine that there is anything special about aquaculture licenses, leases, and land grants for aquaculture, or environmental preview reports and impact statements, that would require such records to be protected under provisions of a statute providing comprehensively for aquaculture. Assuming that to be so, the only other records to which subsection (4) could apply are those relating to trade practices, technology, or financial matters, prescribed under section 5 of the regulations, and which the licensee has requested in writing be designated as "confidential,"

The existing provisions of the *ATIPPA* can provide any protection that may be justified. The public interest is best served if access to such records is regulated by the *ATIPPA*.

The statute does not otherwise indicate any apparent basis for creating a special access protection for the aquaculture business interests in excess of that provided by the *ATIPPA* for all other business interests. The Committee cannot identify any rational basis for continued inclusion of these two provisions on a list of legislative provisions that prevail over the ATIPPA. Subsection 9(4) of the *Aquaculture Act* and subsections 5(1) and (4) of the *Aquaculture Regulations* should be removed from the list.

Section 115 of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*

Interpretation

115. (1) In this section

(a) "delineation well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that there is a reasonable expectation that another portion of that accumulation will be penetrated by the first mentioned well and that the drilling is necessary in order to determine the commercial value of the accumulation;

(b) "development well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that it is considered to be a well or part of a well drilled for the purpose of production or observation or for the injection or disposal of fluid into or from the accumulation;

(c) "engineering research or feasibility study" includes work undertaken to facilitate the design or to analyze the viability of engineering technology, systems or schemes to be used in the exploration for or the development, production or transportation of petroleum in the offshore area;

(d) "environmental study" means work pertaining to the measurement or statistical evaluation of the physical, chemical and biological elements of the lands, oceans or coastal zones, including winds, waves, tides, currents, precipitation, ice cover and movement, icebergs, pollution effects, plants and animals both onshore and offshore, human activity and habitation and related matters;

(e) "experimental project" means work or activity involving the utilization of methods or equipment that are untried or unproven;

(f) "exploratory well" means a well drilled on a geological feature on which a significant discovery has not been made;

(g) "geological work" means work, in the field or laboratory, involving the collection, examination, processing or other analysis of lithological, paleontological or geochemical materials recovered from the seabed or subsoil of a portion of the offshore area and includes the analysis and interpretation of mechanical well logs;

(h) "geophysical work" means work involving the indirect measurement of the physical properties of rocks in order to determine the depth, thickness, structural configuration or history of deposition of rocks and includes the processing, analysis and interpretation of material or data obtained from that work;

(i) "geotechnical work" means work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the seabed or subsoil of a portion of the offshore area;

(j) "well site seabed survey" means a survey pertaining to the nature of the seabed or subsoil of a portion of the offshore area in the area of the proposed drilling site in respect of a well and to the conditions of those portions of the offshore area that may affect

the safety or efficiency of drilling operations; and

(k) "well termination date" means the date on which a well or test hole has been abandoned, completed or suspended in accordance with applicable regulations respecting the drilling for petroleum made under Part III.

(2) Subject to section 18, information or documentation provided for the purposes of this Part or Part III or a regulation made under either Part, whether or not that information or documentation is required to be provided under either Part or a regulation made under either Part, is privileged and shall not knowingly be disclosed without the written consent of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to the administration or enforcement.

(3) A person shall not be required to produce or give evidence relating to information or documentation that is privileged under subsection (2) in connection with legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.

(4) For greater certainty, this section does not apply to a document that has been registered under Division VII.

(5) Subsection (2) does not apply to the following classes of information or documentation obtained as a result of carrying on any work or activity that is authorized under Part III, namely, information or documentation in respect of

(a) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if 2 years have passed since the well termination date of that well;

(b) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) 2 years since the well termination date of the relevant exploratory well, and

(ii) 90 days since the well termination date of the delineation well,

have passed;

(c) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) 2 years since the well termination date of the relevant exploratory well, and

(ii) 60 days since the well termination date of the development well,

have passed;

(d) geological work or geophysical work performed on or in relation to a portion of the offshore area,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or subparagraph (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in another case, after the expiration of 5 years following the date of completion of the work;

(e) an engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to a portion of the offshore area,

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or subparagraph (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in another case, after the expiration of 5 years following the date of completion of the research, study or project or after the reversion of that portion of the offshore area to Crown reserve areas, whichever occurs first;

(f) a contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III;

(g) diving work, weather observations or the status of operational activities or of the development of or production from a pool or field;

(g.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act in respect of the accident, incident or spill;

(h) a study funded from an account established under subsection 76(1) of the *Canada Petroleum Resources Act,* where the study has been completed; and

(i) an environmental study, other than a study referred to in paragraph (h),

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or subparagraph (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in another case, where 5 years have passed since the completion of the study.

Discussion

There were only two representations that bore directly on the issue of this section prevailing over the provisions of the *ATIPPA*, those of James Keating, Vice-President Oil and Gas of Nalcor Energy and Dr. Gail Fraser of York University. Others made more general comments about Nalcor Energy being regulated in the same manner as any other public body.

Mr. Keating expressed grave concerns about the impact any changes might have on the ability of the province to continue to attract major companies to invest the hundreds of millions of dollars required to carry on the exploration necessary to identify and delineate the oil resources in the offshore. If the confidential information, on which exploration companies have spent hundreds of millions of dollars, is at risk of being accessed by competitors or others who do not share the cost of the information, except under the strictly controlled conditions prescribed in the specific legislation under which they operate, they will probably cease such investment, and other potential investors will probably not participate. It could have disastrous consequences for the province's budding offshore oil industry.

Dr. Fraser had a different concern. Her submission dealt chiefly with environmental concerns. She wrote that she often had trouble accessing information about the environmental impact of offshore oil operations regulated by the Canada–Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB). She attributed these difficulties to the provisions of the *Atlantic Accord.* For that reason, she suggested that it would be problematic to have the *Newfoundland and Labrador Atlantic Accord Act* prevailing over the ATIPPA.

There is no information before the Committee that would contradict the views expressed by Mr. Keating. The Committee has no basis for concluding that the apprehensions he expressed are not well founded. Mr. Karanicolas and others would argue that the existing provisions of the *ATIPPA* provide the necessary protection for valuable and confidential proprietary business, technical, scientific and trade information. There are two flaws in that argument, one of which applies to all of the legislative provisions properly listed in the *Access to Information Regulations*. The other is specific to this *Atlantic Accord* legislation.

First, there is no principled basis for the assertion that all of the many pieces of legislation enacted to deal with a very specific circumstance (such as adoption, offshore petroleum exploration, or adult protection, sections of which are enacted to provide for vital security of records or other information related solely to the subject matter of the special legislation) cannot properly provide for appropriate public access to and management of the records respecting information peculiar to the specific subject of that legislation. In fact, where such control is critically important and peculiar to the subject matter of the specialty legislation, proper public access to and management of records are better provided in carefully designed specialty legislation than in a statute of general application such as the *ATIPPA*.

The second flaw in the argument, that the *ATIPPA* can best protect the public interest in all cases, is that it fails to take account of reality in particular circumstances. Mr. Keating's explanation is driven by the unavoidable reality of worldwide circumstances in offshore resource exploration. Imagine that a major exploration company is making a decision as to the jurisdiction in which it will invest a hundred million dollars or more. All other things are equal, but one jurisdiction protects the information derived from that investment with a provision like section 115 (which prohibits disclosure of the confidential and valuable information), and the other protects the information with the *ATIPPA*, where the information is subject to a value judgment by a Commissioner or a court. There cannot be any doubt as to which will be chosen.

With respect to the concerns raised by Dr. Fraser it is noted that subsection (5) contains an extensive list of exceptions to the limitation on disclosure of proprietary information that section 115 otherwise provides.

Taking all of the foregoing factors into consideration, the Committee is satisfied that the public interest would be best served if these provisions continue to regulate access to the records concerned. For that reason the Committee recommends that section 115 of the *Atlantic Accord Implementation Act* remain on the list.

Sections 69 to 74 of the *Children and Youth Care and Protection Act*

***Access to Information and Protection Act* does not apply**

69. Notwithstanding the *Access to Information and Protection of Privacy Act*, the use of, disclosure of and access to information in records pertaining to the care and protection of children and youth obtained under this Act, regardless of where the information or records are located, shall be governed by this Act.

Definition

70. In this Part, "information" means personal information obtained under this Act or a predecessor Act which is held in government records by, or is in the custody of or under the control of, the department, and includes information that is written, photographed, recorded or stored in any manner.

Persons who may obtain information

71. (1) A person over 12 years of age has the right to and shall, on request, be given information relating to himself or herself.

(2) A person over 12 years of age who is, or has been, in the care or custody of a manager has the right to and shall, on request, be given information relating to himself or herself including

(a) information relating to his or her birth family that the minister determines is appropriate to release;

(b) the reasons why he or she was removed from his or her parent and information relating to the continuation of a court order relating to him or her; and

(c) the identity of former foster parents or the name of a former residential placement.

(3) A person who has custody of a child has the right to and shall, on request, be given information about himself or herself and the child.

(4) A person who had custody of a child has the right to and shall, on request, be given information about himself or herself and the child, but only for the period of time that the person had custody.

(5) Where information excepted from disclosure under section 72 can reasonably be severed, a person who is otherwise permitted to receive information under this section shall be given the remainder of the information.

Information not to be disclosed

72. Notwithstanding section 71,

(a) the provincial director or a manager shall not disclose information where

(i) the disclosure is prohibited under the *Adoption Act, 2013,*

(ii)there are reasonable grounds to believe that the disclosure might result in physical or emotional harm to that person or to another person,

(iii) the disclosure would identify a person who made a report under section 11, or

(iv) the disclosure could reasonably be expected to jeopardize an investigation under this Act or a criminal investigation; and

(b) the provincial director or a manager may refuse to disclose information that is a transitory record as defined in the *Management of Information Act*.

Disclosure without consent

73. The provincial director or a manager may, without the consent of another person, authorize the disclosure of information obtained under this Act if the disclosure is

(a) necessary to ensure the safety, health or well-being of a child;

(b) provided to persons with whom a child or youth has been placed for care;

(c) necessary for the administration of this Act; or

(d) for research or evaluation purposes and the person to whom that information is disclosed has signed an agreement to comply with conditions set by the minister.

Right to information and information sharing

74. (1) A manager or social worker has the right to

information with respect to a child or a youth that is in the custody of or under the control of a public body, as defined in the *Access to Information and Protection of Privacy Act,* or a person and that is necessary to enable the manager or social worker to exercise his or her powers or perform his or her duties or functions under this Act.

(2) A public body or a person referred to in subsection (1) that has custody or control of information to which a manager or social worker is entitled under subsection (1) shall disclose that information to the manager or social worker.

(3) Notwithstanding subsections (1) and (2), information that is subject to solicitor-client privilege is not required to be disclosed unless the information is required to be disclosed under section 11.

(4) Notwithstanding subsections (1) and (2), a peace officer may refuse to disclose information where

(a) the disclosure would be an offence under an Act of Parliament; or

(b) the disclosure would be harmful to law enforcement or could reasonably be expected to interfere with public safety, unless the information is required to be disclosed under section 11.

(5) The minister may enter into an agreement with the Nunatsiavut Government with respect to the access to or disclosure of information under this Act.

Discussion

As is the case with the *Adoption Act, 2013*, the legislature has specified that notwithstanding the *ATIPPA*, those provisions shall prevail. The Committee's statutory jurisdiction is to recommend changes to the *ATIPPA* structure. Where the legislature has enacted in another statute that it is to prevail notwithstanding the *ATIPPA,* it is not appropriate for the Committee to question the legislature's judgment in enacting that other statute. In the case of the provisions of the *Children and Youth Care and Protection Act* that prevail over the *ATIPPA*, the Committee's views are, therefore, not pertinent. It may, however, be helpful for the participants to know that the Committee believes there appears to be a sound basis for the current approach.

Like the *Adoption Act, 2013*, this is a specialty statute. It provides for all actions necessary to achieve its purpose, expressed in section 8: "to promote the safety and well-being of children and youth who are in need of protective intervention."

Part VIII of the statute, which contains sections 69 to 74, protects the information that must be collected for the safety and well-being of the children who need intervention by the state. Those sections provide for special circumstances, which primarily involve personal information of the children concerned, rather than information respecting governmental operations. The processes in place for the management of access to and disclosure of information under the *ATIPPA* are not at all suitable for the management of this sort of information. Clearly the public interest is best served by access to this kind of information being regulated by a specialty statute.

Section 5.4 of the *Energy Corporation Act*

Records of commercially sensitive information

5.4 (1) Notwithstanding section 6 of the *Access to Information and Protection of Privacy Act*, in addition to the information that shall or may be refused under Part III of that Act, the chief executive officer of the corporation or a subsidiary, or the head of another public body,

(a) may refuse to disclose to an applicant under that Act commercially sensitive information of the corporation or the subsidiary; and

(b) shall refuse to disclose to an applicant under that Act commercially sensitive information of a third party

where the chief executive officer of the corporation or the subsidiary to which the requested information relates reasonably believes

(c) that the disclosure of the information may

(i) harm the competitive position of,

(ii) interfere with the negotiating position of, or

(iii) result in financial loss or harm to

the corporation, the subsidiary or the third party; or

(d) that information similar to the information requested to be disclosed

(i) is treated consistently in a confidential manner by the third party, or

(ii) is customarily not provided to competitors by the corporation, the subsidiary or the third party.

(2) Where an applicant is denied access to information under subsection (1) and a request to review that decision is made to the commissioner under section 43 of the *Access to Information and Protection of Privacy Act*, the commissioner shall, where he or she determines that the information is commercially sensitive information,

(a) on receipt of the chief executive officer's certification that he or she has refused to disclose the information for the reasons set out in subsection (1); and

(b) confirmation of the chief executive officer's decision by the board of directors of the corporation or subsidiary,

uphold the decision of the chief executive officer or head of another public body not to disclose the information.

(3) Where a person appeals,

(a) under subsection 60(1) of the *Access to Information and Protection of Privacy Act*, from a decision under subsection (1); or

(b) under subsection 43(3) of the *Access to Information and Protection of Privacy Act,* from a refusal by a chief executive officer under subsection (1) to disclose information,

paragraph 62(3)(a) and section 63 of that Act apply to that appeal as if Part III of that Act included the grounds for the refusal to disclose the information set out in subsection (1) of this Act.

(4) Paragraph 56(3)(a) of the *Access to Information and Protection of Privacy Act* applies to information referred to in subsection (1) of this section as if the information was information that a head of a public body is authorized or required to refuse to disclose under Part II or III of that Act.

(5) Notwithstanding section 21 of the *Auditor General Act,* a person to whom that section applies shall not disclose, directly or indirectly, commercially sensitive information that comes to his or her knowledge in the course of his or her employment or duties under that Act and shall not communicate those matters to another person, including in a report required under that Act or another Act, without the prior written consent of the chief executive officer of the corporation or subsidiary from which the information was obtained.

(6) Where the auditor general prepares a report which contains information respecting the corporation or a subsidiary, or respecting a third party that was provided to the corporation or subsidiary by the third party, a draft of the report shall be provided to the chief executive officer of the corporation or subsidiary, and he or she shall have reasonable time to inform the auditor general whether or not in his or her opinion the draft contains commercially sensitive information.

(7) In the case of a disagreement between the auditor general and a chief executive officer respecting whether information in a draft report is commercially sensitive information, the auditor general shall remove the information from the report and include that information in a separate report which shall be provided to the Lieutenant-Governor in Council in confidence as if it were a report to which section 5.5 applied.

(8) Notwithstanding the *Citizens' Representative Act*, the corporation, a subsidiary, another public body, or an officer, member or employee of one of them is not required to provide commercially sensitive information, in any form, to the citizens' representative in the context of an investigation of a complaint under that Act.

Discussion

As is the case with the *Adoption Act, 2013* and the *Children and Youth Care and Protection Act,* the legislature has specified that notwithstanding the *ATIPPA,* those provisions shall prevail. The same comments the Committee made with respect to the impropriety of the Committee questioning the legislature's judgment in the matter apply here with even more force. The legislature specified that this statute is to apply notwithstanding section 6 of the *ATIPPA*. Section 6(1) is the provision that gives the *ATIPPA* priority over all other statutes. The legislature has clearly specified that this statute is to have priority, even in the face of the priority specified in section 6 of the *ATIPPA*.

Again, it may be helpful to participants to know that the Committee believes there is a sound basis for the approach taken.

The comments of Mr. Keating, excerpted above, explain in detail the underlying reasons for the presence of this section in the *Energy Corporation Act*. The compelling factor is that Nalcor Energy is operating, on behalf of the people of the province, in the competitive commercial world. That requires it to keep certain aspects of its operations information confidential from competitors. If it did not, it could run the risk of failure, with the potential for massive adverse financial consequences for the people of the province. As well, it partners with one or more private sector commercial entities in a significant part of its commercially competitive activity. Those commercial partners would not be prepared to disclose significant information to Nalcor Energy if Nalcor Energy were subject to the risk of disclosure of that information through the *ATIPPA*.

From the comments of many participants, the Committee concludes that most people appreciate the importance of specific circumstances in the context of access to information held by a public body. The primary concern expressed is to avoid a situation where the head of a public body, Nalcor Energy, can simply declare the record being sought to be "commercially sensitive" and, with the approval of the board of directors, refuse disclosure. The perception of that circumstance, as much as the reality, gives rise to the concern.

The Commissioner, in his 25 September supplementary letter commenting on Mr. Keating's observations, said that "this provision lacks an objective test, and we are of the view that this weakness should be addressed by removing the subjective aspect and replacing it with something more akin to one of the harms-based exceptions in the *ATIPPA*." While it is not what the Commissioner recommends, the government could go a long way towards addressing many of the expressed concerns by adding even a moderately limiting objective standard by which to establish the reasonable belief of the chief executive officer. That could be achieved by inserting before the words "reasonably believes" in subsection 5.4(1) the phrase "taking into account sound and fair business practices."

Those concerns should also be allayed by the existence of the process for review by the Commissioner. Section 5.4(2) clearly contemplates review by the Commissioner under section 43 of the *ATIPPA*, and subsection (3) contemplates appeal to the courts. In addition, during the hearings, Mr. Keating clearly stated he would have no objection to the Commissioner examining the document to ensure that it was of the character claimed. As a result, the normal review procedures of the Commissioner should apply. In those circumstances the Committee is satisfied that, although the basis for making the decision is different from that which protects third party commercially sensitive information under section 27 of the *ATIPPA*, it is not unreasonable in the circumstances and, because the Commissioner can examine the records, would not prevent disclosure of records that should otherwise be disclosed.

Section 8.1 of the *Evidence Act*

Inadmissible evidence

8.1 (1) In this section

(a) "legal proceeding" includes an action, inquiry, arbitration, judicial inquiry or civil proceeding in which evidence may be given and also includes a proceeding before a board, commission or tribunal; and

(b) "witness" includes a person who, in a legal proceeding

(i) is examined orally for discovery,

(ii) is cross examined on an affidavit made by that person,

(iii) answers interrogatories,

(iv) makes an affidavit as to documents, or

(v) is called on to answer a question or produce a document, whether under oath or not.

(2) This section applies to the following committees:

(a) the Provincial Perinatal Committee,

(a.1) the Child Death Review Committee under the *Fatalities Investigations Act*;

(b) a quality assurance committee of a member, as defined under the *Hospital and Nursing Home Association Act*, and

(c) a peer review committee of a member, as defined under the *Hospital and Nursing Home Association Act*.

(3) No report, statement, evaluation, recommendation, memorandum, document or information, of,

or made by, for or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding.

(4) Where a person appears as a witness in a legal proceeding, that person shall not be asked and shall not

(a) answer a question in connection with proceedings of a committee set out in subsection (2); or

(b) produce a report, evaluation, statement, memorandum, recommendation, document or information of, or made by, for or to, a committee to which this section applies.

(5) Subsections (3) and (4) do not apply to original medical or hospital records pertaining to a person.

(6) Where a person is a witness in a legal proceeding notwithstanding that he or she

(a) is or has been a member of;

(b) has participated in the activities of;

(c) has made a report, evaluation, statement, memorandum or recommendation to; or

(d) has provided information or a document to

a committee set out in subsection (2) that person is not, subject to subsection (4), excused from answering a question or producing a document that he or she is otherwise bound to answer or produce.

Subsection (2) identifies the committees to which this section applies. Three of the four are of a professional medical nature: the Provincial Perinatal Committee; a quality assurance committee of a member, as defined under the *Hospital and Nursing Homes Association Act*;[12] and a peer review committee of a member as defined under that Act. The fourth category is the committee set up under section 13.1 of the *Fatalities Investigations Act*. The relevant subsection reads:

Child Death Review Committee

13.1 (1) The Lieutenant-Governor in Council shall establish a Child Death Review Committee to review the facts and circumstances of deaths referred to in subsection 13.2(1) for the purpose of

(a) discovering and monitoring trends in those deaths; and

(b) determining whether further evaluation of those deaths is necessary or desirable in the public interest.

Discussion

Clearly, these are specialized committees designed to promote critical peer review, over and above any assessment otherwise provided for that is produced in connection with the matters that are the subject of such peer reviews. Subsections (5) and (6) establish that the exemption is confined to documents and proceedings connected with those special purpose committees and does not affect the obligation to answer a question or otherwise produce a document. The section also provides for limitation on the use of such information in legal proceedings. The Committee cannot, on the limited information it has, conclude either that the *ATIPPA* contains provisions that are better suited to managing the special and limited protection required for those particular circumstances, or that the public interest would be best served by the provisions in question continuing to prevail over the *ATIPPA*.

The Committee also notes that the recommendation made by Justice Cameron in her report on the Commission of Inquiry on Hormone Receptor Testing, respecting the application of and possible changes to section 8.1 of the *Evidence Act* to materials considered in peer review committees, is still under consideration by the government. It is reasonable to assume that in the course of that consideration, the government would consider also the effect of section 8.1 of the *Evidence Act* on the *ATIPPA*.

For those reasons, that section of the *Evidence Act* should, for now at least, remain on the list of statutory provisions that prevail over the *ATIPPA*. That recommendation is, however, made in the expectation that in the course of the next *ATIPPA* statutory review, information sufficient to enable a fuller assessment will be available.

12 Now *Health Care Association Act*.

Subsection 24(1) of the *Fatalities Investigations Act*

> **Release of information**
>
> **24.** (1) All reports, certificates and other records made by a person under this Act are the property of the government of the province and shall not be released without the permission of the Chief Medical Examiner.

Discussion

This part of the statute provides for examination of the cause of death in a variety of specific circumstances, all of which appear to suggest that the death may not be as a result of natural causes. Obviously details of such deaths and certificates resulting from post-mortem examinations cannot be made available for public access on demand, nor should they even be subject to the possibility of a commissioner recommending that they be released publicly. Access to such documents is better regulated by provisions in the special statute governing all aspects of the matters to which they relate than by provisions designed for management of general access to public records. The Committee concluded that the public interest will be best served by these provisions continuing to prevail over the *ATIPPA*.

The designated subsection should remain on the list of provisions that prevail over the *ATIPPA*.

Subsection 5(1) of the *Fish Inspection Act*

> **Issue of licences**
>
> **5.** (1) The minister may refuse to issue a licence required under this Act or the regulations without assigning a reason for the refusal.

Discussion

The provisions of the statute do not readily indicate, and the Committee has not been made aware of, the reason why a minister should be empowered to make a discretionary decision refusing the granting of a license without assigning a reason for doing so. It appears to permit an arbitrary decision, and having it prevail over the provisions of the *ATIPPA* offends the principle of transparency and accountability in government. On that basis alone, it would be reasonable to conclude that the public interest would not be best served by continuing to include subsection 5(1) in the list of provisions that prevail over the *ATIPPA*.

To the extent that records that might affect confidential scientific, technical, financial, or commercial information of a third party, such information is adequately protected by the *ATIPPA*. There is nothing in the *Fish Inspection Act* to indicate there is anything special about the inspection of fish plants that would necessitate records relating to the matter being regulated by the special provisions of the statute regulating the inspection. On the information before it, the Committee is unable to identify a credible basis for its continued inclusion on the list of provisions that prevail over the *ATIPPA*.

However, bearing in mind the importance of the fishery and regulation of fish processing facilities to this province, the Committee is reluctant to recommend removal of section 5(1) from the list at this time. Instead, unless the government takes steps to cause its removal the issue should be more fully examined during the course of the next statutory review. For the time being it should continue to be included in the list of provisions that prevail over the *ATIPPA*.

Section 4 of the *Fisheries Act*

> **Secrecy**
>
> **4.** (1) The minister shall keep every return secret and, except for the purpose of a prosecution under this Act, shall not permit a person other than an employee of the department to have access to a return.
>
> (2) An employee of the department shall not disclose or permit to be disclosed to a person other than the minister or another employee of the department a return or part of a return coming to his or her knowledge which can be identified with or related to an individual return or individual person.
>
> (3) Notwithstanding subsections (1) and (2), the minister may, with the written consent of the person from whom a return is obtained, disclose information in that return.

(4) In this section and section 5, "return" means information, oral or written, obtained as a result of a request under this section or section 5.

Assessing the necessity for this section to prevail over the *ATIPPA* requires consideration of the nature of the information contained in the returns. Subsection 3(1) indicates the information that is required by law to be provided on request by the minister:

Information from fish business or enterprise

3. (1) A person who manages, directs or has control of a fish business or enterprise or has the control, custody or possession of the accounts, documents or records relating to a fish business or enterprise shall, at the written request of the minister and within a reasonable time that the minister may specify in the request,

(a) provide copies of the accounts, documents or records of that business or enterprise;

(b) provide information that is sought in respect of that business or enterprise or in respect of the accounts, documents or records of that business or enterprise; and

(c) grant access to the accounts, documents or records of that business or enterprise for the purpose of examination by an employee of the department.

Discussion

Clearly, the information is the proprietary and commercially sensitive information that fishing enterprises are required to provide to the government so that it can monitor certain aspects of the operation of fish businesses and enterprises. In the circumstances there is a clear responsibility to maintain the confidentiality with which the owners of the information treat it.

The provisions of the *ATIPPA* that protect trade and technical secrets and other commercially sensitive information of businesses can probably protect fish businesses as well. However, it may be more appropriate to offer that protection in the statute that regulates the industry, rather than in the more uncertain general protection principles of the *ATIPPA*. On the limited information available to the Committee, it cannot be concluded with confidence which would best serve the public interest.

That section of the *Fisheries Act* should remain on the list of statutory provisions that prevail over the *ATIPPA* until the matter can be more thoroughly considered in the next statutory review, unless the government sees fit to ask the legislature to remove it before that time.

Sections 173, 174, 174.1 and 174.2 of the *Highway Traffic Act*

Section 174.2 has been repealed and does not need to be considered. The remaining three sections read as follows:

Admissibility of report

173. A written report or statement made or provided under section 169, 170, 171 or 172

(a) is not open to public inspection; and

(b) is not admissible in evidence for any purpose in a trial arising out of the accident except to prove

(i) compliance with section 169, 170, 171 or 172, or

(ii) falsity in a prosecution for making a false statement in the report or statement.

Information release- non-reportable accidents

173.1 (1) The registrar may release the information referred to in subsection (2) to

(a) a person involved in an accident which was not required to be reported under this Act;

(b) a person or insurance company that has paid or may be liable to pay damages resulting from an accident; or

(c) a solicitor, agent or other representative of the person or company

where the registrar has received written confirmation of the accident by either of the parties involved in the manner acceptable to the minister.

(2) The registrar may, under the authority of subsection (1), release the following information:

(a) the identification of vehicles involved in the accident;

(b) the name and address of the registered owner; and

(c) the name and address of an insurance company that has issued a policy insuring a party to or a person involved in an accident, together with the policy number applicable to that policy.

Availability of information

174. (1) A person involved in an accident and a person or an insurance company that has paid or may be liable to pay for damages resulting from an accident in which a motor vehicle is involved and a solicitor, agent or other representative of the person or company is entitled to the information that may appear in a report made under section 169, 170, 171 or 172 in respect of

(a) the date, time and place of the accident;

(b) the identification of vehicles involved in the accident;

(c) the name and address of the parties to or involved in the accident;

(d) the names and addresses of witnesses to the accident;

(e) the names and addresses of persons or bodies to whom the report was made;

(f) the name and address of a peace officer who investigated the accident;

(g) the weather and highway conditions at the time of the accident;

(h) [Rep. by 1993 c37 s1] and

(i) the name and address of an insurance company that has issued a policy insuring a party to or involved in an accident, together with the policy number applicable to that policy.

(1.1) In addition to the information to which a person is entitled under subsection (1), a person is entitled to be informed whether a charge has been laid as a result of an accident in which a motor vehicle is involved.

(2) A person shall not make a false statement in a report made or purporting to be made under section 169, 170, 171 or 172.

(3) In a prosecution for violation of section 169, 170 or 172, a certificate purporting to be signed by the registrar that a required report has or has not been made is, in the absence of evidence to the contrary, proof of the facts stated in the certificate.

(4) In a prosecution for failure to make a report required by section 169, 170 or 172 in respect of an accident the place of the offence shall be considered to be the place where the accident occurred.

(5) A person entitled to information under this section shall pay the fee to obtain it that the minister may set.

Report required

174.1 (1) A medical practitioner licensed under the *Medical Act, 2005*, a nurse practitioner as defined in the *Registered Nurses Act, 2008* or an optometrist licensed under the *Optometry Act, 2012* shall report to the registrar the name, address, date of birth and clinical condition of a person 16 years of age or older attending the practitioner or the optometrist for medical or optometric services who, in the opinion of the practitioner or optometrist, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle.

(2) An action shall not be brought against a medical practitioner, a nurse practitioner or an optometrist for complying with subsection (1).

(3) A report referred to in subsection (1) is privileged for the information of the registrar only and shall not be open for public inspection.

(4) A report referred to in subsection (1) is not admissible in evidence for a purpose in a trial except to prove compliance with subsection (1).

Discussion

It is necessary to also examine sections 169, 170, 171 and 172 because those sections describe the nature and content of the information that is intended to be protected from the access requirements of the *ATIPPA*. It is not necessary to reproduce those sections here. Section 169 is lengthy; it identifies the responsibilities of a person involved in a motor vehicle accident. Some of the subsections provide for mandatory reporting of the circumstances of the accident and certain personal information of the driver. Section 170 requires the driver, in circumstances where injury or death is involved, or there is property damage in excess of $2,000, to report to the nearest police officer (or failing the driver, a passenger or the owner of the vehicle if the driver is not the owner). Section 171 requires a police officer who has witnessed or investigated to report, and section 172 requires a garage to report damage.

The information is not about government or its operations. It is private or personal information, usually relating to unfortunate incidents between individuals that could require judicial resolution. It is not information

that any citizen not personally involved is entitled to access at will. Also, the provisions that protect the information are best contained in the statute that otherwise makes full provision for all other aspects of the circumstances that gave rise to compelling the private citizens to make the reports that sections 169–172 require citizens to make. For those reasons the Committee is of the view that the public interest is best served by the specified sections of the *Highway Traffic Act* remaining on the list of statutory provisions that prevail over the *ATIPPA*.

Section 18 of the *Lobbyist Registration Act*

Confidentiality order

18. (1) At the request of a person who is required to register in the registry of lobbyists, the Commissioner of Lobbyists may order that some or all of the information contained in the return that is required to be filed for registration purposes be kept confidential if the information relates to an investment project of the client or enterprise concerned, the disclosure of which may seriously prejudice the economic or financial interest of the client or enterprise.

(2) Unless the Commissioner of Lobbyists extends the order under subsection (1) at the request of the interested person for the period determined by the Commissioner of Lobbyists, the confidentiality order shall cease to have effect 6 months from the filing of the return concerned in the registry of lobbyists.

(3) The Commissioner of Lobbyists shall send a notice of a decision under subsections (1) and (2) to the registrar of lobbyists, and the registrar shall ensure that the information is held as confidential and not available to the public for the duration of the commissioner's order.

Discussion

The information described is straightforward and commercially sensitive; it would clearly be protected under the provisions of existing section 27 of the *ATIPPA*. The *Lobbyist Registration Act* is not a special statute dealing with a class of business that would involve interaction with the public. It is a statute to regulate lobbying and lobbyists. There is no principled basis for according a higher level of protection to commercially sensitive information of a business enterprise that has hired a lobbyist than to one that has not.

In various representations during this review process, the government has emphasized the importance of transparency and accountability. The Committee cannot identify a rational basis for continuing to list the provisions as prevailing over the *ATIPPA*. Those two factors, coupled with the conclusions in the preceding paragraph, lead to the conclusion that the public interest will be best served if section 18 of the *Lobbyist Registration Act* is removed from the list of statutory provisions that prevail over the *ATIPPA*.

Section 15 of the *Mineral Act*

Confidentiality of information

15. (1) Subject to an Act of the province relating to the compilation of data, completion of statistics or an agreement between this province and another province or the Government of Canada relating to the exchange of confidential information under that Act, information that is required to be given under this Act shall be made available only

(a) to persons permitted by this Act to receive that information or authorized by the minister to receive that information;

(b) to persons that the person giving the information may consent to receiving the information; or

(c) for the purpose of assessment or imposition of a tax imposed after receipt of the information upon the person giving the information.

(2) Except with respect to information compiled under section 5, subsection (1) stops applying to information after the expiry of 3 years from the day that the information was given under this Act.

(3) Notwithstanding subsections (1) and (2), where information has been given under this Act in respect of a mineral that is subject to a licence or lease from the Crown, that information may be made available by the minister after the termination, surrender or expiration of the licence or lease regardless of the time when the information was given.

(4) Subsection (1) does not apply to information of the following kinds:

(a) the numbers of people employed;

(b) the amount and nature of work done;

(c) expenditures of money;

(d) the qualifications or skills of persons who are employed;

(e) the residences or places of origin of persons who are employed; or

(f) information that in the opinion of the minister is similar to the information described in paragraphs (a) to (e).

(5) Notwithstanding a provision contained in another Act or in an agreement, whether or not it was passed or entered into before July 12, 1977, respecting the confidentiality of information provided to the department under that Act or agreement, this section applies to that information as if it had been provided under this Act.

It is necessary to examine the information that would be protected by inclusion of section 15 in the list of statutory provisions that prevails over the *ATIPPA*. Two provisions of the *Mineral Act* make it mandatory to provide information, section 5 and subsection 18(1):

Report of search

5. (1) A person who searches for minerals in, on or under land and land under water, whether or not the minerals are vested in the Crown, or who is engaged in pre-production and development activities in relation to a mineral deposit shall, on or before March 15 of the year following the calendar year in which the search is carried out or the activities are engaged in, submit a report to the minister, in a form approved by the minister, containing

(a) the nature and type of work carried out;

(b) the costs incurred;

(c) the locations of the active projects;

(d) the name and address of the person carrying out the work;

(e) the number of persons employed and a summary of the salaries and wages paid; and

(f) a summary of all other expenditures.

(2) Where a search referred to in subsection (1) is done by diamond drilling or other boring method, the report shall contain, in the manner prescribed by regulation

(a) a copy of the logs of each boring including its location, direction, inclination and the geological nature of the rocks penetrated;

(b) a copy of the record of samples taken and the results of assays made of those samples;

(c) a map showing the geographical location and elevations of the collar of each boring;

(d) a copy of sections, profiles or horizontal projections of each boring;

(e) the location and disposition of diamond drill core or cuttings; and

(f) the name and address of the person who performed the diamond drilling or other boring.

(3) Subsection (2) does not apply where, in the opinion of the minister, a report containing the information required under that subsection has been submitted to him or her.

(4) A person who intends to conduct a search for minerals on areas either licensed or leased under this Act shall submit a description of the planned exploration work before starting the work, and when that work involves an activity that the department considers capable of causing ground disturbance, water quality impairments or disruption to wildlife or wildlife habitat, the work shall begin only after the department has issued an exploration approval with terms and conditions prescribed by the minister.

(5) A person who begins work without an exploration approval or who fails to comply with the terms and conditions of an exploration approval under subsection (4) commits an offence.

Reports of mineral surveys

18. (1) A person, other than the holder of a valid licence or lease, who conducts a mineral survey in, on or under land to which this Act applies, and does not within 12 months from the date of the completion of the mineral survey acquire a licence to the land surveyed or a part of the land surveyed, shall, within 12 months from the date of the completion of the survey, submit a detailed report of the survey in a form approved by the minister, containing matters which the minister may specify, including the cost of the survey, the location of and class of a mineral found in, on or under the land.

Discussion

The statute requires that commercially sensitive information be provided. The information includes details of the results of mineral prospecting and exploration on which prospectors and mining exploration companies would likely have spent considerable sums. Enticing prospectors to explore for minerals is important to the government as the owner of most of the undiscovered minerals in the province. Without the kind of protection that section 15 provides, few prospectors would be prepared to spend the money necessary, and the interest of the government and the people of the province would be adversely affected.

The *Mineral Act* is better suited than the *ATIPPA* to offer that kind of protection because it is a special statute governing exploration of minerals, the details of which need to be protected. As well, section 15 contains a sunset clause limiting the protection for the information provided under subsection 18(1) to three years. In those circumstances the Committee has concluded that section 15 of the *Mineral Act* should remain on the list of statutory provisions that prevail over the *ATIPPA*.

Section 16 of the *Mineral Holdings Impost Act*

Confidentiality of information

16. (1) Information contained in, or given to the assessor in relation to, a return required by this Act shall only be made available to persons authorized by the minister to receive that information; and the authorization shall be given only for the purposes of this Act or an Act of the province that provides for the administration of mines or minerals or that imposes a tax in respect of mines or minerals.

(2) Subsection (1) does not affect the operation of

(a) other Acts that provide for the collection of information for statistical purposes; or

(b) an agreement of this province with the Government of Canada or with another province or with a statistical or other agency of the Government of Canada or another province.

Discussion

This statute imposes taxation on mineral holdings within the province. It has nothing to do with payment of royalties for mineral extraction. It imposes a tax on rights to minerals that are held and not being developed, and provides a credit for any amounts paid to the province as rental, or spent on further exploration of the mineral potential of the property. It also allows the owner of the mineral rights to convert that ownership to a staked license which, of course, would not attract the tax because the holder of the staked license would no longer be owner of the minerals. As a result, the Act requires the owners of mineral rights to file returns providing the information respecting the use they made and any expenditure they incurred so that the tax could be calculated. The information that the statute compels the owners of minerals to provide is specified in section 11:

Returns by taxpayer

11. (1) Within 3 months after the close of each calendar year, or another period that the minister may determine with respect to a taxpayer, every taxpayer shall, without notice of demand, complete and deliver to the assessor a return containing

(a) the name of the taxpayer;

(b) the address of the taxpayer or, where the taxpayer has no address or place of business in the province, the address of a trustee or agent within the province to which the assessment, notices and other documents required under this Act may be mailed or served;

(c) a description of all lands within the province in respect of which the taxpayer has an interest in a mineral holding showing with respect to each area the nature and extent of the mineral interest, the location of the mineral holding and a description of all instruments under which an interest comprised in the mineral holding is held by him or her;

(d) a statutory declaration by the taxpayer of all deductions claimed under section 8 in respect of each mineral holding, showing payments and expenditures actually made;

(e) the most recent annual audited financial statement of the taxpayer; and

(f) other facts and additional information that may be prescribed by regulation or that may be required by the assessor under subsection (3).

(2) The return required by this section shall be signed by the taxpayer or by his or her agent, trustee or representative; but, where the taxpayer is a corporation, or an unincorporated association of persons the return shall be signed by an officer or member of the corporation or association who has personal knowledge of the facts and disclosures made in the return.

(3) The assessor may by written notice require a person who has submitted a return to supply further details and more explicit particulars, or to produce documentary evidence to support facts and disclosures made in the return; and upon receipt of that notice, the person to whom it is directed shall, within 14 days after the date of mailing the notice, comply with the requirements contained in it.

(4) A person who acts as custodian of the records of a taxpayer shall, when required to do so by notice from the assessor, prepare and deliver to the assessor, within 30 days after the date of the mailing of the notice, information required in respect of that taxpayer.

The statute is little different from an income tax statute requiring potential taxpayers to report the circumstances that form the basis for the imposition of the tax. The information should not be subject to disclosure to anyone who may seek it under the *ATIPPA*. As this is a special purpose statute providing only for the provision of information for the sole purpose of taxing ownership of minerals, management of the confidentiality provided in the reports is best provided for in the special statute. The Committee is of the view that the public interest is best served by having access to such records regulated by the provisions of the special statute that regulates all other aspects of the subject matter with which it deals. Section 16 should remain on the list of statutory provisions that prevail over the *ATIPPA*.

Section 15 of the *Mining Act*

Confidentiality

15. Any information provided to the minister or an inspector acting under the authority of section 7, 9, 10, 11 or 12 shall be kept confidential unless an agreement for disclosure is made between the minister and the lessee.

Discussion

Section 7 of that Act requires the operator of a "project," defined as a mine or mill or the activity of mining or milling, to file a report once a year on its operations for the preceding year. Although the section does allow the minister to specify the information required, there is nothing otherwise in the statute to indicate that any such information is likely to be of a commercially sensitive nature. Information of a commercially sensitive nature would be as well protected by the appropriate provisions of the *ATIPPA* as by those of the *Mining Act.*

Sections 9 to 12 set out the requirements for a closure and site rehabilitation plan. There is a requirement to provide financial assurance in the form of a cash, bond, letter of credit, establishment of a fund or other acceptable form of security. There is no specific requirement for financial information of a confidential nature. Section 12 requires production of boundary plans, site plans, underground plans and other physical details, none of which requires confidentiality. There is nothing to indicate that the public interest would be best served by those provisions continuing to prevail over the *ATIPPA*, and the Committee cannot identify a credible basis for its so continuing.

Unless there are other reasons not apparent in the statute, section 15 should be removed from the list of statutory provisions prevailing over the *ATIPPA*.

Subsection 13(3) of the *Order of Newfoundland and Labrador Act*

Duties of the council

13. (1) The council shall meet at least once in each year
(a) for the purpose set out in section 10; and
(b) for other reasons related to the Order that the

council considers necessary.

(2) The council may determine the procedures for the conduct of its business.

(3) The deliberations of the council shall be kept confidential.

These deliberations clearly need to be confidential. Section 10 explains why the council meets:

Council to consider nominations

10. The council shall consider nominations received under section 9, and shall submit to the Chancellor the names of not more than 8 individuals in each year who in the opinion of the council are worthy of receiving the Order.

Discussion

The council's minutes would indicate why members of the council decided for or against each nomination. Making such discussions subject to potential disclosure under the ATIPPA would almost certainly deter members of the council from participating, or from expressing themselves frankly. Clearly, the public interest would be best served by that provision of the *Order of Newfoundland and Labrador Act* remaining on the list of statutory provisions that prevail over the *ATIPPA*.

Sections 153, 154 and 155 of the *Petroleum Drilling Regulations*

Confidential information

153. (1) Subject to section 154 and to any law of the province, the director shall securely store and keep confidential all information, reports, cores, cuttings and fluid samples submitted by the operator in accordance with these regulations.

(2) Notwithstanding subsection (1), any information, report, analysis or sample submitted by an operator in accordance with these regulations may be used for the management of oil or gas resources.

Release of information

154. (1) Subject to subsections (2), (3), (4) and (5), information relating to a drilling program that is given in accordance with these regulations shall not be made public.

(2) General information on a well including the name, classification, location, identity of the drilling rig used by the operator, depth and operational status of the drilling program may be released by the director to the public.

(3) Information that is furnished by an operator in support of an application for drilling program approval referred to in section 8 or included in an application for an authority to drill a well referred to in section 29 in respect of

(a) the proposed design, method of operation of a drilling program and objectives of the proposed well shall not be released without the written consent of the operator;

(b) research work that relates to the safety of the drilling operations at a well, shall not be released before the final well report in subsection 151(1) for that well is released without the written consent of the operator; and

(c) research work or feasibility studies relating to exploration or production techniques and systems shall not be released until 5 years has elapsed from the date the work or studies were furnished.

(4) Information referred to in subsection (3) in respect of environmental studies or contingency plans may be released by the minister.

(5) Notwithstanding another provision of these regulations, the director may 2 years after the rig release date in the case of an exploration well or 60 days after the rig release date in the case of a development well, release information contained within a final well report.

Exceptions

155. Notwithstanding section 154,

(a) where information submitted by an operator during the drilling of a well in an area has a direct bearing on the safety of the drilling operation being carried out by another operator in the same area, the director may communicate that information to the other operator; and

(b) information contained in the report referred to in subsection 139(2) may be released by the director.

Discussion

The reason why the drilling companies involved would want this level of confidentiality for the information they are required to submit to government is immediately obvious from the content of these sections of the regulation. For the reasons explained in connection with the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act,* it is clearly in the interest of the government and people of this province to protect the specified information. This will help the province attract the huge private sector investment that is necessary for the resource to be explored, and ultimately result in economic development for the benefit of the province.

The Petroleum and Natural Gas Act provides for highly specific circumstances; the most appropriate place to regulate the protection of this kind of information is, therefore, in regulations under that Act. The Committee concludes that the public interest is best served by these provisions remaining on the list of those that prevail over the *ATIPPA*.

Section 53 and 56 of the *Petroleum Regulations*

Information confidential

53. (1) For the purposes of this section

(a) "operation generating the data" is completed on the last date of acquisition of data from the operation;

(b) "confidential" means that the director, during the confidentiality period, shall not disclose the data without the consent of the owner of the data.

(2) Data acquired during

(a) an exclusive exploration survey submitted to the director under subsection 52(1) shall remain confidential for 5 years following the date that the particular operation generating the data was completed; and

(b) a non-exclusive exploration survey, submitted to the director under subsection 52(1), shall remain confidential for 15 years following the date that the particular operation generating the data was completed,

after which time the director may disclose that data to a person but is under no duty to disclose the data.

(3) Data submitted to the director under

(a) paragraph 52(2)(a) shall remain confidential for 5 years following the date on which the operation generating the data was completed;

(b) paragraph 52(2)(b) shall remain confidential for 5 years following the date of submission of the summary report;

(c) subsection 52(3) shall remain confidential for

(i) 2 years following the rig release date of the well, in respect to a exploratory well, and

(ii) 60 days following the rig release date of the well in respect to a development or stepout well,

after which time the director may disclose that data to a person, but is under no duty to disclose the data.

(4) Notwithstanding another provision of the regulations, a well history report for a development or stepout well shall not be disclosed before the expiration of the confidentiality period of the exploratory well that first penetrated the petroleum pool and led to the drilling of the development or stepout well.

Emergency disclosure

56. Notwithstanding section 53, the director may disclose information submitted under section 52 to another interest holder in order to prevent, control or terminate a blowout of a well or similar emergency incident.

Discussion

Confidential information of the kind identified in these sections is extremely valuable to the exploration companies that have spent huge sums to acquire it. That value would be lost if competitors could access it under the *ATIPPA*. Similar issues have already been discussed in connection with the *Petroleum Drilling Regulations* and the comparable mining exploration statutes. The designated provisions of the regulations should remain on the list of provisions that prevail over the *ATIPPA*.

Section 21 of the *Research and Development Council Act*

Records of commercially sensitive information

21. (1) Notwithstanding section 6 of the *Access to Information and Protection of Privacy Act* , in addition to

the information that shall or may be refused under Part III of that Act, the chief executive officer, or the head of another public body,

(a) may refuse to disclose to an applicant under that Act commercially sensitive information of the council; and

(b) shall refuse to disclose to an applicant under that Act commercially sensitive information of a third party

where the chief executive officer reasonably believes

(c) that the disclosure of the information may

(i) harm the competitive position of,

(ii) interfere with the negotiating position of, or

(iii) result in financial loss or harm to the council or the third party; or

(d) that information similar to the information requested to be disclosed

(i) is treated consistently in a confidential manner by the third party, or

(ii) is customarily not provided to competitors by the council or the third party.

(2) Where an applicant is denied access to information under subsection (1) and a request to review that decision is made to the commissioner under section 43 of the *Access to Information and Protection of Privacy Act* , the commissioner shall, where he or she determines that the information is commercially sensitive information,

(a) on receipt of the chief executive officer's certification that he or she has refused to disclose the information for the reasons set out in subsection (1); and

(b) on confirmation of the chief executive officer's decision by the board of directors of the council,

uphold the decision of the chief executive officer or head of another public body not to disclose the information.

(3) Where a person appeals,

(a) under subsection 60(1) of the *Access to Information and Protection of Privacy Act* , from a decision under subsection (1); or

(b) under subsection 43(3) of the *Access to Information and Protection of Privacy Act,* from a refusal by a chief executive officer under subsection (1) to disclose information,

paragraph 62(3)(a) and section 63 of that Act apply to that appeal as if Part III of that Act included the grounds for the refusal to disclose the information set out in subsection (1) of this Act.

(4) Paragraph 56(3)(a) of the *Access to Information and Protection of Privacy Act* applies to information referred to in subsection (1) of this section as if the information was information that a head of a public body is authorized or required to refuse to disclose under Part II or III of that Act.

(5) Notwithstanding section 21 of the *Auditor General Act,* a person to whom that section applies shall not disclose, directly or indirectly, commercially sensitive information that comes to his or her knowledge in the course of his or her employment or duties under that Act and shall not communicate those matters to another person, including in a report required under that Act or another Act, without the prior written consent of the chief executive officer.

(6) Where the auditor general prepares a report which contains information respecting the council, or respecting a third party that was provided to the council by the third party, a draft of the report shall be provided to the chief executive officer, and he or she shall have reasonable time to inform the auditor general whether or not in his or her opinion the draft contains commercially sensitive information.

(7) In the case of a disagreement between the auditor general and the chief executive officer respecting whether information in a draft report is commercially sensitive information, the auditor general shall remove the information from the report and include that information in a separate report which shall be provided to the Lieutenant-Governor in Council in confidence.

(8) Notwithstanding the *Citizens' Representative Act*, the council, another public body, or an officer, member or employee of one of them is not required to provide commercially sensitive information, in any form, to the citizens' representative in the context of an investigation of a complaint under that Act.

Discussion

The legislature has specified that notwithstanding section 6 of the *ATIPPA,* those provisions of the *Research and Development Council Act* shall prevail. Similar matters were discussed with reference to the *Energy Corporation Act.* The legislature has declared that this statute is to apply notwithstanding section 6 of the *ATIPPA*. It is not appropriate for this Committee to question that

decision in the exercise of its statutory jurisdiction to make recommendations respecting the *ATIPPA*.

Those who expressed concerns may wish to know that the Committee is of the same view here as it is with respect to the *Energy Corporation Act* provision. Although the basis for this decision is different, it is not unreasonable. The review rights of the Commissioner would provide a means of ensuring disclosure of records that should be disclosed.

Sections 47 and 52 of the *Royalty Regulations, 2003*

Confidential information

47. (1) A person who, while employed in the administration of the Act and these regulations,

(a) knowingly communicates or knowingly allows to be communicated to a person not legally entitled to information, information obtained by or on behalf of the minister for the purpose of the Act and regulations;

(b) knowingly allows a person not legally entitled to do so, to inspect or to have access to a book, record, writing, return or other document obtained by or on behalf of the minister for the purpose of the Act and these regulations; or

(c) knowingly uses, other than in the course of his or her duties in connection with the administration or enforcement of the Act or these regulations, information obtained by or on behalf of the minister for the purpose of the Act or these regulations,

is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months or to both a fine and imprisonment.

(2) Subsection (1) does not apply to the communication of information between the minister and the

(a) Minister of Finance and Treasury Board;

(b) Minister of Natural Resources for Canada; and

(c) board.

Confidentiality

52. An arbitrator shall keep confidential all information received from an interest holder or the minister in the course of the arbitration unless otherwise ordered by a court to make that information available.

Discussion

Section 47 does not directly specify that the records concerned are confidential or are not accessible by the public. Instead, the regulations constitute certain behaviours to be offences, such as: knowingly disclosing information obtained as an employee to a person not entitled to have the information, allowing such a person to inspect that information, or using the information other than in the course of the employee's duties. The regulation also provides for severe penalties for committing any such offence. The regulation does not specifically prohibit disclosure of information to a person "legally entitled to information," such as a person seeking access under the *ATIPPA*. In any event, the present *ATIPPA* prohibits the release of disaggregated royalty information. While this is not legal advice, it must be observed that it is not at all clear that simply providing for an employee offence provision to prevail over the *ATIPPA* necessarily prevents disclosure if the *ATIPPA* otherwise requires it. If it is intended to be so interpreted, it could only be by inference because it is not specific. At the very least it is ambiguous.

Certain provisions of the regulations require and provide for arbitration of disputes. Section 52 requires an arbitrator to keep confidential any information the arbitrator receives in the course of arbitration. The arbitrator is not a public body and so would not be subject to the *ATIPPA* in any event. It is not clear why section 52 was ever included in a list of regulatory provisions that prevail over the *ATIPPA*.

Attention should also be drawn to the portion of this report dealing with the growing worldwide movement referred to as the "Extractive Industries Transparency Initiative" (EITI). That portion of the report explains why the provisions of the *ATIPPA*, that prohibit disclosure of royalty payment details, run counter to the developing international approach.

This matter is of such significance and can have such far-reaching consequences, that it is not appropriate for the Committee, in the course of recommending provisions to improve the existing *ATIPPA*, to include a change of that magnitude. It must be a policy decision

for government and the legislature. In the circumstances the responsibility of this Committee is appropriately discharged by drawing attention to the matter.

However, with respect to sections 47 and 52 of the *Royalty Regulations, 2003,* their effect in their present form is sufficiently uncertain that the Committee cannot identify a credible basis for placing them on a list of statutory and regulatory provisions that prevail over the *ATIPPA*. Offence provisions of regulations are incongruous on a list of provisions that prevail over the *ATIPPA,* and they should be removed.

Section 12 and subsection 62(2) of the *Schools Act, 1997*

Student records

12. (1) A student record shall be maintained for each student in the manner required by a policy directive of the minister.

(2) Except as provided in this section a student record may only be reviewed by

(a) the parent of the student; or

(b) the student, if the student is 19 years of age or older,

to whom that student record pertains.

(3) A parent or student, if the student is 19 years of age or older, shall review the student record at a time and with a person designated by the board and receive an explanation and interpretation of information in the student record from that person.

(4) A parent or student, if the student is 19 years of age or older, who is of the opinion that the student record contains inaccurate or incomplete information may request the principal to review the matter.

(5) A student record may be used by the principal and teachers of a school and by board employees to assist in the instruction of the student to whom that student record pertains.

(6) Without the written permission of the parent of a student, or the student if the student is 19 years of age or older,

(a) a student record shall not be admissible in evidence in a trial, inquiry, examination, hearing or other proceeding except to prove the establishment, maintenance, retention or transfer of that student record; and

(b) a person shall not be required to give evidence respecting the content of the student record in a trial, inquiry, examination, hearing or other proceeding.

(7) Notwithstanding subsections (1) to (6), a principal may use a student record to prepare information or a report

(a) required under this Act; and

(b) when requested in writing by a parent, or where a student is 19 years of age or older, the student or former student, for

(i) an educational institution, or

(ii) an application for employment.

(8) This section shall not prevent the use of a report based upon a student record by the principal of a school attended by that student, or the board, for the purpose of a disciplinary proceeding commenced by the principal respecting the conduct of that student or a prosecution of an offence under this Act.

(9) An action shall not lie against a person who contributes test results, evaluations or other information to a student record where he or she acted in good faith within the scope of his or her duties.

Minutes

62. (1) A board and the executive committee of that board shall keep minutes of its proceedings and the minutes shall at all reasonable times be available for inspection by an official of the department designated by the minister, and on request, to members of the public.

(2) Notwithstanding subsection (1), the minutes of a closed meeting shall not be available to the public.

Discussion

It is obvious that information in a student register should not be disclosed to any person other than the persons provided for in the statutory provision. Further discussion respecting section 12 is unnecessary.

With respect to section 62, the statute generally requires board meetings to be open to the public. The statute does, however, permit the board to vote at a public meeting to convene a closed meeting. It is not difficult to understand that certain matters, such as disciplinary matters, need to be discussed in a closed meeting. A

closed meeting would be pointless if the minutes were subject to disclosure under the *ATIPPA*. It makes sense that protection for such minutes should be in the special statute that provides for the meeting, rather than in the *ATIPPA*. The Committee concludes that the public interest will be best served if those provisions of the *Schools Act, 1997* remain on the list of provisions that prevail over the *ATIPPA*.

Sections 19 and 20 of the *Securities Act*

Non-disclosure

19. (1) Except in accordance with section 20, no person or company shall disclose, except to his, her or its counsel,

(a) the nature or content of an order under section 12 or 13; or

(b) the name of a person examined or sought to be examined under section 14, testimony given under section 14, information obtained under section 14 or section 14.1, the nature or content of questions asked under section 14, the nature or content of demands for the production of a document or other thing under section 14 or section 14.1, or the fact that a document or other thing was produced under section 14 or section 14.1.

(2) A report provided under section 18 and testimony given or documents or other things obtained under section 14 or 14.1shall be for the exclusive use of the superintendent and shall not be disclosed or produced to another person or company or in a proceeding except in accordance with section 20.

Disclosure by superintendent

20. (1) Where the superintendent considers that it would be in the public interest, he or she may make an order authorizing the disclosure to a person or company of,

(a) the nature or content of an order under section 12 or 13;

(b) the name of a person examined or sought to be examined under section 14, testimony given under section 14, information obtained under section 14 or section 14.1, the nature or content of questions asked under section 14, the nature or content of demands for the production of a document or other thing under section 14 or section 14.1, or the fact that a document or other thing was produced under section 14 or section 14.1; or

(c) all or part of a report provided under section 18.

(2) No order shall be made under subsection (1) unless the superintendent has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the superintendent; and

(b) in the case of disclosure of testimony given or information obtained under section 14, the person or company that gave the testimony or from which the information was obtained.

(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) authorizing the disclosure of testimony given under subsection 14 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of another country or jurisdiction.

(4) An order under subsection (1) may be subject to terms and conditions imposed by the superintendent.

(5) A court having jurisdiction over a prosecution under the *Provincial Offences Act* initiated by the superintendent may compel production to the court of testimony given or a document or other thing obtained under section 14 or 14.1, and after inspecting the testimony, document or thing and providing interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant where the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution.

(6) A person appointed to make an investigation or examination under this Act may, for the purpose of conducting an examination or in connection with a proceeding commenced or proposed to be commenced by the superintendent under this Act, disclose or produce a thing mentioned in subsection (1).

(7) Without the written consent of the person from

whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 14(1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of another country or jurisdiction.

Discussion

These two sections are in Part VI of the Act, which empowers the superintendent to appoint investigators to conduct certain investigations:

- for the administration of the securities law of the province
- to assist in the administration of the securities laws of another jurisdiction
- with respect to matters relating to trading in securities in the province
- with respect to matters in the province relating to trading in securities in another jurisdiction
- for the due administration of the securities law of the province or the regulation of the capital markets in the province
- to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction

Other sections provide for the issuing, after a hearing in private, of court orders to empower the investigator to make inquiries, take statements under oath, require production of and seize documents, and take a variety of other steps necessary in connection with the investigation. It is in the nature of police work focussed on the financial and securities industry. As with a police investigation, the information gathered should not be disclosed except in the ordinary course of administration of justice. Regulating access to such records is best provided for in the statute that comprehensively provides for all aspects of the subject matter of the legislation. The public interest will be best served by having those sections of the *Securities Act* remain on the list of statutory provisions which prevail over the *ATIPPA*.

Section 13 of the *Statistics Agency Act*

Disclosure of information

13. (1) Except for the purposes of communicating information in accordance with the conditions of an agreement made under section 14 or 15 and except for the purposes of a prosecution under this Act,

(a) a person other than the director or a person employed by the agency and sworn or affirmed under section 9 shall not be permitted to examine an identifiable individual return made for the purpose of this Act;

(b) a person who has been sworn or affirmed under section 9 shall not disclose to a person other than a person employed by the agency and sworn or affirmed under section 9, information obtained under this Act that can be identified with or related to an individual, person, company, business or association.

(2) The director may authorize the following information to be disclosed:

(a) information collected by persons, organizations or departments for their own purpose and communicated to the agency, but that information when communicated to the agency shall be subject to the same secrecy requirements to which it was subject when collected and may only be disclosed by the agency in the manner and to the extent agreed upon by the collector of the information and the director;

(b) information relating to a person or organization in respect of which disclosure is consented to in writing by the person or organization concerned;

(c) information relating to a business in respect of which disclosure is consented to in writing by the owner of the business;

(d) information available to the public under another law;

(e) information in the form of an index or list of

(i) the names and locations of individual establishments, firms or businesses,

(ii) the products produced, manufactured, processed, transported, stored, purchased or sold, or the services provided by individual establishments, firms or businesses in the course of their business, and

(iii) the names and addresses of individual establishments, firms or businesses that are within specific ranges of numbers of employees or persons constituting the work force.

To understand the prohibition against disclosure under the above provision, it is helpful to consider the source of the information and the manner in which it can be collected. Those are indicated in section 11:

> **Access to records**
>
> **11.** A person having the custody or charge of documents or records
>
> (a) that are maintained in a department or in a municipal office, company, business or organization; and
>
> (b) from which information sought in respect of the objects of this Act can be obtained,
>
> shall grant access to the documents or records to the director or a person authorized by the director.

Discussion

Clearly this is not wholly government information. Much of it may be the private information of the parties from which it is taken by force of law. It may be that such records can be adequately protected by the provisions of the *ATIPPA*. However, as totally private information it would seem appropriate for such records to be protected directly through provisions of the statute authorizing their collection and management. The Committee does not have sufficient information to reach a conclusion as to which course would best serve the public interest. That section of the *Statistics Agency Act* should remain on the list of statutory provisions prevailing over the *ATIPPA*, at least until the next statutory *ATIPPA* review, unless the legislature decides otherwise in the meantime.

Section 18 of the *Workplace Health, Safety and Compensation Act*

> **Information confidential**
>
> **18.** (1) An employee of the commission or a person authorized to make an inquiry under this Act shall not divulge, except in the performance of his or her duties or under the authority of the board of directors, information obtained by him or her or which has come to his or her knowledge in making or in connection with an inspection or inquiry under this Act.
>
> (2) Notwithstanding subsection (1), the board of directors may permit the divulging to legal counsel or another authorized representative either of a person seeking compensation or of another interested party of information referred to in subsection (1) or other information contained in the records or files of the commission.

Discussion

The purpose of the statute is to create a no-fault system of compensation for workers who are injured as a result of activity associated with their work. Section 19 lists aspects of employee and workplace circumstances that may be relevant to determining entitlement to compensation. Section 17 authorizes the appointment of a person "to make the examination or inquiry into a matter that the commission considers necessary for the purpose of this Act." The information gathered is largely personal information, and in any event not conventional government information. Therefore, access to it is best regulated by the special statute that regulates all other aspects of the subject matter of the statute. There is nothing to indicate that the public interest will be best served by having such information subject to access consideration under the *ATIPPA*. Section 18 should, therefore, remain on the list of statutory provisions that prevail over the *ATIPPA*.

Sections 17.1 and 17.2 of the *Revenue Administration Act*

A bill to amend the *Revenue Administration Act* was passed by the House of Assembly on 25 November 2014 and received royal assent on 16 December 2014. The amending statute is to come into force on a day to be proclaimed by the Lieutenant-Governor in Council. As at the writing of this report, that has not occurred.

The amending statute adds two sections to the *Revenue Administration Act*. It also amends the *Access to Information Regulations* to add those two sections to the list of legislative provisions that prevail over the *ATIPPA*. While this is the direct action of the legislature in the passage of another statute, it is also an action taken

specifically in respect of the *ATIPPA*, in that it amends the *Access to Information Regulations* made under the authority of the *ATIPPA*. Accordingly, the Committee considers that it is within its mandate and responsibility to express its views on the desirability of these amendments, in the context of preserving the integrity of the access to information law of the province, particularly in light of the Committee's objective to recommend adjustments that will cause the *ATIPPA* to rank among the best such laws. The two sections of the *Revenue Administration Act* and the amendment to the *Access to Information Regulations* read as follows:

> **Electronic registry**
>
> **17.1** (1) The minister shall establish an electronically accessible system to provide information respecting tax administered under this Act, and may determine the information respecting tax owing under this Act that may be provided.
>
> (2) A person may, as the minister may permit, by electronic means, request a clearance certificate in respect of a taxpayer in the manner that the minister may determine.
>
> (3) A request under subsection (2) shall be accompanied by the fee prescribed in section 113.1 and the Information required by the minister to identify the taxpayer in respect of whom the clearance certificate is requested.
>
> (4) The minister shall, within 3 business days after receiving a request under subsection (2), confirm that receipt by issuing an electronic notice of confirmation to the person who made the request.
>
> (5) Where a notice of confirmation has been issued with respect to a request, the minister shall provide the requested clearance certificate within a reasonable time period after the issuance of the notice of confirmation.
>
> **Time of notification**
>
> **17.2** Electronic information provided by the minister in response to a request under section 17.1 shall be considered to be provided to the person who made that request when it enters an information system outside the control of the minister.
>
> NLR 11/07 Amdt.

> **2. Section 5 of the *Access to Information Regulations* published under the *Access to Information and Protection of Privacy Act* is amended by adding immediately after paragraph (q.1) the following:**
>
> (q.2) sections 17.1 and 17.2 of the *Revenue Administration Act*

Discussion

The Committee has no information beyond the wording of the two new sections, that would provide any guidance as to the purpose of adding those provisions to the list of the legislative provisions that are to prevail over the *ATIPPA*. There may be sound reasons for the change, but if there are, they are not obvious from the content of the two provisions.

The *Revenue Administration Act* is a general statute providing for the collection, receipt, and administration of taxation revenues. It is perfectly normal for such statutes to require, in connection with determining taxes due, that taxpayers provide the government with information that is private and confidential. It is reasonable, therefore, that records relating to such information not be accessible to persons generally under access to information legislation.

When considered in the context of the related sections of the *Revenue Administration Act*, those new amending sections do not seem to involve any such confidential information. They are wedged between sections 17 and 18:

> **Action to recover tax**
>
> **17.** (1) The amount of tax may be recovered with costs, by action in the name of the minister in a court, as debt due to the Crown.
>
> (2) An action under subsection (1) shall be tried without a jury and the court may make an order as to costs in favour of or against the Crown.
>
> **Tax as lien**
>
> **18.** (1) Until the amount of the tax required to be paid under this Act is paid, it is a first lien in favour of the Crown on the entire assets of the estate of the taxpayer and the lien has priority over all other claims of a person against the taxpayer.

> (2) The lien referred to in subsection (1) attaches on the date the tax was due to the Crown and continues in force until paid, or until a clearance certificate has been issued by the minister.
>
> (3) A lien for tax in respect of real property is considered to be a first mortgage ranking in priority over every grant, deed, lease, or other conveyance and over every judgment, mortgage, or other lien or encumbrance affecting the real property affected or the title to the real property affected and the minister may discharge the lien by power of sale under the *Conveyancing Act*.
>
> (4) The registration of a grant, deed, lease or other conveyance, or of a judgment, mortgage, or other lien or encumbrance, whether the registration was before or after the time the lien was attached does not affect the priority of the lien.
>
> (5) The minister may register the lien in the Registry of Deeds or the Personal Property Registry.

When considered in the context of sections 17 and 18, any record connected with the two new sections would not appear to involve confidential information. Any such record would only indicate whether the taxpayer was in default of payment of any tax due or whether the related property and assets of the taxpayer were subject to a lien in favour of the government to provide security for the due payment of the tax.

That assessment of the effect of the two amending provisions is further buttressed by the fact that section 17.1 entitles "a person," which can only be construed as "any person," to request a clearance certificate in respect of "a taxpayer," which can only be construed as any taxpayer, and the minister is required to confirm receipt of the request within three days. The minister is then required to issue the clearance certificate within a reasonable time. There does not appear to be any requirement for maintaining confidentiality of any record issued under the new amending sections. There is, therefore, no apparent need for the amending sections to be placed on the list of legislative provisions that prevail over the *ATIPPA*.

Unless there are factors of which the Committee is unaware, the Committee recommends that the designated amending sections of the *Revenue Administration Act* not be added to the list of legislative provisions that prevail over the *ATIPPA*.

Issue (iii): *Should the list of legislative provisions that prevail over the ATIPPA be decided by the legislature and become part of the Act, or by the Lieutenant-Governor in Council as a regulation alterable at any time without reference to the legislature?*

This issue did not receive a lot of attention but the ability of the Cabinet to designate provisions of other statutes that prevail over the rights of citizens conferred by the legislature, without reference to the legislature, was raised as a concern. The Committee shares that concern. It is not unusual for the Lieutenant-Governor in Council to be empowered by a statute to make regulations having a significant impact. However, the House of Assembly enacted the *ATIPPA* to assist citizens in holding government to account. Giving government the power to declare that other statutes and regulations will prevail over that statute is inconsistent with its purpose. For that reason, the Committee concluded that the *ATIPPA* should be amended to remove that regulation-making power from the Lieutenant-Governor in Council and provisions that are to prevail over the *ATIPPA* should be identified by the House of Assembly.

Undoubtedly, circumstances that require immediate response could arise while the House of Assembly is not in session. That possibility can be accommodated without granting Cabinet the total power of the legislature in relation to matters that prevail over the *ATIPPA*. An urgent circumstance can be adressed by authorizing the Lieutenant-Governor in Council to add to the list a statute or regulation that must be added before the legislature can convene. Any such Order would be valid only until the end of the next sitting of the House of Assembly.

The same concerns required the Committee to examine the remainder of the regulation-making powers listed in section 73 to identify any that might cause the same adverse impression of the integrity of the *ATIPPA*. That process identified four that should be deleted. Items (c), (o), and (q) should be deleted for the reasons expressed. Item (r) should be deleted because it is spent.

Issue (iv): *Should every committee conducting a review of the ATIPPA assess each statute to determine whether it should stay on the list of those that prevail over the ATIPPA?*

It was the strong recommendation of the Commissioner that such a review should be carried out. In fact, he suggested that the onus should be on each public body responsible for legislation on that list to make a convincing case for their continued inclusion in the list.

The Committee shares the view of the Commissioner with respect to the necessity for inclusion of those provisions in the review. The Committee concluded that a comprehensive review of the *ATIPPA* required consideration of section 6 and the list of statutory and regulatory provisions that results from it. We do not, however, agree that the legislation should impose an "onus" on each public body to make a convincing case. The representation, if any, that a public body wishes to make should remain a matter for decision by the public body.

Recommendations

The Committee recommends that

37. The following provisions be removed from the list of legislative provisions that prevail over the *ATIPPA*:
- (a) subsection 9(4) of the *Aquaculture Act;*
- (b) subsections 5(1) and (4) of the *Aquaculture Regulations;*
- (c) section 18 of the *Lobbyist Registration Act;*
- (d) section 15 of the *Mining Act;*
- (e) sections 47 and 52 of the *Royalty Regulations, 2003*;
- (f) sections 17.1 and 17.2 of the *Revenue Administration Act*.

38. All of the remaining legislative provisions presently listed in the *Access to Information Regulations,* other than those specified in Recommendation 37 above, remain on a list of legislative provisions that prevail over the *ATIPPA*.

39. An amendment be made to the provision that is section 6(2) of the *Act*, to provide that the list of legislative provisions that will prevail over the *ATIPPA* are those listed in a schedule to the *ATIPPA*.

40. A provision be added to provide for the Commissioner having jurisdiction to require production of all records in respect of which exemption from disclosure is claimed under any of the legislative provisions specified in that schedule to the *ATIPPA*, and the corresponding right of entry under section 53 in respect of those records.

41. An addition be made to what is existing section 74, of a provision that will require that every statutory five-year review include review of each of the legislative provisions listed in that schedule to the *ATIPPA* to determine the necessity for continued inclusion in the list of provisions that prevail over the *ATIPPA*.

42. A section be added that will authorize the Lieutenant-Governor in Council, at any time when the House of Assembly is not in session and it is considered necessary to take action before the House of Assembly will next meet, to make an order adding a statutory or regulatory provision to that schedule to the *ATIPPA*, but such order shall not continue in force beyond the end of the next sitting of the House of Assembly.

43. Iitems (c), (o), (q) and (r) be removed from the items of regulation making powers in section 73 of the *Act.*

44. In addition to the foregoing recommendations respecting the *ATIPPA*:

(a) The Committee recommends that the Government consider placing a bill before the House of Assembly to amend section 5.4(1) of the *Energy Corporation Act*, and section 21 of the *Research and Development Council Act*, by inserting the phrase "taking into account sound and fair business practices" immediately before the words "reasonably believes" in each of those sections.

(b) The Committee recommends that more information respecting the justification for section 8.1 of the *Evidence Act*, section 5(1) of the *Fish Inspection Act*, section 4 of the *Fisheries Act*, and section 13 of the *Statistics Agency Act* being continued on the list of legislative provisions that prevail over the *ATIPPA* be made available to the next *ATIPPA* statutory review committee, for any of those provisions that are on the list at that time.

Chapter Six

PERSONAL INFORMATION PROTECTION

6.0 Introduction

Concerns about the security of personal information did not appear to be a primary concern of most people who addressed the Committee. There were a few exceptions, which can be summarized as follows:

- Several participants were concerned that some municipalities over-protected personal information to the point of obscuring information that by tradition and practice had always been made public.
- At least one participant complained that requested personal information had been wrongly withheld, despite a series of reviews and some litigation.
- Another participant felt that to disclose the actual salaries of public servants was a questionable invasion of their privacy.
- Presenters for political parties were concerned about the privacy implications of a practice that routes constituents' requests for assistance from a public body through a minister's political staff.
- The Speaker of the House of Assembly, on behalf of all the parties represented in the House, expressed concern about the liability of Members of the House of Assembly to whom personal information was voluntarily disclosed in the course of trying to deal with constituent problems. He felt that Members should be protected from any negative repercussions stemming from the disclosure of the personal information of constituents in these cases.

The most prominent theme in personal information protection was concern about the treatment of personal opinions given in the course of employment. An employer requested that the *Act* return to its pre–2012 version, so that the opinions of employees about third parties would be inaccessible to applicants seeking records about themselves. A professional group requested that their recommendations and analyses, given in the course of their duties, be declared confidential in all cases. And organizations representing the interests of participants in health-related inquiries sought added protection for professional evaluations given in the course of quality assurance and peer reviews.

Finally, the Information and Privacy Commissioner made many suggestions for improving his ability to take action to prevent misuse of personal information, investigating potential and real privacy problems more fully, and generally dealing with privacy issues from a variety of angles.

These issues were raised primarily by professional groups, employers, politicians, and the Commissioner. This suggests that the gaps in existing personal information protection provisions of the *ATIPPA* have not come to the attention of the wider public, which is currently more concerned with the loss of transparency resulting from the Bill 29 amendments. Few privacy incidents outside the health sector seem to have captured popular attention in recent times. And indeed, with a few significant omissions, notably those dealing with the powers of the Commissioner and provisions for privacy impact assessments, the personal information

protection provisions of the *ATIPPA* generally reflect best practices across the range of comparable jurisdictions.

In addition, the province's recent experience in creating, applying, and administering the *Personal Health Information Act (PHIA)* has resulted in developing significant expertise in the area of health privacy. *PHIA* is one of Canada's most recent pieces of health privacy legislation and is not the subject of the present review. However, some of its approaches and practices could be integrated into the *ATIPPA*.

The concerns and suggestions we heard, as well as our own research into approaches in other jurisdictions which could better protect privacy in this province are grouped by subject matter in the remainder of this chapter.

Because of the wide variety of subject matters respecting personal information protection, the Committee's conclusions are expressed and recommendations are made after our analysis of each subject, instead of at the end of the chapter, as is the case in other parts of this report.

6.1 Notice to affected persons

Legislation in some jurisdictions includes provisions for notifying individuals when their personal information is being released. Memorial University suggested adding a section to the *ATIPPA* that would require notice to a third party in an access to information request. This is already part of Ontario[1] and British Columbia[2] legislation, where it is included in the section of the legislation concerning third party business interests. The notice provisions apply equally to the interests of third parties in respect of their personal information.

Despite this general approach, there are some circumstances in British Columbia when notice to a third party is not required. This is the case when the public interest overrides the rules of non-disclosure with respect to release of personal information. In British Columbia's *Freedom of Information and Protection of Privacy Act*, for example, a public body may release personal information if there are compelling circumstances that affect anyone's health or safety; and

> 33.1(m)(ii) notice of disclosure is mailed to the last known address of the individual the information is about, unless the head of the public body considers that giving this notice could harm someone's health or safety.

Newfoundland and Labrador's equivalent provision, section 39(1)(p), does not currently allow the head of a public body to disregard the notice requirement in similar circumstances. Nor does it contemplate the head of a public body communicating by a means other than the mail system.

Another consideration for a notice requirement is that some public bodies may have difficulty retracing all individuals when a bulk release of personal information takes place, often in the context of historical research or inquiries into past incidents.

Rapid and accurate identification of individuals is crucial in an emergency. With natural disasters, global epidemics, and terrorism-related violence, emergency planning has taken on a new importance. This is one of the reasons personal information held by public bodies should be accurate and up to date. In a public emergency, the usual restrictions on the use, collection, and disclosure of personal information will not apply.[3]

1 Ontario *FIPPA*, s 28.

2 BC *FIPPA*, s 23.

3 Canada OPC, *Privacy in the Time of a Pandemic* (2009).

Analysis

Under the *ATIPPA*, where personal information of a third party may be disclosed in an access request, the head of the public body is required to consider whether disclosure would be an unreasonable invasion of a third party's privacy. In those circumstances, it would be wise to incorporate a notification requirement such as those that exist in the British Columbia and Ontario legislation.

One of the advantages of such a notification requirement would be to give prior notice of an impending release of personal information to those affected. The third party would then be in a position to ask the Commissioner to review the decision before the release of personal information takes place.

Recommendations

The Committee recommends that

45. A provision be added to the *ATIPPA* along the lines of the British Columbia *Freedom of Information and Protection of Privacy Act* provision that would require reasonable efforts to be made to notify third parties of the impending release of their personal information in the case of an access request. A third party would be allowed an opportunity to make a complaint to the Commissioner before such action is taken.

46. The Office of Public Engagement, in consultation with the Newfoundland and Labrador Fire and Emergency Services Agency, examine how the information rights (access and personal) of persons are best protected in emergency situations involving the population's health or safety.

47. Sections 30(2)(c) and 39(1)(p) of the *Act* be amended to include any form of communications appropriate to the circumstances.

6.2 Data breach

Data breaches did not appear to be a major concern of participants in the review exercise. Yet they are taking place. The Office of Public Engagement shared statistics at the hearings on the number of privacy breaches that had occurred since January 2013. Since 2013, reporting and addressing privacy breaches has become standard policy. Minister Collins advised:

> Between January 2013 and June 2014, 39 privacy breaches were reported to the Office of Public Engagement and of these, 30 (77 per cent) were minor in nature, involving limited amounts of personal information; while nine were serious involving sensitive personal information (e.g., social insurance number).[4]

4 Government NL Submission, August 2014, p 21.

There have also been data breaches in the recent past. In 2008, for example, a spate of apprehended information leaks stemming from laptop thefts at Memorial University and the Eastern District School Board came to public attention. In the same year, the Workplace Health, Safety and Compensation Commission suffered a leak of confidential files through the misuse of a file-sharing programme, and an online application site for student aid at the provincial Department of Education was breached, although the problem was quickly corrected.

The apparent serenity about personal information challenges during the Committee's hearings and in written submissions may stem from the relatively little attention they received in the *Act* before 2012, which meant that fewer actions could be taken by the OIPC. The Office of Public Engagement was created in October 2012 and has recently (January 2014) updated its protection of privacy manual.

Contrast this with the provisions of the *Personal Health Information Act* (*PHIA*) of 2008, which came into force completely in 2011. The protection of information rights in the health care sector has led to greater awareness of potential problems and the appropriateness of serious enforcement measures, including bringing to court those who have "willfully" breached the personal information of patients in the public health system.

Few references to data security issues exist in the *ATIPPA* as it is presently worded; the only specific mention is found in the following section:

> The head of a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.[5]

This reference in the *Act* to data breaches is no longer adequate, since public bodies other than those in the health sphere hold information of great interest to ill-motivated persons inside and outside the public service. It is time for a serious examination of how the present legislation and its application deal with inevitable breaches in security of personal information.

Both the minister and the deputy minister of the OPE explained at the hearings that despite the silence of the *Act*, in practice, public bodies are required to report breaches to the Office of Public Engagement ATIPP Office and when necessary, to the affected individuals.

The OPE provides resources to assist public bodies in responding to privacy breaches, including a privacy breach protocol.

Deputy Minister Rachelle Cochrane said that many, but not all, public bodies report a data breach to the OIPC. Although there is no statutory requirement to notify the OPE, the OIPC or affected individuals, many public bodies do notify these parties in the event of a breach.[6]

The OIPC discussed the question of breach reporting at both its appearances before the Committee. In June 2014, it suggested a statutory requirement for breach reporting to both the Commissioner and the affected individual. But it suggested further study as to the severity of a breach which would merit this treatment.

In its supplementary submission to the Committee in late August 2014, the OIPC stated that all privacy breaches experienced by a public body should be reported to the Commissioner because this would add to the body of expertise on how to deal with data breaches:

> Having knowledge of the types of breaches and the actions being taken by public bodies to respond to these breaches would be helpful to our Office in discharging our oversight function, because it would allow us to identify trends and problems and to address such issues from an oversight perspective.[7]

The OIPC also stated that, given the current policy of the OPE that all privacy breaches be reported to their ATIPP Office, "we see no additional burden for the public body to make the same report to the Commissioner."[8]

5 *ATIPPA* s 36.

6 Government NL Transcript, 19 August 2014, p 200.

7 OIPC Supplementary Submission, 29 August 2014, p 12.

8 *Ibid.*

Analysis

The need for more effective protection of personal information is recognized internationally. The Privacy Commissioner of Canada pointed out that in the major Review of the Privacy Guidelines in 2013, the Organization for Economic Co-operation and Development (OECD) adopted new provisions recommending that member countries, which includes Canada, implement mandatory breach notification schemes.[9]

The *PHIA* could serve as a model that would be useful in the broader public sector. The *PHIA* deals comprehensively with security of information, providing for notification of individuals whose personal health information has been breached and notice to the Commissioner in cases of a material breach.

There are even provisions for breaches discovered by researchers when processing or analyzing the personal information of third parties. To protect the anonymity of research subjects, the researcher cannot notify the research subject of the breach. They must go back to the health custodian from whom the information was obtained, who then must contact the research subject to obtain consent to be contacted by the researcher.

Notification to the individual is waived when the custodian reasonably believes that the breach will not have an adverse impact on the provision of health care to the individual or the mental, physical, economic, or social well-being of that individual.

9 Privacy Commissioner of Canada Submission, 7 August 2014, p 1.

Conclusion

Since relatively few data breaches from public bodies are documented, the optimal requirement would be to report all breaches to the Commissioner, who could recommend any necessary follow up, notification of the affected parties if that has not already been done, preventative measures for the future, and so on. While this would place an administrative burden on the Commissioner which the circumstances of each breach may not warrant, the Committee agrees with the OIPC's recommendation in this respect.

Data breach reporting better informs and protects individuals who may be the victims. It also sensitizes the public body and its personnel to the importance of data security at all times. Now that information held by public bodies is under increasing pressure from data predators, a workable notification scheme for data breaches is essential. The Commissioner addressed the value of reporting breaches:

> While some public bodies have voluntarily reported significant breaches to this Office, such reporting is not required by law, and it tells us nothing about the state of overall privacy compliance. We are unable to spot trends or systemic issues, and therefore are unable to recommend steps to help prevent further breaches in the future.[10]

Given these comments, and with the new powers recommended for the Commissioner in chapter 7, including the authority to audit and produce special reports, it is necessary that he be informed of all privacy breaches. Since details of all breaches are already collected by the Office of Public Engagement, it would simply be a matter of transferring the information to the Commissioner.

The recent government policies encouraging the reporting of data breaches should be incorporated into law and added to the *ATIPPA*. With respect to notification of affected individuals, the Committee believes this should be done only in cases where the privacy breach would create a risk of significant harm.

10 OIPC Submission, 16 June 2014, p 75.

The Committee recommends that

48. The *Act* be amended to require a public body to:
(a) report all privacy breaches to the Commissioner; and
(b) notify affected individuals when there is a risk of significant harm created by a privacy breach.

6.3 Personal information and politics

This section deals with the often nebulous dividing lines between government and political parties; those elected members who support the government of the day and those in the Opposition. There are three interrelated topics:

- the extent to which the political staff of a minister should be involved when an MHA is dealing with the public service in the course of assisting a constituent
- the responsibility and liability of Members of the House of Assembly who disclose personal information in the course of trying to help a constituent
- how political parties should collect, use and disclose the personal information of voters

The *ATIPPA* reflects the principle that there are clear limits on the use of personal information by public bodies and, by implication, those who work for them. Two sections are particularly important in this regard:

Use of personal information

38. (1) A public body may use personal information only
(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose as described in section 40;
(b) where the individual the information is about has identified the information and has consented to the use, in the manner set by the minister responsible for this *Act*; or
(c) for a purpose for which that information may be disclosed to that public body under sections 39 to 42.
(2) The use of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.

Disclosure of personal information

39. (1) A public body may disclose personal information only…
(k) to a member of the House of Assembly who has been requested by the individual the information is about to assist in resolving a problem with government that the constituent might have.

Given these strict limits on the use of personal information by a public body, it is surprising to hear of the frequent involvement of political staff in constituents' requests routed through their MHAs, who may be members of the Opposition.

6.3.1 Political staff and constituent matters

Both political parties in opposition identified political interference as an issue. They pointed out that MHAs attempting to obtain assistance with government services or benefits for a constituent are often routed through the office of the minister responsible for the area of the request. As a result, political staff may often see the personal information that is intended to be seen only by the public servants administering a program or service. This practice is not supported by the *Act* or by the advice contained in the Office of Public Engagement's *Protection of Privacy Policy and Procedures Manual*.

Gerry Rogers, New Democratic Party MHA, first raised the issue at the public hearings in June:

> We believe that this compromises the inherent right to privacy of our constituents. There is an unwritten policy now when I, as an MHA, need to access information on behalf of a constituent whether it be through income support, whether it be through educational information ... or health information, I'm now required to go directly to the Executive Assistant of the appropriate minister, which is a political appointment, thereby endangering the right of privacy to my constituents by placing their personal information, some of it which is so incredibly intimate and personal before the eyes of a political appointed Executive Assistant, bypassing the appropriate worker who is working on the ground, in the field who actually has the relevant information.
>
> Sometimes our requests are simple, simple in terms of we need to know what is the new timeframe for when the information that the constituent needs or what can be done to help a specific constituent with a need. So that lays their personal intimate information again before an unnecessary set of eyes. Another barrier to our ability to work on behalf of our constituents again is government's unwritten policy dictating all requests for assistance or information to go through the minister's political staff. That is what we are forced to do.[11]

The Leader of the Official Opposition, Dwight Ball, complained of the same thing. He stated that it "speaks to an overarching climate of secrecy under which we, as the opposition, are forced to operate,"[12] with the result that it takes additional time to obtain information for constituents. The overriding concern, though, was privacy. He said he had seen cases where constituents abandoned their requests because they did not want their information placed in front of ministers and their political staff.[13] Mr. Ball said at one time he could go directly to staff in the department and work on the constituent's case, but that changed around 2012,[14] at the time the Bill 29 amendments were approved by the legislature.

Government representatives did not deny the existence of a practice to send MHAs to ministers' offices when seeking assistance for constituents. Indeed, Minister Collins felt that this could make for quicker and more efficient treatment. He explained that public servants sometimes feel concern about requests from political parties: concern about perceived liability, about media coverage, and about involvement of MHAs' political staff whom they do not know personally. Minister Collins told the Committee that this practice was at the discretion of each individual minister.

The Information Commissioner of Canada, Suzanne Legault, provided some perspective on this issue with respect to access to information, not constituency matters. She stated that she often hears about attempted political interference in cases where information is requested from the Federal Government. She reminded the Committee that the only people who can make decisions on access to information or personal information requests are those who have been formally delegated to do so by the minister or the head of the public body. She summarized the way in which political interference can work:

> The people who have delegated authority are the only people who are allowed legally to make decisions on disclosure.
>
> What happened in the political interference cases is that there were people who worked in the minister's office

11 New Democratic Party Transcript, 26 June 2014, pp 17–18.

12 Official Opposition Submission, 22 July 2014, p 40.

13 Official Opposition Transcript, 22 July 2014, pp 124–125.

14 *Ibid* 121–122.

> who had no legal authority to make any kind of decisions on disclosure within those departments and they were giving instructions to the people who had appropriate legally delegated authority to make decisions and they were asking them and instructing them to do something other than what they thought was appropriate in applying the *Act*.
>
> That's what happened in those cases. And ... in the first case the information was disclosed many months later and only through additional requests made by the requester who at that time happened to be a journalist, and it is only because this journalist made additional access to information requests that this situation was actually investigated and exposed, because they were documented records.
>
> In the second case it was the same. We asked for all communications between the ministers, staffers and the people who had proper legal delegation of authority, and through the chains of emails that we found that there had been instructions to change their decisions.[15]

At a subsequent hearing, the Commissioner provided the Committee with some information on how his office had dealt with the problem involving MHA Gerry Rogers and her attempt to get help for a constituent. His office attempted to investigate a formal complaint Ms. Rogers made in August 2012. She alleged that in the course of attempting to help a constituent obtain information from the government, the constituent's personal information had been used and disclosed by a minister's executive assistant without consent.

Several problems arose. The OIPC said it could not accept this as a privacy complaint under section 44 of the *Act*, because the language of that provision is limited to an individual complaining about the misuse of his or her own information. The Commissioner relied instead on a general authority to make recommendations, and investigated a complaint about an apparent practice in government whereby MHAs were required to channel inquiries from constituents through political staff working for the public body's minister.

The Commissioner concluded that while there may be complex cases that warrant the participation of ministerial staff, and where the minister may have to exercise discretion on matters where no government position has yet been taken, there is no justification for sharing the personal information of a constituent with the minister's staff on routine inquiries.[16] A member of the Commissioner's staff wrote to the minister in question outlining these principles. No response was ever received.

15 Information Commissioner of Canada Transcript, 18 August 2014, pp 102–103.

16 OIPC Supplementary Submission, 29 August 2014, Appendix 3.

Analysis

The *Act* clearly sets out the limits for access by a public body to the personal information of a citizen. The disclosure principle of the Code of Fair Information Practices, which has inspired much of North America's privacy legislation, sets out the basic principle in data protection that personal information can be disclosed only by those who have consent of the individual or those authorized by law.

Given these generally accepted principles and the clarity of the law, it is hard to see how the political staff of a minister's office would have an automatic right to intervene and, as a result, be in a position to view any personal information necessarily disclosed in the course of the MHA resolving a problem on behalf of a constituent.

MHAs are frequently asked by constituents to make representations to a public body, usually a government department, to obtain some licence, permit, or other entitlement the constituent may have. This is a time-honoured practice. There is special provision in the *ATIPPA* to facilitate that activity by an MHA without its resulting in a breach of the constituent's personal privacy. Under section

39(1)(k), a public body is authorized to disclose personal information of a person "to a member of the House of Assembly who has been requested by the individual the information is about to assist in resolving a problem."

The Committee could find no statutory or regulatory authority for intervention in the MHA's efforts by a minister's political staff. The most concerning aspect is that it can and frequently does result in disclosure of personal information to a person who has not been authorized to see it. Neither can it be said to be authorized by section 39(1)(u) because it is not "necessary" for that political staff to have the information in order for the governmental service to be delivered to the constituent.

Conclusion

The behaviour of political staff is not something the Committee can appropriately address. Possibly, the constituent concerned could complain to the Commissioner, who could investigate whether that constituent's rights had been breached by an intervention by political staff.

It should also be observed that there is no apparent justification for such intervention in the context of fair and acceptable political practices, and it should cease. It is not, however, a matter that should be addressed directly by a provision in the *ATIPPA*, except for the offence provision, if indeed that applies in the circumstances. If it is to be statutorily addressed it should be in the *House of Assembly Act*. Perhaps the most effective and direct way to address this issue is by the individual MHA who encounters the problem. They may choose to deal with it by raising the matter as a breach of their privileges in the House of Assembly or, when the House of Assembly is not in session, in a more public manner through the media.

Just before this report was prepared for publication, the Committee was made aware through news stories that this issue had been raised in the House of Assembly by the Leader of the Official Opposition. The Premier has acknowledged that it is a practice,[17] and he proposed to look into the matter further.

17 NL *Hansard*, 11 December 2014.

6.3.2 Risk of liability of Members of the House of Assembly

A second issue respecting Members of the House of Assembly is the potential for liability when they handle personal information on behalf of constituents. This matter was brought to the attention of the Committee by the Speaker of the House of Assembly, Ross Wiseman, in a letter to the Committee Chair on 13 August 2014, after consultation with the Management Commission of the House and the agreement of all parties. The Speaker outlined MHAs' concern about their vulnerability and that of their staff as a result of using or disclosing the personal information of their constituents. The staff of the House of Assembly had instructed members in best practices in handling personal information, including the desirability of obtaining written consent. But there remain practical problems, which the Speaker summarized in his letter:

> The ATIPPA/Privacy personnel of the House of Assembly have instructed Members and their assistants in the best practices with respect to obtaining consent for the Member to act on behalf of constituents. It is understood that some constituents may only ever instruct verbally (which instruction is recorded in writing) or may in fact be functionally or actually illiterate and/or unable to understand the full ramifications of asking for the Member to act for them and to have their personal information. In

> many instances there will be no issue. The riskiest situation would be where the advocacy does not assist in producing the desired outcome and personal information has been given to other persons and bodies as a solution to a problem is sought. In such situations a constituent might be more likely to claim that they did not understand or did not consent to the release of the information. At that point a Member or constituency assistant is vulnerable to an action for breaching privacy.[18]

18 Speaker of the House of Assembly Submission, 13 August 2014, p 2.

The Speaker asked the Committee to consider an amendment to section 71 of the *ATIPPA* so that a Member of the House of Assembly cannot be sued for "disclosing information obtained from a public body in accordance with paragraph 39(1)(k) while acting in good faith on behalf of an individual."

Conclusion

The *Act* provides that an MHA who is trying to assist a constituent may have access to his or her personal information held by a public body under section 39(1)(k), an exception to the general rule of the confidentiality of personal information.

Nonetheless, the Speaker of the House has requested an indemnity clause for a member of the House who while acting in good faith, discloses that personal information when requesting help from government departments and other public bodies on behalf of constituents. Such a clause should be added to section 71 of the *Act* as it would clarify and protect the MHA's role. However, it should not be a substitute for obtaining written consent from the person requesting help, nor for implementing appropriate information-handling practices within the MHA's own office.

6.3.3 Personal information and political parties

The third and final issue to be explored under the topic of personal information and political parties is that of the personal information collected, used, and disclosed by provincial political parties.

In Newfoundland and Labrador, as in most Canadian jurisdictions, political parties are subject to strict rules governing their use of personal information, including donations and expenses by parties and candidates, during election periods.

But increasingly, privacy experts have grown concerned about the amount of personal information collected by political parties, particularly in North America, under the influence of political practices in the United States, a country where there is no privacy legislation such as that which exists in Canada or Europe. [19]

Professor Colin Bennett of the University of Victoria, a world-renowned privacy expert, recently wrote an analysis of the use of personal information by federal and provincial political parties in Canada and concluded that limits on their use of personal information are overdue and that those limits should be consistent with international standards.[20]

Bennett's research revealed that political parties in

19 Delacourt, *Shopping for Votes* (2013).

20 Bennett and Bayley, *Canadian Federal Political Parties* (2012), p 33.

Canada (except in BC) are largely free to collect information on voters, including any habits, ideas, or preferences that may be available publicly or that may be purchased from specialized sources. Voters do not have a right to know what information a political party holds on them and cannot check to see if it is correct. They do not know how this information is shared among party officials or elected party members. When a party forms a government, it is not clear if information kept in their voter databases is used, or how it might be used, for government decisions.

Traditionally, political parties did their best to ascertain accurately who their supporters and detractors were. What has changed? The sheer amount of information that can be obtained and held indefinitely, the extent to which it spills over from the documenting of political preferences to lifestyle choices, leisure activities, and religious affiliations, all of which can be cross-referenced in order to categorize individuals as supporters and non-supporters. This information does not vanish after the election. It can be kept and refined as more personal information trickles in about individual voters from media reports, the purchase of new information, and the scouring of social media sites between election dates.

While the use of personal information by political parties was not specifically raised as a concern by participants, Minister Collins, when questioned on this topic, expressed his openness to the idea of requiring political parties to adhere, at the very least, to a code of practice concerning the handling of the personal information of voters.

This idea is gaining headway internationally. In the UK, political parties must respect the *Data Protection Act 1998*. The UK Information Commissioner has issued guidance to political parties about the use of and access to voter information.[21]

In Canada, British Columbia has legislated in this area.[22] The Information and Privacy Commissioner of BC has investigated two incidents concerning political parties. One had to do with the provincial NDP requesting the passwords to the Facebook sites of its candidates, a policy the Commissioner found could not be justified under BC legislation.[23] The other dealt with allegations that government information was being shared with the Liberal party. Fortunately, the Commissioner found this was not so. She made recommendations to both political parties, which included the training of political staff in the protection of personal information.[24]

21 UK ICO, *Guidance on Political Campaigning* (2014).

22 BC *Personal Information Protection Act*.

23 *Summary of the Office of the Information and Privacy Commissioner's Investigation of the BC NDP's use of social media and passwords to evaluate candidates* (12 October 2011), P11-01-MS.

24 *Sharing of Personal Information as Part of the Draft Multicultural Strategic Outreach Plan: Government of British Columbia and the BC Liberal Party* (1 August 2013), F13-04.

Conclusion

Personal information in the hands of political parties is an area of concern for those who value their privacy. The laws which apply to individuals and corporations (the *Privacy Act*), public bodies (the *ATIPPA*), and commercial organizations (*PIPEDA*) do not cover political parties.

Clearly, a gap exists in the personal information protection available in the province. While it is not, strictly speaking, within the purview of this Committee because the *ATIPPA* does not apply to political parties, it is appropriate that the Committee draw the problem to the attention of government.

Recommendations

The Committee recommends that

49. Section 71 of the *ATIPPA* should be amended to provide Members of the House of Assembly immunity in cases where they disclose personal information while acting in good faith in the course of attempting to help a constituent.

6.4 Other questions related to personal information

Few participants raised any issue with the definition of personal information in the *Act*.[25]

However, some questions did arise in the course of the Committee's work, and those are summarized in this section.

The *ATIPPA* defines personal information in section 2:

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

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

(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,

(iii) the individual's age, sex, sexual orientation, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, blood type or inheritable characteristics,

(vi) information about the individual's health care status or history, including a physical or mental disability,

(vii) information about the individual's educational, financial, criminal or employment status or history,

(viii) the opinions of a person about the individual, and

(ix) the individual's personal views or opinions, except where they are about someone else.

25 Memorial University was critical of the changes made in the Bill 29 amendments, which affected the treatment of opinions when a person requested access to personal information. This is discussed elsewhere.

6.4.1 Recorded information

Because of our understanding of DNA, personal information does not necessarily have to be recorded: it exists in bodily samples unique to each person. Therefore, the reference in the definition to *recorded* information may unnecessarily limit the scope of the definition.

The Commissioner pointed out that bodily samples from an individual are usually labelled or identified according to a system.[26] The *Personal Health Information Act* (*PHIA*) refers to "identifying information in oral or recorded form" and includes information that relates to

26 OIPC Supplementary Submission, 29 August 2014, *Appendix 2*.

"a bodily substance" in its definition. And under the *ATIPPA*, bodily samples would most likely only be used in the context of law enforcement, where special provisions relating to that context adequately protect the personal information contained in such samples. The Commissioner's Office committed to revisit the issue in the course of the *PHIA* review, scheduled for 2016.

Conclusion

Modification of the definition of personal information to include a reference to bodily samples is not necessary at this time and could be re-examined in a subsequent review.

6.4.2 Business contact and employee information, and work product information

Memorial University suggested adopting the British Columbia definition of personal information, which specifically excludes contact information.[27] The university, under Recommendation #1, recommended that

> the definition of personal information in BC's FIPPA be adapted to replace the current definition in the *ATIPPA*, as follows: Personal information means recorded information about an identifiable individual other than business contact information.[28]

The College of the North Atlantic supported the recommendation of Memorial University to exclude business contact information.[29] This is how the college expressed its suggestion for change:

> 1. Amend the definition of personal information to exclude business contact information and add a definition for employee personal information

The college submitted that the definition of what constitutes employee personal information be added to the definition of personal information, under section 2(o) of the *ATIPPA*. The college referred to the Alberta example. Section 1(l)(j) of Alberta's *Personal Information Protection Act* defines "personal employee information" as follows:

> "personal employee information" means, in respect of an individual who is a potential, current or former employee of an organization, personal information reasonably required by the organization for the purposes of
>
> (i) establishing, managing or terminating an employment or volunteer-work relationship, or
>
> (ii) managing a post-employment or post-volunteer-work relationship
>
> between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship;

It was suggested that this proposed amendment would enable public bodies to clearly identify what information is responsive to an applicant's request when the applicant is employed by a public body and submits a request for all of his or her personal information.

These two public bodies also proposed a separate definition for 'work product information.' The concept of 'work product information' is about information that is akin to professional or technical opinions, and that is generated by an individual in the course of work.

27 BC *FIPPA*, Sched 1, "Personal Information" means recorded information about an identifiable individual other than contact information.

28 Memorial University Submission, 13 August 2014, p 5.

29 College of the North Atlantic Submission, August 2014, pp 7–8.

Analysis

Although the recommendations from Memorial University and College of the North Atlantic appear to be useful, there must be further examination to ensure all aspects of these questions are explored. For example, excluding business contact information from the definition of personal information may negatively affect people working from home. In many cases, their business contact information may also be their personal contact information. Excluding business contact information from the protection of the *ATIPPA* could result in unforeseen negative consequences, since it may have the effect of also making their home address, phone number, email address, and other personal information accessible under the *ATIPPA*.

Similarly, there should be full exploration of the policy reasons or the effects of creating a category for work product information in a provincial law which does not cover commercial activities. Is it a category of personal information or a separate category? Jurisdictions differ widely on the answer to this question, and that underscores the need for more study. How a category of work product information would interact with the present definition of personal information should also be considered. This issue was not raised by any other public bodies. It could be specifically studied in a future review.[30]

30 Canada Privacy Commissioner, "*Work Product" Information* (2006).

Conclusion

The Committee heard few opinions as to whether these matters should be excluded from the *Act*. It would be inappropriate for the Committee to recommend a change without further research.

6.4.3 Personal information of the deceased

This is a topic that attracted the interest only of the Office of the Information and Privacy Commissioner. Currently, section 30(2)(m) provides that the disclosure of personal information is not an unreasonable invasion of a third party's privacy where that personal information is about a person who has been deceased for 20 years or more. The Commissioner's commentary on the issues of privacy and dignity after death, however, is an eloquent one.

> In all of the circumstances enumerated in section 30(2), the public body cannot withhold the personal information because those categories of information have been deemed to be "not an unreasonable invasion" of privacy. While it is acknowledged that the privacy interests of the deceased are generally considered to decrease over time, we do not consider it appropriate to legislate a firm cut-off date after which the privacy rights of the deceased are completely extinguished. The disclosure of personal information of the deceased raises issues of personal dignity for the deceased as well as surviving family members. Would we want sensitive personal information about us released after we are gone? The answer may vary depending on the information, and the concerns may fade as the years pass, but a more nuanced approach might allow for greater sensitivity. Section 30(2)(m) provides no opportunity to consider those issues once 20 years has passed.[31]

31 OIPC Submission, 16 June 2014, p 33.

Elsewhere in the *Act*, a surviving spouse or relative is mentioned as a potential recipient for the personal information of the deceased, as long as the disclosure is not an unreasonable invasion of privacy.[32] The information of the deceased can also be released when the release is authorized by provincial or federal law.[33]

Yet, as the Commissioner points out, the personal information of the deceased is available on request 20 years after the person's death.

32 *ATIPPA* s 39(1)(v).

33 *Ibid* 30(2)(d).

Analysis

The Commissioner's argument on this matter is persuasive. Setting an arbitrary limit after which all personal information of a deceased is available to requesters does not seem to take into account the possible effect on any family members or friends who may be living long after the 20-year period has elapsed.

The Commissioner pointed out that a more individualized, circumstantial test would allow consideration of other factors to be taken into account to determine if a requested disclosure would be an unreasonable invasion of privacy. Some factors might include the length of time elapsed since death, whether the personal information was supplied in confidence, and whether it may unfairly damage the reputation of a third party referred to in the requested record.

Following the example of BC's *FIPPA*, the Commissioner suggested the deletion of the present section 30(2)(m).

A new section would be added to section 30(5). The new section would deal with all the relevant circumstances to be considered to ensure that a disclosure of personal information is not an unreasonable invasion of privacy.

Conclusion

The Commissioner's suggestion should be followed to provide a more nuanced test for the release of information of the deceased.

Recommendations

The Committee recommends that:

50. Section 30(2)(m) of the *Act* be deleted and there be added to what is presently section 30(5) a provision that would require public bodies to consider disclosing personal information of the deceased to an applicant where the length of time that has elapsed since death would allow a determination that disclosure is not an unreasonable invasion of privacy.

6.4.4 Restrictions on the export of personal information from the province

After the adoption of the legislation known as the *Patriot Act* by the United States in 2001, many Canadians wondered about the protection of their personal information if it were sent to the United States for storage or processing. There were also concerns about the ability of the US government to obtain information from other countries, which was provided for in section 215 of the *Patriot Act*.

Anxieties in British Columbia were acute enough in 2004 to prompt the addition of extra provisions in *FIPPA*, their public sector access and privacy legislation.[34] The general rule is that public bodies in BC must store personal information in Canada. Access to this information must also be from Canada. And if a public body received any type of request for personal information, even legally authorized, from a foreign court, an agency of a foreign state, or another authority outside Canada, the minister responsible for the administration of the BC Act was to be notified immediately.

Other Canadian jurisdictions have also addressed storage and processing of information held by public bodies, including Nova Scotia and Quebec. Quebec set simpler rules for public bodies than British Columbia. Before releasing personal information outside the province, the public body must ensure that the information will receive protection equivalent to that under the provincial Act.[35] If not, the public body must refuse to release the information.

Privacy lawyer and expert David Fraser summarized the requirements in Nova Scotia as follows:

> The *Personal Information International Disclosure Protection Act* requires that information under the custody and control of a public body be stored only in Canada and accessed only in Canada unless the individual has consented to its storage or disclosure outside of Canada or one of a number of narrow exceptions apply. Importantly, the head of a public body may authorize the storage of personal information or access to personal information from outside of Canada if the head of the public body determines it is for the necessary operations of the public body. The head is obliged to report these exceptions to the Minister of Justice after the year end in which these decisions are made.
>
> The public body and any of its service providers are under a legal obligation to report any foreign demands for disclosure. Violating any of these provisions is an offense.[36]

34 BC *FIPPA*, s 30.1.

35 CQLR c A-2.1, s 70.1.

36 Canadian Privacy Law Blog, 18 April 2011.

Analysis

The issue of setting conditions on the export outside of Canada, or indeed outside the province, of personal information held by public bodies was not raised with the Committee. Before addressing this subject further, it would be prudent to await an in-depth assessment of the impact of these various laws in the different provinces. Have they raised the cost of information processing? Have they been effective in preventing access to personal information by non-Canadian authorities? And how useful is this approach in light of recent revelations about the structure and relationships of international intelligence between the US and its allies, which include Canada?

Conclusion

The Government of Newfoundland and Labrador should continue to follow the ongoing debate about the privacy and security of the personal information of Canadians in order to determine if there are appropriate steps it might take.

6.5 Information on salaries and benefits

In the Bill 29 changes to the *ATIPPA*, the term "remuneration" was changed to "salary range" in the list of allowable exceptions to what is considered personal information (section 30(2)(f)). It had previously been allowable to disclose salary and other details of a public official's compensation, but after 2012 only the salary range could be disclosed.

The Office of the Information and Privacy Commissioner referred to this amendment in his June submission, noting that the change made by Bill 29 from "remuneration" to "salary range" had the merit of preserving public accountability for most employees. "Salary range" gave an approximate earning bracket but not the exact pay of an individual, preserving some degree of privacy for the employee while acknowledging the legitimate interest of the citizens and taxpayers. However, the Commissioner pointed out that in the senior salary ranges, where there may be perks such as bonuses, severance pay, and vehicle or housing allowances, such an accountability mechanism is missing. He recommended returning to the pre–Bill 29 wording by including remuneration rather than salary range. This section also allows for the disclosure of information on the position and functions of people who work for public bodies, including the staff of a minister.

Private citizen Lynn Hammond felt salary range was the preferred way to address this issue, because of the privacy implications of revealing people's individual salaries.

> I think that we need to remember that the Public Service, the members of the Public Service are people. They are people with lives outside of government and there may be some very personal reasons why an individual may not want to disclose their personal information. I fully appreciate the appropriateness for providing scales with regards to individual types of positions. However, an individual's unique personal financial circumstances, I feel, should not be publicly disclosed. And there could be a number of personal reasons why someone might not want to do that.[37]

Ms. Hammond stated if there were to be an exception, it may be most appropriate for people with high levels of accountability.

> If the Committee decides that it is necessary for individuals of higher accountability, of higher salaries, for those to be disclosed, then I encourage you to consider it based on accountability, not on a salary number. Rather than identifying that $100,000 threshold, to consider it on those higher levels of accountability of senior positions or appointments. Again, that wouldn't be my preference but if you feel that it is necessary to go to some level of disclosure on that, I encourage you to consider accountability rather than financial value.[38]

Another consideration raised by Ms. Hammond is that the relatively small number of employees in each position for which a salary range is made public means that in many cases individual salaries are, essentially, public information. This was confirmed by the Committee through its review of the 2014–15 Departmental Salary Details, published as part of the budget. While the document reveals salary information for government departments, and not other public bodies, the salary information for hundreds of individual positions is disclosed.

37 Hammond Transcript, 20 August 2014, p 34.

38 *Ibid* 35–36.

Of the 271 positions in the Department of Finance, for example, the individual salaries for 89 positions are revealed.[39] The salaries for 102 individual positions are revealed in the Department of Transportation and Works, out of the 1325 total positions.[40] The salary details for the legislature, which includes Hansard and the broadcast centre, as well as the statutory offices of the Auditor General, the Chief Electoral Officer, the Citizens' Representative, the Office of the Child and Youth Advocate and the Office of the Information and Privacy Commissioner, reveal the individual salary details for 74 of the 137 positions.[41]

Leader of the Official Opposition Dwight Ball in his presentation to the Committee raised the question of the transparency of salaries and benefits given to individuals. He pointed out, as the Commissioner had, that the revised wording of Bill 29 had the effect of obscuring income, other than salary, that senior officials might receive: "The revised language denies the public access to information regarding the remuneration many senior officials and public employees receive in addition to their base salary."[42] Mr. Ball concluded that for employees of public bodies, the salary range should be disclosed, as should information on bonuses, severance, and pension benefits.

The Office of Public Engagement told the Committee the *Act* was amended after the 2011 review because some employees had privacy concerns "about the disclosure of their exact salaries." The deputy minister of OPE stated that the present practice in government is to provide the salary range. As a default position, where there is no range, the exact salary is provided.[43]

Few participants expressed concern about the privacy implications of additional payments to public employees. Any concerns about the competing claims of personal privacy and transparency in this area have been resolved in favour of transparency by the government practice of posting travel and out-of-pocket expenses for ministers from 2008 onward.[44]

39 NL *Departmental Salary Details, 2014–15*, pp 15–20.
40 *Ibid* 32–41.
41 *Ibid* 43–46.
42 Official Opposition Transcript, 22 July 2014, p 72.
43 Government NL Transcript, 19 August 2014, p 153.
44 NL *Ministerial Expense Claims*.

Analysis

For the last several decades, Canadian jurisdictions have opted for differing degrees of transparency as to the payments and benefits of public officials. The tendency is to reveal only the salary range, rather than the exact salary, unless there is no range. However several jurisdictions also reference other earnings. The Alberta legislation, for example, states that disclosing the discretionary benefits paid to an officer, employee, or member of a public body is not an unreasonable invasion of privacy. The Ontario legislation refers to disclosure of salary range and benefits. The Commissioner said six Canadian jurisdictions follow the pattern of Alberta and Ontario, by using the term "salary range," but also including the term "benefit" or "discretionary benefit."[45]

In 1996, Ontario took a step toward disclosure that no other Canadian jurisdiction has so far copied, by adopting the *Public Sector Salary Disclosure Act, 1996* which is also known as the Sunshine List. The *Act* mandated the publication of the names, positions, salaries, and taxable benefits of all public sector employees who made over $100,000. With the passage of time and inflation, this list has grown to such a length and contains so many names as to have lost its initial function of highlighting the big earners. In the 2014 release, more than 97,000 names of nurses, doctors, teachers, civil servants,

45 OIPC Submission, 16 June 2014, p 33.

police, and firefighters were presented in five thick binders. The number earning more than $100,000 had grown by 11 percent from the year previous, and by 82 percent since 2008, when the list contained just under 54,000 names.[46]

During the hearings, the Commissioner and the Leader of the Official Opposition pointed out that revealing salary ranges does not mean complete transparency, as it does not include the earnings of certain officials who may be given substantial bonuses or other important benefits.

A CBC investigation made public in November 2012 showed that several public bodies "declined to release information related to pay or perks above the base salary."[47]

In an age where the values of equality and democracy are seen increasingly as being central in our society, there is diminishing justification for holding confidential the payment schemes for employees and officials who are paid from the public purse. Unfortunately, this does result in less privacy for those public officials and employees. However, the deleterious effect of disclosing salaries or pay scales has yet to be shown. Some, such as judges and elected officials, have been subject to such a regime for years.

Financial benefits come in many forms, direct and indirect. Pension credits, various perks, and overtime pay combine to form the total value of any position to an individual. Inversely, they are all part of the total cost to the citizens of any particular position held by an individual.

No representatives of organized labour communicated with the Committee, so it is impossible to know what their opinion is on the treatment of overtime pay, which is often a substantial source of income for some workers.

46 "'*Sunshine list' 2014*," CBC News, 28 March 2014.

47 "*Bill 29 means some pay and perks now off limits*," CBC News, 20 November 2012.

Conclusion

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.

Recommendations

The Committee recommends that

51. Section 30(2)(f) of the *Act* should revert to the pre–Bill 29 wording of "remuneration" rather than "salary range", and remuneration would include salary and benefits.

6.6 Social media

Social media communications occupy an ambiguous position in the world of information. They are often made public to a large following, but their contents are touted as being in a unique zone where they are unavailable as evidence. This subject needs further research but it is an ongoing challenge.

The increasing use of social media suggests that the *ATIPPA* could be modified to specify that information disclosed by an individual on a social media site is not entitled to protection as the personal information of that individual. No one addressed this issue before the Committee. At least one Canadian jurisdiction has legislated in respect of the issue.

The *Freedom of Information and Protection of Privacy Act* in British Columbia allows public bodies to disclose information that individuals have already revealed about themselves on social media:

> **33.1** (1) A public body may disclose personal information referred to in section 33 inside or outside Canada as follows:
> … (r) if the information
>
> (i) was disclosed on a social media site by the individual the information is about,
>
> (ii) was obtained or compiled by the public body for the purpose of enabling the public body to engage individuals in public discussion or promotion respecting proposed or existing initiatives, policies, proposals, programs or activities of the public body or respecting legislation relating to the public body, and
>
> (iii) is disclosed for a use that is consistent with the purpose described in subparagraph (ii);

Given the prevalence of this form of communication, it may soon be important for government to take the initiative and clarify the status of personal information found on social media. And there are important issues to consider. For example, could a public body use information that is available on social media to make a case for eliminating benefits or beginning an inquiry? (The police are heavily present on social media but they have powers under the Criminal Code.) Another question to be explored involves the selection of privacy settings, and whether the individual has chosen to make information available to the public or to keep it private. This matter is complicated by the fact that the companies running the sites have a history of changing the settings and terms of use without having to obtain further consent.

Conclusion

The Committee notes that the Communications Branch of the Executive Council has produced a document titled "Social Media Policy and Guidelines." The document states that only authorized employees may post information, and it must support government policy. In the case of their private postings on their own social media sites, employees are posting on behalf of themselves and not on behalf of the government. The statement outlines the policy to be followed in posting to departmental websites:

- The use of social media must support the government's overall communications strategy and be approved by the executive, the communications director and the Communications Branch of Executive Council;
- Content must be identified as being posted by or on behalf of the Government of Newfoundland and Labrador;
- The use of social media must comply with all provincial laws and government policy, including protection of privacy and records management;
- Social media sites are to be supported with technical and monitoring measures to ensure

the timely removal of offensive postings, including information that jeopardizes the privacy of others.[48]

This is an important subject for public bodies, since they may increasingly feel under pressure to use the medium to disseminate information to the public. It is also an area that the Commissioner could address through the research power that the Committee has recommended elsewhere in the report. Such research could inform an approach for public bodies on this important question and help in the further development of a social media protocol.

48 NL *Social Media Policy and Guidelines* (2014).

Recommendations

The Committee recommends that

52. The Office of the Information and Privacy Commissioner should study the continuing use of social media by public bodies and make recommendations where necessary to modify the social media protocol of public bodies.

6.7 Privacy in the workplace

In our technology-dominated society, constant surveillance by the employer is a part of working life. Most work vehicles now include a geopositioning system (GPS) that enables employers to locate their equipment and, consequently, the person operating it. Metadata (data about data) is generated by each computer record that is created, allowing the reader to understand who created the record, how and when. Surveillance cameras that protect property also track the people who pass in front of the cameras. Electronic access to premises gives a minutely accurate record of employee whereabouts.

Amidst all this surveillance, personal information is often poorly protected in the workplace. From sensitive human resource files left carelessly on desks to unprotected databases to surreptitious keyboard monitoring, the opportunities for serious privacy violations are numerous. Although Newfoundland and Labrador recognized early on that people need a statutory right of action when they feel their privacy has been invaded, the *Privacy Act* applies only to certain situations where the actions of one person are felt to be detrimental to the privacy of another.

What can employees do if they feel that they are subject to surveillance or being constantly tracked and measured? If they are unionized, they can negotiate to add some privacy protection to their collective bargaining agreement. If they work for a public body, their employer must respect the *ATIPPA*. If they work for a federally regulated employer such as a bank or an airline, the provisions of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* on the collection and use of personal information will apply to their workplace. But this leaves a large segment of the workforce in the province whose employers are not subject to regulation protecting personal information.

Conclusion

Both British Columbia and Alberta have addressed this issue by including the protection of personal information about private sector employees in their own private sector legislation. Since the *ATIPPA* applies only to public bodies, Newfoundland and Labrador will have to find a solution that protects personal information in the private sector either in a new stand-alone act or as an amendment to existing labour legislation. It is outside the mandate of this Committee to recommend a course of action, but policy makers should be aware that workers in the private sector are as deserving of protection for their personal information as are those who work for public bodies.

Recommendations

The Committee recommends that

53. It is appropriate for Government to consider the need to provide, in labour standards legislation, for protection of personal information of employees where that information is held by employers not covered by the *ATIPPA*.

Chapter Seven

THE INFORMATION AND PRIVACY COMMISSIONER

> In a manner similar to the *Privacy Act*, **the *Access Act* establishes a central role for the Information Commissioner, who is charged with protecting and acting as an advocate of the rights of access requesters,** and with conducting investigations.[1]
>
> — Justice Binnie, Supreme Court of Canada

7.1 Oversight model

This section will:

- describe three possible models for oversight of processes by which citizens exercise their right to access information and to protect the privacy of their personal information
- describe practices in other Canadian and international jurisdictions
- consider which of the three models will best ensure that citizens can exercise those rights effectively, with the least possible delay, with the least possible cost, and in a user-friendly process
- consider the mandate of the OIPC and the changes, if any, that should be made to that mandate
- explain the basis for the conclusions reached

The three options considered are:

(i) not having a special oversight commissioner and, as a result, leaving public bodies subject to the ordinary law. Citizens who believe a public body has not properly discharged its duties under a statute can apply to the Trial Division of the Supreme Court for judicial review.

(ii) retaining the present structure under which the Commissioner operates, the ombuds model, whereby the Commissioner has no order-making power, only the ability to recommend. The head of a public body involved does not have to comply with the recommendation of the Commissioner.

(iii) changing the present structure to an order-making model. When the Commissioner conducts a requested review, his decision would take the form of an order with which the public body would have to comply, unless it appealed or sought judicial review.

The Committee quickly dispensed with option (i) because appeal directly to the Trial Division is already an option available to an applicant under section 43 of the *ATIPPA*, and option (i) would mean eliminating altogether the much more user-friendly ombuds model. As well, many participants expressed concern about additional costs and time this option would require.

The Supreme Court of Canada commented extensively on the use and purpose of an ombuds model of oversight when that court was dealing with issues involving commissioners responsible for official languages, privacy, and access to information under the relevant

1 *H. J. Heinz Co. of Canada Ltd. v Canada (Attorney General)*, 2006 SCC 13 at para 38, [2006] 1 SCR 441 [*Heinz*].

federal statutes. Their comments are instructive.

In its 2002 decision in *Lavigne v Canada (Office of the Commissioner of Official Languages)*,[2] the court was dealing with two appeals by the same person, one arising under the *Official Languages Act* and the other under the *Privacy Act.* In describing the nature of the office of the Commissioner under each of those statutes, Justice Gonthier wrote:

> The Privacy Commissioner and the Official Languages Commissioner follow an approach that distinguishes them from a court. Their unique mission is to resolve tension in an informal manner: one reason that the office of ombudsman was created was to address the limitations of legal proceedings. As W. Wade wrote (*Administrative Law* (8th ed. 2000), at pp. 87-88):
>
> If something illegal is done, administrative law can supply a remedy, though the procedure of the courts is too formal and expensive to suit many complainants. But justified grievances may equally well arise from action which is legal, or at any rate not clearly illegal, when a government department has acted inconsiderately or unfairly or where it has misled the complainant or delayed his case excessively or treated him badly. Sometimes a statutory tribunal will be able to help him both cheaply and informally. But there is a large residue of grievances which fit into none of the regular legal moulds, but are none the less real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country...What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong...It was because it filled that need that the device of the ombudsman suddenly attained immense popularity, sweeping round the democratic world and taking root in Britain and in many other countries, as well as inspiring a vast literature.
>
> [39] An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement.[3]

There are, however, other duties related to fostering access to publicly held information and protecting personal information.[4] As well, that court's view respecting the full function of an ombuds model oversight commissioner, appears to have evolved somewhat in the ensuing years.

The nature of the Commissioner's power to oversee processes used to access information clearly indicates an intention to create an ombuds model. That power does not include the ability to make a binding order of any kind. Here is a summary of the Commissioner's powers:

- in appropriate circumstances, to approve extensions (including the extension that the public body can itself add) beyond the time otherwise available to the public body to disclose a requested record
- to authorize a public body to disregard a request, in appropriate circumstances
- to receive and address concerns respecting a public body's response to requests
- in most cases, to request that any or all records in question be made available for inspection by the Commissioner
- to enter the office of any public body to review certain but not all records in issue
- to attempt to resolve differences informally between the requester and the public body
- to proceed with a full investigation of the matter
- to prepare a report of the investigation and make recommendations as to whether or not all or any part of the records should be released by the public body
- to appeal, with the consent of the requester, a decision of a public body to the Trial Division of the Supreme Court
- to intervene in an appeal under section 60 of the *Act*
- to report annually to the House of Assembly

Those are all characteristics of an overseer that functions as an ombudsperson, not an adjudicative

2 2002 SCC 53, [2002] 2 SCR 773.

3 *Ibid* at paras 38–39.

4 See *Heinz, supra* note 1 at paras 34–40.

order-making body. Any appeal to or review by the Trial Division is a review of the decision of the head of the public body, not of the recommendation by the Commissioner.

The *Act* also confers jurisdiction on the Commissioner for non-process-related action to enable oversight of the regime for access to information and privacy. The Commissioner is empowered, amongst other things, to do the following:

- inform the public about the *Act*
- receive comments from the public about administration of the *Act*
- comment on the implications of proposed legislative programs for access to information and protection of privacy
- comment on the implications for protection of privacy of disclosing personal information for record linkage or using information technology in the collection or storage of personal information
- bring to the attention of a head of a public body any failure of that public body to fulfill the duty to assist
- make recommendations about the administration of the *Act* and about ensuring compliance with the *Act*

Again, all of these aspects of jurisdiction are characteristics that are consistent with an ombuds model of oversight.

What we heard

No single aspect of the operation of the *ATIPPA* attracted the diversity of opinions that the role and performance of the Commissioner did. Most of the views expressed to the Committee concerned issues of access, delays, and transparency. Participants wanted a strong, independent Commissioner who would speak out when appropriate and act when necessary so citizens' rights would be effectively enforced.

From organizations

The OIPC

The Commissioner made what may have been his simplest but most significant statement during his opening comments at the first hearing. It was made while he was speaking about his not being able to conduct investigations and reviews. He observed that the office of the Commissioner was created "to have a timely, cost-effective mechanism to deal with this."[5] By "this," he meant the need for citizens to be able to challenge a refusal by the head of a public body to disclose requested information. Without that ability, citizens could find their access to the information arbitrarily or wrongly refused or delayed. The Commissioner's observation succinctly summarizes the primary oversight objective and is consistent with what this Committee views as an umbrella direction "to make the *Act* more user friendly."

The Commissioner's formal written submission made no recommendation respecting the possibility of the legislation being amended to provide for order-making power. The matter was addressed only as result of questions by the Committee to both the Commissioner and the Director of Special Projects in the OIPC. On being pressed by each member of the Committee with the suggestion that order-making power might be desirable, the Commissioner made these comments:

- I think we look at the successes that we've achieved in this office over the years in terms of compliance rate with our recommendations for example, I think the compliance rate is very high and not very often that the public body has frankly said, "No, we're maintaining our position … and records will not be released."
- The fact [is] that we're able to achieve 80% success with our informal resolution process. I believe that the ombuds model is a very good one.

5 OIPC Transcript, 24 June 2014, p 33..

- There's some very good and strong compelling arguments for order power. Not having that in this province, we've tended to concentrate and try to make the process that we have work as efficiently as we can. There are merits to having order power, again, but consensus in my view personally is that the ombuds model is a good one and it does work.
- From our office's perspective in terms of preparation for this review, we focused our attention primarily on the issues that were show stoppers for this jurisdiction, the fact that there has been a huge degradation in the Commissioner's authority. If we had that authority that I believe is necessary for the office to do its work, then I think that things would happen in a very favourable way… I guess the extra step of looking at order power would be something that, yes, it would be a good thing but… there's so many things on our plate at this point that we are struggling to try to repair in terms of our ability to do our job even with the ombuds model.
- You know, we can work with a good piece of legislation and an ombuds model and maybe at a future date in a future review where all those things might be in place that we are able to go that extra step but … I think we got to walk before we run here and to try to get some fundamental changes that we think have been … done incorrectly, repair is the focus of our presentation and submission.[6]

After the introductory comments by the Commissioner, Sean Murray, the Director of Special Projects in the OIPC, elaborated on the detailed specific recommendations set out by the OIPC in its initial written submission. As noted above, these contained no reference to the possibility of providing the OIPC with order-making power. In response to a question by the Committee about the roles of the OIPC and the court respecting solicitor-client privilege, Mr. Murray commented on the differences between decisions from an order-making oversight body and decisions of a public body after a recommendation from an ombuds model oversight body. He was asked the specific question: which of the two do you think is more appropriate to the stated purposes of access to information as stated in section 3 of the *Act*? His response included a number of comments, some of which were prompted by further questioning. Those comments include the following:

- It certainly has worked both ways in Canada. You can certainly choose one or the other option and both models have things to recommend them I think. If you have order power and you're issuing an order you're doing something that affects the rights of parties and I guess you could be into a process…Under order power I'd imagine there'd have to be an exchange of submissions, that it'd perhaps be a little more formalized. The natural justice I think would come into it much more than it does right now because we're not making any orders that affect anyone's rights. So there is that side of it and I suppose you have to look at the effects of going that route as well and whether it is the most effective approach to it. If you have order power certainly it's not going to speed up the review process because we're going to have to make sure that we write a report, issue a report with an order that provides all the support and evidence and demonstrates that we've considered the arguments of all the parties that have come to us.
- Certainly, it wouldn't make the process any quicker to go through order power. There's a lot of pros and cons to it. I guess we hadn't put it in our submission as a recommendation because really our experience over the last couple of years, particularly since Bill 29, and since our jurisdiction has been challenged we're in a situation where we've got a house and the rain is pouring through the roof and we're missing windows and doors and someone's coming up to us and saying would you like a garage added to your house. It might be a great thing to have but we've not turned our minds to it because we felt like we've had so many other issues that are on our plate.
- We think we've been pretty effective with recommendation power in the sense that I've just looked back over the last couple of annual reports and there's only been 3 or 4 cases each year where a public body, after we issue our report, has not followed our recommendation and we or the applicant have the ability to go to court then if we wish to.
- So I guess when we look at there are 700 access to information requests filed each year … 100 of them might come to our office for review, 75 or 80 of them might be resolved informally. Of the remainder, let's say 20 or 25 that we issue a report on … if in the end there are only a few situations where public bodies are not following our recommendations, and there is still an outlet to go to court with those if we had order power, I wonder if we'd be going to court any less.

6 *Ibid* 59-–62

- When we've got down to that point, in those 3 or 4 cases the public body is still saying no after a report has been issued, they're pretty dug in and I think those are cases that even if we had order power I wonder whether those would be the cases…that the public body would be seeking judicial review.
- In terms of the efficiency of the process, what I'm saying is that whether you go with order power or recommendation power, in those kinds of circumstances you might end up in courts just as frequently.
- What we've recommended here is to focus on improving some of the exceptions to the right to access, improving privacy oversight and improving the jurisdictional or clarifying the jurisdictional issues for the Commissioner's review of access to information. If the government received your report and said well we'll give the Commissioner order power but the rest of that we'll leave alone I think it'd be not a good outcome because I think some of the other issues are—they are up front issues regarding the exceptions to the right to access.[7]

Following these comments by Mr. Murray, the Commissioner added these:

- The notion of order power is a tremendous tool for the Commissioner to have in his or her toolbox but fundamentally we're not there yet because of Bill 29. With the significant loss of jurisdiction in the Commissioner's office I think there's more fundamental questions. If Bill 29 had not occurred and we were in a different process …then I think you could very well have Sean and I in front of you saying we would recommend order power because we have a substantial, a strong, a consistent piece of legislation that we've been working with for 10 years.
- It's relatively young in the life of a piece of legislation so to make the quantum leap I think from where we are now as a result of Bill 29 to order power when we're still lacking, or could be still lacking the jurisdiction of the Commissioner to look at—even to see documents. So I think order power is a question that will come in the future once we have a stable and consistent piece of legislation that the Commissioner's office would have been working with for a number of years, work out protocols and procedures and now we're ready and I think that could very well be, I just don't think it's now.[8]

In response to a suggestion from a Committee member that "some might say to you that there is no better time than the present to go for the whole package," the Commissioner replied:

> There's truth in that but …based on the significant changes at the first review that we need to get down to a firmer footing. I think there's more fundamental issues. And again, I will say that the ombuds model for this jurisdiction appears to work very well.[9]

From the Federal Information Commissioner

Suzanne Legault, the Federal Information Commissioner, responded as follows to a Committee member's question as to the most appropriate oversight model:

- The recommended international norm is an independent oversight that has the ability to review all of the records and all of the decisions on disclosure and that has the ability to issue orders in all respects of the disclosure decisions.
- You have to look at it in context. For instance, an ombudsman's model can work in Canada, obviously, because we have democratic institutions which are well functioning. … So you have to put the oversight model in the context of the institutions, with the judiciary, the parliamentarians and the government institutions. … if the recommendations are not going to be respected at all then it will not work.[10]

Ms. Legault said that there are a lot of delays in the ombuds model in terms of investigative function because there is a lot of back and forth, and if the recommendation of the Commissioner is not accepted, the Commissioner or the requester has to take the matter to court. The onus to seek and obtain disclosure is on the requester. She suggested this could be reversed and the onus would be on the institution in an order-making model. She expressed her belief that "certainly for the federal model…an order making model is the best model."[11]

Ms. Legault further suggested that if the ombuds model continues in this province, there should at least be

7 OIPC Transcript, 26 June 2014, pp 7–12.
8 *Ibid* 15–16.
9 *Ibid* 16–17.
10 Information Commissioner of Canada Transcript, 18 August 2014, pp 54–56.
11 *Ibid* 59.

order-making power for all procedural and administrative matters such as extensions of time limits and proposed charges. She was asked her opinion about a hybrid model in which, if the Commissioner recommended disclosure, the public body would have the option of following the recommendation or applying to court for a declaratory order that it was not required by law to disclose. In that circumstance, both the onus to initiate the court review and the burden of proof would be entirely on the public body. She replied that she would have to consider it in terms of administrative law and judicial review.

From political parties

The Liberal Party, Leader of the Official Opposition, Dwight Ball

Dwight Ball, the Leader of the Official Opposition, when asked if he thought the Commissioner should have order-making power, observed "it's something that we've thought about…would like to think it through a little more to get the full breadth and scope of what that impact would be."[12]

The New Democratic Party, Gerry Rogers, MHA

Gerry Rogers, MHA, recommended, "in the event of a dispute, the Information and Privacy Commissioner be authorized to rule on whether or not the contested information should be kept secret."[13]

From the media

Canadian Broadcasting Corporation

The only comment the CBC made that bears on the role of the Commissioner is that order-making power from a requester's perspective is preferable.

James McLeod of the Telegram

Mr. McLeod expressed the view that

> To make the system truly credible, there must be some mechanism within the system where an independent agent can order documents released if they find that the government has improperly withheld. Maybe that power could be vested in the OIPC. Or maybe the *Act* could consider a system where if the OIPC found that the government was improperly withholding information, and all other avenues are exhausted, the office is obligated to go to the courts and leave it to a judge to make the final call. I really don't know how it should work …. I just know that leaving it up to cabinet ministers to have the final say on what documents get released—even what documents the OIPC can review—is a deeply flawed system, and that needs to be fixed.[14]

From individuals

Terry Burry

Mr. Burry made submissions that commented on the Commissioner and his office. On the power that should be conferred on the Commissioner, he observed:

- In my presentation to Mr. Cummings[15] four years ago, I recommended that the Information and Privacy Commissioner, Mr. Ed Ring, be given order power, much like a judge and in the same manner as other provinces, most notably, that which has been adopted by Quebec, Ontario, British Columbia, Alberta and Prince Edward Island.[16]
- ...The Commissioner should have the final say concerning any disputed information being released to an applicant and a final judgement on any delays beyond 30 days is warranted, without having to go to court… subject only to limited rights of judicial review.[17]

From the OIPC following up at the conclusion of the hearings

In his final appearance before the Committee, the Commissioner referred to the view he earlier expressed about using an ombuds model as opposed to an order-making model of oversight. He had indicated that the office preferred to address the more fundamental problems until the statute and its processes and procedures have had more time to mature. He now stated that

- We have looked at the order power model and believe it could work equally as well here in Newfoundland

12 Official Opposition Transcript, 22 July 2014, p 35.
13 New Democratic Party Transcript, 26 June 2014, p 11.
14 McLeod Transcript, 26 June 2014, pp 8–9.
15 Cummings Report, January 2011.
16 Burry Submission, 24 July 2014, pp 8–9.
17 Burry Transcript, 24 July 2014, pp 19–20.

and Labrador as it does in Alberta, Ontario and British Columbia.

- The informal resolution process where we resolve the vast majority of our access requests …would not be compromised by having order making power.
- Another advantage I believe, [is] that order-making power will provide a strong incentive for public bodies once we get to the formal investigation stage to provide a strong, comprehensive and detailed submission to the OIPC that would clearly state the case of the public body and allow full and accurate consideration by the OIPC…So I think that would be a strong incentive for public bodies to put more effort where required into their submissions to this office.
- The disadvantage I think would be for … the OIPC to lose the current ability… to go to court on behalf of the applicant if … the public body refuses to adopt the recommendation.[18]

In response to questions from Committee members, the Commissioner further commented that:

> I would hope that whichever model is chosen we have to think about that this is a small jurisdiction and we need a model that is going to work here. … Currently we have several analysts who can deal with inquiries when they come in, just general inquiries, they can accept new files and work on informal resolution. They can then proceed to work on their formal complaint investigation—formal investigation and drafting of reports and that function would have to be separated.
>
> When you have a small office then you divide that group into two and you'd have one group that worked on informal resolution perhaps, I'm just speculating on how this might work now. And of course we have *PHIA* to oversee as well. … whatever model we have to be careful that we don't divide our office up so finely that if one person is missing that we have a big problem.[19]

18 OIPC Transcript, 21 August 2014, pp 8–10.

19 *Ibid* 12–13.

Oversight models in other Canadian jurisdictions

It will be helpful to give some consideration to the role of the Commissioner under the laws that correspond to the *ATIPPA* in the other Canadian jurisdictions. Table 5 indicates the general nature of the systems in each of those jurisdictions.

Four of the five oversight bodies having order-making power are in the four provinces having, by a wide margin, the largest populations in Canada. The fifth belongs to the province with the smallest population, but it is also, by a wide margin, geographically smallest. All of the provinces that are comparable in population and geographical size to Newfoundland and Labrador have the ombuds model. These facts may be noteworthy but they do not, alone, make a strong argument for retaining the ombuds model of oversight. However, they do highlight the significance of the Commissioner's observation about the concerns of splitting a small office into two separate function divisions, one for routine inquiries and informal resolution and the other for formal investigations and drafting reports and, as he also observed, having to discharge the OIPC's obligations under *PHIA* on top of that. The Commissioner urged that care be taken so "we don't divide our office up so finely that if one person is missing we have a big problem."

As both the Commissioner and Mr. Murray noted, adopting the order-making model would require a more formalized structure. Mr. Murray contemplated that "natural justice" would come into it more than it does right now. It is reasonable to conclude that he was referring to the normal principles of natural justice requiring a formalized hearing process with submissions and hearings involving all concerned parties. That is consistent with the Commissioner's comment that there would be incentive for public bodies "to provide a strong, comprehensive and detailed submission to the OIPC that would clearly state the case of the public body and allow full and accurate consideration by the OIPC."

Table 5: Review Mechanism for All Jurisdictions in Canada Access to Information			
Jurisdiction	Order Power or Ombuds Power*	Statute provides for appeal to the court of the decision of the head of public body	Only Judicial Review of the Commissioner's Order is available
Canada	Ombuds	New hearing	
Newfoundland & Labrador	Ombuds	Appeal by new hearing	
Nova Scotia	Ombuds	Appeal by new hearing	
New Brunswick	Ombuds	Appeal by new hearing	
Manitoba	Ombuds	Appeal by new hearing	
Saskatchewan	Ombuds	Appeal by new hearing	
Northwest Territories	Ombuds	Appeal by new hearing	
Yukon	Ombuds	Appeal by new hearing	
Nunavut	Ombuds	Appeal by new hearing	
Quebec	Order	No	No. Can appeal the decision of the Commission on questions of law or jurisdiction to the Court of Quebec.
Prince Edward Island	Order	No	Yes
Ontario	Order	No	Yes
Alberta	Order	No	Yes
British Columbia	Order	No	Yes
*Order Power: provides review officers the authority to resolve complaints and order disclosure of documents. The other system is an investigative model, in which a review officer has the power to investigate, mediate and recommend. The latter is an ombudsman-like role, where the officer does not have the power to order disclosure of documents.[20]			
Prepared by the ATIPPA Review Committee Office			

When he answered questions about the possibility of having order-making power at the first hearings, Mr. Murray expressed the view that "certainly it is not going to speed up the review process because we're going to have to make sure we write a report…with an order that provides all the support and evidence and demonstrates that we have considered the arguments of all of the parties that have come to us." On top of that, of course, there would still be either a right of appeal to the court or a right to seek judicial review of the administrative process. The delay experienced at the moment would likely grow to unimaginable proportions.

Like the *ATIPPA*, the access laws of New Brunswick, Nova Scotia, Northwest Territories, Manitoba, Nunavut, Saskatchewan, Yukon, and the Federal Government all employ the ombuds model to ensure compliance by public bodies with access to information and protection of privacy laws. The oversight officer, usually called commissioner, cannot issue orders to a public body. The oversight office can only recommend a course of action that it considers would constitute compliance. While the public bodies involved usually comply with the recommendations, in a significant portion of the cases they choose not to comply.

That is not the approach taken in the access to information and protection of privacy laws of Alberta, British Columbia, Ontario, Prince Edward Island, and Quebec, where the commissioner's office has order-making power. In each of those jurisdictions the oversight body can issue orders requiring the public body to comply with a specific disclosure order. In Quebec the order can be appealed to the Court of Quebec. In the other four provinces, the orders are subject to judicial review by the superior courts.

20 Striking the Balance (2001), p 101.

In Manitoba, the Ombudsman makes a report and recommends a course of action. There are two avenues for recourse if a recommendation is not complied with. First, the Ombudsman may ask the adjudicator to review a matter, for example, where the head of a public body refuses to take action to implement the Ombudsman's recommendations. The adjudicator is required to conduct a review and make an order. In the alternative, if the Ombudsman does not request a review by the adjudicator, then an applicant or third party may appeal the public body's decision to refuse or grant access to the court.

The federal access and privacy statutes use the ombuds model for oversight. They contain provisions that, while not identical, are very similar to the corresponding *ATIPPA* provisions. Comments by the Supreme Court of Canada as to the role of the Commissioner under the federal statute are instructive as to how provisions respecting the role of the Commissioner in this province would be interpreted by the courts. In its decision in *H. J. Heinz Co. of Canada Ltd. v Canada (Attorney General)*, the court was considering a provision of the federal law that is slightly different from the *ATTIPA*. A third party challenging a public body's decision to release information cannot seek review from the federal commissioner as a third party can under the *ATIPPA*. Under federal law, the application must be to the Federal Court. As well, the federal system has a separate statute and commissioner for each of access and privacy. Neither of these differences otherwise affects the applicability of the court's comments about the role of a commissioner under an ombuds model. On that subject the majority in *Heinz* wrote:

> **The Information Commissioner and the Privacy Commissioner benefit not only individuals who request access or object to disclosure, but also the Canadian public at large, by holding the government accountable for its information practices.** As this Court has emphasized in the past, the Commissioners play a crucial role in the investigation, mediation, and resolution of complaints alleging the improper use or disclosure of information under government control: *Lavigne*, at paras. 37-39. Also, as former Justice La Forest notes in a recent report entitled *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*, Report of the Special Advisor to the Minister of Justice (November 15, 2005), at pp. 17-18, **the role and responsibilities of the Commissioners extend even further to include auditing government information practices, promoting the values of access and privacy nationally and internationally, sponsoring research, and reviewing proposed legislation.**

However, as the following discussion will show, in the specific circumstances of the case at bar, the Privacy Commissioner and the Information Commissioner are of little help because, with no power to make binding orders, they have no teeth. Where, as here, a party seeks to *prevent* the disclosure of information as opposed to requesting its release, the Commissioners' role is necessarily limited by an inability to issue injunctive relief or to prohibit a government institution from disclosing information. Section 44 is therefore the sole mechanism under either the *Access Act* or the *Privacy Act* by which a third party can draw the court's attention to an intended disclosure of personal information in violation of s. 19 of the *Access Act*, and by which it can seek an effective remedy on behalf of others whose privacy would be affected by the disclosure of documents for which the third party is responsible.

The *Privacy Act* establishes a central role for the Privacy Commissioner in the protection of privacy rights. Under s. 29(1)(*a*) through (*f*), individuals who believe that personal information about themselves has been wrongfully used or disclosed by a government institution may complain to the Privacy Commissioner. The Privacy Commissioner is charged with receiving and investigating such complaints and, where they are well-founded, with reporting his or her findings and recommendations to the appropriate government institution (ss. 29(1) and 35). To do this, the Commissioner is accorded broad investigative powers, including the powers to summon and enforce the appearance of persons, compel persons to give evidence, enter government premises, and examine records on government premises (s. 34). Pursuant to s. 37, the Privacy Commissioner may also carry out its own investigations in respect of personal information under the control of government institutions to ensure compliance with the *Privacy Act*. However, while these complaint mechanisms are important in the larger scheme of the *Privacy Act*, they are available only where the wrongful disclosure has *already* occurred and where the complaint is laid directly by the person who is the subject of the information that was wrongfully disclosed (i.e. not by a third party). The Privacy Commissioner may not, therefore, act to prevent the disclosure of personal information.

Third parties may receive some assistance from the Privacy Commissioner pursuant to s. 29(1)(*h*)(ii) of the

Privacy Act, which requires the Privacy Commissioner to receive and investigate complaints "in respect of any other matter relating to . . . the use or disclosure of personal information under the control of a government institution". In contrast to s. 29(1)(*a*) through (*f*), this provision accords the Privacy Commissioner a broader ambit of investigation and does not appear to be limited to situations where the wrongful disclosure of personal information has already occurred or where the complaint was received directly from the individual involved. It may therefore be open to a third party to initiate a complaint on behalf of employees or others *before* disclosure occurs. This broader complaint mechanism is inadequate, however, because the Privacy Commissioner has no authority to issue decisions binding on the government institution or the party contesting the disclosure. Nor does the Commissioner have an injunctive power which would allow it to stay the disclosure of information pending the outcome of an investigation. Indeed, s. 7 of the *Access Act* requires the government institution to disclose the requested information within a specific time limit once a disclosure order is issued. The Privacy Commissioner's ability to provide relief to Heinz is thus very limited.

In a manner similar to the *Privacy Act*, **the *Access Act* establishes a central role for the Information Commissioner, who is charged with protecting and acting as an advocate of the rights of access requesters,** and with conducting investigations. In a dispute under the *Access Act*, where a person makes a request to a government institution for access to a record and the request is denied, the requester may file a complaint with the Information Commissioner, which the Commissioner must investigate (s.30). Section 36 of the *Access Act* accords to the Information Commissioner broad investigative powers similar to those of the Privacy Commissioner and, as a result of its expertise, staff and flexibility, the office of the Information Commissioner is in a unique position to conduct such investigations: *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (C.A.).

However, the Information Commissioner is of only limited assistance in circumstances like those in the case at bar. **The primary role of the Information Commissioner is to represent the interests of the public by acting as an advocate of the rights of access requesters**. Here, Heinz is *contesting* a decision to disclose information. While s. 30(1)(*f*) of the *Access Act* charges the Information Commissioner with receiving and investigating complaints "in respect of any other matter relating to requesting or obtaining access to records under this *Act*", **such broad language does not change the fact that the role of the Information Commissioner, and this is consistent with the purpose of the *Access Act* as a whole, is to act, where appropriate, as an advocate of the disclosure of information.** Moreover, like the Privacy Commissioner, the Information Commissioner may not issue binding orders or injunctive relief and accordingly cannot order the government not to disclose a record.

Section 44 thus establishes the sole mechanism within the scheme of the *Access Act* and the *Privacy Act* by which a third party may request an independent review of a ministerial or government decision to disclose information. As a result, s. 44 helps to promote the purposes of both Acts by providing an avenue for complaints relating to the violation of privacy and ensuring that government institutions are accountable for their information practices.[21] [emphasis by bolding added]

21 *Heinz*, *supra* note 1 at paras 34–40.

Oversight models in international jurisdictions

In its review of New Zealand's official information legislation, the NZ Law Commission summarized the state of the law in Australian state and federal jurisdictions, and in the United Kingdom and Ireland. Excerpts from that report describe the oversight models in those jurisdictions:

Australian Commonwealth[22]

> The Office of Information Commissioner is a recent development in the Australian Commonwealth. It was established by the *Australian Information Commissioner Act*

22 Proposed legislative changes are currently under consideration in Australia.

2010 which creates a dedicated Freedom of Information Commissioner responsible for carrying out functions that can be categorised as adjudicative, oversight and monitoring, and advisory. The Department of Prime Minister and Cabinet is responsible for FOI policy and the management of the *Freedom of Information Act* across the Australian Government through its Privacy and FOI branch.

The Commissioner is responsible for promoting awareness and understanding of the legislation, assisting agencies to publish information in accordance with information publication schemes, providing information, advice, assistance and training to any person or agency about the *Act,* issuing guidelines, making reports and recommendations to Ministers, monitoring and reporting on compliance and reviewing the decisions of agencies, amongst others. The Federal Reforms also incorporated the Office of the Privacy Commissioner into the Information Commissioner's Office.

It was thought that the role carried out by the Ombudsman reviewing individual decisions was reactive in its approach and was not enough to support an effective freedom of information regime. The Australian Ombudsman echoed these calls, saying that a major shortcoming of Australia's FOI regime:

> **…is that it lacks an FOI champion, who is independent of government, has a dedicated role and powers, adequate funding, and a secure power base.**[23]

Queensland

In July 2009 the Queensland Parliament replaced its *Freedom of Information Act* with the *Right to Information Act 2009*. This retained the existing Office of Information Commissioner, which oversees privacy matters, and creates in addition a Freedom of Information Commissioner who is deputy to the Information Commissioner. As well as being responsible for complaints, this Commissioner has responsibility to carry out:

- Support functions, including the provision of advice about interpretation and administration of the *Act,* giving information to agencies and requesters, promoting awareness of the *Act* within the community and within government through such activities as training and education programmes, and identifying and commenting on legislative changes that would improve the *Act*; and
- Performance-monitoring functions such as auditing and reporting on agencies' compliance with the *Act*, publishing performance standards and best practice for agencies, and reporting to Parliament the outcome of any review.

New South Wales

Following the Queensland review of its freedom of information law, the NSW Ombudsman carried out an extensive review of that state's FOI laws and made over 80 recommendations for change. The *Government Information (Public Access) Act 2009*, creating a new Office of Information Commissioner, came into effect on 1 July 2010. The Commissioner is a statutory officer of Parliament, independent from the executive who is required to promote public awareness and understanding of the law as well as provide information, advice, assistance and training to agencies and the public. The Commissioner also has a monitoring role over agencies' functions and may report to the Minister if legislative or administrative change is necessary. The NSW Information Commissioner Office and Privacy Commissioner Office are co-located, but each still exists under its own statute.

Tasmania

Breaking away from the mould set by the Queensland and New South Wales reforms, the Tasmanian Government chose to retain the Ombudsman as its complaint body but gave the office an enhanced role with a number of oversight and reporting functions that it had not previously had to carry out.

United Kingdom

An Information Commissioner's Office has had oversight of freedom of information matters in the United Kingdom since 2001 as well as of matters under the *Data Protection Act 1998* (similar to our privacy legislation). The Commissioner is responsible for complaints, oversight and monitoring, and training and assistance on matters affecting access to information.

The Commissioner is responsible for approving model publication schemes, promotion of good practice by agencies, the promotion and dissemination of information about the *Act*, voluntary audits of agencies' compliance, and reporting to Parliament annually on these matters. Reports are also made regularly to Parliament about compliance across the sectors or in response to specific issues

23 John McMillan, Commonwealth Ombudsman, Seminar of the Commonwealth FOI, Canberra, 26 June 2009.

such as the Ministerial veto of the decision to release cabinet documents relating to military action against Iraq.

Ireland

> Amongst the jurisdictions we looked at, Ireland is the only jurisdiction where the Information Commissioner can be a presiding Ombudsman. Each Office is governed by its own legislation with different powers and functions but they are carried out by the same person.[24] [emphasis added]

One aspect of the commentary respecting the New South Wales legislation that was attractive to the Committee is that the commissioner "**is required** to promote public awareness and understanding of the law as well as provide information, advice, assistance and training to agencies and the public." The present *ATIPPA* simply states that the Commissioner **may** do those things.[25] Another aspect of the law in Queensland also attracted the attention of the Committee: the commissioner has responsibility to carry out "performance-monitoring functions such as auditing and reporting on agencies' compliance with the *Act*, [and] publishing performance standards."[26]

The Committee agreed with the Australian Commonwealth Ombudsman that it is crucial to have an access to information champion.

While the *ATIPPA* provides for an oversight body that is independent of government, it does not require the Commissioner to be a freedom of information champion. The Committee believes that having the Commissioner play that role (in the manner described in the excerpts from *H.J. Heinz* quoted above) in this province would help citizens obtain the access they request. In the longer term, it would help develop a culture that is more consistent with the objectives of the *ATIPPA*, a culture in which access to much of the information held by public bodies is made easier.

24 NZ *The Public's Right to Know: Review of the Official Information Legislation* (2012) at ss 13.121-13.135.

25 *ATIPPA* s 51.

26 *Right to Information Act 2009* (Qld), s 131.

Issues

The key questions arising from the foregoing are: Will the right of citizens to access information be better served by an oversight body that is an ombuds model or an order-making model, or some other variation? Which will offer a more user-friendly system? Which system will make people feel confident that the information they are required to provide to public bodies will be treated appropriately?

Analysis

At issue, then, is which model will achieve the most efficient but user-friendly system for citizens accessing information or seeking to protect the privacy of their personal information. The first matter to be considered must be the basic characteristics and capabilities of each of the two models. Table 6 provides a side-by-side comparison of the two models.

The chief purpose of such an oversight body is to ensure that practices and procedures are in place to facilitate access to information on a timely basis and to ensure privacy is protected. Regarding the right of citizens to access information, the Commissioner wrote in an annual report:

Table 6: Oversight Models	
Order-making model	Ombuds model
Detached, unbiased adjudicator	Access and privacy protection champion
More limited problem-solving role	Facilitator, expediter, and mediator
Can order compliance with recommendation	Can only recommend
Auditor of public body performance	Auditor of public body performance
No ability to appeal on behalf of requester	Able to appeal on behalf of requester
Education role more difficult if also adjudicator	Educator of public and public bodies
Difficult to monitor in a small province if also adjudicator	Watchdog for privacy issues
Cannot easily advise if adjudicating	Access and privacy consultant to government
Prepared by the ATIPPA Review Committee Office	

> By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it. Furthermore, the legislation places the burden squarely on the head of the public body that any information that is withheld is done so appropriately and in accordance with the legislation.[27]

An ombuds-model oversight body must advocate for the right of citizens to access information and to ensure that their personal information in the hands of government is protected. It must also help citizens exercise those rights. The responsibility in an ombuds model is both proactive and reactive. The Commissioner has the reactive power to investigate complaints about a public body's actions or inaction. Additional proactive powers are conferred on the Commissioner by section 51 to make recommendations that will ensure compliance with and better administration of the *Act*.

It is understandable that so many participants would rush to the conclusion that the Commissioner should have order-making power. Many requesters have had unsatisfactory experiences involving absolute refusals of disclosure and partial or severely redacted disclosure. Some have experienced the frustration of a Commissioner throwing his hands up and explaining that he is unable to help because he cannot even see the records to enable him to determine whether or not they are what the head of a public body says they are.

Taking all the foregoing circumstances into account, the Committee can only conclude that the last thing the system needs is a more complicated review process for requests to access information held by public bodies in this province. Both the Commissioner and Mr. Murray indicated that if the Commissioner had order-making power, the process could take longer and require formal hearings and all the paraphernalia of official proceedings.

The Committee agrees that significant additional delays would almost be inevitable if another formalized adjudication structure and process were put in place.

Order-making power does not seem warranted when one considers the number of matters that would be dealt with by an order-making oversight body. Table 7 below lends support to Mr. Murray's and the Commissioner's observations. It includes the statistics for the full eight years for which the Commissioner has been operating and filed reports.

As Mr. Murray indicated, the OIPC has conducted an average of fewer than 16 formal reviews a year over the last eight years. In less than 2.5 cases, on average, did the public body still refuse to provide information after a report was issued. He also indicated that even if the OIPC had order power, those may well be cases where the public body would still be seeking judicial review.

As discussed later in this chapter, all of the information before the Committee indicates that the single most frustrating aspect of the province's access to information system is the inordinate delay that characterizes a significant portion of the requests for access. These are not delays of days or weeks; they are delays of months and in many cases a number of years. Such delays often render the records of little or no value to

27 OIPC *Annual Report 2010-11*, OIPC *Report 2005-002*, p c.

Table 7: ATIPPA Statistics Public Body Responses to Commissioner's Reports Following Reviews of Access Requests									
Fiscal Year	Total Number of Reports*	No Recommendations		Commissioner made Recommendations to Public Body					
		Commissioner Agrees with Public Body		Recommendations Accepted				Recommendations Rejected	
				Fully	Partially	Total	%	Total	%
2012–13	15	7	46.7%	5	2	7	46.7%	1	6.6%
2011–12	25	9	36%	13	3	16	64%	0	0
2010–11	14	7	50%	6	1	7	50%	0	0
2009–10	11	1	9.1%	3	3	6	54.5%	4	36.4%
2008–09	16	4	25%	6	5	11	68.8%	1	6.2%
2007–08	18	5	27.8%	10	2	12	66.7%	1	5.5%
2006–07	15	2	13.3%	6	2**	8	53.3%	5	33.4%
2005–06	11	0	0	8	1***	9	81.8%	2	18.2%***
Prepared by the ATIPPA Review Committee Office, based on statistics in annual reports of the OIPC.									

*For the purpose of this Table, "Total Number of Reports" is the number of reports to which public bodies have responded in a fiscal year. It is not always the same as the number of reports issued by the Commissioner in a fiscal year, because the response of the public body is sometimes received in the following fiscal year.

**In one case, recommendations to release information were subsequently accepted and further information was released (See Report Summary 2006-014).

***Recommendations to release information were subsequently accepted and the majority of information was released (See Report Summaries 2005-004 and 2005-005).

the purpose for which they were requested, and in many cases totally useless.

Admittedly, there are other important factors that frustrate requesters:

- When a public body claims that because of the nature of the record the law does not require the release of that record, the Commissioner cannot, in some circumstances, review the record to assess the legitimacy of the claim.
- A public body can on its own initiative extend the time limit for decision on release of a document.
- A public body can disregard a request by claiming the request to be vexatious or frivolous.
- The Clerk of the Executive Council can declare a document to be an official Cabinet record and so preclude any consideration of it by the OIPC.

Ways of mitigating these factors are addressed in other chapters of this report, but none has the prospect of reducing requester frustration and making the *Act* more user friendly than will measures to correct the inordinate delay that presently characterizes the system.

Conclusion

Retaining the present ombuds model will not, alone, correct the time delays that are currently experienced. But it will not add to those delays. If an order-making model were put in place, given the population and land mass of this province, delays would almost certainly be exacerbated. Other changes respecting time limits and practices, discussed later in this chapter, can also make a significant contribution to resolving the problem of delays. Those changes will not be a substitute for the benefit of an order but, bearing in mind Mr. Murray's views and the statistics showing that an average of less than three review recommendations are rejected by public bodies, the overwhelming majority of requesters will receive their final decision in a fraction of the time it is now taking.

One additional change, a kind of hybrid of order-making and ombuds, could greatly improve the circumstance for the less than three on average of the Commissioner's recommendations that are rejected by public bodies each year. That change would be a statutory requirement that upon receipt of an OIPC recommendation the public body concerned would, within 10 business days, have the option **only** of complying with the recommendation or applying to court for a declaration that, by law, it is not required to comply.

The statutory requirement would not be an order that the public body comply, but the result for the requester would be the same. In an order-making model, the public body would still have the option of seeking court review. The big benefit of the hybrid approach is that the burden of initiating a court review and the burden of proof would be on the public body. As well, the Commissioner would be in a position to respond to the public body's application for the declaration, because he would not be the maker of an order under review by the court, and because he would have a statutory responsibility to champion access. The Commissioner said that the major disadvantage of the order-making model was not being able to respond to a court application. The hybrid model would eliminate both the additional delays inherent in the order-making model and the disadvantage of the Commissioner's being unable to respond to any court application by the public body.

Adequate jurisdiction, independence, expertise, efficiency, and user-friendly practices and procedures are determining factors for success in an ombuds-style office of the Commissioner. The Committee has concluded that creating an entity with those characteristics would require that the OIPC be recast in a somewhat changed role.

That said, the Committee accepts the recommendation of the federal information commissioner that the Commissioner should have decision making power respecting all procedural matters, estimates and waiving of charges. These matters would be dealt with expeditiously by procedures determined by the Commissioner. They would not follow the same process or timelines as complaints filed with the Commissioner respecting access to records or correction of personal information. For example, they would not be addressed by way of a recommendation to the head of the public body. Instead the head of the public body would be required to follow the Commissioner's decision, and these matters would not be the subject of an appeal before the court.

The representations that the Committee heard from the overwhelming majority of participants and the Committee's own research establish that the present legislative jurisdiction, procedures, and practices of the OIPC do not permit that office to be easily modified. The recasting will require so many extensive changes to the existing *ATIPPA* that the most expeditious way to proceed is to structure a revised statute by retaining and incorporating in it all that is good and useful of the existing version and adding the new provisions necessary to achieve the desired recasting.

The Committee recommends that

54. The ombuds oversight model be retained, with the exception that decisions of the Commissioner respecting extensions of time, estimates of charges, waiving of charges and any other procedural matters be final and not subject to appeal.

55. The powers of the Office of the Information and Privacy Commissioner be increased to reflect proposals discussed elsewhere in this report.

56. The Office of the Information and Privacy Commissioner adopt the changes in procedures and practices presently employed in the Commissioner's review processes that are necessary to reflect the comments of the Committee in this and other chapters.

57. Oversight by the Office of the Information and Privacy Commissioner include responsibility for approving all extensions of time and all decisions to disregard an application, and that amendments to the *ATIPPA* result in:

(a) eliminating the ability of public bodies to unilaterally extend the basic time limit;

(b) providing for extension only for such time as the OIPC shall, on the basis of convincing evidence, approve as being reasonably required;

(c) requiring that the requester be advised without delay of the extension and the reasons for it; and

(d) permitting a public body to disregard a request only upon prior approval of the OIPC, sought immediately upon the public body concluding that the request should be disregarded, and in no event later than five business days after receipt of the request.

58. The provisions of the legislation relating to the oversight model should indicate that, with respect to access to information and protection of personal information:

(a) priority is to be accorded to requesters achieving the greatest level of access and protection permissible, within the shortest reasonable time frame, and at reasonable cost to the requester; and

(b) the Office of the Information and Privacy Commissioner has primary responsibility to:

- advocate for the achievement of that priority
- advocate for the resources necessary
- monitor, and audit as necessary, the suitability of procedures and practices employed by public bodies for achievement of that priority
- draw to the attention of the heads of public bodies and to the Minister responsible for the Office of Public Engagement any persistent failures of public bodies to make adequate efforts to achieve the priority
- provide all reasonable assistance to requesters when it is sought
- have in place such procedures and practices as shall result in all complaints being fully addressed, informal resolution, where appropriate, being completed and any necessary investigation and report being completed strictly within the time limits specified in the *Act*inform the public from time to time of any apparent deficiencies in any aspect of the system, including the Office of the Information and Privacy Commissioner, that is in place to provide for access to information and protection of personal information

7.2 Status, term of office, and salary of the Commissioner

While some participants were critical of certain aspects of the Commissioner's performance, most expressed a high regard for and great confidence in the OIPC. Most also recommended, as noted in other parts of this report, that the powers of the Commissioner should be enlarged to enable the OIPC to determine virtually any access issue that may arise.

Present situation

Status

The status, term, and salary are provided for in Part IV.1 of the *ATIPPA*. The statute that resulted from Bill 29 significantly altered some of the jurisdiction and powers of the Commissioner and the office through which the Commissioner functions (OIPC). However, it made no change in the provisions of the *Act* establishing the position of Commissioner or the office.

The appointment section reads today as it did when it was first enacted in 2002. It provides that the office is to be "filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly."

The legislation constitutes the Commissioner an officer of the House of Assembly, and prohibits the holder of the office from being nominated for election or being elected to the House of Assembly. It also prohibits the Commissioner from holding any other public office or carrying on any other business, trade, or profession. Apart from the Commissioner's designation as an officer of the House of Assembly, there is nothing else in the statute to indicate the status to be accorded to the Commissioner.

Except for two participants, all others expressed a high regard for the Commissioner and great confidence in the effort the OIPC makes to ensure that their right to access information and pursue protection of their privacy would be properly managed. The critical views are set out below. They are set out here not to indicate that the Committee accepts the inferences, but to demonstrate the perception of lack of independence, and expectation of partiality that result from the short term of office and the controlling position of the government in reappointment.

Term

The short duration of the term of the Commissioner's appointment is an aspect of the *ATIPPA* that attracted a large number of critical comments. Subsection 42.2(1) of the *ATIPPA* provides:

> Unless he or she sooner resigns, dies or is removed from office, the commissioner shall hold office for 2 years from the date of his or her appointment, and he or she may be re-appointed for further terms of 2 years.

Salary

The salary to be paid to the Commissioner is not specified and the statute provides no means for its objective determination. The relevant provision is section 42.5:

> (1) The commissioner shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the House of Assembly Management Commission.
>
> (2) The salary of the commissioner shall not be reduced except on a resolution of the House of Assembly carried by a majority vote of the members of the House of Assembly actually voting.
>
> (3) The commissioner is subject to the *Public Service Pensions Act, 1991* where he or she was subject to that *Act* prior to his or her appointment as commissioner.

Other subsections make provision for hiring staff and for the Commissioner's oath of office and oaths of the staff. Subsection 32(4) of the *House of Assembly Accountability, Integrity and Administration Act* applies to the Commissioner. It provides:

> Policies relating to deputy ministers, including policies with respect to the reimbursement of expenses, apply to the clerk and persons appointed to preside over a statutory office, except where varied by a directive of the commission.

Other Canadian jurisdictions

Table 8 below indicates the term of office, renewal options, and removal process for the oversight official in the Canadian jurisdictions.

Table 8: Terms of Office (Canadian Commissioners)				
Jurisdiction	Term	Process	Renewable	Removable
Newfoundland and Labrador Commissioner	2 years	LGiC on Resolution HOA	Yes	Yes, resolution of majority of HOA
Nova Scotia Review Officer	Not less than 5 nor more than 7 years	GiC	Yes	Yes, resolution of majority of HOA
New Brunswick Commissioner	7 years	LGiC on LA recommendation	No, LGiC extension not more than 1 year	Yes, upon address in which 2/3 LA Members concur
Prince Edward Island Commissioner	5 years	LA on recommendation of Standing Committee and 2/3 LA Resolution	Yes, continues until successor appointed up to 6 months	For cause, yes, resolution of HOA
Quebec Commissioner	5 years	Resolution at least 2/3 NA Members	Yes, remain until successor	Yes, resolution of at least 2/3 NA Members
Ontario Commissioner	5 years	LGiC on address of Assembly	Yes	For cause, yes, LGiC after address of LA
Manitoba Information and Privacy Adjudicator		LGiC on recommendation of Standing Committee on LA		Yes, LGiC on Resolution of LA 2/3 majority
Manitoba Ombudsman	6 years	LGiC on recommendation of Standing Committee on LA	Yes, reappointment for second term of 6 years	Yes, LGiC on Resolution of LA 2/3 majority
Saskatchewan Commissioner	5 years	LGiC on Assembly recommendation	Yes, for 1 term	Yes, LGiC on Resolution of Assembly
Alberta Commissioner	5 years	LGiC on Legislative Assembly recommendation	Yes, continues until successor appointed to a max of 6 months	Yes, LGiC on recommendation of LA
British Columbia Commissioner	6 years	LGiC on recommendation of LA by unanimous vote of special committee	Yes	Yes, LGiC on recommendation of 2/3 LA Members
Yukon Ombudsman is Commissioner	5 years	Commissioner on Legislative Assembly recommendation	Yes	For cause, yes, on recommendation of LA
Nunavut Commissioner	5 years	Commissioner on Legislative Assembly recommendation	Yes	Yes, Commissioner on LA recommendation
Northwest Territories Commissioner	5 years	Commissioner on Legislative Assembly recommendation	Yes	Yes, Commissioner on LA recommendation
Federal Information and Privacy Commissioners	7 years	GiC on Resolution of Senate and House of Commons	Yes	For cause on address of Senate and HOC
Prepared by the ATIPPA Review Committee Office				

What we heard

From organizations

The OIPC

In the initial written submission the Commissioner made only a brief representation concerning his term of office, and no representations respecting status or salary:

> Extending the term of office to six years would put the Information and Privacy Commissioner in the same term of office already accorded to the Child [and] Youth Advocate and Citizen Representative, and would be consistent with other Information and Privacy Commissioners elsewhere in Canada.
>
> The current 2-year term is too short a period to allow a new commissioner to become expert in both the ATIPPA and PHIA. Additionally, the term of office ought to be longer than the term of office of government so that the independence of the office is protected from any negative perception[28]

The Federal Information Commissioner

The Federal Information Commissioner expressed the view that the short term creates a perception of lack of independence and that it is detrimental to the credibility of the oversight office. She also suggested that the term has to be more than the length of one government (more than 4 years); it should be in the neighbourhood of 8 to 10 years, and it should be a term that leads to no reappointment. She also observed that a longer term is necessary to recruit qualified candidates[29].

The Centre for Law and Democracy

The Centre for Law and Democracy (CLD) indicated they would prefer to see at least 4 to 6 years and that 10 to 12 years was perhaps too long. They also said that "security of tenure is important but you also need to be able to judge their performance and to replace somebody who is not doing a good job." They thought there should be a chance to renew the term.[30]

From individuals

Simon Lono

Mr. Lono recommends a term of 10 years, the same as for the Auditor General. He suggests two years "doesn't provide for an accumulation of experience and knowledge of the Commissioner. I think it can cause issues in terms of a Commissioner self-centering themselves. I raise that as a potential issue as opposed to a real one." He added:

> I think that the terms and conditions of appointments should reinforce the best, not the worst. And it really struck me when I went through all the other House Officer positions how unusual the Privacy Commissioner is in that respect. No other position has a two-year appointment. I think if the Auditor General had a two-year appointment…we would think that pretty strange, and, yet, we don't seem to really think it's all that strange for a privacy commissioner. And I think it is just as strange for a lot of the very same reasons.[31]

With respect to salary, he said he could see the position treated as a deputy minister equivalent. There would be value to that clarity, but he would not want to see a fixed dollar-per-year provision. That, he suggested, would pose a political problem.

Edward Hollett

Mr. Hollett suggests changing the role of the commissioner to include a responsibility comparable to that of the Auditor General. This would include changing the term of appointment to a single one of 10 years.[32]

Terry Burry

In his written submission, Mr. Burry recommends a 10-year term and no renewal instead of a piecemeal renewal every 2 years. Mr. Burry added, "I am very suspicious that a two year renewal term is no more than a 'trap,' and can have the effect of keeping the Privacy Commissioner

28 OIPC Submission, 16 June 2014, pp 93–94.

29 Information Commissioner of Canada Transcript, 18 August 2014, pp 107–110.

30 CLD Transcript, 24 July 2014, pp 133–134.

31 Lono Transcript, 25 June 2014, pp 38–39.

32 Hollett Submission, June 2014, p 8.

at bay, and on a short leash with respect to how the government of the day can easily dismiss the Privacy Commissioner if he produces results unfavourable to the government's political interest."[33]

Mr. Burry was one of the participants who were critical of the Commissioner. He demonstrated the point he was making with respect to the effect of the two-year term by referring to a comment that the Commissioner made when Bill 29 was first introduced. Mr. Burry wrote:

> It is interesting to observe that the Privacy Commissioner, was, initially, completely satisfied with the Cummings Report: *Review of the Access to Information and Protection of Privacy*, but now in his presentation to you on June 24, 2014, he would like to see changes. Why I wonder? Anything to do with the possibility that his two year appointment might not get renewed if he spoke contrary minded?[34]

Mr. Burry elaborated on those comments when he appeared at the hearings, with respect to this matter he said:

> For example when the Cummings Report came out Mr. Ring was all in favor of the report, but now it seems like he would like to see some changes there. So I'm thinking that's kind of related to the fact that possibly he's only got a two-year term and he doesn't want to say anything to be detrimental to getting reappointed because he had an about-face, I think, from his initial feelings about the Cummings Report and what he presented, I think, to this Committee more recently.[35]

Deborah Moss

Ms. Moss made comments respecting the Commissioner that were similar to those of Mr. Burry. She claimed to be confused by information presented to the Committee by Mr. Ring. She quoted stories in the *Telegram* in June of 2012 when Bill 29 was before the House of Assembly. Those stories commented on the fact that Bill 29 would reverse the effect of a decision of the Court of Appeal confirming the right of the Commissioner to review documents in respect of which solicitor-client privilege was claimed, and that Bill 29 would, if passed, take away that right. She then quoted the Commissioner as having, at some point, commented on the issue and said "without having the information provided to us, then there was no way that this office could fulfill its mandate and provide an independent review."

Ms. Moss observed that on 18 June 2012, the following line appeared in the *Telegram*: "'I still maintain, based on my review, that the legislation remains robust, and that people's rights to access information will be protected,' Ring told reporters Monday ." Ms. Moss then noted that on 21 June 2012, "Mr. Ring was reappointed as the Privacy Commissioner."

Having set out these matters, Ms. Moss writes:

> Looking back, perhaps one can speculate as to the reasoning for the Commissioner's commentary of June 18, 2012. However, his reappointment for a further 2-year term just (3) days later is certainly dubious and optically, it is quite concerning.
>
> On June 16, 2014, Commissioner Ring made a submission of 99 pages outlining a number of recommendations and revisions. The contents of which are in stark contrast to his assertion that the legislation was robust enough back in 2012.[36]

From the media

James McLeod of the Telegram

Mr. McLeod commented on the role of the Commissioner in his written submission. He wrote:

> The Information and Privacy Commissioner's office should be made much, much stronger. With all due respect to the good people who work within the Office of the Information and Privacy Commissioner, the legislative framework they work within leaves a lot to be desired. It didn't get much attention during the Bill 29 process, but one of the only recommendations that wasn't accepted from John Cummings' report in 2011 was recommendation 21 to make the Commissioner's term five years.
>
> Why stop at five years though? Why not make the Commissioner's term ten years with no option for re-appointment—on a par with the auditor general? Another option would be to go with the Child and Youth Advocate model with a six year term, and the possibility of one re-appointment, for a total of 12 years maximum.[37]

33 Burry Submission, July 2014, p 10.
34 *Ibid* 12.
35 Burry Transcript, 24 July 2014, pp 11-12.
36 Moss Submission, 2 July 2014, p 3.
37 McLeod Submission, June 2014, p 2.

From political parties

The Liberal Party, Leader of the Official Opposition, Dwight Ball

Mr. Ball thought the minimum should be 5 years but suggested there should be consistency with other officers of the House of Assembly. He said he did not know if it would be difficult to get people to fill that role or not. He agreed that there would be greater independence if there were no opportunity for reappointment.

He also said that "the idea of not having a reappointment, even if it's a five year term without the possibility of reappointment, would add to greater independence. Certainly for ten years I think we'd see it in a greater level."[38]

The New Democratic Party, Gerry Rogers, MHA

The New Democratic Party suggested at least 5 years, and said that would extend beyond a political term of office. "It would also give the person time 'to get your feet under you.'" They had no objection to a 10-year term, no objection to re-appointment or non-reappointment, but at the very least it must be a 5-year term.[39]

From government

Minister responsible for OPE, the Honourable Sandy Collins

Minister Collins advised that the issues government considers in the appointment processes include competency, consistency, and commitment. He advised that the 2-year term in this province is the shortest in all jurisdictions and the average term for information and privacy commissioners in Canada is five years. He suggested that a ten year appointment "handcuffs governments." He also suggested that the 5 and 6 year appointments have worked but that "it is nice to have the option to reappoint." He was asked: Would there be a problem with requiring majority approval on both sides of the House of Assembly? His answer was: "No!"[40]

38 Official Opposition Transcript, 22 July 2014, pp 114–115.

39 New Democratic Party Transcript, 26 June 2014, p 22.

40 Government NL Transcript, 19 August 2014, pp 171–172.

Issues

The comments that the Committee heard and the limited provisions in the present legislation raise three questions for the Committee's consideration:

1. What ranking in the present public service categories would indicate a status that reflects the importance of the office and provides a standing for the Commissioner to deal effectively with the public service on access and privacy matters?

2. What term of office, renewal possibilities, and appointment and renewal procedures would best ensure an OIPC that is, and is perceived to be, independent of government?

3. What level of salary and what process for adjusting it occasionally would be commensurate with the importance of the office, the need to attract competent candidates, and the preservation of the office's independence?

Issue 1: The status appropriate for the office

The importance of the Commissioner's office to the effective administration of the regime that oversees and protects the right of citizens to access information held by public bodies is not in question. That the person who holds the office and discharges the responsibility should be accorded respect and have a status that will ensure an ability to achieve the objectives of the statute is also beyond question. In practical terms, that will require that the office holder have a status equivalent to that of the most senior of the public service officials whose decisions are challenged and commented upon by the Commissioner.

The status of most of the persons whose decisions or approvals of decisions the Commissioner regularly reviews is that of a deputy minister. To avoid the possibility of the Commissioner appearing in any manner subordinate, or even junior, to the public officials whose decisions are being questioned, it would seem appropriate that the statute specify that in respect of all interaction with public bodies, the Commissioner is to have the status of a deputy minister[41] in the province's public service.

Issue 2: The term and process for appointment and reappointment

No concern was expressed about the existing manner of initial appointment by the Lieutenant-Governor in Council, after approval of a resolution passed by the members of the House of Assembly. Effectively the decision to approve the appointment is that of the House of Assembly, and in actually making the appointment, the Lieutenant-Governor in Council is the agent implementing the decision of the House of Assembly.

Of course, "Lieutenant-Governor in Council" is simply the constitutional name for the Cabinet or the government in power at the time. That government is made up of members of the political party having the majority of members of the House of Assembly. As a result, the political party in power has control of both bodies. However, the requirement for decision by a majority vote in the House of Assembly precludes secret determination by the government. Requiring approval by resolution of the House of Assembly ensures opportunity for open public debate on the merits or otherwise of the proposed appointee. The Committee is satisfied that this is an appropriate process for initial appointment and should be retained. However, the Committee is of the view that the perception of a Commissioner who is independent from government would be greatly enhanced if the choice resulted from efforts by a selection committee that would identify leading candidates for consideration. Such a committee could consist of persons holding offices such as the Clerk of the Executive Council, Clerk of the House of Assembly, Chief Judge of the Provincial Court, and President of Memorial University.

Two additional matters in the present appointment process are problematic and should be addressed. First, the two-year term is excessively short and makes reappointment a practical necessity. Having a new Commissioner every two years does not permit the incumbent time to become fully knowledgeable about the system, let alone develop expertise and competence. Even with reappointment being confirmed by the House of Assembly,[42] Government would appear to be able to control the outcome. In a majority government circumstance, as has almost always been the case here, they would effectively have that ability. Second, this situation is exacerbated by the fact that the *ATIPPA* does not contain a provision for objective determination of the salary and other benefits to be paid to the Commissioner. It provides that the Commissioner "be paid a salary fixed by the Lieutenant-Governor in Council after

41 This is not intended to affect the reporting responsibility of the Commissioner provided for in the *House of Assembly Accountability, Integrity and Administration Act*.

42 While that is not specified to be a requirement by the *ATIPPA*, the effect of subsection 21(1) of the *Interpretation Act* would produce that result.

consultation with the House of Assembly Management Commission."[43]

That combination of factors is almost certain to create the perception of a Commissioner beholden to government. That is obvious here from the comments of Ms. Moss and Mr. Burry. This aspect of the *ATIPPA* attracted almost universal condemnation because of the potential for destruction of the independence of the Commissioner. Even if a strong and principled Commissioner could resist that destruction of independence, the perception that such a Commissioner is not independent and, in Mr. Burry's words, "kept on a short leash," is unavoidable. Perception is frequently as harmful as reality. The Committee recommends a radical change.

Several suggestions were made during the course of the hearings. One possibility is a long term, between 8 and 12 years with no possibility of reappointment. In that way the Commissioner could look forward to a reasonable term, but have no incentive to behave in a manner likely to result in reappointment. The Centre for Law and Democracy expressed a concern that such an approach could result in being stuck for a very long time with an appointee who turned out not to be a very good performer.

A shorter term of five to six years without the possibility of reappointment would likely be too short to attract good applicants to the position. The possibility of one reappointment would avoid that problem, but leave a Commissioner with apprehensions about the probability of reappointment. It would also result in the perception of a Commissioner potentially making decisions favourable to government in order to increase the likelihood of reappointment. Requiring approval by a resolution of the House of Assembly would not resolve this because members in a majority government rarely vote against government wishes. There would still be a perception of a commissioner likely to make decisions favourable to the government in order to make reappointment more likely.

A possible solution was raised in the course of the hearings. That was to provide for a term of five or six years, with one reappointment by the Lieutenant-Governor in Council after approval by a double majority of the House of Assembly. (A double majority is a majority of the members on the government side of the House and a majority of the members on the opposition side of the House.) That should avoid both the possibility of a Commissioner making recommendations designed to increase the probability of reappointment and the perception that he or she is making such decisions.

Issue 3: The salary and benefits payable to the Commissioner

Few participants commented on the matter of salary and benefits. One who did was emphatic that the specific amount should not be expressed in the statute. That seems a reasonable position. However, the Committee is of the view that the existing provision ought not to be continued. For the same reasons that reappointing ought not to be for short terms, government ought not to be able to periodically revise the Commissioner's salary, even after consultation with the House of Assembly Management Commission. The political party in power is the determining influence in both bodies. The prospect of perception of a Commissioner making recommendations likely to result in a more favourable salary increase would remain.

Jurisdictions across the country have various means of establishing the salary of the Commissioner or ombudsperson. In some it is set by the Cabinet and in others by the legislature. At the national level it is related to the salary of a Federal Court judge and in British Columbia it is related to the salary of the chief judge of the Provincial Court. The value of using the salary of a judge to determine the salary of a Commissioner is that the salaries of judges are assessed and recommended by an objective process independent of government.

The Committee believes the best option is to provide for a salary that is calculated by relating it to the salary of a person holding a senior responsible position, but one that is determined objectively by a process that is independent of government. A second significant consideration is that the salary should reflect the importance and responsibility of the position and be sufficient to attract

43 *ATIPPA* s 42.5(1).

persons with the training, experience, and skill that will result in sound performance of the office. As well, the Committee feels that the importance of the position and the increased responsibility that the Committee is proposing warrant a salary larger than is presently the case.

However, there are other factors to be considered: the Committee is proposing that the Commissioner have the status of a deputy minister, the *House of Assembly Accountability, Integrity and Administration Act* makes similar provision, and that Act also provides that the Commissioner reports to the Clerk of the House of Assembly on financial matters. Taking those into account, it would seem appropriate that the Commissioner's salary be comparable to the deputy minister level. However, all of those salaries are established from time to time by government.

A public sector salary in this province that reflects major responsibility and is set independently of government is that of a judge of the Provincial Court. The Committee concluded that the Commissioner's salary should be expressed in the statute to be the percentage of a provincial court judge's salary, other than the Chief Judge, that takes into account the above factors. The percentage of a provincial court judge's salary that approximates the salary of a senior deputy minister is seventy-five.

Recommendations

The Committee recommends that:

59. The provision of the *Act* providing for appointment of the Information and Privacy Commissioner by the Lieutenant-Governor in Council on resolution by the House of Assembly be retained for future appointments, but that there be added thereto the following:

(a) Before an appointment is made, the Speaker of the House of Assembly shall put in place a selection committee comprising

(i) The Clerk of the Executive Council or his or her deputy,

(ii) The Clerk of the House of Assembly or if the Clerk is unavailable, the Clerk Assistant of the House of Assembly,

(iii) The Chief Judge of the Provincial Court or another judge of that court, designated by the Chief Judge, and

(iv) The President of Memorial University or a vice-president of Memorial University, designated by the President.

(b) The selection committee shall develop a roster of qualified candidates, and in the course of doing so may, if the committee considers it necessary, publicly invite expressions of interest in being nominated for the position, and submit the roster of persons qualified to the Speaker.

(c) The Speaker shall consult with the Premier, the Leader of the Opposition and the leader or member of another party that is represented on the House of Assembly Management Commission, and after doing so, cause to be placed before the House of Assembly for approval the name of one of the persons on the roster to be appointed Commissioner.

60. The Commissioner be appointed for a term of six years, and be eligible for one further term of six years, on reappointment by the Lieutenant-Governor in Council after approval by a majority of the members on the Government side of the House of Assembly and separate approval by a majority of the members on the opposition side of the House of Assembly, with the Speaker having the right to cast a tie-breaking vote on either or both sides of the House of Assembly.

61. A provision be added to the *ATIPPA* to specify that in respect of all interactions with a public body, whether or not it is a public body to which the *Act*

applies, the Commissioner have the status of a Deputy Minister.

62. The provision contained in section 42.5 of the *Act* respecting salary of the Commissioner be replaced by a provision to require that the Commissioner receive a salary that is 75% of the salary of a Provincial Court Judge, other than the Chief Judge, and, apart from pension, the additional benefits as provided to a Deputy Minister.

63. The provision respecting pension contained in section 42.5(3) of the *Act* be retained and there be added a provision that, where the Commissioner is not subject to the *Public Service Pensions Act, 1991* prior to his or her appointment as Commissioner, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the public service pension plan.

7.3 The role of the Commissioner

"A good watchdog has a loud bark and no bite. The bite should be in the courts."

— James McLeod, Presentation to the Committee

Most of the views expressed to the Committee concerned issues of access and transparency. Participants articulated a wish to have a strong, independent Commissioner who would speak out when appropriate and act when necessary so citizens' rights would be actively enforced.

The perception described to the Committee is that of a Commissioner largely relegated to a reactive mode of functioning. Most of his Office's efforts go into attempting to mediate requests for reviews of public body decisions to withhold information. The majority, some 75–80 percent according to the Commissioner's representations at the first hearing, are resolved amicably. The remainder usually give rise to a written report. A small number are discontinued or the Office declines to investigate. Where the Commissioner makes recommendations to a public body, those recommendations are fully followed on average only about 60 percent of the time, with 16 percent of the recommendations being fully rejected.[44]

Recourse to the courts appears to be the only way for the Commissioner to borrow an authoritative voice for a message about respecting information rights. He claimed that he had more challenges to his jurisdiction than any other Commissioner in the country. The Information Commissioner of Canada concurred with this view, saying the percentage of cases which were contested by public bodies and ended up before the courts was much higher in Newfoundland and Labrador than in the federal jurisdiction.[45]

The primary activities of the Office seem to be report writing, appeals to the courts, and the settlement process for complaints and reviews. The outreach program of the Office appears to include an annual report to the House of Assembly, made several months after the end of the reporting period; a few public presentations; meetings with officials; and infrequent media interviews.[46] Nonetheless, in the post–Bill 29 environment, people look to the Commissioner to act as a strong and articulate guardian of their values, particularly as regards access to information. This was evidenced in the repeated references the Committee heard to the lack of power and

44 OIPC *Annual Report 2012-13*, p 72. See Table 7 of this report.

45 Information Commissioner of Canada Transcript, 18 August 2014, pp 60–62.

46 OIPC *Annual Report 2012–13*, pp 25–28.

tenuous status of the Commissioner.

The strength, independence, and expertise of the Office of the Commissioner are among the key ingredients in a democratic society where transparency in the public sector and privacy for individuals are cherished values. To wield these capabilities, the Office would need to be recast on a firmer foundation with a broad array of enforceable powers and a clear mandate to take action on its own initiative.

With respect to access to information

Legislative provisions

The sections of the *ATIPPA* that describe the powers of the Commissioner and the review and complaint roles with respect to access are:

43. (1) A person who makes a request under this Act for access to a record or for correction of personal information may ask the commissioner to review a decision, act or failure to act of the head of the public body that relates to the request, except where the refusal by the head of the public body to disclose records or parts of them is

(a) due to the record being an official Cabinet record under section 18; or

(b) based on solicitor and client privilege under section 21.

(2) A third party notified under section 28 of a request for access may ask the commissioner to review a decision made about the request by the head of the public body.

(3) Notwithstanding subsection (1), a person who makes a request under this Act for access to a record or for correction of personal information may, within 30 days after the person is notified of the decision, or the date of the act or failure to act, appeal directly to the Trial Division under section 60.

(4) A person who has appealed a decision directly to the Trial Division shall not ask the commissioner to review a decision under this Part, but another party to the request may do so.

(5) The commissioner may refuse to review a decision, act or failure to act where an appeal has been made to the Trial Division.

44. (1) The commissioner may investigate and attempt to resolve complaints that

(a) an extension of time for responding to a request is not in accordance with section 16; or

(b) a fee required under this *Act* is inappropriate.

45. (1) A request to the commissioner under section 43 to review a decision, act or failure to act shall be made in writing

(a) within 60 days after the person asking for the review is notified of the decision, or the date of the act or failure to act; or

(b) in the case of a third party, within 20 days after notice is given in the case of a review under subsection 43 (2); or

(c) within a longer period that may be allowed by the commissioner.

(2) The failure of the head of a public body to respond to a request for access to a record is considered a decision to refuse access to the record, but the time limit in paragraph (1)(a) shall not apply in the absence of notification of that decision.

(3) The commissioner shall provide a copy of a request for review to the head of the public body concerned and in the case of a request for review from a third party, to the applicant concerned.

46. (1) The commissioner may take steps that he or she considers appropriate to resolve a request for review under section 43 or a complaint under section 44 informally to the satisfaction of the parties and in a manner consistent with this *Act*.

(2) Where the commissioner is unable to informally resolve a request for review within 60 days of the request, the commissioner shall review the decision, act or failure to act of the head of the public body, where he or she is satisfied that there are reasonable grounds to do so, and complete a report under section 48.

(3) The commissioner may decide not to conduct a review where he or she is satisfied that

(a) the head of a public body has responded adequately to the complaint;

(b) the complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this *Act*;

(c) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date when the complaint was filed is such that a review under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or

(d) the complaint is trivial, frivolous, vexatious or is made in bad faith.

(4) Where the commissioner decides not to conduct a review, he or she shall give notice of that decision, together with reasons, to the person who made the complaint and advise the person of his or her right to appeal the decision to the court under section 60 and of the time limit for appeal.

(5) Section 8.1 of the *Evidence Act* does not apply to a review conducted by the commissioner under this Part.

48. The commissioner shall complete a review and make a report under section 49 within 120 days of receiving the request for review.

49. (1) On completing a review, the commissioner shall

(a) prepare a report containing the commissioner's findings on the review and, where appropriate, his or her recommendations and the reasons for those recommendations; and

(b) send a copy of the report to the person requesting the review, the head of the public body concerned and a third party who was notified under section 47 .

(2) Whether or not the commissioner makes a recommendation to alter the decision, act or failure to act, the report shall include a notice to the person requesting the review of the right to appeal the decision of the public body under section 50 to the Trial Division under section 60 and the time limit for an appeal.

Section 51 of the *Act* confers general powers and duties on the Commissioner in these words:

51. In addition to the commissioner's powers and duties respecting reviews, the commissioner may

(a) make recommendations to ensure compliance with this *Act* and the regulations;

(b) inform the public about this *Act*;

(c) receive comments from the public about the administration of this *Act*;

(d) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;

(e) comment on the implications for protection of privacy of

(i) using or disclosing personal information for record linkage, or

(ii) using information technology in the collection, storage, use or transfer of personal information;

(f) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants; and

(g) make recommendations to the head of a

public body or the minister responsible for this *Act* about the administration of this *Act*.

The Commissioner also plays a significant role under the *Personal Health Information Act* (*PHIA*), but the focus there is on protection of the personal information of people receiving health care from public bodies. While that statute contains a number of provisions that preclude application of the *ATIPPA*, it does affirm the right a person might otherwise have to access other information under the *ATIPPA*.[47]

While the Committee has no mandate related to the *PHIA*, the Committee cannot ignore the existence of the *PHIA* and the burdens it places on the OIPC.

Other relevant law

Another source of law can have a major impact on the powers and duties of the Commissioner. Decisions of the courts determine how statutory provisions that confer jurisdiction on the Commissioner are to be interpreted. Such decisions, particularly those decided by the Court of Appeal, but also Trial Division decisions that have not been appealed, become authoritative statements of the law. There is a small body of jurisprudence that has interpreted provisions of the *ATIPPA*, some of which provides guidance as to the role and powers of the Commissioner.

One of the earliest decisions[48] dealt with the limits of the Commissioner's obligation to conduct reviews of decisions by a public body refusing access. After receiving 55 applications from the same applicants to review decisions of a public body that had refused the requested access, the Office of the Commissioner advised that it would not accept any further requests from the applicants until the office had completed the 26 they were still reviewing. The applicants sought an order from the court to direct that the Commissioner's decision be withdrawn. The court concluded that while section 46(1), which authorized informal resolution, was permissive and did not require the Commissioner to take that step, subsection (2) was mandatory and the Commissioner was required to conduct requested reviews.

In a more recent decision in 2011, the Court of Appeal[49] affirmed that the Commissioner had authority to require that solicitor-privileged documents be produced for his examination during the course of carrying out an investigation. This newly confirmed power was short-lived. Less than a year later, Bill 29 deprived the Commissioner of the power to require production of such documents.

As noted elsewhere, in the chapter of this report dealing with records subject to solicitor-client privilege and Cabinet confidences, subsection 52(2) originally empowered the Commissioner to require "any record in the custody or control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner." After the passage of Bill 29 that general power was still there, but "any record which contains information that is solicitor-client privileged or which is an official Cabinet record under section 18" was excepted by the amendment. And there are other classes of documents that the Commissioner cannot currently require public bodies to produce.

A 2012 decision[50] of the Chief Justice of the Trial Division resulted in further limits on the ability of the Commissioner to require production of "any record" held by a public body. The decision provides an interpretation of a provision contained in section 5 of the *ATIPPA*. The relevant portion reads as follows:

> **5.** (1) This *Act* applies to all records in the custody of or under the control of a public body but **does not apply to**
>
> (a) a record in a court file, a record of a judge of the Trial Division, Court of Appeal, or Provincial Court, a judicial administration record or a record relating to support services provided to the judges of those courts;

47 *PHIA* s 12.

48 *McBreairty v Information and Privacy Commissioner (Nfld. and Lab.)*, 2008 NLTD 19.

49 *Newfoundland and Labrador (Information and Privacy Commissioner) v Newfoundland and Labrador (Attorney General),* 2011 NLCA 69.

50 *The Information and Privacy Commissioner v Newfoundland and Labrador (Business),* 2012 NLTD(G) 28.

(b) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;

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

(c.1) records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act;*

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

(e) [Rep. by 2002 c16 s2]

(f) [Rep. by 2002 c16 s2]

(g) a record of a question that is to be used on an examination or test;

(h) a record containing teaching materials or research information of an employee of a post-secondary educational institution;

(i) material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person, agency or organization other than a public body;

(j) material placed in the archives of a public body by or for a person, agency or other organization other than the public body;

(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

(l) a record relating to an investigation by the Royal Newfoundland Constabulary if all matters in respect of the investigation have not been completed; or

(m) a record relating to an investigation by the Royal Newfoundland Constabulary that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter. [emphasis added]

In dealing with the nature of the authority of the Commissioner, the Chief Justice wrote:

> The authority of the Commissioner is found in and only in the *Act*. The ability of the Commissioner to demand the production of records for his review — for the purpose of assessing decisions made by public bodies on either mandatory or discretionary exceptions — is not unlimited. It is circumscribed by the provisions of the *Act*.[51]

Section 5 is presently under review by the Court of Appeal, so it would be inappropriate for the Committee to comment on the manner in which section 5(1) should be interpreted. It is, however, appropriate for the Committee to comment on how the provision should be revised to ensure that the Commissioner has the powers that the Committee feels he should have for the future.

Practices

The OIPC has written and published fourteen "policies" to assist those seeking to assert rights under the *ATIPPA*. The policies are implied or articulated in the *ATIPPA*. Essentially, they describe the practices followed by the Office in the normal discharge of its duties.

One of the policies creates a "banking" system. This requires that when the office has five review requests under active consideration from the same applicant, any further requests will be banked until one of the five active requests is closed. At that time the first banked file is brought forward for active consideration. While the statute does not make specific provision for banking, the Commissioner created a policy to accommodate such a process:

> Shortly after the Office of the Information and Privacy Commissioner began its function, two Applicants over a short period of time inundated the Office with requests. By late 2006 early 2007, these Applicants accounted for more than 50% of the workload of the Office. In the summer of 2007 the Commissioner (my predecessor) based on the volume of work presented by these two Applicants and a requirement to provide fair and equitable services to the remainder of the applicants applying to the Office… suspended the right of these Applicants to submit any further Requests for Review to the OIPC until the large outstanding number of requests were concluded. As a result, these Applicants filed with the courts objecting to their rights under the *Act* (ATIPPA) being unilaterally suspended. The subsequent court case was heard over

51 *Ibid* at para 82.

> two days during late 2007 and early 2008. The decision of the court was favorable to the Applicants and essentially concluded that citizens should not be deprived of their rights under *ATIPPA* due to either the administrative or work load issues in this Office. The judge further strongly recommended that some sort of a banking system be implemented that would allow these Applicants to exercise their rights under the *Act* and further allow the OIPC to manage the work load of the Office in a measured and balanced manner thus allowing all citizens of the Province to have their access requests and complaints actioned in an efficient and timely manner.[52]

It would be appropriate to add a provision to the statute to provide explicitly for the sensible practice the Commissioner has developed to cope with that challenging situation.

Extensions of time are provided for in the *ATIPPA* and the procedures for extensions are specified. However, the Commissioner has added another.[53] If informal resolution has not been successful within the stipulated time but "continued progress is being made" and both parties agree, the OIPC will extend the informal resolution stage by 30-day extensions. There is no authority for this in the statute. In fact, the *ATIPPA* provides that if the matter has not been resolved informally within 60 days, the Commissioner "shall" review the decision and complete a report.[54]

The OIPC has also created a practice to accommodate the fact that "the only mechanisms in the *ATIPPA* are to resolve a file or issue a Report."[55] In circumstances where a requester's participation is essential and that participation is not forthcoming, further progress is not possible. In that circumstance, after review by the Commissioner, the OIPC will close the file.

Following the 2011 decision of the Court of Appeal respecting the Commissioner's right to examine documents subject to a claim of solicitor-client privilege,[56] the OIPC implemented a practice consistent with a suggestion made by the court in that decision. That non-binding suggestion indicated that in appropriate circumstances a possible alternative to production of solicitor-client privileged documents might be for the Commissioner to rely on an affidavit or letter from a senior official of the public body claiming solicitor-client privilege.

52 OIPC *Annual Report 2008–09*, p 28.

53 OIPC Policy 5, *Extension of Time for Informal Resolution* (2010).

54 *ATIPPA* s 46(2).

55 OIPC Policy 9, *Decision to Close A File Early* (2010).

56 *Supra* note 49 at paras 78–79.

What we heard about access

From the Office of the Information and Privacy Commissioner

The Commissioner addressed the Committee as to how the provisions of the *ATIPPA* that concern his role and jurisdiction support or inhibit his work.

The Commissioner made five separate representations. His office provided a detailed written submission in advance of the first public hearing in June. At the invitation of the Committee, he and the Director of Special Projects assisted the Committee by providing detailed information about the operations of the *ATIPPA*. They were in constant attendance at the hearings and had read the participants' written submissions, all of which were posted on the Committee's website. They were also, again at the invitation of the Committee, the concluding presenters, at which time they provided a further written submission and expressed their views on submissions by other participants. Their final submissions comprised their written comments on further issues raised by the Committee during their last appearance, and on any matters addressed in written submissions made to the Committee after the last day of the hearings.

The original written submission

The OIPC commented extensively on the shortcomings of the *ATIPPA* in its provisions respecting the role and jurisdiction of the Commissioner. The submission strongly criticizes the elimination of the right of the Commissioner to review certain documents under three sections: 5, 18, and 21. Section 5 provides that the *Act* applies to "all records in the custody or under the control of a public body" but then lists a significant number of records to which the *Act* "does not apply." At the request of the Attorney General in a number of cases, court decisions have interpreted this to mean that the Commissioner cannot require production of a record to which the *Act* does not apply.

Sections 18 and 21 deal, respectively, with Cabinet records and records subject to solicitor-client privilege. Bill 29 amendments to those and related sections remove the right of the Commissioner, when conducting a review, to require production of certain Cabinet records and records claimed to be solicitor-client privileged.

The OIPC also proposed that section 51 be amended to empower the Commissioner to audit the performance of public bodies to assess any aspect of compliance with the *ATIPPA*. The Office also suggested the *Act* should be amended to require that government consult with the Commissioner at least 30 days in advance of first reading of any new legislation which could have implications for access to information or protection of privacy. The Commissioner emphasized that the OIPC should be consulted on any draft bill arising from the work of the Committee.

At the initial public hearing

The OIPC emphasized that, in addition to protecting privacy, the purpose of the *ATIPPA* is to make public bodies more accountable. The OIPC states that the Commissioner's review of refusals by public bodies to disclose requested public records is "the primary mechanism by which that accountability is ensured." The OIPC submitted that removing the role of the Commissioner in respect of three types of public records, as was done by Bill 29, made the OIPC arguably "the weakest access to information oversight body in Canada."[57]

The OIPC submission emphasizes another significant point. The Office knew of no reason for such reduction in the Commissioner's jurisdiction. The submission emphasizes that the Commissioner cannot release or order a public body to release a public record under any circumstances, and there has never been an incident of improper handling by the OIPC.

To address these concerns, the OIPC recommends amendments to the legislation. With respect to the section 5 problem, the Office suggests that the Commissioner's right to review records should be similar to that found in the Alberta legislation. It would require, when he is investigating a complaint, the production to the Commissioner of any record, **whether or not the record is included among those excluded from application of the *Act* under section 5**. The OIPC recommends that these problems be addressed by amending subsections 52(2) and (3) to state clearly that the Commissioner can require production of any record he considers relevant to investigation of a complaint.

From the Federal Privacy Commissioner and the Federal Information Commissioner

Both commissioners supported the OIPC's recommendation that it be provided with power to conduct audits of public bodies' performance in relation to their duties under the *ATIPPA*.

From the Centre for Law and Democracy

The written submission of the Centre recommends

> that the Commissioner be granted additional powers to impose appropriate structural measures on public authorities which systematically fail to disclose information or otherwise underperform, either by imposing sanctions on them or by requiring them to take remedial actions, such as training programmes for staff. In order to facilitate efforts to improve RTI implementation more broadly, we recommend granting the Commissioner expanded powers to initiate their own investigations where there is concern about systematic failures to implement the law.[58]

57 OIPC Submission, 16 June 2014, p 51.

58 CLD Submission, July 2014, p 10.

In the oral presentation the Centre's spokesperson, Michael Karanicolas, made observations bearing on the role of the Commissioner. He indicated the Commissioner should have fining power, "with the hope that expanding the powers of the OIPC would be sufficient to ensure broad respect for the office and for their decisions."[59] He also expressed the view that mediation/informal resolution is a positive aspect of an access system, as long as it is done "expeditiously" and in a way that does not "allow governments to unreasonably stall the resolution of the claims."[60]

From the Canadian Federation of Independent Business (CFIB)

A spokesperson for the Federation, Vaughn Hammond, explained in detail the frustration of their members with what they see as a totally unnecessary double appeal process. He detailed the circumstances of a member still waiting for a decision from the court, two years after his initial application for the information, during 10 months of which the same matter was under review by the Commissioner. Mr. Hammond then summarized the Federation's view of the whole process with the following comment:

> So, I think the things that you have to consider is there is not that many small business owners in this province that are actually going to take two years of their time, a substantial portion of their income and actually try to seek this information, whether it is on principle or not. So I think when you go forward you might want to consider how you can shorten that process; be it the review and complaint process and the appeal process. Because the way I would look at it is that when somebody requests information and they're denied that information, well that person's appeal process, if you will, is to go to the Office of the Privacy Commissioner. However, when the Privacy Commissioner brings down his or her judgement, in this case it was a him, the appeals process allows for a third party to bring the courts into it now, and then you are just dragging it out that much longer. Because ideally, if you didn't necessarily have that second appeal process, our member could have had that information back in June, July or August of last year, and they could have gone on and [done] the things that they needed to do. So I just wondered, I guess the question I have for you guys is why is there a kind of two appeals processes for access to information requests?[61]

Also, the CFIB suggests that it would help their members if the OIPC were given an education mandate.

From government

The minister responsible for the Office of Public Engagement was asked by a Committee member whether it would pose a problem if the Commissioner had the power to audit personal information-handling practices from time to time. Minister Collins replied "No."[62]

From political parties

Official Opposition Leader Dwight Ball agreed that the Commissioner should have the power to conduct audits on his own initiative.

From the media

James McLeod of the Telegram

James McLeod commented in his written submission on the role of the Commissioner:

> The best role for a strong commissioner or strong watchdog is to be investigating and reporting, rather than forcing people to do things. A good watchdog has a loud bark and no bite. The bite should be in the courts.[63]

Ashley Fitzpatrick of the Telegram

Ashley Fitzpatrick expressed concern about how the Commissioner's office functions and the delay she experienced in receiving information:

> I felt—on all sides—there was little appreciation for the fact I was placed in a position where the government had clearly broken the law, to the point where no one could deny it, and yet the onus was being placed on me to address it.

59 CLD Transcript, 24 July 2014, p 119.
60 *Ibid* 136.
61 CFIB Transcript, 25 June 2014, pp 8–9.
62 Government NL Transcript, 19 August 2014, p 203.
63 McLeod Submission, June 2014, p 10.

From individuals

Terry Burry

Terry Burry made a variety of observations in both his written and oral submissions that bear on the role and powers of the Commissioner, including this one:

> Bill 29 further cuts the power of the independent watchdog that is charged with investigating citizens' complaints. The government has fought a series of Supreme Court skirmishes with the Information and Privacy Commissioner to weaken his powers. More and more records will be put out of reach of the Commissioner, leaving court action as the only recourse.

Edward Hollett

Edward Hollett suggested the Commissioner be given audit power for both access to information and protection of privacy. He saw this as a way of countering what he perceived as a government culture inimical to access to information requests.

Despite criticism of the current operation of the *ATIPPA*, most people who addressed the Committee clearly want the Commissioner to have the power to address their concerns and speak for them on access issues. They want him to hold government to account, particularly as regards their right to access information. This was clear from the repeated references the Committee heard to the weakness of the Commissioner's position.

Analysis with respect to access

This analysis of the role of the Commissioner is informed by everything the Committee considered in relation to access to information. Although some of those considerations are examined elsewhere in this Report, each of them affects our assessment of the role and jurisdiction of the Commissioner.

The *ATIPPA* requires the Commissioner to report annually to the House of Assembly. The relevant section[64] reads as follows:

> The commissioner shall report annually to the House of Assembly through the Speaker on
>
> (a) the exercise and performance of his or her duties and functions under this *Act*;
>
> (b) the commissioner's recommendations and whether public bodies have complied with the recommendations;
>
> (c) the administration of this *Act* by public bodies and the minister responsible for this *Act*; and
>
> (d) other matters about access to information and protection of privacy that the commissioner considers appropriate.

Included among the Commissioner's powers is the ability to comment publicly on legislative schemes.[65]

In addition to an annual report, required by the *ATIPPA*, the OIPC publishes an annual performance report, as required by the *Transparency and Accountability Act*.

In its 2013–14 Performance Report, the OIPC wrote that "this Office values its role as an independent support and arbitrator for the citizens of the Province. Every effort is taken to ensure our integrity such that we are trusted to **represent citizens in their dealings with public bodies and custodians.**" [emphasis added]

It would be difficult to criticize the Commissioner's perception of his role if that statement in fact described the manner in which his role was carried out. But it is not totally consistent with the way in which the role of the Commissioner was described in the 2012–13 Annual Report, the latest published at the time of writing:

> The Role of the Commissioner
>
> In accordance with the provisions of the *ATIPPA*, when a person makes a request for access to a record and is not

64 *ATIPPA* s 59.

65 *Ibid* s 51(d).

satisfied with the resulting action or lack thereof by the public body, he or she may ask the Commissioner to review the decision, act or failure to act relating to the request. The Commissioner and this Office therefore have the key role of being charged by law with protecting and upholding access to information and protection of privacy rights under the *ATIPPA*.

This responsibility is specific and clear, and this Office takes it seriously. However, there are often questions concerning how we see our role, and how we do our job. **It has been mentioned earlier that the Office is independent and impartial**. There are occasions when the Commissioner has sided with applicants and other occasions when the Commissioner supports the positions taken by public bodies. **In every case, having conducted our research carefully and properly, all conflicting issues are appropriately balanced, the law and common sense are applied and considered, and the requirements of the legislation are always met. Applicants, public bodies and third parties must understand that this Office has varied responsibilities, often requiring us to decide between many conflicting claims and statutory interpretations.**

As noted, this Office does not have enforcement or order power. We do not see this as a weakness, rather it is a strength. Order power may be seen as a big stick which could promote an adversarial relationship between this Office and public bodies. We promote and utilize negotiation, persuasion and mediation of disputes and have experienced success with this approach. Good working relationships with government bodies are an important factor and have been the key to this Office's success to date.

Success can be measured by the number of satisfied parties involved in the process, by fewer complaints, and by more and more information being released by public bodies without having to engage the appeal provisions of the *ATIPPA*. We are equally committed to ensuring that information that should not be released is indeed protected.

This Office is committed to working cooperatively with all parties. We respect opposing points of view in all our investigations but pursue our investigation of the facts vigorously.

We are always available to discuss requests for review and related exceptions to the fullest extent at all levels without compromising or hindering our ability to investigate thoroughly. We emphasize discussion, negotiation and cooperation. Where appropriate, we are clear in stating which action we feel is necessary to remedy disagreements. In that regard, we will continue to make every effort to be consistent in our settlement negotiations, in our recommendations and in our overall approach.[66] [emphasis added]

As the objectives expressed in the *ATIPPA* indicate, a citizen who seeks information from government is entitled to receive it unless there is a clear and lawful reason for withholding it. In recent years, an individual citizen has had a greatly reduced chance of achieving access to requested information at a reasonable cost, and within the time frame in which the information would still be of value. This is a result, in part at least, of historical practices and three other significant factors:

- public bodies having exclusive custody and control of all records
- employees of public bodies lacking a culture of facilitating the release of government information, and instead feeling obliged to keep everything confidential
- public bodies having the overwhelming power of a bureaucracy to resist releasing information in any circumstance where the public body desires to resist it

How these factors developed historically can be readily understood. However, an ombuds model oversight body is intended to overcome them and to foster a culture of commitment to the objectives of facilitating democracy and promoting transparency and accountability in government. At the moment, the OIPC's practices and procedures seem unintentionally to hinder, as much as they promote, achievement of those *ATIPPA* objectives.

The Committee has no reason to think that the objectives of the OIPC are other than to do the very best they possibly can to assist citizens who seek their assistance. However, their approach to that task, as it is described in the 2012–13 Annual Report quoted above, and the practices and procedures they employ result in inordinate delays in resolution for at least half of the matters they are asked to address.

66 OIPC *Annual Report 2012-13*, pp 13–14.

Undoubtedly, the intention of the OIPC is to achieve a perfect result by the means they have articulated:

- being "independent and impartial"
- "having conducted our research carefully and properly"
- "all conflicting issues are appropriately balanced"
- "the law and common sense are applied and considered"

That, however, is the course that would be followed by an order-making oversight body whose decision is subject to judicial review on the basis of the record of the manner in which it heard all relevant evidence, weighed that evidence, considered the statutory law and relevant jurisprudence, and reasoned a decision in a manner to satisfy the scrutiny of a court reviewing that decision. That is not what a commissioner in an ombuds model oversight body should be doing. The appellate court will not be reviewing the OIPC decision; it will be considering the issue anew.

The question asked by Vaughn Hammond of the Canadian Federation of Independent Business, in the comment quoted above, is most appropriate:

I guess the question I have for you guys is why is there a kind of two appeals process for access to information requests?

The ombuds model for an access to information oversight body is **not** designed to be an impartial adjudicator between the all-powerful public bodies and the much weaker citizens. Its role is not to ensure, in the words of the OIPC description of the Commissioner's role, that "all conflicting issues are appropriately balanced, the law and common sense are applied and considered, and the requirements of the legislation are always met." When the OIPC describes the role of the Commissioner in the 2012–13 Annual Report and asserts that the Office "has varied responsibilities, often requiring [OIPC] to decide between many conflicting claims and statutory interpretations," the OIPC is describing the function of the courts, not that of an ombuds model oversight body.

Rather, an ombuds model oversight body should, in the words of the Supreme Court of Canada in the *Heinz* decision, "represent the interests of the public by acting as an advocate of the rights of access requesters."[67] It is an agency that will provide whatever assistance is reasonable and lawful to ensure that the objectives of the *ATIPPA* are achieved. It will facilitate citizen participation in democracy and increase transparency and accountability in government, by enabling the citizen to access the requested information while that information still has value, not 4 or 12 or 36 months later, when it is likely meaningless.

The Canadian Federation of Independent Business is quite right—the practices and procedures employed by the OIPC have converted what was intended to be an expeditious summary process to facilitate access to information into a formal appellate review process taking many months, and sometimes years, to complete. A dissatisfied party exercising its right to appeal to the courts then has to duplicate that process on the hearing of the appeal.

The Committee is satisfied that the difficulties about which participants spoke do not arise from the mandate of the OIPC expressed in the *Act*. The way the OIPC perceives and usually applies the mandate is, however, problematic. Most participants believed that the difficulties came from the reduction of the powers the Commissioner had before the Bill 29 amendments. Undoubtedly, those are significant factors. All have been considered elsewhere in this report. However, the statistics, discussed below indicate that significant problems existed with oversight processes and procedures prior to Bill 29.

It must be acknowledged that the Commissioner indicated that some 75 percent of the total complaints or requests for reviews his office receives are resolved through his office's "informal resolution" process. However, as will be seen from the tables below, that 75 percent of complaints and reviews suffers from equally long delays. In 2013–14, only 16 percent of those were completed within the 60-day statutory time limit and 55 percent took longer than 6 months.

67 *Heinz*, *supra* note 1.

As noted elsewhere in this report, the Commissioner said that, on occasion, citizens become so frustrated that they simply give up and walk away from their requests. In the Committee's view it is the particular responsibility of the Commissioner and his whole office to put in place practices and procedures that will ensure that the citizen who looks to the OIPC for help is never placed in that position.

Without an oversight body functioning in a manner that will assist the average requester to surmount the overwhelming advantage enjoyed by a public body that is resisting or delaying disclosure of information, all the great statements about facilitating citizens' meaningful participation in the democratic process and commitment to accountability and transparency in government become meaningless platitudes.

The Committee believes the comments of the 2012–13 Annual Report quoted above, on the role of the Commissioner reveal a failure to carry out, or for that matter even to recognize, the proper role for a commissioner in an ombuds model overseeing a system for access to information and protection of privacy. The Commissioner cannot properly carry out his function to promote and facilitate achievement of the objectives of the *ATIPPA* if he feels responsible for ensuring that, as between the public bodies and the citizens, "all conflicting issues are appropriately balanced" and deciding "between many conflicting claims and statutory interpretations." He cannot, at the same time that he "represents citizens in their dealings with public bodies and custodians," as is asserted in the latest performance report, also be the "independent and impartial" arbiter. The two responsibilities inherently conflict.

This matter has been discussed largely in terms of average citizens accessing information, so that they can participate meaningfully in the democratic process. There is, however, a group of citizens for whom access to information that is not complete and timely is virtually worthless: those involved in the news media. They have no special right to access information that other citizens lack**.** Their rights to access are no greater and no less than those of any other citizen. But those involved in the media play a respected and important role in the process of transparency and accountability in government. If government-held information they request is not reasonably available **in a timely fashion**, seldom will it be of any value many months or years down the road.

Amongst other general powers described in section 51 of the *Act*, there is conferred on the Commissioner the power to "make recommendations to the head of a public body or the minister responsible for this *Act* about the administration of this *Act*."

The Committee has not been provided with any evidence that the Commissioner exercised this power to any significant degree, or at all. An examination of the OIPC annual reports indicates that starting in the 2009–10 Annual Report the OIPC inserted a new section entitled "Systemic Issues." It listed eight:

> 1. Delegation: Normally it is the *ATIPPA* coordinator appointed by the public body who would engage with the OIPC investigator during the informal resolution process utilized to attempt to resolve Requests for Review without engaging the formal investigation process. In order for the informal resolution process to be effective and successful, and to be conducted in a timely manner, coordinators must be provided with the appropriate level of authority to make the decisions necessary to advance the process.
>
> 2. Leadership: Is clearly the single most important determinant of how well public bodies fulfill their obligations under the *Act*. Senior management's commitment to the access regime determines the level of resources allocated to the access program as well as the degree of institutional openness. Public bodies are urged to allocate sufficient resources within the organization that are proportional to the demands placed on them by applicants. Senior managers are also encouraged to become personally engaged with the process and to instill the culture of openness envisaged by the legislation.
>
> 3. Time Extensions: It is our experience that on a number of cases certain public bodies have used time extensions for inappropriate reasons, for example, they are under resourced or simply too busy to deal with the request at the moment. This practice is strongly discouraged as it makes inappropriate use of a legitimate matter (under certain circumstances) and seriously contributes to delays in dealing with and bringing closure to the request for information.
>
> 4. Public Body Consultations: This issue represents a challenge for the timely delivery of information. Only

the public body subject to the request is accountable for meeting the requirements of the *Act*. Although this Office encourages heads of public bodies to consult as required in order to help lead to a more informed decision; it must be stressed that consultation must be conducted in a timely manner to ensure legislative timelines are met.

5. Resources: Of the approximately 470 public bodies responsive to *ATIPPA*, only three public bodies have full-time coordinators. The lack of resources, be it funds or staff, can significantly undermine the effectiveness of the *Act* and ultimately result in delays which detrimentally impact requester's right to information.

6. Records Management: Access to information relies heavily on effective records management. Public bodies that are unable to effectively manage information requested under the *Act* face time-consuming retrieval of records, uncertain, incomplete or unsuccessful searches, as well as the risk of substantial delays and complaints. Initiatives have been undertaken to address records management across government and to varying degrees across the full spectrum of public bodies responsive to the *Act*, but sustained effort and attention is required to achieve the required results.

7. ATIPP Coordinator Turnover: Understandably some turbulence and lack of continuity does exist when dealing with public bodies that frequently change their *ATIPPA* coordinator. In some cases this is unavoidable due to changes in employment, promotion or retirement. Experience has shown that public bodies that have made frequent coordinator changes have experienced considerable difficulty in processing access requests particularly as it relates to requests submitted to the OIPC.

8. Blanket Approach to Claiming Exceptions: On many occasions public bodies have simply identified the exception(s) which it intends to claim regarding a specific access to information request. Many of the exceptions have a number of very specific items. I urge public bodies in future to be more specific when claiming a specific category of information under one of these exceptions and to provide a detailed explanation in support of the specific exception item claimed. This would, firstly, allow the public body to concentrate on the details of the exception being claimed and secondly, to take much of the guess work out of the process for the OIPC staff and ultimately contribute to a timely resolution to the request.[68]

68 OIPC *Annual Report 2009-10*, pp 47–48.

Despite identifying these systemic issues, there is nothing to indicate that the OIPC made, or intended to make, any efforts to ensure they would be addressed. In fact, in the paragraph introducing the list of issues, the OIPC wrote:

> During this reporting period a number of systemic issues have been observed that have contributed significantly to the challenges associated with resolving access requests within the legislated timeframes. These issues are identified at this time to make public bodies aware that they exist and that they contribute to problems during both the informal resolution process and the formal investigation process undertaken by the OIPC. It is not our intention at this time to provide a comprehensive analysis of these issues or make comprehensive recommendations to address and rectify the problems.[69]

In the next annual report, the eight systemic issues were repeated virtually verbatim but a ninth was added:

> 9. Open Communication and Dialogue: This particular issue is in many ways, the key to early and satisfactory resolution to many access requests. It should be emphasized that fully 75% of all access requests are resolved by informal resolution. It is only when the applicant, public body representative and Analyst from our Office are prepared to enter into early and meaningful dialogue and negotiations can matters be resolved in a timely manner and to the mutual satisfaction to both the applicant and public body. It is through this good will and positive approach that matters can be clarified, refined and the specific information narrowed and identified. I would take this opportunity to congratulate applicants and public body representatives for engaging in the informal resolution process and, for the most part, creating an environment that contributes to bringing closure to the majority of access requests and avoids the time consuming process of moving on to formal investigation and reports.[70]

The introducing paragraph remained the same but there was added to the last sentence the words "but rather to identify them in this forum for the benefit of public bodies so that they may have an opportunity to improve their performance in this regard." The same introducing paragraph and the same nine descriptions of

69 *Ibid* 47.

70 OIPC *Annual Report 2010-11*, p 47.

systemic issues were repeated in the annual reports for the years 2011–12 and 2012–13. The annual report for the year 2013–14 had not been made public by late February 2015.

There is no explanation for the reluctance of the Commissioner to make recommendations or to report his concerns to the minister. At least two participants inferred that the reluctance of the Commissioner to be more assertive reflected the fact that his term of office is subject to reappointment every two years and he is not in a position to be assertive on any issue. Whatever the reason for the Commissioner's approach, it must change if the *ATIPPA* is to make a meaningful contribution to facilitating democracy or making government more transparent and accountable.

It may be that the OIPC is woefully under-resourced and the staff is doing the best job possible with the resources available. If so, there is no evidence that the Commissioner has been taking strong public positions on the matter. There is no indication of it in the most recent annual report. Prior reports occasionally refer to anticipated increased workload but gave no indication that additional funding was requested.

Conclusion with respect to access to information

As is noted elsewhere in this report, the Committee found no justification for the changes made by Bill 29 that prevented the Commissioner from asking to review documents in respect of which solicitor-client privilege is claimed, or documents certified to be official Cabinet records. In fact, all the evidence before the Committee demonstrates the appropriateness of the Commissioner's being able to see the documents that will enable his office to make a determination as to whether the requested records can or cannot be released because of solicitor-client privilege or status as official Cabinet documents.

For those and other reasons, the Committee concludes that any limitation on the Commissioner's power to require production of records for his examination in the course of an investigation should be strictly limited to certain of those to which the *Act* does not apply. The records listed in section 5 of the present *ATIPPA*. Elsewhere in this report, the Committee has recommended that certain records on that list should also be subject to production for the Commissioner's examination. It is not necessary to repeat that discussion here.

The Committee agrees with the Commissioner that requiring official staff of the OIPC to sign agreements of confidentiality in respect of records being made available for examination in the course of investigations is offensive and the practice should be stopped. If other loyal public servants, in ministerial offices and Executive Council office, can be trusted with custody of such documents on the basis of their general oath of confidentiality, there is no reason why the loyal public servants in the OIPC cannot be similarly trusted on the basis of their similar oath.

In order for the *ATIPPA* to function as it should, the Commissioner must be cast in the role of public watchdog with the dual responsibilities of access champion and protector of personal information. The Committee concludes that in order to realize that vision, the Commissioner must be provided with an expanded role, including enhanced duties and additional powers.

With respect to protection of personal information

This portion of the chapter will deal with the role of the Commissioner and his powers, duties, and status, in relation to the personal information provisions in the *ATIPPA*.

The Commissioner's powers to deal with personal information issues (outside those in the health care sector, which has its own statutory scheme found in the *PHIA*) are mainly located in sections 44 and 51 of the *ATIPPA*:

> 44. (2) The commissioner may investigate and attempt to resolve complaints by an individual who believes on reasonable grounds that his or her personal information has been collected, used or disclosed by a public body in contravention of Part IV.
>
> 51. In addition to the commissioner's powers and duties respecting reviews, the commissioner may
>
> (a) make recommendations to ensure compliance with this *Act* and the regulations;
>
> (b) inform the public about this *Act*;
>
> (c) receive comments from the public about the administration of this *Act*;
>
> (d) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;
>
> (e) comment on the implications for protection of privacy of
>
> (i) using or disclosing personal information for record linkage, or
>
> (ii) using information technology in the collection, storage, use or transfer of personal information;
>
> (f) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants; and
>
> (g) make recommendations to the head of a public body or the minister responsible for this *Act* about the administration of this *Act*.

While these sections may appear to constitute a wide array of powers, they pale in comparison with those granted to many Commissioners in more recent or more complete legislative schemes. In Canada, some Commissioners (Alberta, British Columbia, and Quebec) can make an order upon the completion of the investigation into a privacy breach. Internationally, when personal information is misused, orders can be made directly (in the UK) or by the courts on application by the Commissioner (in Australia). Other powers to deal with a variety of contemporary challenges in data protection exist and are already used by officials in other jurisdictions.

In Newfoundland and Labrador, the more recent *PHIA* has already helped the Commissioner to focus on personal information matters. The *PHIA* adds to his existing powers. The Commissioner's powers in the *PHIA* refer directly to personal health information and its confidentiality. For example, section 79(c) allows him to receive comments from the public about matters concerning the confidentiality of personal health information or access to that information, rather than generally about the administration of the *Act*. And section 79(d) allows him to comment on practices of health custodians, in addition to proposed legislative schemes or programs.

The many participants who were not public bodies often referred to the role of the Commissioner as central to the credibility of an information rights scheme. With few exceptions, members of the public and the media put great faith in the work of the Commissioner's office and deplored the limitations on his powers wrought by Bill 29. They often contrasted the professional manner in which requests to his office were handled with the lack of response or lengthy delays which they attributed to public bodies. Overall, the Commissioner and his office appear to enjoy the confidence of most of those members of the public who use the *ATIPPA*.

But Terry Burry recollected that the Commissioner did not criticize Bill 29 forcefully until it had been passed.[71] Indeed, he recalled, the Commissioner had

71 Burry Transcript, 24 July 2014, p 28.

initially been positive about the new legislation. Mr. Burry linked the rather precarious employment status of the Commissioner to the fact that he was reappointed for another two-year term just before he started to voice any criticisms. Few other participants echoed this viewpoint, the majority voicing the notion that his power should be strengthened and reiterating their confidence in the Office.

At the time of the passage of Bill 29, the Commissioner, according to his own comments at the hearing, was not given an opportunity to make his views known to the House of Assembly and thus to the public. The Commissioner said:

> Unfortunately, the OIPC was precluded from any participation in that review except for its initial submission and this is in spite of numerous attempts by our office to become involved, to be engaged because it's our view that we have a unique perspective and experience.[72]

It is important to maintain general public confidence in the system and strengthen the enforceability of the *ATIPPA* principles, which include the protection and the administration of the *Act* in the public interest. The question then arises: should there not be a reinforcement of the Commissioner's powers?

A review of several jurisdictions, both within and without Canada, reveals that a wide array of powers and duties can help the data protection authority in protecting personal information. These are discussed below.

Speaking out before legislation is passed

Information rights would be better protected if the *ATIPPA* provisions were more definite on this point. Included among the Commissioner's duties is the ability to comment publicly on legislative schemes.[73] However, comments on legislation seem to be scarce in annual reports.

The annual report for the period 1 April 2012 to 31 March 2013 contains few comments on the introduction of Bill 29, passed in June 2012, which seriously curtailed the Commissioner's powers. Only five pages are devoted to Bill 29, and they mainly contain comments on the effect of the amendments on the workload of the Office. Rather laconically, the section concludes:

> Based on our experience to date and on the broadening of the language in a number of sections, there is potential for less information being released. As a result, the OIPC strongly encourages public bodies to use discretion where possible and release information even if a discretionary provision applies but no identifiable harm will occur.[74]

It is more effective to comment before legislation is adopted than after provisions are enacted into law.

Audit powers

Audit powers are essential to a dynamic and efficient oversight model. Elsewhere in Canada, auditing practices for handling personal information (as well as the general information management schemes) of public bodies have proved valuable in bringing to light questionable habits that are difficult to perceive from outside the public body. Auditing reveals systemic problems that may go unnoticed until it is too late and there is a serious personal information breach.

Auditing has been an essential tool for the Privacy Commissioner of Canada. His 2012-13 Annual Report describes a major audit of Revenue Canada, an entity with some 40,000 employees that handles millions of tax returns from businesses and individuals every year. After a series of complaints over the years about snooping by employees, an audit was launched. The audit found that despite a culture of security and confidentiality, marked weaknesses in implementing privacy practices meant that employees' inappropriate access to taxpayer files was not detected over a period of time.[75] The result of the audit included the nomination of a Chief Privacy Officer for Revenue Canada and a series of initiatives to limit access to taxpayer files.

This is an example of the benefits of audit power. It can be used across a system; it can unleash change across the board; and it has an impact on an organization which

72 OIPC Transcript, 24 June 2014, p 22.

73 *ATIPPA* s 51(d).

74 OIPC *Annual Report 2012-13*, pp 15–19.

75 Office of the Privacy Commissioner of Canada *Annual Report 2012-13*, pp 20–25.

is far greater than that of the investigation of a single complaint.

There is no need to make the Commissioner's audit power formally contingent on a complaint or even reasonable grounds—both are qualifiers that may challenge and delay audit action. The Commissioner should be able to draw up an audit plan based on what he feels are the most serious threats to information rights.

Edward Hollett in his written submission suggested audit power for the Commissioner as a way of countering what he saw as a government culture inimical to access to information requests. He stated:

> One means to restore the balance would be to enhance the power of the access and privacy commissioner. In that light, the committee should consider the following suggestions:
>
> - Change the role of the commissioner to include a responsibility comparable to that of the Auditor General.
> - Require that the commissioner produce an annual, public audit report of both privacy and access in government. The report would be the result of a specific review of a department or agency and would include recommendations for changes.[76]

Many data protection authorities in Canada carry out audits, often under different names, such as inquiries or investigations. These authorities need broad powers to initiate their own inquiry into practices that may be contrary to their Acts. More recent legislation, such as that in British Columbia or New Brunswick, gives specific audit powers to the Commissioner. It is noteworthy that BC has adopted the tribunal model, while NB has opted for the ombuds model. The Commissioner should be given specific audit power, with no set time limit to complete an audit.[77]

Research

Research is essential to understanding personal information challenges and emerging methods of protection. It is hard to see how the OIPC can keep up with developments in technology affecting personal information use and security without an acknowledged research function and the financial support it requires. These are necessary to make the OIPC into a significant force for education and enforcement. An independent research function would also give the OIPC an autonomous view of the implications of legislation or programs regarding personal information that may be introduced by government.

A contemporary approach to personal information protection is reflected in the frequently amended British Columbia legislation. There the Commissioner has a broad range of powers, which include conducting both investigations and audits to ensure compliance with any provision of the BC Act and regulations. She can also "engage in or commission research into anything affecting the achievement of the purposes of this Act."[78]

The federal Privacy Commissioner carries out an extensive applied research program and distributes yearly grants to fund research into various aspects of privacy. These grants have facilitated ground-breaking research in many areas, notably in genetic personal information protection, identity theft, the de-identification of health information, and children's privacy.[79]

The Ontario Information and Privacy Commissioner has likewise focused on privacy research, generating countless discussion papers and submissions for legislative bodies, ministers, and fact-finding reviews. They have focused on combining data protection principles with the advantages of new technology (biometrics, facial-recognition technology, smart cards) so as to make a significant contribution to privacy protection while maximizing the advantages of new technology.[80]

The Commissioner should be empowered to conduct his own research into matters affecting information rights.

76 Hollett Submission, June 2014, p 8.

77 See: BC *FIPPA*, ss 43(1)(a), 44; NB *Right to Information and Protection of Privacy Act*, s 60(1)(g); Alberta *Freedom of Information and Protection of Privacy Act*, s 53(1)(a).

78 BC *FIPPA*, s 42(1)(e).

79 https://www.priv.gc.ca/information/research-recherche/index_e.asp.

80 http://www.ipc.on.ca/english/Home-Page/.

Privacy impact assessments

The current *Act* is silent on privacy impact assessments (PIA). A PIA is an internationally recognized assessment method that can be applied to proposed programs or policies to identify potential privacy problems. PIAs examine whether the proposed program or policy collects more personal information than is needed to meet the objectives of the initiative. They also examine the sharing of the personal information collected, the access, storage, correction, and disposal of personal information, and the proposed duration of the program or policy. With the benefit of a PIA, the public body may then undertake a full review of the policy or program.

Most jurisdictions in Canada and in other Commonwealth countries now have robust privacy impact assessment approaches. Some are standard government policy, as within the Government of Canada, where the Treasury Board has detailed guidelines on the subject. These guidelines require privacy impact assessments to be submitted to the Office of the Privacy Commissioner for comment before a program is deployed. Some are legislatively mandated, as is the case in BC.

What we heard about protection of personal information

The OIPC noted that Bill 29 introduced increased data-sharing possibilities in section 39:

> 39.(1) A public body may disclose personal information only…
>
> (u) to an officer or employee of a public body or to a minister, where the information is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or minister to whom the information is disclosed.

This means that new programs could be created, using information collected for another program and for another purpose, without an assessment as to the impact this would have on personal privacy.

The Commissioner's Office saw first-hand the results of not carrying out a privacy impact assessment where a public body failed to consider in advance the consequences of enlarging access to a public database. As a consequence there was a privacy breach:

> In one case investigated by our Office, employees in one public body were given access to the database of another public body, but the disclosing public body had failed to put any parameters around the disclosure or use of that information. They also failed to ensure that access was limited to those who had a legitimate need, and had failed to put any kind of information sharing agreement in place with the receiving public body. In that case, an employee misused his access to the database for personal purposes. A "catch-all" provision such as 39(1)(u) should be subject to an appropriate level of oversight to ensure that such personal information sharing occurs only when necessary.[81]

The OIPC recommended that all PIAs related to a common or integrated program or activity or a data-linking initiative or any disclosure under section 39(1)(u) be forwarded to the OIPC for the Commissioner's review and comment. Moreover, the OIPC recommended that the *ATIPPA* be amended to include a requirement that public bodies complete a PIA on all new enactments, systems, projects, programs or activities to be submitted for approval to the minister responsible for the *ATIPPA*.

The Office of Public Engagement's *Protection of Privacy Policy and Procedures Manual* of January 2014, gives some attention to the description of Privacy Impact Assessment Tools. These are described variously as the Preliminary PIA Checklist, the Privacy Impact Assessment, and the Privacy Impact Report. The OPE's manual gives guidance as to what should be done to prepare for a common or integrated program or service. It stops short, though, of making a privacy impact assessment mandatory, or even suggesting which newly created programs might be priorities for privacy reviews.

At the hearings, however, Rachelle Cochrane, deputy minister of the department responsible for the *ATIPPA,* stated that one recent policy initiated by her office requires all new or redesigned programs that

81 OIPC Submission, 16 June 2014, p 74.

handle personal information to complete a privacy impact assessment. She added that in 2013–14, 34 preliminary privacy impact assessments and one full privacy impact assessment had been carried out. In addition, she mentioned that 11 government websites had been reviewed to verify whether personal information was being appropriately collected and used.

Public bodies in Newfoundland and Labrador are gaining experience in preventative privacy exercises. A PIA is increasingly becoming a standard procedure before new ways are devised to collect, share, or disclose personal information. It is important that it be mandated here as well.

In Alberta, the use of privacy impact assessments began as early as 1995. The importance of this approach is reflected on their Commissioner's website, where a whole section is devoted to the topic of PIAs. Among the features of the section 8 is a Registry of Privacy Impact Assessments where third parties can determine the acceptable standard for a PIA. While most PIAs are in the area of health care, where they are mandatory, some deal with community services and commercial driver qualifications. The Office of the Alberta Information and Privacy Commissioner explains the relevance of PIAs as follows:

> The Office of the Information and Privacy Commissioner has developed a Privacy Impact Assessment (PIA) process to assist organizations in reviewing the impact that the new project may have on the individual privacy. The process is designed to ensure that the public body or custodian evaluates the program or scheme to ensure compliance with the FOIP *Act* or HIA.
>
> The PIA process requires a thorough analysis of potential impacts on privacy and a consideration of measures to mitigate or eliminate any such impacts. The privacy impact assessment is a due diligence exercise, in which the organization identifies and addresses potential privacy risks that may occur in the course of its operations.
>
> While PIAs are focused on specific projects, the process should also include an examination of organization-wide practices that could have an impact on privacy. Organizational privacy policy and procedures, or the lack of them, can be significant factors in the ability of the organization to ensure that privacy protecting measures are available for specific projects.[82]

82 http://www.oipc.ab.ca/pages/PIAs/Description.aspx.

The Federal Government and the Office of the Privacy Commissioner of Canada have also placed increasing importance on privacy impact assessments to mitigate the effects of ever-wider information sharing, often undertaken for reasons relating to public safety and national security. In 2011 the Office of the Privacy Commissioner of Canada published *Expectations,* a short document designed to assist federal public bodies in carrying out such assessments. The first page describes the importance of PIAs:

> Privacy Impact Assessment (PIA) is a process that helps determine whether government initiatives involving the use of personal information raise privacy risks; measures, describes and quantifies these risks; and proposes solutions to eliminate privacy risks or mitigate them to an acceptable level. The Canadian government has been an international pioneer in the use of PIAs as a tool to ensure privacy is considered in the development of programs and initiatives. In 2002, the Government of Canada's *Privacy Impact Assessment Policy* came into effect, requiring most federal government institutions to develop and maintain PIAs to evaluate whether program and service delivery initiatives involving the collection, use or disclosure of personal information were in compliance with privacy legislation, policies, guidelines and best practices. More recently, as part the overall TBS Policy Suite Renewal process, and in an effort to help government institutions streamline their PIA processes, the PIA Policy has been replaced with the *Directive on Privacy Impact Assessment*. As did the Policy before it, the Directive applies to 250 government institutions listed in the schedule to the *Privacy Act*, including parent Crown corporations and any wholly owned subsidiary of these corporations.[83]

In his submission the Privacy Commissioner of Canada stressed that "privacy impact assessments are a valuable tool in fostering a greater institutional privacy culture and in consolidating internal accountability frameworks."[84]

Finally, the British Columbia government requires that public bodies conduct a PIA on all new enactments, systems, projects, programs, or activities during the development stage. PIAs of ministries must be submitted

83 https://www.priv.gc.ca/information/pub/gd_exp_201103_e.asp.

84 Privacy Commissioner of Canada Submission, 7 August 2014, p 3.

to the minister responsible for the *Freedom of Information and Protection of Privacy Act* for review and comment. Any PIAs of public bodies (including ministries) relating to a common or integrated program or activity or a data-linking initiative must be provided to the Commissioner for review and comment.[85]

The Committee concluded that prevention is the optimal way of protecting personal information, and it can be achieved by clearly spelling out in the *ATIPPA* the following statutory obligations. The first requirement is for departments to carry out privacy impact assessments where personal information is involved in the development of new government programs and services and to submit them to the minister responsible for the *ATIPPA* for review and comment. Second, PIAs would also be forwarded to the Commissioner for his review and comment if they pertain to departments that address a common or integrated program or service for which disclosure of personal information may be permitted under section 39(1)(u).

Government collection of information on its citizens

Governments everywhere are attempting to make better policies and find savings by combining information available from their own internal sources—information gathered directly from individuals in the course of administering government programs such as income assistance, child protection, or health care—with other information available commercially.

This information is purchased through commercial data brokers who aggregate and analyse personal information acquired by private corporations. Loyalty cards, draws, analyses of website visits and online browsing patterns, and registration for the provision of goods or services are all a rich source of data about people's consumer and financial habits, opinions, daily choices, and even travel itineraries.

"Big data" is the term coined to describe the voluminous amount of information, much of it personal, being generated by the network of computers that assist in and document our daily activities. These activities range from driving a car to taking a jar off a supermarket shelf to visiting a bank machine to keeping a medical appointment. Many observers see in the analysis of big data great promise for future knowledge breakthroughs in vital areas such as health, agriculture, or accident prevention. The proponents of big data argue that analyzing available information with the appropriate algorithms should yield new trends, undocumented associations, and regular or irregular occurrences that have, until now, largely escaped attention.[86]

Carefully and appropriately used, big data can help us with many of the great challenges to the societies of the 21st century: environmental change, human health, and natural resource husbandry. But without the proper safeguards to prevent so much information revealing individual identities in embarrassing or harmful ways, the application of big data can lead to unplanned negative or discriminatory consequences to individuals. For example, using general characteristics of students who did not pursue higher education to justify the compulsory streaming of young people could result in the exclusion of able potential candidates, based on a generalization to which they are the exception. Personal freedom to achieve could be thwarted by machine-made decisions.

In the future, citizens will increasingly be subject to decisions based on information they did not give to the government and did not know was shared with the government. Individuals and communities could be unaware they are being profiled. There has been extensive scholarship on this subject, particularly in the United States. Knowledge of information-related issues by the staff of the Commissioner's office could help government make wise decisions when it is confronted with policy and ethics challenges resulting from the aggregation of massive amounts of information about its citizens.

An Information and Privacy Commissioner in the 21st century must have some oversight of the process by which the government obtains and uses information to profile its citizens. In this new information

85 BC *FIPPA*, s 69.

86 Mayer-Schönberger and Cukier, *Big Data: A Revolution* (2012).

world, it would be wise to add to the Commissioner's powers, as is found in British Columbia, the power to "authorize the collection of personal information from sources other than the individual the information is about."[87]

The Commissioner should oversee the government's ability to collect a massive amount of information on its citizens from sources other than the individual concerned. He should be informed and his authorization requested when the government goes to outside sources for information on citizens, unless those methods of collection are already authorized under the *Act*.

Special reports

In other jurisdictions, a commissioner's broad reporting powers to the legislative body is also a useful tool in the kit of a data protection authority. In Newfoundland and Labrador, the Commissioner's existing obligation, as described in section 59 of the *ATIPPA*, is only to make an annual report to the House of Assembly.

Other jurisdictions

British Columbia's Information and Privacy Commissioner has a variety of powers and duties which allow that Commissioner to effectively protect personal information, including the power to make a special report to the Legislative Assembly.

The BC Commissioner may make a special report to express an opinion about the inadequacy of budgetary provisions for his or her office, or to underline similar concerns about support given by the BC Public Service Agency. This power is expressed as follows:

> **41** (1) The commissioner may appoint, in accordance with the *Public Service Act*, employees necessary to enable the commissioner to perform the duties of the office.
>
> (2) The commissioner may retain any consultants, mediators or other persons and may establish their remuneration and other terms and conditions of their retainers.
>
> (3) The *Public Service Act* does not apply in respect of a person retained under subsection (2).
>
> **(4) The commissioner may make a special report to the Legislative Assembly if, in the commissioner's opinion,**
>
> **(a) the amounts and establishment provided for the office of commissioner in the estimates, or**
>
> **(b) the services provided by the BC Public Service Agency**
>
> **are inadequate for fulfilling the duties of the office.**[88] [emphasis added]

In short, when the Commissioner feels there are inadequate resources to do a satisfactory job, this sentiment may be expressed directly before the entire Legislative Assembly.

This appears to be a useful bulwark against serious or targeted underfunding of the Commissioner's office. Although the perception of underfunding in relation to needs may be pervasive throughout the public sector at any given time, the inability of the Information and Privacy Commissioner to carry out his or her duties will jeopardize information rights for all citizens and may encourage disregard or negligence in protecting personal information or making information generally available for public scrutiny.

In British Columbia, a dynamic interpretation of the Commissioner's duties to oversee the information management system has triggered the writing of a number of special reports over the years, many of which deal with the handling of personal information. The BC Commissioner made six special reports in 2014 alone. These reports were in addition to her regular publishing of decisions on cases referred to adjudication.

In September 2014, the BC Commissioner made another special report which contained criticism of several practices involving public bodies:

- the lengthening delays in responding to requests for information

87 BC *FIPPA*, s 42(1)(i).

88 BC *FIPPA*, s 41.

- the increasing number of requests for which no information can be located (due, it was suggested, to the practice of deleting information instead of preserving it)
- the frequent estimates given to applicants of very high processing fees, in excess of what was eventually paid, a practice the Commissioner feared served as a deterrent to applicants

A special report is usually an extraordinary recourse and is confined to the most serious concerns. It is always written in addition to the annual report. Here is how the duty to make an annual report and the option to make a special report are defined in the federal *Privacy Act*:

> **Annual report**
>
> **38.** The Privacy Commissioner shall, within three months after the termination of each financial year, submit an annual report to Parliament on the activities of the office during that financial year.
>
> **Special reports**
>
> **39.** (1) The Privacy Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 38.

The most recent special report was made to Parliament in January 2014 by the Acting Privacy Commissioner of Canada. It documented the use of Canadians' personal information by national security agencies without their knowledge or consent. The report also suggested better ways to enhance transparency about the use of personal information in that context. Other special reports by the Federal Privacy Commissioner concerned banks of unreviewed and inaccessible personal information held by the RCMP much longer than necessary (2008) and an investigation into the loss by a government department of a hard drive containing the personal information of several hundred thousand people (2014).

The Newfoundland and Labrador Commissioner's website does not have reports other than performance and annual reports and reports on findings after reviews or investigations. Occasional press releases comment on current affairs, but do not constitute detailed reports on a topic important to access or privacy questions. This abbreviated use of reporting limits the ability of the public to understand quickly and easily the major challenges documented by the Commissioner's office. Insights into access and privacy problems must be ferreted out from the annual report or from the recommendations contained in the Commissioner's findings. And in the 2012–13 report, only about half the findings included recommendations. This suggests that the functioning of the access and privacy protection scheme could be enhanced by augmenting the opportunities for the Commissioner to communicate with the House of Assembly and thus with the public.

The Commissioner's existing obligation to make an annual report to the House of Assembly should be complemented by a new power to make a special report to the House at his discretion. A report highlighting a single major issue sends a powerful message. By reading such a report, the public may more easily be made aware of serious or urgent information rights problems as they arise, outside the annual reporting cycle. When the report is tabled during the session of the House of Assembly, the minister responsible for the legislation would then be obliged to acknowledge the existence of the report in the House and answer questions on its contents.

The power to investigate privacy complaints

Part IV of the *ATIPPA*, dealing with the protection of personal information, was not proclaimed until 2008. As a result, when Mr. Cummings was conducting his review in 2010, the Commissioner's office had less experience

with the protection provisions than with the access provisions of the *ATIPPA*. The omissions in the present *Act* are of greater concern now that time has passed and people are increasingly aware of and nervous about new technological challenges to the security and confidentiality of personal information.

The Committee heard widespread criticism of the curtailing of the Commissioner's power to review certain records after Bill 29. This criticism usually came from participants who had tried to access non-personal records. However, these limitations also capture requests for correction of one's own personal information, which may or may not be present in such records. Restoring the Commissioner's power to review the records independently would strengthen privacy rights.

The Commissioner does not yet have a full suite of powers to deal with all the circumstances in which personal information may be misused.

By one of the positive changes made by Bill 29 the Commissioner gained the power to investigate privacy complaints in 2012. Section 44(2) was added to the existing power to investigate complaints about fees or time extensions:

> The commissioner may investigate and attempt to resolve complaints by an individual who believes on reasonable grounds that his or her personal information has been collected, used or disclosed by a public body in contravention of Part IV.

However, this new power is limited. It does not address a situation where one person, or an organization such as an advocacy group, makes a complaint on behalf of another person or a group of persons. There also appears to be no specific provision in the present *Act* for the Commissioner to undertake his own investigation of perceived privacy breaches.

Even more telling of the limited power of the Commissioner in relation to violations of personal information is the fact that a complaint appears to end at the Commissioner's office. Its outcome can only be an investigation and mediation services. The Commissioner is not even obliged to make a report. And personal information complaints cannot be taken any further.

In spite of the weakness of the *ATIPPA* in remedying privacy problems, the Commissioner compensated for his lack of specific powers with a creative use of the general powers conferred on him under section 51. This states that the Commissioner may "make recommendations to ensure compliance with this *Act* and the regulations."

Acting on his own initiative, the Commissioner has conducted several privacy investigations every year and made recommendations for the future where appropriate. This has been an important tool for dealing with possible misuse of personal information.

Complaints can be about several things, including fees charged and alleged excessive time extensions. They are also the way for an individual to seek an inquiry into the handling of his or her own personal information. But neither the investigation route nor the complaint route leads to more than a report and possible recommendations. There is no path to the Trial Division of the Supreme Court from a privacy investigation or a complaint.

The limited powers of the Commissioner with respect to privacy violations parallel other aspects of the generally passive role in which the existing legislation casts him.

This is at a time when the use of technology, from super-computers to surveillance cameras to GPS systems, means that individuals are less and less aware when they are being tracked or when their data in the hands of a public body has been compromised. Specialized organizations such as advocacy groups and civil society think-tanks play an important role in defining privacy challenges and seeking remedies for people who may be affected, yet unaware that their personal information is at risk.

The Office of the Information and Privacy Commissioner recognized the glaring gaps in privacy protection in its June 2014 submission to the Committee, where an entire chapter is entitled *Ensuring that the Commissioner has Adequate Means to Protect Personal Privacy.*

This chapter eloquently describes the shortcomings of the *Act* in relation to privacy. As the OIPC describes it:

> In fact, section 44(2) is silent on what, if anything, can be done with a privacy complaint beyond investigating and attempting to resolve it. If resolution is not possible, and even more importantly, if the Commissioner believes that there are issues of ongoing non-compliance with Part IV, the *ATIPPA* provides no clear tools for oversight, either by the Commissioner or by the courts. Essentially, compliance with Part IV is voluntary, for all intents and purposes.[89]

This is a remarkable statement about the lack of personal information rights in much of the Newfoundland and Labrador public sector. Fortunately, health information is dealt with under another, more adequate piece of legislation, the *Personal Health Information Act* (*PHIA*).

The problem is partly attributable to the failure to give any access to the courts for the complainant or for the Commissioner to obtain a binding decision on a privacy matter. The public body, under the present law, does not really have to deal with personal information problems raised by individuals if the Commissioner's mediation fails. It may simply ignore the whole matter.

Another serious shortcoming is that the *Act* only envisages complaints about one's own personal information. It ignores the fact that an important feature of privacy provisions has been third-party reporting of perceived violations of personal information to privacy watchdogs who then act upon the information.

Current legislation in Newfoundland and Labrador makes for a very lopsided approach, where issues about access, generally to non-personal information, follow one path to the courts under the heading of reviews, while issues about timelines, fees, and possible misuse of personal information can benefit only from mediation attempts by the Commissioner. This categorization of information rights into those benefitting from the possibility of final adjudication and those meriting only a conciliatory approach does a real disservice to the protection of personal information. In short, citizens have virtually no means of redress in case of a privacy violation by public bodies.

A review of other Canadian jurisdictions by the OIPC in its first submission revealed that in several other provinces, personal information questions, if unresolved by initial mediation, had the same general treatment as access to information questions. Moreover, personal information questions could be the subject of a binding order either by the Commissioner or his or her delegate (Ontario, Alberta, British Columbia, Prince Edward Island), or by an adjudicator (Manitoba).

89 OIPC Submission, 16 June 2014, p 70.

Conclusion with respect to protection of personal information

Other weaknesses in privacy protection stem from the fact that the Commissioner has a toolkit which is only partly full. He lacks audit power. Privacy impact assessments, where they are carried out, are not presented to him for comment. His only recognized vehicle for expressing opinions about information rights is his annual report. And he needs to know what personal information the government is using to analyze its citizens.

The Committee agrees with the many participants who suggested that the Commissioner ought to be empowered to audit, on his own initiative, the performance by public bodies of their duties and obligations under the *ATIPPA*. However, the Committee does not agree that the Commissioner should be empowered to impose measures or any form of penalty, as some have suggested, on public bodies or public servants failing to conform to all of the requirements of the *ATIPPA*. It would not, however, be inappropriate for the Commissioner to announce publicly that a particular public body was found wanting, or severely wanting, on a consistent basis, if that were the case. The effect of that, or even of announcing publicly that the OIPC was sufficiently concerned about a public body's consistently poor performance that the Commissioner had placed

the public body on audit watch until further notice, would likely carry with it a sufficient embarrassing effect that a marked improvement in performance would follow in short order.

Recommendations

The Committee recommends that

64. With respect to the role of the Commissioner in access to information that the *Act* provide for:

(a) a role and jurisdiction to promote and facilitate efficient and timely access to requested information unless there is a clear and lawful reason for withholding access;

(b) a jurisdiction that will enable the Office of the Information and Privacy Commissioner to carry out the duty to advocate for the principle of the fullest possible timely access to information while preserving from disclosure only those records that are of the limited class or kind specifically provided for in law;

(c) procedures that will enable the Office of the Information and Privacy Commissioner to respond to citizens' complaints or requests for assistance in an efficient and timely manner; and

(d) time limits for any procedure under the statute that will result in the information still having value to the requester.

65. With respect to the role of the Commissioner in protection of personal information that the *Act* provide for:

(a) The Commissioner being empowered to review, and if thought appropriate, authorize the collection of personal information from sources other than the individual the information is about, and section 51 of the Act being amended to that effect and the corresponding power being added to section 33(1)(a).

(b) Section 44(2) being eliminated and a new section being created encapsulating the Commissioner's power to accept a complaint from an individual concerning his or her own personal information or, with consent, the personal information of another individual, where he or she has reasonable grounds to believe it has been collected, used, or disclosed contrary to the *Act*.

(c) The Commissioner having the power to accept such a complaint from a person or organization on behalf of a group of individuals where the individuals have given their consent.

(d) The new provision to confer a power parallel to the Commissioner's power to review a complaint under section 43 and make a recommendation to a public body to destroy information or to stop collecting, using or disclosing information. If the head of the public body does not agree with that recommendation then the head could seek a declaration in the Trial Division. If the head does not seek a declaration and does not comply, then the Commissioner could file the recommendation as an order of the court.

(e) The Commissioner having the duty to review a privacy impact assessment developed by a department of government for any new common or integrated program or service for which disclosure of personal information may be permitted under section 39(1)(u).

(f) A requirement for all public bodies to report privacy breaches to the Commissioner.

(g) The Commissioner having broad powers to investigate on his own initiative.

66. With respect to the role of the Commissioner generally that the *Act* provide for:

(a) a banking system to appropriately deal with circumstances where one person or one group continues to file complaints while that person

or group has more than five complaints outstanding;

(b) a mandate to develop and deliver an educational program aimed at better informing people as to the extent of their rights under the *Act* and the reasonable limits on their rights, and better informing public bodies and their employees as to their responsibilities and their duty to assist;

(c) a mandate to engage in or commission research;

(d) a mandate to audit, on his or her own initiative, the practices of public bodies in carrying out their statutory responsibilities under the *ATIPPA*;

(e) a requirement that government consult with the Commissioner as soon as possible prior to and in no event later than the date on which notice is given to introduce a bill in the House of Assembly, to obtain advice as to whether or not the provisions of any proposed legislation could have implications for access to information or protection of privacy and a requirement that the Commissioner comment on those implications;

(f) a duty to take actions necessary to identify, promote, and where possible, cause to be made, adjustments to practices and procedures that will improve public access to information and protection of personal information; and

(g) the Commissioner should have the power to make special reports at any time on any matters affecting the operations of the *ATIPPA*.

67. There be added to the items listed in the section 70 of the *Act* respecting the annual report of the Minister, the following:

(e) systemic and other issues raised by the Commissioner in the Office of the Information and Privacy Commissioner annual reports.

7.4 Issues with the Commissioner's independent review process

> "As for the OIPC, my dealings with that office were less than satisfying. Even months after the legislated deadline for a response in my case, there was a feeling I needed to bargain or negotiate for the information, when what I was seeking was a more forceful hand, without having to go to court."[90]
>
> —Ashley Fitzpatrick, Submission to the Committee

Many requesters have experienced unduly long delays, virtually all of which they seem to have attributed to the public bodies. That may be a natural consequence of the OIPC always being able to correctly attribute resistance to disclosure to the public body, regardless of where in the process the cause of the delay actually occurs.

The OIPC commented in its 2012–13 Annual Report on delays occurring when public bodies handle requests:

> This issue represents a challenge for the timely delivery of information. Only the public body subject to the request is accountable for meeting the requirements of the *Act*. Although this Office encourages heads of public bodies to consult as required in order to help lead to a more informed decision, it must be stressed that consultation must be conducted in a timely manner to ensure legislative timelines are met.

90 Fitzpatrick Submission, 25 July 2014, p 4.

In the same Annual Report, the OIPC first quoted a news release the Commissioner made on 12 January 2013, and then admonished public bodies in the following words:

> I feel it is necessary for me to publicly call on all public bodies and remind them of their responsibilities under the ATIPPA. **If they cannot do their work within the time frames set out in the ATIPPA, they are undermining the very purpose of the law.** [emphasis added]
>
> I will here once again remind public bodies of their statutory duty to respond to access to information requests within the legislated time limits.

For participants who believed the difficulty and delay in achieving their requested access was entirely attributable to public bodies, giving the Commissioner order-making power seemed an easy solution. The Committee did explore in some detail, with the Commissioner and the Director of Special Projects, the possible benefits of converting to an order-making model. As their comments previously quoted indicate, the OIPC was not enthusiastic about the prospect.

The Committee did not feel justified in rushing to recommend order-making power without full consideration of all causes of the delays, all potential consequences of changing the model, and all alternative solutions. The Committee started by discussing with the Commissioner and Mr. Murray, on the first day of the hearings, the causes of the delays about which so many users of the *ATIPPA* were complaining. This was at an early stage in the Committee members' inquiries. Like most members of the public, the Committee was operating on the assumption that all delays resulted from public body action or inaction.

One of the explanations offered by Mr. Murray was that the time it took to resolve a complaint also varied with the volume of the records in question. He described what might be the workload in a matter involving 200 or 300 pages. That was clearly a reasonable proposition, so he was asked to give the Committee some idea of how many of the 25 or so review reports the OIPC did each year would involve 200 or 300 pages. His answer was:

> 5 or 10 or 15 would be in the minority, I would say. They're not all 200 or 300, but it's not unusual. I'd say an average one if I had to guess will be you know a 100 pages. That wouldn't be unusual…at an average.[91]

That is so lacking in precision as to be of little value to the Committee. Fortunately, more precise information was provided later by the Information Commissioner for Canada when she appeared before the Committee:

> Before coming here, we did ask to see what's the volume of pages per request because in order to assess what's an appropriate time you need to have information about volume of pages per request. So, the average here is 37. Thirty-seven pages per request. Six hundred and sixty requests in the last fiscal year across 460 bodies covered by the legislation. And if you look at the details from the Office of Public Engagement in terms of each institution, the ones that receive the most requests they are looking at around between 30 and 40 requests. So institutions here overall in the aggregate, they're not dealing with high volumes of pages on their routine requests and they don't seem to be getting…huge amount of requests.[92]

That information, however, related to all requests for information, not just those that the OIPC was asked to review. The Committee does not have separate information as to the volume involved in the matters reviewed by the OIPC but can only assume that the average should not be vastly different.

The Committee originally had the impression, based on comments by early participants including the OIPC, that the lengthy delays in producing information was caused by inefficient handling of requests by staff in the public bodies and, in some cases, by their reluctance to assist disclosure. Information provided by participants and by the OIPC did reveal significant delays, without indication of any cause other than the public bodies. No statistics in the Commissioner's annual reports indicate either the length of the delays or at what stage or stages of the process delay was occurring. However, comments received in questionnaires submitted by ATIPP coordinators caused the Committee to look deeper. The Committee wanted a better understanding of the level of

91 OIPC Transcript, 24 June 2014, p 195.

92 Information Commissioner of Canada Transcript, 18 August 2014, pp 68–69.

efficiency achieved by the *ATIPPA* ombuds model as it is presently structured, its application of the provisions of the *ATIPPA*, the procedures and practices it presently employs, and the times involved at the various stages.

Because the OIPC's otherwise very detailed annual reports do not give any indication of the time and delays involved in its own procedures, it was necessary for the Committee to examine the Commissioner's review reports for all of the matters in respect of which the OIPC was asked to do a review and which were followed by a Commissioner's report. It was from that source that the Committee extracted the dates of:

- the applications for information
- the decisions of public bodies
- the requests for review by the Commissioner
- the conclusion of the informal resolution processes
- the issuing of review reports by the Commissioner

These spanned the more than six years from February 2008 to August 2014. The time that each process required was calculated at the various stages, from the time the request for access was originally made to the date when the final decision was implemented. The result of that examination is shown in Appendix F. So that the reader will have a convenient example without having to refer to the appendices, Table 9 was prepared showing only the statistics taken from the Commissioner's reports filed during the twelve months immediately preceding the commencement of writing this report, on completion of the public hearings at the end of August 2014. It is set out opposite.

When those average delays are considered, it quickly becomes clear that something is radically wrong—with the present structure, the policies and practices employed by the OIPC, the resources available, or some other factor. It is difficult to conclude that the present system works well, as the Commissioner claims, when it results in delays of the magnitude indicated in Appendix F, occurring while the matters are under the Commissioner's control. In a significant portion of the cases, access is achieved only after a great deal of effort, delay, expense, and frustration, and after the requester is kept waiting sometimes for years to obtain the requested information. In many instances, by that time the information is redundant or its usefulness has greatly diminished.

The Commissioner made another comment that demonstrates the level of frustration citizens feel with the existing processes. He was asked by a Committee member to give a sense of what applicants say when they cannot obtain the requested information and they are facing the possibility of court action. He replied:

> that's a very good question and sometimes the applicants say nothing and just walk away because it's just not worth the effort, they don't have the money, they don't have the time. And it's in my view a huge barrier to justice and to the individual rights under the act. Other people are in it for the long haul and even if at the end of the day, the information you receive it's out of date and not—no longer suitable for the purposes in which they requested the information, they want to go through the process and essentially hold public bodies accountable.

The Committee agrees fully with the comments and admonitions the Commissioner directed to the public bodies as to the effects of such delays. However, the Committee cannot fail to comment on the fact that the information the Committee has been able to gather, since the conclusion of the hearings, establishes that the delays occur largely while the matters are under the Commissioner's exclusive control. It is recognized that, during the informal resolution process, the time involved is partly dependent on responses from both the public body and the requester, and a third party when one is involved. Nevertheless, it is the Commissioner who is in control, and who has responsibility to call public bodies to account if they are causing unnecessary delay. He is given specific authority[93] to ensure compliance with the *Act*, and that would include ensuring that timelines required by the *ATIPPA* are met.

In its formal written policies, the OIPC outlines what happens when informal resolution efforts do not succeed and a decision is made to proceed with formal investigation. The OIPC then states:

93 *ATIPPA* s 51(a), (f), (g).

Table 9: Timelines for Access to Information Requests resulting in a Report by the OIPC (for the 12 months ending August 2014)											
Public Body Access Application Process Timelines				Office of Information & Privacy Commissioner Review Process Timelines							
Public Body	Application Received at Public Body	Today Days	Interval Days	Report	Review Started	Days for Informaal Resolution	Formal Review Started	Days for Formal Review	Review Closed	Total Days	Combined Total Days
Environment &Conservation	30-May-2012	55	7	A-2013-014	30-Jul-2012	135	11-Dec-2012	295	2-Oct-2013	430	485
College of North Atlantic	7-Dec-2012	13	0	A-2013-015	19-Dec-2012	220	26-Jul-2013	87	21-Oct-2013	307	320
College of North Atlantic	20-Nov-2012	30	0	A-2013-016	19-Dec-2012	220	26-Jul-2013	87	21-Oct-2013	307	337
Eastern Health	14-Feb-2013	42	19	A-2013-017	15-Apr-2013	124	16-Aug-2013	74	29-Oct-2013	198	240
Royal Newfoundland Constabulary	31-Dec-2012	24	30	A-2013-018	21-Feb-2013	182	21-Aug-2013	99	28-Nov-2013	281	305
Premier's Office	4-Jun-2013	58	9	A-2013-019	9-Aug-2013	62	9-Oct-2013	50	28-Nov-2013	112	170
College of North Atlantic	16-Apr-2008	59	21	A-2013-020*	24-Mar-2010	986	3-Dec-2012	361	29-Nov-2013	1347	
				* Review Request received 3-Jul-2008 and placed in abeyance under OIPC banking policy. Review was reopened on 24-Mar-2010.							1406
Health & Community Services	19-Apr-2013	29	31	A-2014-001	17-Jun-2013	144	7-Nov-2013	74	20-Jan-2014	218	247
Eastern Health	25-Jul-2013	26	15	A-2014-002	3-Sep-2013	140	20-Jan-2014	16	5-Feb-2014	156	182
Finance	6-Aug-2012	116	0	A-2014-003*	27-Nov-2012	182	27-May-2013	255	6-Feb-2014	437	553
*Applicant filed 9 ATIPPA Requests with Public Body and requested a review of 8 by the OIPC.				1) 27-Nov-2012 for #1, #2, #4, #5, #6, #7 2) 15-Apr-2013 for #8 and #9 (#3 not reviewed)							
Advanced Education & Skills	3-Oct-2012	115	7	A-2014-004	1-Feb-2013	50	22-Mar-2013	321	6-Feb-2014	371	486
College of North Atlantic	16-Dec-2010	61	8	A-2014-005	22-Feb-2011	386	13-Mar-2012	706	17-Feb-2014	1092	1153
Justice	14-Dec-2010	63	15	A-2014-006	1-Mar-2011	511	23-Jul-2012	590	5-Mar-2014	1101	1164
Tourism, Culture & Recreation	22-Nov-2012	148	1	A-2014-007	19-Apr-2013	242	16-Dec-2013	134	29-Apr-2014	376	524
Transportation & Works	30-Aug-2013	81	14	A-2014-008	2-Dec-2013	86	25-Feb-2014	136	11-Jul-2014	222	303
Nova Central School District	21-Dec-2011	57	5	A2014-009	20-Feb-2012	583	24-Sep-2013	321	11-Aug-2014	904	961
Nova Central School District	3-Apr-2012	17	13	A2014-010	2-May-2012	511	24-Sep-2013	321	11-Aug-2014	832	849
Fire & Emergency Services	18-Feb-2014	29	17	A2014-011	4-Apr-2014	60	2-Jun-2014	79	20-Aug-2014	139	
Average Days for Public Body ATIPPA Process		57		Average Days for OIPC Informal Resolution		268	Average Days for OIPC Formal Review & Report	23	Average Days for OIPC Process	491	168
Prepared by the ATIPPA Review Committee Office				Average Days for Combined ATIPPA Process							548

> The OIPC makes all reasonable efforts to complete the investigation and to prepare a Report **within 90 days of receiving the Request for Review**.[94] [emphasis added]

Two provisions of the *ATIPPA* mandate specific time limits for the completion of Commissioner's responsibilities in responding to requests for reviews:

> Where the commissioner is unable to informally resolve a request for review within 60 days of the request, the commissioner shall review the decision, act or failure to act of the head of the public body, where he or she is satisfied that there are reasonable grounds to do so, and complete a report under section 48.[95]
>
> The commissioner shall complete a review and make a report under section 49 within 120 days of receiving the request for review.[96]

An examination of Table 9 discloses key facts about the 18 requests for review in respect of which the Commissioner issued reports during the 12 months immediately preceding the writing of this report:

- In only 3 of those requiring formal investigation, when informal resolution did not succeed, was formal investigation started within the time mandated by the *ATIPPA*.
- In none of the 18 was the report of the formal investigation prepared within the 90 days set out in the OIPC policy.
- In only 1 of the 18 was the report of the formal investigation completed within the 120 days then mandated by the *ATIPPA*.
- In only 3 of the 18 was the report completed in less than 6 months (183 days).
- In 12 of the 18, the reports were not completed after nine months (274 days).
- In 10 of the 18, the reports were still not completed after 1 year.
- 5 of the 18 reports of the formal investigations had still not been completed after more than 2 years.

The Committee is concerned that its criticisms not be in any manner unfair to the Commissioner. In that regard, it must be acknowledged that in the years preceding that time frame at least one of the requests involved in those 18 reports (one of the longer ones) had been put in abeyance for nearly 21 months under the OIPC's banking policy. That policy is well justified, so those 21 months were not counted in calculating the times involved in the table. In terms of timeliness, the performance is clearly not in accord with the principles expressed in the *ATIPPA*, or the expectations of the citizens who requested the information. It is equally unacceptable that all but one of the eighteen were in breach of the specific time requirements of the *ATIPPA,* and the vast majority were overdue by many months.

One might speculate that the poor performance could be peculiar to that 12-month period, but the table at Appendix F shows otherwise. It provides similar but less detailed data for all reports issued from February 2008 to August 2014. These facts pertain to the 101 reports issued by the OIPC in that six-and-a-half years:

- Only 3 of the 81 reports to which the pre Bill 29 time limit of 90 days applied were issued within the mandated time.
- Only 2 of the 20 reports to which the post Bill 29 time limit of 120 days applied were issued within the mandated time.
- In 43 of the 101 requests, the reports were not completed even one year after receipt of the request for review.

In six-and-a-half years, just slightly more than 10 percent of the Commissioner's reports were issued within 120 days. The time limits were not just slightly exceeded. Even if the time limits were increased to 6 months, only 30 percent would have been issued within that time frame.

In most of the annual reports, the OIPC has emphasized its focus on informal resolution through extensive negotiation and persuasion, and it asserts positions like these:

94 OIPC Policy 6, *Decision to Move to Formal Investigation,* p 2, Procedure 4. At the time that policy was written the statutory time limit was 90 days. It was expanded to 120 days by the 2012 amendments to the *Act*.

95 *ATIPPA* s 46(2).

96 *Ibid* s 48.

> We promote and utilize negotiation, persuasion and mediation of disputes and have experienced success with this approach. Good working relationships with government bodies are an important factor and have been the key to this Office's success to date.
>
> The key tenet of our role is to keep the lines of communication with applicants, public bodies and affected third parties open, positive and productive.

The Committee agrees that the informal resolution process is a useful tool, but it is intended to produce results more quickly and with less difficulty. It was never expected to cause excessive delay. In the circumstances, the Committee can do no less than remind the Commissioner and the staff of the OIPC, of the words they addressed to the public bodies in the 2012–13 Annual Report, quoted above:

> If they cannot do their work within the time frames set out in the *ATIPPA*, they are undermining the very purpose of the law.

The OIPC's annual reports do not specify the delays that occur after a requester makes a complaint or seeks a review of a refusal to disclose. After the Committee staff extracted from the Commissioner's review reports the data that enabled it to produce Appendix F (the timelines resulting in reports), it became clear that more information was needed respecting timelines for matters resolved at the informal resolution stage.

Delays in the matters resolved at the informal resolution stage

The Committee asked the OIPC for details concerning the timelines for matters settled through informal resolution. Although the Committee's request came late in the process, the OIPC responded expeditiously and their response is attached as Appendix G. The information provides a list of files which were resolved informally by the OIPC between April 2008 and September 2014 and the respective time frames for the resolution of each file. A summary of the statistics for those six years is set out below in Table 10.

The Committee staff calculated the average time involved in the 31 matters that were resolved by informal resolution in 2013–14. After deducting any time that a matter was held in abeyance, the average is a shocking 238 days: nearly eight months (see Appendix G).

The ATIPP departmental response timelines, set out in Table 14 indicate that a total of 334 applications for access to information were handled by departments in the same fiscal year. In stark contrast, 88 percent of the responses were provided within the statutory time limit. Those statistics also demonstrate steady improvement in public body performance during that year. The on-time responses increased from 58 percent in the first month of that fiscal year to 97 percent in the last month of that year.

Bearing in mind that the public body concerned would in the ordinary course have gathered all relevant documentation before making the decision on each

Table 10: Requests for Review Resolved through Informal Resolution by OIPC

Fiscal Year	# of Informal Resolutions	# completed within 60 days*	% of Total	# taking up to 6 months	% of Total	# taking longer than 6 months	% of Total
2008-2009	58	20	34%	23	40%	15	26%
2009-2010	62	21	34%	30	48%	11	18%
2010-2011	58	16	27.6%	19	32.7%	23	39.7%
2011-2012	54	10	18.5%	21	39%	23	42.5%
2012-2013	27	2	7%	10	37%	15	56%
2013-2014	31	5	16%	9	29%	17	55%
Total	290						

(*It should be noted that prior to Bill 29 the time limit for informal resolution was 30 days. Bill 29 increased it to 60 days.)
Prepared by the ATIPPA Review Committee from information supplied by OIPC.

matter for which the requester sought review, and it could quickly be handed over to the Commissioner for his review, it is not at all clear what circumstances could possibly require another eight months, on average, to reach an informal resolution. There is also no clear explanation why the percentage of completions within 60 days should have steadily decreased from 34 percent in 2008–09 to 16 percent in 2013–14. As well, there is no obvious explanation as to why the percentage of requests taking longer than 6 months to resolve informally should have more than doubled from 26 percent in 2008–09 to 55 percent in 2013–14.

It is even more difficult to understand when one considers there were only about half the number of requests for review (resolved through informal resolution) in 2013-14 than there were in 2008-09 or 2009-10.

The Committee realizes that the public bodies were probably persistent in refusing disclosure; that is why the Commissioner was asked to review the matters. However, anything the public body wanted to redact would have been highlighted and easy for the Commissioner to review in context. Whatever the average number of pages for each matter, it should only take a matter of days, at most, for the Commissioner to reach an informed and sound conclusion as to whether the law required that the public body disclose the record or that it was permitted to refuse to disclose it.

Comments of the OIPC respecting delays in matters resolved at the informal resolution stage.

Although it was not requested, the OIPC also forwarded, with the information sought by the Committee, a letter to provide some explanation for the delays. It is too long to reproduce in full here, so the full explanation offered by the OIPC is attached as part of Appendix G. It will be sufficient to quote here some significant excerpts in order to convey a flavor of the explanation:

> The time frame within which we do our work is a matter of concern for me, because I believe the mission of our Office is one of public service. Any unnecessary delay in the provision of that service is a failure to deliver that service as it should be done. Certainly there have been delays caused by workload, vacations, illness, transition periods in and out of maternity leave, normal employee turnover, the inexperience of new staff, etc. There have also on occasion been delays, whether in the completion of formal reports or of informal resolution efforts, which have resulted from a failure to complete work in as timely a manner as should be expected by staff of this Office. As the supervisor of the Analysts who do the vast majority of this work, I take responsibility for these failures and delays. I try to ensure that such delays are kept to a minimum by meeting with the Analysts on a regular basis to review the progress being made on their files, in an effort to help them stay on track and address any stumbling blocks they may have encountered in moving files forward.
>
> That being said, I am of the view that most of the time frames noted in the attached schedule are as long as they are for a number of diverse and in most cases, valid reasons. In the limited amount of time available to us, we have gathered the necessary statistics for you, but we have also used the time available to examine those files which have been open for the longest period of time before being resolved informally. These include files being banked in accordance with the Trial Division decision of Judge Seaborne, as well as files which were held in abeyance pending the resolution of other processes—typically, these were court cases and subsequent appeals which were relevant to the issue to be determined in our Review.
>
> First of all, I should explain that "informal resolution" is the default stage for files. As soon as we receive a request for review, before we get the records, and before any work is done, we are at day 1 of the informal resolution process. The numbers you see reflect that, even though we may not get our first look at the records for 2 weeks. Although we have not had time to go through each file and provide an explanation as to why it took as long as it did to resolve, we have reviewed those files which took the longest to close, and briefly noted the reason in the attached table. I would now like to take this opportunity to explain those reasons a little more fully…
>
> There are two other files noted on the attached list where this Office was unable to obtain records from a public body. In those two instances, the public body was quite uncooperative and refused to provide the information requested by this Office. The result was this Office issuing to the public body a Summons to Produce under the powers given to this Office in the *Public Inquiries Act*. The public body complied with the summons and

> upon review of the information provided this Office was able to resolve the two matters informally…
>
> There are other notations on the attached lists indicating that the delay in resolving matters was due to the following:
>
> 1. the large number of records which had to be reviewed and discussed with the public body (which can go into thousands of pages),
> 2. the applicant being out of the country for several months which interfered with the informal resolution process, and
> 3. an amendment to the *ATIPPA* which occurred during the informal resolution process. The effect of this amendment was discussed among the parties and eventually resulted in the applicant and the public body agreeing that the applicant could file a new access request taking advantage of the legislative change which allowed the applicant to obtain more information from the public body.

With great respect to the OIPC, the Committee is of the view that the explanations are seriously wanting. No doubt the difficulties described in the letter were encountered, but on closer examination of the whole of the information, it must be observed that only 24 out of the 112 matters on the list that took longer than 6 months to resolve informally are noted to have been affected by those explanations. Out of 54 matters resolved informally in 2011–12, 28 took longer than 6 months, but only 12 of those were affected by the noted explanations. Out of only 27 matters resolved informally in 2012–13, 15 took longer than 6 months but only 7 were affected by the noted explanations. And out of only 31 matters resolved informally in 2013–14, 20 took longer than 6 months but only 4 were affected by the noted explanations.

Clearly, the OIPC's workload based on matters resolved at the informal resolution stage has decreased greatly in the last two years from the previous four years. In 2013—14, 31 matters were resolved informally, and 27 in 2012—13. There had been 54 in 2011–12; 58 in 2010–11; 62 in 2009–10 and 58 in 2008–09. It is not possible to find in the OIPC letter a readily acceptable explanation for the fact that this portion of the OIPC workload decreased by approximately 50 percent in the last two years but there was no improvement in the delay statistics. In fact they deteriorated.

One other aspect of the OIPC letter requires comment. The concluding paragraph may indicate the root cause of the delay problem at the OIPC:

> It is also worth noting that some jurisdictions place no time limits on informal resolution. A time limit may be a useful yardstick in terms of performance by our Office, but at the complaint/appeal stage, if a time limit was strictly enforced and the necessary work was not completed, I am not sure as to how strict enforcement of an informal resolution time limit would help ensure that applicants receive the information they are entitled to under the *ATIPPA*. I should also point out that the Supreme Court, Trial Division has considered the issue of the Commissioner's time limit in the *ATIPPA* in terms of completion of a review: *Oleynik v. (Newfoundland and Labrador) Information and Privacy Commissioner,* 2011 NLTD(G) 34. The court determined that the time limit was directory, not mandatory.

That paragraph clearly indicates that the OIPC is totally ignoring the 60-day time limit allowed by subsection 46(2) of the *ATIPPA* for completion of the informal resolution process. That subsection reads as follows:

> Where the commissioner is unable to informally resolve a request for review within 60 days of the request, the commissioner shall review the decision, act or failure to act of the head of the public body, where he or she is satisfied that there are reasonable grounds to do so, and complete a report under section 48.

The OIPC appears to assume that it has the right to ignore the specific direction of the legislature that "the commissioner shall review the decision" if it has not been resolved within 60 days. The quoted paragraph indicates that the OIPC believes the decision of the court in *Oleynik v Information and Privacy Commissioner*[97] somehow confirms the right of the OIPC to ignore the strict direction of the legislature. While this is not intended to be a legal opinion, it is appropriate for the Committee to make two comments: (i) the Committee can find nothing in that decision that would appear to confirm such a right in the OIPC, and (ii) that case arose

97 2011 NLTD(G) 34 [*Oleynik*].

because a requester had, after waiting more than 18 months, commenced court proceedings to compel the Commissioner to complete his review and file a report.

It is necessary to look a little closer at the case to appreciate the full impact of the position being taken by the OIPC. The requester had, with effect from 30 July 2008, asked Memorial University to provide copies of emails written or received by a named person at Memorial in which the requester's name was mentioned. The university had extended the 30-day time limit to 60 days and responded on 3 October 2008, which the Commissioner found was one day beyond the limit. The requester was not satisfied and requested review on 6 October 2008. The OIPC has acknowledged that:

> The Applicant stated that if a repeated search was found to be prohibitively costly, then he would ask that it be focused on a shorter time period: April 13-24, 2008. Alternatively, the Applicant stated that if it were found to be technically impossible to retrieve these messages, he would at least like to know whether any messages were deleted during that time period, particularly on April 18, 2008 between 4:00 pm and 8:00 pm.[98]

The requester also complained about the 30-day extension Memorial University had unilaterally taken. Informal resolution was undertaken but was not successful and, on 4 May 2009, after some 210 days, 180 days beyond the statutory limit then applicable, the OIPC started formal investigation.

When by 22 April 2010 the OIPC had still not written a report, the requester filed proceedings in the Supreme Court which the judge described as "asking the court to order the Commissioner to complete his review and file a report." That was 563 days after the review was requested, although section 48 of the *ATIPPA*, at the relevant time, specified that "the commissioner shall complete a review and make a report under section 49 within 90 days of receiving the request for review."

Six days later on 28 April 2010, the OIPC filed its report. The *ATIPPA* process had spanned 634 days from the date when the requester asked Memorial University to proceed with the search to the date when the OIPC produced its report. Only 67 of those days were taken by Memorial University and the few days the requester had the university's response before seeking review by the OIPC.

Nevertheless, the requester served the court proceedings on the OIPC on 25 May 2010 and proceeded with his court action, which the judge in her decision described in this manner:

> On June 14 and October 6, 2010 when the matter came before the court for status updates, the applicant confirmed, despite receiving the report, he wished to continue with his application for both an order of an *mandamus* and/or *certiorari* because of the inappropriate time delays occasioned by the Office of the Information and Privacy Commissioner and also because the report failed to address the key issues identified by the applicant. The applicant stated that if the application for a writ of *mandamus* was dismissed, an order for *certiorari* to quash the report of the Commissioner would be appropriate as the report is defective.[99]

With the limited nature of the search request made to the university, a search for emails sent or received by a specifically named person in a specified 6-month time frame, and also the further reduction of that time frame authorized by the requester when he sought review by the OIPC, neither the informal resolution stage nor the review investigation stage should have required much time. In fact, in her decision, Madam Justice Fry made the following comment on that matter:

> Counsel for the respondent [i.e., the Commissioner] acknowledged that the Commissioner was clearly late in issuing the report. **The investigation, according to the affidavit filed, took approximately one month to complete;** however, the Commissioner's formal review and report took many more months to complete due to staff shortages and the backlog of files being processed at the time by the office of the Commissioner.[100] [emphasis added]

The OIPC letter asserts that "The court determined that the time limit was directory, not mandatory." Those words appear in the decision, but other comments clearly

98 OIPC *Report A-2010-005*, 28 April 2010, para 4.

99 *Oleynik*, *supra* note 97 at para 8.

100 *Ibid* at para 55.

indicate they do not imply the OIPC is at liberty to ignore the express direction of the *ATIPPA,* as it read at that time, that if informal resolution is not achieved in 30 days the commissioner **shall** review his decision, and the commissioner **shall** complete a review and make a report within 90 days. What the court in fact decided is:

> **In this case**, given the non-binding nature of the review and report, the lack of any prescribed consequences for failure to meet the deadline and the general purpose of the legislation, I am satisfied that the 90 day time limit in section 48 is directory rather than mandatory. **Accordingly, I do not find there is a basis in the circumstances of this case to attach any legal consequences, such as invalidating the report, to the failure of the Commissioner to provide his report within 90 days.**
>
> I have noted through my review of the material filed that the Commissioner expects public bodies to respect the timelines outlined for their activities prescribed under the legislation. **Despite not attaching legal consequences to the failure of the Commissioner to provide his report within 90 days, I do believe it is important that the Office of the Information and Privacy Commission also meet the statutory timelines outlined for the performance of their duties under the *Act*.**
>
> Since the Commissioner did in fact file his report, any delay was cured when the statutory duty was performed by the release of the report and **the failure to comply with the time limits does not, in these circumstances, carry any legal consequences.**[101] [emphasis added]

It is also interesting to note that this matter went through:

- court preparation preliminaries and status hearings before the trial judge on 14 June 2010 and 6 October 2010
- trial of the issues on 31 January 2011
- preparation and filing of a 30-page detailed and reasoned judgement 29 days later, on 1 March 2011
- the requester, being dissatisfied with the trial judge's decision, filing a notice of appeal to the Court of Appeal
- the requester making an interlocutory application to a judge of the Court of Appeal for an order that the Commissioner deliver to the Court of Appeal the documents that he had considered
- that application being argued before the Chief Justice of the Court of Appeal on 8 November 2011
- the Chief Justice rendering, 11 days later, on 18 November 2011, an 11-page reasoned decision as to why such an order could not be made in the circumstances
- the preparation of the appeal book, the appellant's factum and the respondent's reply factum
- the hearing of the appeal before a panel of three justices on 10 February 2012
- the preparation and filing, 18 days later, on 28 February 2012, of a 5-page reasoned decision, with the agreement of each of the three justices, explaining the reasons for dismissing the appeal

All of these proceedings were completed in 20 fewer days than the total time involved in the *ATIPPA* process, from the date on which the requester asked Memorial University to proceed with providing copies of the emails to the date when the OIPC filed its report in response to the request to review the decision of Memorial University. One has to also ask: if, as Justice Fry stated, the affidavit evidence indicated the investigation took approximately a month to complete, what could possibly have caused the writing of the report to require another nearly 11 months?

The OIPC letter does not emphasize it, but the Committee is aware that additional responsibilities were added to the OIPC: privacy oversight in 2008 and *PHIA* responsibilities in 2011. Presumably, provision was made for any additional staff and other resources necessary to discharge those additional responsibilities. At least there is nothing in the subsequent annual reports to indicate that the resources of the office are insufficient to meet its responsibilities. The OIPC has occasionally commented on potential difficulties or backlogs of files it expected to have in meeting the challenges arising from additional responsibilities being placed on the office from time to time.

However, the Committee has not found, in the

101 *Ibid* at paras 59–61.

OIPC annual reports, comments that shortages of staff and resources have prevented the office from meeting the statutory time limits. Many annual reports did, however, contain comments such as this:

> The additional work associated with the proclamation into force of Part IV of the ATIPPA (the privacy provisions) in January 2008 has further compounded and to some extent frustrated the Office's ability to meet certain legislated timeframes.[102]
>
> I should also note that our Office, even with the additional staff, has been challenged to cope with the demands placed on it due to the significant workload resulting from the privacy breach investigations. The backlog of Requests for Review and privacy complaints has grown since the last reporting period.[103]
>
> I should also note that our Office has been challenged to cope with the demands placed on it due to the significant workload resulting from privacy breach investigations.[104]

There was never an indication that the office requested but was unable to obtain additional resources. The Committee staff extracted from annual and other reports, the budget and staffing information for a twelve-year period. There have been periodic increases in staff and other budgetary resources for the office during that period, which seem to coincide with additional responsibilities being given to the office from time to time. That information is displayed in Table 11.

In fact, when the Commissioner appeared before the Committee at its hearings, and was recommending additional powers and responsibilities, he was asked "Are you satisfied that you have adequate staff and resources to fulfill those duties properly and efficiently if the changes were adopted by the legislature?" His answer was not very explicit in light of the specificity of the question, but it gave no indication of any shortage of staff or resources. He said:

> Well we've got two time frames in which we can compare: prior to Bill 29 and it was a moving target if I could use the

Table 11: Office of the Information and Privacy Commissioner Budget and Staffing

Fiscal Year	Budget Estimate	Revised Budget	Staff	Comments
2003-04	$230,000 (Salaries: $185,000)	$121,200 (Salaries: $79,200)	1	
2004-05	$264,000 (Salaries: $200,000)	$264,000 (Salaries: $200,000)	4	ATIPPA, Section 42.1 in force 13 December 2004; Remaining ATIPPA Provisions (excluding Part IV) came into force 17 January 2005. OIPC opened on 17 January 2005. Staff count from Budget Salary Details.
2005-06*	$320,300 (Salaries: $225,300)	$320,300 (Salaries: $225,300)	4	*Report covers period 17 January 2005 to 31 March 2006.
2006-07	$301,500 (Salaries: $232,500)	$307,600 (Salaries: $239,600)	5	
2007-08	$439,200 (Salaries: $340,000)	$462,800 (Salaries: $341,000)	7	Part IV — Privacy Provisions Proclaimed on 16 January 2008
2008-09	$810,200 (Salaries: $510,800)	$791,200 (Salaries: $509,200)	9	
2009-10	$1,115,900 (Salaries: $767,200)	$1,003,700 (Salaries: $681,000)	13	
2010-11	$1,168,000 (Salaries: $846,300)	$1,074,700 (Salaries: $824,600)	14	
2011-12	$1,204,400 (Salaries: $887,200)	$1,216,400 (Salaries: $954,600)	14	Personal Health Information Act Proclaimed on 1 April 2011
2012-13	$1,413,000 (Salaries $1,024,000)	$1,247,000 (Salaries: $993,000)	15	
2013-14	$1,230,900 (Salaries: $991,400)	$1,204,600 (Salaries: $1,009,600)	13	Staff count from Budget Salary Details
2014-15	$1,178,100 (Salaries: $938,200)		13	Staff count from Budget Salary Details OIPC website lists 12 staff

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102 OIPC *Annual Report 2008–09*, p 30.

103 OIPC *Annual Report 2009–10*, p 17, repeated verbatim in OIPC *Annual Report 2010–11*, p 17 and repeated virtually verbatim in OIPC *Annual Report 2011–12*, p 20.

104 OIPC *Annual Report 2011–12*, p 30.

term because of the proclamation of the privacy provisions in 2008 and then personal health information coming on in 2011. There was a struggle to try to keep up with the anticipation of how much workload will be involved. **We're at some sort of equilibrium now. We have a significant backlog and every year there seems to be more and more files being carried over and there are some good reasons for that.** For example the office took on the role of conducting our two investigations that eventually led to prosecutions, significant amount of time by 2 of our five analysts to do that and they were literally doing nothing else but that so there was — the workload for everybody increased. For those kinds of developments **it's difficult at any point in time to say we have enough. I tell you what, you can never have too much and we can always use more.** [emphasis added]

Delays in other Canadian jurisdictions

The Committee has limited specific evidence about delays in other jurisdictions. However, one of the members of the Committee is a former Privacy Commissioner for Canada. She has confirmed, based on her knowledge and experience, that delays in meeting timelines have been a problem in virtually all jurisdictions of the country.

The Committee's research did turn up some information on delays in two jurisdictions using the ombuds model oversight body, the federal commissioner's office and the Saskatchewan commissioner's office. In Saskatchewan in 2012–13, the Office had an accumulated backlog of 37 cases that were over two years old.[105] A concerted effort was made, with the result that all but one of these cases was closed by 31 March 2014.

The Information Commissioner of Canada is giving priority to achieving more timely service delivery. In a recent report, she summarized developments over the previous year as follows:

> In 2013–2014, the Commissioner closed more complaints within nine months of their being registered (63 percent) than she did in 2012–2013 (57 percent). This continues the trend of increasingly timely investigations since 2011–2012. The overall median time for closing a complaint was 194 days from the date it was registered (down 21 days from 2012–2013). However, there remains a gap of 173 days (roughly six months) between the median closure time for refusal complaints when measuring from the date the file is registered and from when it is assigned to an investigator. The Commissioner does not have enough staff to immediately assign these files upon receiving them.[106]

In terms of delays in the OIPC processes, it would appear that Newfoundland and Labrador is not unique. Nevertheless, that does not make the kinds of delays demonstrated in Appendices F and G and Table 9 any more acceptable. The Committee's task is to make recommendations that will result in improvements to performance under the *ATIPPA*, and make it more user friendly, not simply to result in performance that will be the same as that of other jurisdictions. If the Centre for Law and Democracy is correct, aiming for the current standard in this and other Canadian jurisdictions should not be our objective.

The Committee encountered some difficulty in dealing with this matter of the operation of the OIPC. The Committee is not constituted as an inquiry under the *Public Inquiries Act, 2006* and does not have power to summon or compel witnesses. It is simply a review committee: it hears only from those wishing to appear or to make written submissions without appearing, and receives responses from those who consent to respond to its inquiries. In fact, it was as a result of voluntary responses to inquiries sent out to ATIPP coordinators that the Committee became aware of this aspect of the delay problem.

Without specific evidence as to the causes, the Committee is, to some extent at least, speculating on the factors that might be driving the delay. The factors may include:

- some complexity in the existing oversight model
- the practices and procedures in place for general oversight by the Commissioner
- the burden on the OIPC to discharge all of the functions arising under the *PHIA* as well as the *ATIPPA*
- the practices and procedures in place for dealing with complaints and requests for review

105 Saskatchewan OIPC, *Annual Report 2013-14*, p 2.

106 Canada Information Commissioner, *Annual Report 2013-14.*

- resistance of public bodies to accepting responsibility for responding quickly to requests
- the failure of the OIPC to take seriously the importance of its own compliance with statutory time limits for the informal resolution process, and for the overall review process
- the apparent belief that the Commissioner's review should be conducted as extensively as would a judicial inquiry, when its role is recommending not adjudicating
- ignoring the fact that it is not the Commissioner's review that is subject to appeal to court; rather, it is the decision of the public body, and that appeal process is a hearing *de novo* (essentially, a new hearing, with all the evidence presented)
- the practice of casting the Commissioner's recommendation in the form of an appellate court type decision with detailed analyses of:
    - the factual situation
    - the procedures to date and their results
    - the law
    - comments in historical reports of the Commissioner
    - comments in historical reports of commissioners in other jurisdictions and jurisprudence generally,
- the possibility that resources are inadequate for the responsibilities that the OIPC has to discharge
- if resources are in fact inadequate, the failure of the Commissioner to say so in his annual reports or make any public statement about the fact

Part of the problem may be reflected in the views that were expressed by the OIPC in its most recent annual report.[107] The OIPC wrote:

> As noted, this Office does not have enforcement or order power. We do not see this as a weakness, rather it is a strength. Order power may be seen as a big stick which could promote an adversarial relationship between this Office and public bodies. We promote and utilize negotiation, persuasion and mediation of disputes and have experienced success with this approach. Good working relationships with government bodies are an important factor and have been the key to this Office's success to date.

The Commissioner's additional comments quoted above, about the effect of order-making power on a small office, are also apt.

In any ordinary case not complicated by third party interests, all that should be required, after reasonable examination of the records involved, and the public body's explanation of the basis for its refusal to disclose, is a summary exercise of common sense and reasonable judgement as to whether it is clear that the *ATIPPA* permits the head of the public body to refuse to disclose the record to which the applicant is otherwise presumed to be entitled, or whether the Commissioner should recommend its disclosure. As the Commissioner noted in a comment quoted above, the onus is on the public body to establish that the law permits refusal to disclose. That should not take an inordinate amount of time. The public body would have all relevant material and information readily at hand, because it would have had to gather those materials and assess them in order to refuse disclosure to the applicant in the first place. Certainly in a matter of days, such material could be available to the Commissioner from any public body in the province, and in many cases the material could be available in hours.

Bearing in mind that it is the decision of the public body that is subject to review by the court, and not the investigation report of the Commissioner, and bearing in mind the fact that the court's review is a review *de novo,* there is no justification for the elaborate assessment of previous report decisions from this jurisdiction and other Canadian jurisdictions that characterize the Commissioner's report-writing practices. In all but the rare case, where huge volumes of records may be involved, eliminating that unnecessary approach and replacing it with a summary review and assessment process by the Commissioner will greatly reduce the time required for the Commissioner to review the request and make an early recommendation as to whether the public body should release the requested record or is justified in withholding it.

107 OIPC *Annual Report 2012–13*, p 13.

When one considers the OIPC description of the practices and times involved in the informal review process, which sometimes takes many months and occasionally a year or more, it is almost inconceivable that there would be anything new to discover by the end of that process. One would expect that, if at the end of that process the matter was still not resolved, a report with a clear recommendation could be written in a matter of days at the most. It is inconceivable that it could require many more months and sometimes more than a year. The figures in Table 9 indicate that the average time involved for those 18 review requests at the informal resolution stage was nearly 9 months. One cannot imagine why any remaining investigation or report writing would require on average more than another 7 months. Something is radically wrong.

Conclusion

The Commissioner should not continue the present approach of reluctance to make strong representations to the minister, and report the same publicly, respecting systemic problems or any other deficiency he discovers. The Commissioner also has the primary responsibility to identify any deficiency in staffing or other resources experienced by his office, and make those needs known to the minister. That responsibility includes making any persistent failure to address those needs known publicly.

In all of the foregoing circumstances, the Committee can only conclude that there are serious deficiencies in the practices and procedures presently employed by the OIPC in carrying out its review function in respect of complaints and requests for review of access decisions by public bodies. The Committee will make recommendations intended to overcome these deficiencies.

The manner in which the Commissioner and the staff at the OIPC presently manage their handling of complaints and requests for review has resulted in unacceptable delay for the overwhelming majority of those who seek the assistance of the Commissioner.

It is clear that the system is not now functioning in a manner that comes even remotely close to achieving the objectives expressed in the *Act* as it now exists, let alone reflecting the kind of statute the Committee has been asked to recommend, one that will be user friendly and that, when it is measured against international standards, will rank among the best.

Major changes in the approach, processes, powers, resources, and direction as to the primary role of the Commissioner are necessary.

Recommendations

The Committee recommends that

68. Each annual report of the Commissioner contain a time analysis generally consistent with that set out in Table 9 of Volume II of the report of the functions and procedures employed from the date of receipt of the application for access to the records or correction of personal information to the closing of the matter after informal resolution, the issuing of the Commissioner's review report, or the withdrawal of the request, whichever applies, for all complaints made to the Commissioner.

Introduction

Time limits are basic elements in all access to or freedom of information practices, and all protection of privacy laws. And while there are variations in the amount of time by which a public body must respond to a requester, most of the laws are dogged by the same issue—how can a public body be forced or persuaded to respond in the legally mandated time?

The simple truth is that few laws imposing duties and obligations on public bodies regarding time limits have any teeth when it comes to enforcement.

The fundamental issue for the requester is that delays stand in the way of the legal right to access certain information. The Constitution Unit at University College London put the delay issue in the context of where the power lies in their recent assessment of the UK Government's performance under the *Freedom of Information Act 2000:*

> Despite its evident discomfort at the continuing pinpricks of FOI, the government remains in a very strong position. It holds the information. It can resist disclosure for years if it wants to fight the system and fight appeals.[108]

Yet, access and freedom of information laws should not be seen as casual and unenforceable promises. They provide individuals with a legally enforceable right to obtain information and data compiled and held by their governments, a point that was underscored by one presenter when he appeared before the UK justice committee. He suggested that even impossibly difficult people in the UK "have rights when it comes to FOI, which is as it should be."[109]

Legislative provisions

Time limits are specified in the *Act* for the various procedures from making a request for access to or correction of a record up to and including appeal to the Trial Division of the Supreme Court. They are summarized below in Table 12.

Table 12: *ATIPPA* Time Limits

Duty of public body to assist	The duty continues throughout the process and the head of a public body is required to "make every reasonable effort" to assist an applicant in making a request and "to respond without delay."
Time limit to respond to request	The public body "shall make every reasonable effort to respond to the request within 30 days," UNLESS the time limit is extended by the head of the public body because of one of the circumstances listed in section 16(1); notice is given to a third party and that third party has a further 20 days to respond; the request has been transferred to another public body; the time limit is further extended by the Commissioner, for an uncertain period.
Time limit to request review by Commissioner	Within 60 days after receiving decision of the public body
Time available for informal resolution	Within 60 days of date of request to the Commissioner
Time available to conduct review if informal resolution fails or is not undertaken	Within 120 days of date of request to the Commissioner
Time for public body to make a decision	Within 15 days after receipt of Commissioner's report
Time limit for appeal to Trial Division	Within 30 days after receipt of public body's decision in response to Commissioner's report
Prepared by the ATIPPA Review Committee Office	

108 UK *Post-legislative scrutiny of the FOI Act 2000* (2012), p 43.
109 *Ibid* 20.

Comparison with other Canadian and international jurisdictions

All the jurisdictions under study provide for similar waiting times once requests are received. The 20 working days in New South Wales and the United Kingdom (except Scotland, which has its own law) is similar to the 30 days in Australia, Canada, and the three provinces considered (Ontario, Alberta and Newfoundland and Labrador).

All the jurisdictions provide for time limit extensions, including the extra time to consult with third parties for business, trade, or other commercial reasons, and when issues of personal privacy arise in third party requests.

While all jurisdictions provide for extending time limits, differences arise in terms of how those are applied.

New South Wales stands out from the group because of its truncated timelines for consulting with third parties and retrieving records. 10 working days in NSW is about 16 days less than the timeline for extensions in Australia and Canada (including Ontario, Alberta, and Newfoundland and Labrador), and 10 days less than extensions in the UK.

The UK law makes provision for extra time for complying with information requests to schools while they are closed, and also in the case of some archived records. But the general rule is that extensions will only be given where extra time is required to allow for consideration of the public interest test.

The law in Australia and Alberta allows for an extension of up to 30 days, while Ontario and the federal Canadian jurisdiction allow for a "reasonable" time.

Alberta stands out from the group with a provision that allows an extension where a third party asks an adjudicator to review a decision that grants access.

Newfoundland and Labrador has the shortest mandatory transfer time at 7 days; however, a transfer restarts the 30-day time frame for the receiving public body to respond to the request. Ontario's timelines stick to the strict 30-day requirement; the transfer must take place within 15 days of being received; the 30-day clock begins to run from the time when the first agency received the request; it does not restart.

The New South Wales' Information and Privacy Commission found that 87 percent of all applications were decided within the statutory time frame of the *Government Information (Public Access) Act 2009*, in their three-year survey published this year.[110] The statutory time frame includes the original period of 20 working days, the maximum extension of 15 working days, and an extension beyond 35 days with the approval of the applicant. The IPC reported only 3 percent of applications went beyond 35 working days.

In the UK, the House of Commons Justice Committee reviewed the *Freedom of Information Act 2000* in 2012, 12 years after it was passed.[111] Findings of the committee and reports from witnesses include:

- The 20-day time limit was treated as a "minimum" rather than requests being responded to "promptly" (*journalism student and FOI user)*
- Delays are "endemic" *(media)*
- Complaints about delays occurred generally with extension to the 20-day time limit and during internal reviews

UK authorities are not required to keep compliance statistics, but some individual organizations do. The Ministry of Justice reported that in 2010, 17 percent of requests to government departments (4,696 of 27,290) took more than 20 working days. Of those that applied for an extension, 53 percent were completed within the time limit of 20 working days set by the ICO. The remaining 47 percent took up to 6 months.[112]

In Canada, public attention focused on delays in responding to access requests with the presentation to Parliament of a report by the Office of the Information Commissioner (OIC) for 2008–09. A study group set up by the Treasury Board Secretariat validated the concern by OIC. They quoted an official from the Privy Council Office:

> volume increases, staff shortages, increasingly complex files and the need for consultations all directly affect a

110 NSW IPC, *Report on the Operation of the GIPA, 2012-2013.*
111 UK *Post-legislative scrutiny of the FOI Act* (2012).
112 *Ibid* 40.

department's ability to complete requests without a time extension.[113]

While the federal Office of the Information Commissioner concluded there was a "misuse of time extensions," the officials noted the volume and complexity of requests, and as a consequence, searches had changed. Regardless, there was agreement that legislated time limits were not being met.

Canadian Information and Privacy Commissioners are reporting an increase in the number of requests from public bodies for extensions of the timeline for responding to requests. Alberta's commissioner reported 31 such requests for extensions in 2010–11, 26 in 2011–12, and 68 requests in 2012–13.[114] The BC Commissioner has explored trends with respect to timelines, responsive records, and the administration of fees. That review was undertaken in the wake of a report by the Commissioner that there had been a 123 percent increase in time extension requests from 2011–12 to 2013–14. The report found that the average on time response across all ministries fell from 93 percent to 74 percent and average processing times have increased from 22 to 44 days. [115]

113 Canada, *Reducing Delays in the Processing of Access to Information Requests* (2012).

114 Alberta IPC, *Annual Report 2012-13,* p 25.

115 BC IPC, *Annual Report,* p 15, and IPC BC Commissioner *Special Report* 23 September 2014.

What we heard

From organizations

Office of the Information and Privacy Commissioner

In its initial submission the OIPC wrote very little about timeliness of processing requests for access or review. The only substantive recommendation respecting time limits was to expand the time available to the Commissioner for "informal resolution." Reviewing that submission is important to understanding the process and how it affects delays in achieving the access to which the citizen is entitled. The OIPC wrote:

> Section 46 deals with informal resolution of a request for review. Subsection 46(1) provides that the Commissioner may take the steps he considers appropriate to informally resolve a request for review to the satisfaction of the parties involved and in a manner consistent with the *Act*. Subsection 46(2) provides that where the Commissioner is unable to informally resolve a request for review within 60 days, the Commissioner is required to review the decision, act or failure to act of the public body and to complete a report under section 48 (contingent on whether the Commissioner determines that any of the provisions in 46(3) apply).
>
> In our submission to Mr. Cummings during the last *ATIPPA* review, this Office explained the challenges involved in completing the informal resolution process during the 30-day period that was set out in the previous version of subsection 46(2). We pointed out that the laws in other Canadian jurisdictions authorize the use of an informal resolution or mediation process prior to a review or inquiry being conducted by the commissioner, and most do not set time constraints within which this process must be completed. Nova Scotia and New Brunswick are exceptions, setting time limits of 30 and 45 days, respectively.
>
> This Office recommended that section 46(2) be amended to eliminate the reference to a 30-day time restriction for the informal resolution process. Mr. Cummings agreed and proposed that the Commissioner be provided with the discretion to determine the length of time for the informal resolution process in all cases. Bill 29 amended subsection 46(2) to increase the informal resolution period from 30 days to 60 days.
>
> Approximately three-quarters of our Reviews are resolved informally, and it is typically the preferred outcome for all parties, primarily because of the timely result. However, informal resolution can be a long process in itself. Sometimes a large volume of records is involved, and there can be an extended back and forth process to ensure that the *ATIPPA* is applied correctly, which can include negotiating the release of additional

> records. Sometimes public bodies simply need additional time to undertake tasks necessary to advance the informal resolution process, which can involve additional searches for records, reconsidering the application of exceptions, and in some cases reconsidering the exercise of discretion for discretionary exceptions. Sometimes applicants themselves request that the process be extended to accommodate their own professional or personal obligations.
>
> Informal resolution requires the active involvement of all parties. Our approach has been that as long as there continues to be a reasonable prospect of progress in the informal resolution process and we continue to have the support of the applicant and public body, we believe that the informal resolution process should proceed. Even when the entire matter is not resolved informally, it is helpful in preparation for the formal Review, and ultimately the Commissioner's Report, to clear the decks of any matters that can be resolved informally so that the Review and Report can focus only on any intractable, outstanding issues. We therefore recommend that the time limit for informal resolution be removed, which would be consistent with our position that the Commissioner's staff should continue informal resolution efforts as long as there is progress towards resolution and the parties agree to continue the process.[116]

When it was suggested to the Commissioner that the time limits for informal resolution were already lengthy, and perhaps the time limit should be reduced instead, he replied:

> I think what you're suggesting and what you're commenting on is ideal and makes me a very happy person as the commissioner to see this kind of a turn around, this kind of production but I think we're dealing with resourcing, we're dealing with to some degree, a culture shift and buy in and it's… we're not there yet Sir.

It was also suggested to him that extended time limits could drive that culture. He responded:

> It does to a degree but in some cases, from our office's perspective, the individuals have already dealt with the public body and they're coming to ask us now can we help and in very simple terms and so we start negotiating with the public body and try to reduce the amount… the scope of the request and to do anything we can to provide some level of satisfaction for the applicant. And it's like this void you get sucked into it and we're at day 27 of our informal resolution now and somebody's on vacation for two weeks for example or someone is sick and so, rather than cut it off and go do the process of asking for public body and the applicant to make submissions and we'll do a review, produce a report at the end of what we recommend to the public body, they may or may not agree with the recommendations, they may maintain their position that the information should not be withheld for whatever reason. So we tend to go the extra step day by day by day and yes, it… so it's all in… for the process of trying to get at least some resolution as quickly as we can **and yes, the timelines are terrible**.[117] [emphasis added]

When he appeared before the Committee as its first presenter, the Commissioner concluded his opening remarks without addressing timeliness. The Committee had, however, received numerous comments in other written submissions about delays in obtaining access to requested information. Based on those comments, the Committee drew the Commissioner's attention to his comment that the office of "Commissioner was created to have a timely and cost effective means of accessing information." He was asked why, if somebody is simply seeking a document, or two or three documents, or a relatively minor amount of information, it should take more than four or five days. The Commissioner replied:

> I totally agree with you Sir and in many situations that's exactly what occurs, what we're dealing with by the time situations come to our office, problems that have developed between the applicant and the public body and for whatever reason, it could be volume of the records, it could be a situation where you got an applicant…constantly applying to a particular public body, a bad faith has developed and there is not the level of cooperation that should be there, all these things.[118]

The causes of the lengthy delays in proceedings before public bodies were pursued with the Commissioner. The Committee's concern was expressed to him in the following manner:

116 OIPC Submission, 16 June 2014, p 39.

117 OIPC Transcript, 24 June 2014, pp 56–57.

118 *Ibid* 49–50.

> Your presentation employs the old adage "**justice delayed is justice denied"** and translates it to **"access delayed is access denied**", and that's a credible assertion. Don't those time limits invite delay? They have a 60 day time limit, doesn't that say you can sit and do nothing for 45 days and then the last few days and start at it, and then you've got to ask for an extension time and why … would there be any problem with having a shorter time frame, say 10 days, respond within 10 days or a week or something of that order unless the nature of the search involved or the nature of the request was such that an extension is required in which case, ask you for… to approve an extension. Would that make any contribution to reducing these delays if you only had to respond in that way then you only have a part time *ATIPPA* coordinator, if you had to respond on a timely basis then you'll have the *ATIPPA* coordinators you need to do it, will you not? You put them in place if you're required by law but if you got 60 days to think about it and sit and do nothing, doesn't that invite delay?[119]

That resulted in the following further exchange:

> Mr. Ring: Yes and I totally agree that in some situations where a public body is particularly busy or the coordinator particularly busy or you have multiple requests that you're dealing with that they, they actually don't get at the file until day 25 and then the first thing in the *Act* as it stands now that head of the public body has the ability…to extend it further of 30 up to 60 days and then beyond that ask the commissioner for an extension. In an ideal world sir I could not agree more with you but I don't think that in terms of Newfoundland legislation that we're that far out of sync, if at all, with other jurisdictions across the country where the reality of getting this kind of work done, in a perfect world where there was resources allocated at the public body level it would be… it would be ideal but…
>
> Chairman: Our mandate is to make recommendations that will make the operation better. The fact that they have a different standard or a lesser standard in most or all of the other jurisdictions doesn't diminish the burden of that mandate.
>
> Mr. Ring: I'll agree.
>
> Chairman: Would your office be prepared to express at a later time because it's not really contained in your submission now, at a later time, more appropriate time limits that would achieve the objectives of the *Act* and provide for timely disclosure would still allow it to operate in such a way that it doesn't unduly interfere with the normal operations of public bodies but that should be more responsive, I saw there was time at 60 days and 90 days, it's just, off the top of my head it doesn't seem right, particularly in a day and age when everything is computerized and you can access it or locate it by putting an inquiry into a computer for the most part, there's always going to be circumstances when you have some trouble. But isn't there, can't those time limits be improved, would your office in the meantime and at perhaps some later time, give the committee some advice as to what might be better time limits?
>
> Mr. Ring: We'd be more than happy to do that sir and we'll provide some commentary and some recommendations and look at the pros and cons in terms of the reality of dealing with these on a day to day basis. It's a question again, I keep referring back to the fact that I believe it's a resourcing issue at the public bodies and I think also it's not all public bodies have bought into this process as readily as others. And so yes there are public bodies that I believe procrastinate and I believe wait till day 28 to get out an issue and then automatically the head's going to extend it. So some of that does occur and we address it when we can at our office but again, when you have recommendation power it can only bring you so far.[120]

Unfortunately, the OIPC did not later suggest "more appropriate time limits." The only further references to timeliness were contained in the supplementary submission of the OIPC, filed on 29 August:

> It may well be the case that the legislated time lines can be tightened in order to better serve the public. It is quite possible that the first 30 day extension, which can be applied unilaterally by a public body, may be being abused. We see no reason why all such extensions should not have to be approved first by the Commissioner. That being said, we have not encountered a major problem with public bodies not meeting the time frames as they are currently mandated by legislation. If there is such an issue, applicants are not choosing to bring it to our attention.[121]

The only other recommendation having some connection with time limits was in the initial written submission of the OIPC and it recommended, without any

119 *Ibid* 51–52.

120 *Ibid* 52–54.

121 OIPC Supplementary Submission, 29 August 2014, p 2.

detailed discussion, an amendment that would make it mandatory for the head of a public body to respond to a request within 30 days, rather than the present language, which requires only that the head of a public body shall make every reasonable effort to respond.

Mr. Murray, the Director of Special Projects for the OIPC, also commented on the issue of timeliness of responses:

> Another issue that we noted I think and there was some talk about during our presentation and there's been other discussions about it was the timeliness of responses by public bodies to access to information request. And one of the things that we did in 2012 shortly after the Bill 29 amendments; we began to notice an increase in the number of complaints to our office that the timelines were not being met. That people were not getting access to information for three or four or five or six months after they had filed their requests. And normally our experience from 2005 is you get one or two of these a year.
>
> Just every now and again a public body completely blows it and that's just life and we'll deal with it and if we can resolve it informally we will, if not we'll issue a report and draw attention to the errors of the public body and make recommendations. But in 2012 they were really starting to pile up and we were wondering what was going on and so it became a serious enough issue that in January 2013 we issued a news release in conjunction with a report on one of these cases and I believe we had 12 or 14 files piling up of what we call a deemed refusal. Because the *Act* says that if they do not provide the response within the time allotted by the *Act* they are deemed to have refused to provide — they are deemed to have said basically no to the access request and so we call it a deemed refusal.
>
> But once we issued that news release we engaged with the ATIPP office, the minister responsible for the office of Public Engagement and senior staff and they committed right away to getting the message out throughout government that they've got out be a completely different approach to the timelines, we've got to have much better compliance and aiming for 100%. And over the course of the next several months we finished some investigation, issued a few more reports on files that we had already accumulated.
>
> But by February 2014 which was just over a year later, we issued a follow up news release indicated that the issue had been resolved from our point of view and no further request for review or complaints about that late — people not getting a response until after legislated timelines. No further complaints have come into our office. So currently we are not experiencing that issue, now if it's possible that some applicants are getting late replies and not coming to our office, we don't know. But I mean the statistics from the — presented by the Office of Public Engagement show that their records anyway show that they are at 100% compliance in meeting the legislated timelines. That would be the 30 days or the extended timeline. [122]

When Mr. Murray was asked at the hearing in June if there was a logical basis for having a 30-day time limit and why it should not be 15 or 10, he replied:

> I have certainly encountered situations where I'm not surprised at all that it took 30 days but you got to remember that we get the cases before us that are the most difficult, the most complicated, with the largest volume of records and things like that. So if someone asked for a small document that's fairly straightforward perhaps there's no reason at all that it should take any more than a few days. It all depends — because quite often what we've seen in our office, again, we don't see all the routine access requests, we just see the ones that come to us for review. I've seen plenty of access to information requests which are worded something along the lines of I'd like to receive all the information about topic X within the control and custody of your public body. So if you're the access and privacy coordinator you're knocking on office doors up and down the hallway, "have you got anything on this subject", you're getting the IT people in to do a scan of everybody's computer to go through everyone's email records, to look at the backup logs, to look down in the basement where they keep the files from older than 3 years ago and they're pouring through that stuff. So there can be a big challenge for certain type of requests and I think the reason why the — and you'll find that 30 days is pretty standard across the country. So I think the reason why you find that is for those reasons. Now I know internationally you will some shorter time periods. I couldn't quote you any specific examples but I know there are shorter time periods than 30 days but I can tell you that I have seen a fair number of access to information requests that I'm not surprised at all that they took 30 days or longer.[123]

Those comments were supplemented by further comment by the Commissioner when he added:

> An example I suppose that we could use for comparison purposes is that since Bill 29 the commissioner's office has

122 OIPC Transcript, 21 August, 2014, pp 36–38.

123 OIPC Transcript, 26 June 2014, pp 21–22.

> the authority to extend time limits beyond 60 days the original 30 days extended by the head and now further and it's not uncommon for a public body with some good legitimate reasons to come in and say that because of this, that, and the other thing we need more time to do this, will you extend it another 3 weeks or another month. Now we will look at the circumstances look at the argumentation and say no, 5 working days is all that should believe necessary reasonably to deal with this issue. So we've not carte blanche said okay if there's time extension request we'll give it to you. It has to be very well substantiated and we do not routinely give extensions beyond what we feel is necessary and is not been problematic. So public bodies will some more than others take the line of least resistance and if they got 60 or 90 then that's what they're going to take.[124]

Mr. Murray was also asked about the length of time involved in the informal resolution process and the review process. The Chair asked him about the time involved in investigating requests for review and the writing of reports:

> [The reports] take the form of a decision of the Court of Appeal doing an assessment of the factual situation, an assessment of the applicable law, an assessment of the historical jurisprudence and it runs on, I mean why is that necessary? Why is all of that necessary when somebody is simply looking for access to a document? Why can't we have a summary process…The Commissioner's role could provide for a more expeditious release of information.[125]

Mr. Murray's response included these comments:

> We take it very seriously that, you know we don't want to make, you know judgement calls off the top of our head on these things, because each case can, you know as you know brings different facts to bear and require different interpretations and we also want our reports to be able to be used as tools for education for public bodies. We don't want to have to write the same report 10 or 15 or 20 or 50 times. We want to be able to write one report that deals with a particular type of circumstance that we encounter and be able to say, look, in the future and we do this all the time and then we use this as a tool in informal resolution. When we get a new request for review that deals with a subject that we've dealt with in another report in the past, where we've sorted it out in detail as to how this type of situation should be dealt with we can say it to the public body and/or to the Applicant when we're trying to resolve it: Look, this is how this type of case goes. This is how we've decided this type of case in the past. Now, if you want to keep going and make this a formal report, you know we can go down that route, but we're suggesting that this should be resolved informally this way or that way based on this report that we've decided in the past and the one of the parties, the public body or the Applicant or the third party can see our reasoning and can see the case law that we've cited, can see that it's well researched and well thought out and it's a great tool for informal resolution.[126]

The Federal Information Commissioner

The Federal Information Commissioner was asked if she had encountered any compelling methods for dealing with excessive delay on the part of public bodies. She responded:

> Well, in that respect I must say I've looked at the *ATIPPA* specifically because the rules at the federal level are different in terms of time extensions. … So the situation here in Newfoundland and Labrador under the *ATIPPA* is different.
>
> When we look at the initial time to respond, the Organization of American States, I think, talks in their model about 20 working days which is along the same lines as the 30-day timeline that exists here. And then, if I'm not mistaken, here under the legislation there is another 30-day extension that's possible at the behest of the institution, and then they have to seek permission of the Commissioner for an extension beyond that.
>
> ...It has to be approved by the Commissioner after 60 days, essentially, so there is quite a lot of discipline here in this piece of legislation. It is not inconsistent, really, with what's going on internationally. Before coming here, we did ask to see what's the volume of pages per request because in order to assess what's an appropriate time you need to have information about volume of pages per request. So, the average here is 37. Thirty-seven pages per request. Six hundred and sixty requests in the last fiscal year across 460 bodies covered by the legislation. And if you look at the details from the Office of Public Engagement in terms of each institution, the ones that receive the most requests they are looking at around between 30 and 40 requests. So institutions here overall in the aggregate,

124 *Ibid* 22–23.

125 OIPC Transcript, 24 June 2014, p 188.

126 *Ibid* 189–190.

> they're not dealing with high volumes of pages on their routine requests and they don't seem to be getting…huge amount of requests. It is nothing compared to Citizenship and Immigration Canada that receives over 20,000 requests. So, that's sort of the data I think one has to look at in terms of timelines, but I didn't see in here in the ATIPPA, in terms of the timelines, anything that I thought was inconsistent with international norms. It seems to be appropriate.[127]

Centre for Law and Democracy

The Centre argued that the 30-day provision for extension should be deleted, and retained only for exceptional circumstances. Michael Karanicolas said long delays have two impacts:

- They frustrate requesters and discourage them from using the system.
- Information often loses value over time, which becomes a major issue for journalists and commercial users.

In his oral presentation, Mr. Karanicolas, speaking for the Centre, said "it would be great" to see a culture shift in public bodies so that meeting time limits becomes "a core part of their mandate rather than something that they have to fulfill…the minimum requirements for."[128] He summarized the kind of provisions the Centre would like to see respecting time limits:

> The main thing that we want to see is an elimination of any possibility to go beyond 60 days. That's our main recommendation. Initial 30-day time limit with a requirement to respond within ten days and basically as a status update on what's happening, I think that that would be a good addition. Hopefully, that would prompt more initial action rather than waiting till day 25 or 26, as is mentioned.[129]

Memorial University

In its written submission, the university explained why it was recommending that the time limits not be changed and commented on what it saw as a defect. The submission stated:

> Memorial University submits that the time limits for responding to ATIPP requests are appropriate, as is the provision added in the 2012 amendments that permits the information and privacy commissioner to authorize a further extension of the time for responding to a request. Since that amendment (to s.16) in 2012, the university has asked the OIPC a number of times to permit a further extension and, in each case, the extension was granted. The flexibility offered by sub-section 16(2) in which the commissioner can authorize extension of the time limit for a period longer than 30 days is a flexibility that is necessary when, from time to time, an ATIPP request is for a particularly large volume of records, or the requester does not provide sufficient detail to enable the public body to identify records sought, or the request merits an extension that the commissioner otherwise deems to be appropriate.
>
> The *ATIPPA* does not allow additional processing time when an applicant modifies a request. A recent ATIPP applicant modified her request multiple times, each requiring a new search in accordance with the new parameters. The legislation also does not provide a pause in the 30 day timeline while a public body waits for clarification from an ATIPP applicant. In a recent case, the IAPP office waited 28 days for responses to requests for clarification. Despite numerous emails and telephone messages that sought to help the applicant to clarify the request, reduce fees and achieve a full response as efficiently as possible, four weeks passed before the request was clarified in sufficient detail by the applicant to enable identification of the records sought.[130]

From the media

Ashley Fitzpatrick of the Telegram

Ms. Fitzpatrick suggested there should be some mechanism that triggers independent review and automatic penalty for an unexplained delay in response to a request filed under the *ATIPPA*. She described one instance where she waited nearly seven months, but noted that she has not faced the same wait time since. She does not, however, expect any response before at least 30 days, as a matter of standard practice.[131]

127 Information Commissioner of Canada Transcript, 18 August 2014, pp 67–69.

128 CLD Transcript, 24 July 2014, p 122.

129 *Ibid* 123.

130 Memorial University Submission, 13 August 2014, p 9.

131 Fitzpatrick Submission, 25 July 2014, p 4.

From political parties

The Liberal Party, Leader of the Official Opposition, Dwight Ball

In the section of his submission entitled *Substance of Deliberations,* Mr. Ball told the committee about the 186 days it took to receive a response from the Department of Finance with respect to briefing notes and financial analysis on the Lower Churchill Project. "Within that six-month window," he said, "the fall sitting of the House of Assembly had come and gone, the debate on Muskrat Falls was over, and government formally sanctioned the Muskrat Falls project."[132]

The New Democratic Party, Gerry Rogers, MHA

The NDP brief cites "frivolous procedural delays…and illegal delays in response." They questioned the value of having a legislated 30-day response time, saying it is "sometimes ignored." In that vein, the NDP complained "when we do get a successful reply, it is always on the last day of their…30-day or 60-day requirement."[133]

From individuals

Edward Hollett

When discussing the unnecessary length of present timelines, amongst other things, Mr. Hollett also suggested we should not abandon that fundamental philosophical concept, the notion that the government ought to be directly responsible to its citizens. He added that part of what we have to do is remind government officials who they actually work for and that they do have a duty to provide a service to the public.[134]

Terry Burry

Mr. Burry recommended "timely responses" from public bodies to those requesting information. He also suggested the turnaround time should be, typically, no more than 10 days unless there are extenuating circumstances.[135]

Simon Lono

Mr. Lono commented briefly on this matter. In his initial letter to the committee, he wrote that time limits are "mostly observed but often disregarded for no obvious reasons."[136] At the hearing, he expanded on those comments.

> S. LONO: In terms of general provisions, not dealing specifically with parts of legislation but just sort of general matters, one is time limits. You talked yesterday, I heard a lot of discussions about time limits and the 30-day limits and 60-day limits and those kinds of things. In practice, the way it's really worked out is that if there is a 30-day limit then you're going to receive your information on the thirtieth day. If there is a 60-day limit, well you could be pretty sure that on the sixtieth day you're going to get an envelope on your desk.
>
> CHAIR: Or worse still, there might be action seeking, on the sixtieth day action seeking an extension.
>
> S. LONO: Yes, that's just as bad. And that doesn't take into account the all too frequent cases where time limits breeze by and nothing happens. It just takes forever in some cases for things to happen. And you don't even get an explanation for it.[137]

Dr. William Fagan

Dr. Fagan asked the question that seems to trouble a great many people seeking to rely on the access to information system: "Why does it take an agency the full 30 days to, and sometimes an additional day or two, to respond, when the request is for a copy of a letter and the applicant has provided the agency with the sender, the recipient and date?" He then said, "I get the impression that the applicant is being punished for requesting the information."[138]

Adam Pitcher

Adam Pitcher recommended "severe penalties…for unjustifiable delays in responding to requests."[139]

132 Official Opposition Submission, 22 July 2014, p 11.
133 New Democratic Party Submission, 26 June 2014, p 16.
134 Hollett Transcript, 25 June 2014, pp 42–43.
135 Burry Transcript, 24 July 2014, p 31.
136 Lono Submission, 24 June 2014, p 13.
137 Lono Transcript, 24 June 201, pp 40–41.
138 Fagan Submission, 25 June 2014, p 1.
139 Pitcher Submission, 27 December 2013.

Dr. Thomas Baird, Department of Mathematics and Statistics, Memorial University

Dr. Baird wrote the Committee after the presentation by Memorial University and expressed his opposition to, amongst other things, the university's position that the time limits remain unchanged. He did not address any aspect of the time limits. Rather he opposed five of the university's ten recommendations on several grounds:

- Only administration officials were represented on the university committee that prepared the submissions.
- There was "no representation from the faculty, students or any other group."
- The document was not approved by the Board of Regents or the Senate, so the submission does not legitimately represent the views of the university community.[140]

From government

The Minister responsible for OPE, the Honourable Sandy Collins

Prior to Minister Collins' appearance before the Committee, a written presentation was submitted by his office. It provided a great deal of information and statistics that were helpful for the Committee's assessment of the timelines and the timeliness of provision of access by public bodies. Generally, those statistics substantiated the impression the Committee had received from other sources that in the preceding year or so there had been noticeable improvement in on-time performance. The submission acknowledged that government had "placed increased emphasis on meeting the legislative timelines."[141]

The written submission explained the process involved in responding to requests for access. It also provided tables that showed the historical record of government departments, in terms of meeting timelines, during the past six fiscal years. Two of these are discussed below.

The minister emphasized that responding to requests can often take longer than 30 days. This can be the result of legislative requirements that involve consultations with third party businesses, other departments or individuals, and other causes. Requests involving third party business information often require additional processing time. This is a result of the requirement to notify a business when its information has been requested. In terms of the process followed by the ATIPP coordinator to process requests, the *Act* also requires coordinators to notify a business if a request may involve their business, including commercial information. The business then has 20 days to consent to release. If it does not consent, the head of the public body has 10 days to make a final decision on whether to release and notifies the business of its decision. Where the department intends to release information without the consent of the business and has notified the business of this decision, the business has 20 days to appeal this decision to the Commissioner. During this time, the department cannot release the information relating to the business.

The written submission of the OPE indicated that its ATIPP Office has begun publishing statistics on the Open Government website showing departmental response times, and the submission contained that table for the period from January 2013 to June 2014. The Committee obtained from the website the version updated to September 2014, which is included and discussed below.

After his presentation, the minister's attention was drawn to the perception of insensitivity resulting from the head of a public body's being able to delay beyond the statutory 30 days by simply extending the period for a further 30 days. He was asked if it would make more sense to get the permission of the Commissioner. He responded:

> Well, as long as the department is able to consult with the OIPC and explain their reasons for wanting the extension, I guess you'd be left in the same spot. And if it's relevant and reasonable I'd imagine the OIPC would grant that. So I think that's a fair comment...

140 Baird Submission, 25 August 2014.

141 Government NL Submission, 19 August 2014, p 8.

> But, again, back to your point of perception, I think that would clarify and give people a sense of comfort, yeah.[142]

The deputy minister, Rachelle Cochrane, added:

> But I see no reason operationally why the OIPC [should not approve] in all instances if that's where you're going.[143]

142 Government NL Transcript, 19 August 2014, pp 75–77.

143 *Ibid* 76.

Analysis

The Committee appreciated the statistical information that the minister presented in his written submission. One table in particular provided valuable information: statistics that included the number of applications government departments handled in each of the fiscal years from 2008–09 to 2013–14; the numbers and percentages of those that received a response within the 30-day statutory time limit; and the same information for those that were responded to within an extended time frame. Requests that were made before Bill 29 could be extended a further 30 days. Requests made after Bill 29 could be extended 30 days by the public body, or longer by the Commissioner. That is the table immediately below.

The portion of applicants that received a response within the basic 30-day time limit over those six fiscal years averaged 59 percent. That is hardly a sterling performance. Even when one adds to that 59 percent those for whom an extension was implemented, only a total of 70 percent were responded to within the statutory time limit. The percentage of public body responses within the statutory 30-day time limit had been steadily deteriorating from an unimpressive 72 percent in 2008–09 to a dismal 45 percent by 2011–12. Even with the statutory 30-day extension, the percentage responded to within 60 days in 2008–09 only increased to 80 percent. By 2011–12 that percentage had fallen to 56 percent. There was a very minor improvement in 2012–13.

Table 13: Timelines by Fiscal Year of Departments

Year	Total # of requests	Met		Met with Extension		Not Met		Met + Met with ext.	
		Total	%	Total	%	Total	%	Total	%
2008–09	259	186	72%	21	8%	52	20%	207	80%
2009–10	304	179	59%	23	8%	102	34%	202	66%
2010–11*	337	186	55%	34	10%	116	34%	220	65%
2011–12	273	123	45%	29	11%	121	44%	152	56%
Pre–2012 Avg.	293	169	58%	27	9%	98	33%	195	67%
2012–13*	317	157	50%	27	9%	132	42%	184	58%
2013–14	299	204	68%	77	26%	18	6%	281	94%
Post–2012 Avg.	308	181	59%	52	17%	75	24%	233	76%

Source: OPE Supplementary Submission 18 September 2014 (as Table 5a)

Fortunately, as Table 14 indicates that all changed drastically in fiscal year 2013–14.

Table 14: Access Requests (General and Personal) Responded to by Government Departments

Response Times	Timelines Met*	Timelines Not Met	Total Responses	% of Timelines Met
Jan-13	10	10	20	50%
Feb-13	23	10	33	70%
Mar-13	21	11	32	66%
Apr-13	26	19	45	58%
May-13	26	5	31	84%
Jun-13	17	3	20	85%
Jul-13	27	6	33	82%
Aug-13	33	1	34	97%
Sep-13	23	1	24	96%
Oct-13	26	0	26	100%
Nov-13	24	2	26	92%
Dec-13	26	1	27	96%
Jan-14	11	1	12	92%
Feb-14	25	1	26	96%
Mar-14	29	1	30	97%
Apr-14	24	0	24	100%
May-14	14	1	15	93%
Jun-14	28	0	28	100%
Jul-14	16	0	16	100%
Aug-14	28	0	28	100%
Sep-14	24	1	25	96%
TOTAL	481	74	555	88%

Source: OPE website[144]

Table 14 is an updated version of the table (5) presented to the Committee in the submission of the OPE. The updated table was retrieved from the Open Government website and it carries the information forward to September 2014. It indicates that, over a 21-month period starting in January 2013, departments have met 88 percent of requests within the statutory time limit,[145] with the monthly "timelines met" response rate exceeding 95 percent for the 12-month period October 2013 to September 2014, and reaching 100 percent on five occasions. The table requires some comment.

First, it is apparent from Table 13, also presented by the minister, that this excellent on-time performance is a recent development. In Table 13, the statistics for the 2013–14 fiscal year stand in stark contrast to the statistics for the preceding five fiscal years. Something significant and beneficial, that produced a commendable improvement in public body performance, happened during that year.

Second, the difference between the statistics for the first six months and for the last six months of the calendar year 2013 is also striking. The average monthly on-time performance in the first six months was 69 percent, but the average in the last six months was 94 percent. Something was being done differently, starting about mid-year 2013 and continuing through the first nine months of 2014. Something appears to have happened in May 2013 that resulted in a jump from an average of about 60 percent on-time performance to 84 percent.

A third comment is a caution that the table does not indicate which, if any, of the responses each month included an extension added by the head of the public body for up to 30 days, and which, if any, also had further extensions approved by the Commissioner. The preceding table does indicate that of the 299 for the whole year, 95 had extensions, and of those, 77 responses were made within the extended deadline but 18 were not.

A fourth comment: the single most significant feature of Table 14 is that the striking improvement that started in May 2013 at 84 percent and by three months later had reached 97 percent, in the next 13 months never fell below 92 percent, and in 5 of those 13 months reached 100 percent.

144 The Committee notes some variations between the two tables for fiscal year 2013–14 but is unable to account for these variations.

145 *Timeline is met* means a response has been sent to the requester within the 30-day limit, within 60 days if the head of the public body unilaterally extended the limit, or within an uncertain time if the Commissioner approved an extension beyond those 60 days. Accessed online: http://www.open.gov.nl.ca/information/timelines.html.

That fourth comment provides the Committee with all of the evidence it needs to support its conclusions that the basic time limit for response should not be increased beyond the existing 30 days, there is no need for public bodies to have a unilateral right to extend that basic time limit, and extensions shown by public bodies to be necessary can be approved by the Commissioner.

The Committee concluded that the significant improvement in timeliness of performance over the past year or so was likely driven by one or other, or more likely a combination of two circumstances. One is the effort of the Commissioner in drawing public attention to the tardy performance by public bodies in his news release on the subject in January 2013. The other is the minister's statement that government is placing "increased emphasis" on timeliness.

The Committee can only assume that the increased emphasis is real and will continue. The Committee expresses the hope that this achievement will be the incentive that motivates public bodies concerned to continue on the same course. That could be helped by government finding some means to acknowledge those who have been involved in that achievement.

The increased efficiency clearly demonstrates how much better the system can work when there is not only a statement of commitment to openness and access, but also sufficient commitment at the highest levels of government to cause it to be implemented.

By way of a national comparison regarding timelines, the Committee notes that the Canadian newspapers' annual audit of national public bodies contained an independent assessment of Newfoundland and Labrador's performance. Newfoundland and Labrador, Prince Edward Island, and the Yukon responded most quickly to requests, while British Columbia was the slowest.[146] Newfoundland and Labrador responded within the legally required 30 days to 13 of 16 requests, or 81 percent. (In terms of content, 8 of those requests were released in full and 4 were denied in whole or in part.)

The Committee's concern about delays in achieving requested access originally focused on delays in responses by public bodies. But information provided in responses to questionnaires sent by the Committee to ATIPP coordinators prompted the Committee to do a more extensive assessment. Committee staff examined all reports prepared by the OIPC in the course of dealing with requests for review and investigating complaints from 2006 to date.

Those reports usually contained a detailed explanation of the entire process of each review or complaint, including the dates when each stage of the process started and completed. That enabled the Committee to prepare a detailed table of the time involved at each stage of the process, from the time when the request for the record was made to the public body through to the OIPC report and the final delivery of the record, or refusal to deliver, for some 101 reviews or complaints filed over more than eight years.

The Committee concluded, initially from its examination of the summary of timelines involved in the 18 requested interventions by the OIPC (shown in Table 9), and later based on supplementary information, that delays recently experienced during the initial public body stage are not the major factor in the overall delay in access to the requested information. The fuller summary in Appendix F demonstrates that to have been the case for some time. The delay that resulted after the OIPC became involved was almost always many times longer than the delay at the initial public body stage.

It is not likely that all of that delay is due solely to procedures at the OIPC. Nevertheless, it is the Commissioner who is in a position to control those matters and has at least some power to be decisive and cause processes to be different. There may be room for further enhancement of the Commissioner's power, but decisiveness, firmness, and initiative on the part of the Commissioner will be even more important in achieving a user-friendly system of access to information and

146 Newspapers Canada, 2013/2014 FOI Audit.

protection of privacy that, when compared with others, will rank among the best.

The Committee also assessed the elements of the review stage of the matters covered in the Commissioner's reports (referred to in Table 9), to identify the times involved in the informal review process. The table in Section 7.4 of this chapter provides that information and displays it in the context of the overall time involved at both the public body stage and the OIPC review stage. The times involved are both surprising and problematic, particularly when they are considered in the context of the express direction of the *ATIPPA* that:

> Where the commissioner is unable to informally resolve a request for review within 60 days of the request, the commissioner shall review the decision, act or failure to act of the head of the public body, where he or she is satisfied that there are reasonable grounds to do so, and complete a report under section 48.

The Committee concludes that the OIPC has not respected that very explicit direction. Even though failure to conform to such statutory direction may not invalidate any subsequent report,[147] that record of delays discloses unacceptable practices that provide justification for the criticisms of so many users. The flaw in those practices is clearly demonstrated by the delays noted in the table, but it was best expressed by Ashley Fitzpatrick of the *Telegram,* when she wrote:

> Even months after the legislated deadline for a response in my case, there was a feeling I needed to bargain or negotiate for information, when what I was seeking was a more forceful hand, without having to go to court. I felt—on all sides—there was little appreciation for the fact I was placed in a position where the government had clearly broken the law, to the point where no one could deny it, and yet the onus was being placed on me to address it.

The public body continues to be involved during the informal resolution stage. Information provided by the Commissioner and the OIPC Director of Special Projects suggests that the extended time involved in efforts to achieve informal resolution is driven in the main by delays in pushing every proposal through the bureaucratic levels of the public body.

However, as noted in the commentary on the role of the Commissioner and the need for change in the operations of the OIPC, a major factor appears to be the OIPC's overly formalized process of writing minutely analyzed reports in the style of Court of Appeal judgements that are quoted and referenced across the jurisdictions of the country. If waiting months, and often years, for the requested information were acceptable, then that approach might work. However, the priority is a speedy, cost-effective decision on whether or not the requester is entitled to access the requested record. The current approach works against achieving those goals.

The consequences of the OIPC's frequent inability to comply with time limits are obvious. They contribute significantly to the fact that the overall operation of the *Act* at present is anything but user friendly. While it is, as Mr. Karanicolas of the Centre for Law and Democracy acknowledges, far from being among the worst of international regimes, it is certainly also far from being among the best, which is the objective indicated when the former Premier announced the appointment of the Committee.

Unfortunately, legislating stricter time frames will not alone create a system that will be user friendly and rank among the best. It is, however, an essential component of the total package of reforms necessary to achieve at least some degree of success towards achieving that objective. An unrelenting commitment to the principle of open government and accountability, coupled with the dedication of those at the highest levels of government and in all other public bodies involved, is critical to real success in achieving the desired results.

147 See *Oleynik*, *supra* note 97 at paras 50–61.

69. The Committee recommends that the revised statute make provision for the following:

(i) Processing request for access

The head of a public body shall make every reasonable effort to assist an applicant in making a request for access to information or correction of personal information and to respond without delay to an applicant in an open, accurate, and complete manner. Following the procedures and any applicable variations or extensions provided for in the statute, the head of a public body shall respond to the request within 20 business days of receipt of the request, or within the time resulting from application of the procedures set out in the sequence of actions and timelines in Recommendation 70.

(ii) Making a complaint to the Commissioner

If a requester is dissatisfied with a decision, act, or failure to act of a public body, arising out of a request for access to information or correction of personal information, or a third party is dissatisfied with a decision to release information, either may, within 15 business days of notice of the decision being given by the public body, complain to the Commissioner about the decision, act, or failure to act of the head of the public body. Upon receipt of a complaint, the Commissioner shall provide a copy to the public body and any other party involved, and advise them and the complainant of their right to make representation to the OIPC within 10 business days of the date of notification.

The Commissioner may take any steps that he or she considers appropriate to resolve the complaint informally, to the satisfaction of all parties and in a manner consistent with the *Act*.

The Commissioner may terminate the attempt to resolve the matter informally at any time that he or she concludes it is not likely to be successful and shall terminate it within 30 business days after receipt of the complaint, unless before that time the Commissioner receives from each party involved a written request to continue the efforts to resolve the matter informally beyond the expiration of that period of 30 business days until the matter is informally resolved or a further 20 business days expire, whichever shall first occur.

The Commissioner shall, not later than 65 business days after receipt of the complaint, complete a report. That time limit is firm, whether or not the informal resolution period has been extended. The report is to contain the Commissioner's findings on the review, his or her recommendations, where appropriate, and a brief summary of the reasons for those recommendations. The Commissioner shall then forward a copy to each of the parties.

Within 10 business days of receipt of the Commissioner's recommendation, the public body shall decide whether it will comply with the recommendation of the Commissioner or whether it will seek a declaration from the Trial Division that it is not required by law to so comply, and shall within those 10 business days serve notice of its decision on all other persons to whom the Commissioner's report was sent, and inform them of the right of any party that is dissatisfied with the decision to appeal the decision to the Trial Division and of the time limit for an appeal.

If the public body fails to make that decision and serve the prescribed notice within the time specified, or having done so fails to carry out its decision within 15 business days after receiving the Commissioner's report, the Commissioner may prepare and file an excerpt from

the Commissioner's report, that contains only the recommendation that the public body grant access to a record or correct personal information, in the Registry of the Trial Division of the Supreme Court, and the same shall constitute an order of that court.

Whether or not the public body decides to comply with the Commissioner's recommendation, if the requester or third party is dissatisfied with the decision received from the public body, the requester or third party may, within 10 business days of receipt of the decision of the public body, appeal to the Trial Division of the Supreme Court, and if requested, either or both of the Commissioner and the other party shall be granted intervenor status.

(iii) Appeals to the Trial Division of the Supreme Court

Where an appeal by either a requester or a third party is taken to the Trial Division or a public body makes an application to the Trial Division for a declaration pursuant to the *Act*, the fact that there has already been significant delay in final determination of entitlement to access the requested information shall be sufficient to establish special urgency, and the matter shall proceed in accordance with the *Rules of the Supreme Court of Newfoundland and Labrador, 1986* providing for expedited trial, or such adaptation of those rules as the court or judge considers appropriate in the circumstances.

70. The Committee further recommends that the timelines and sequence of actions to be applied to all procedures from the making of the initial request for a record to the taking of an appeal to the Trial Division of the Supreme Court should be set out in a readily identifiable part of the statute. Those provisions should reflect the following:

Sequence of action and timelines

Day Request Received

Any employee of a public body, who is not the ATIPP coordinator of that public body, receiving a request for access to information or for correction of personal information shall date and time stamp the request and, without disclosing the name of the requester to any other person, forward the request to the ATIPP coordinator for the public body.

Upon receipt of that request the ATIPP coordinator shall advise the requester of its receipt and start the search process at the earliest possible opportunity. The ATIPP coordinator shall not disclose the name of the requester to any other person other than coordinator's assistant and the Commissioner, except where it is a request for the requester's personal information or the requester's identity is required to respond to the request.

Whenever any notice is to be given to, or information is to be received from, the requester or a third party by the public body, it shall be given or received through the ATIPP coordinator.

Business Day 1 to Business Day 5

The head of a public body may, upon notifying the requester that it is doing so, transfer a request for access to a record or correction of personal information to another public body, within 5 business days after receiving it, where it appears that the record was produced by or for or is in the custody or control of that other public body. That other public body shall thereafter treat the request as if it had received the request from the requester on the date it was received from the public body that received it from the requester.

OR

If the public body concludes that the request is frivolous or vexatious, or for any other valid reason it should be disregarded, the public body may, no later than 5 business days after receipt of the request, apply to the Commissioner for approval to disregard

the request. The Commissioner shall respond to the public body's application without delay and in no event later than three business days after receiving it. If the Commissioner approves disregarding the request, the public body shall immediately advise the requester.

Business Day 10

The head of a public body will release the record if it is then available and the law does not permit or require the head to refuse release, or correct the personal information if the requested correction is justified and can readily be made.

OR

The ATIPP coordinator shall forward an advisory response to the requester advising:

- any then-known circumstance that could result in denial of the request
- any then-known cause that could delay the response beyond 20 business days from receipt of the request and the estimated length of that possible delay
- the estimated cost, if any
- any then-known third party interest in the request
- possible revisions to the request that may facilitate its sooner and less costly response
- any other factor, of which the public body is then aware, that could prevent release or correction of the record as requested within the 20 business day basic time limit

Business Day 10 to Business Day 20

If circumstances make it reasonable that the requester be informed of factors arising in the course of addressing the request, of which the requester was not previously made aware, that may adversely affect disclosure or correction of the record as requested within the time required, the public body shall forward a further advisory response or responses to the requester.

OR

The public body will forward to the requester the final response as soon as it is possible to do so, but no later than 20 business days after receipt of the request, unless extension of that time has been approved by the Commissioner.

OR

As soon as the public body concludes that an extension will be required, and no later than 15 business days after the request was received, the public body shall apply to the Commissioner for an extension of time. The Commissioner may refuse the requested extension or, if satisfied that an extension is necessary and reasonable in the circumstances, grant an extension for the minimum period that the Commissioner considers to be necessary for the public body to fully respond. The head of the public body shall notify the requester of the extension, if approved.

If an extension of time is granted, any procedures otherwise applicable shall continue to apply during that extended period, and the public body shall provide the requester with a final response within the extended time approved by the Commissioner.

OR

Where the public body becomes aware of third party interest, upon forming the intention to release the requested record, the public body shall make every reasonable effort to notify the third party. Immediately upon the public body deciding to release the requested record, the public body shall notify the third party of its decision to release the record unless it receives confirmation from the third party or the Commissioner that the third party has within 15 business days filed a complaint with the Commissioner or appealed directly to the Trial Division.

If the public body receives confirmation that the third party has filed a complaint with the

Commissioner or appealed to the Trial Division, the public body shall inform the requester and shall not release the requested record until it receives a recommendation from the Commissioner or an order of the court. Immediately after receipt of the Commissioner's recommendation, the public body shall notify the Commissioner, the requester, and the third party of its decision.

The public body shall withhold acting on its decision until the time limited for any appeal therefrom has expired and, if no appeal is taken, proceed with its decision, but if within that time an appeal is taken from that decision, the public body shall continue to withhold action on its decision pending an order of the court.

Chapter Eight

MUNICIPALITIES—ENSURING TRANSPARENCY AND ACCOUNTABILITY WHILE PROTECTING PRIVACY

Introduction

One of the clearest examples of the collision between privacy concerns and the right to access information played out in submissions regarding municipalities, and the way in which those organizations are applying the provisions of the *ATIPPA*. The Committee heard from several sources that some municipal governments take a restrictive view of what information can be disclosed to requesters because of concerns about how this will affect the personal information of third parties. We heard that this concern about privacy goes so far as to include the documents prepared for municipal councillors, whose role it is to make well-informed decisions on local matters. The Committee heard that this restrictive interpretation of the right to access in some municipal governments is the result of input from the Department of Municipal Affairs and advice from the Office of Public Engagement ATIPP Office.

Newfoundland and Labrador's 276 incorporated municipalities account for sixty percent of the 460 public bodies covered by the *ATIPPA*. During the Committee's work, seven submissions raised issues related to municipalities in four main categories:

- publication of personally identifiable information, such as the names of residents on letters and the names of development applicants;
- release of information related to council business (the amount paid to settle a dispute with a resident);
- confusion about the compatibility of section 215 of the *Municipalities Act, 1999* (documents that "shall" be made available by council for public inspection) with the privacy sections of the *ATIPPA*; and
- development of local and/or regional corporate structures by municipalities that are not specifically mentioned in the definitions section of the *ATIPPA*.

The Committee did not hear from Municipalities Newfoundland and Labrador or the Department of Municipal Affairs on these issues.

Pre–Bill 29 legislation

Prior to the Bill 29 amendments, municipal governments were affected by several parts of the *ATIPPA*, including:

- section 2 defines a public body to include a local public body and therefore the *ATIPPA* applies to municipalities
- section 19 protects local public body confidences, including drafts of resolutions, bylaws, private Bills, and the substance of deliberations of meetings where the *Municipalities Act, 1999* or another Act allows a private council meeting
- section 30 prohibited disclosure of personal information to a requester, except for classes of information identified in that section
- section 33 sets out that personal information is to be collected directly from the individual, unless it is collected for a particular purpose such as law enforcement or determining suitability for an award
- sections 39, 41 and 42 set out the circumstances

where personal information could be released, and
- section 40 establishes that the use of information must be consistent with the purposes for which the information was collected.

Bill 29 amendments

The amendments in 2012 introduced a number of changes to the *ATIPPA* as far as municipalities were concerned, including:

- section 19 stated that the protection for draft legislation or bylaws would not be lost if the drafts had been discussed only incidentally in a public meeting;
- section 30 introduced a harms test for personal information, which established that public bodies must refuse to disclose information that would be an unreasonable invasion of a third party's personal privacy; and
- section 30 also set out three groupings of circumstances as guiding criteria:
  - i. circumstances where the disclosure is not an unreasonable invasion of a third party's personal privacy;
  - ii. circumstances where disclosure is presumed to be an invasion of a third party's personal privacy; and
  - iii. a requirement that the head of the public body consider all relevant circumstances, including that the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny.

What we heard

The Commissioner's primary concern was to ensure that corporations owned by one or more public bodies (especially municipalities) are brought under the *ATIPPA* by adding a new clause to section 2(p), which defines the term "public body." The Commissioner stated such a move is necessary "in order to maintain an appropriate level of accountability."[1]

Submissions documented significant confusion about the use of personal information in some municipal business and public meetings. Participants recounted that all names were blacked out systematically in the information released by some municipalities, a practice that seemed to result from a fear of litigation. But disclosure practices in some other municipalities were less restrictive. The Committee heard from several sources that the personal information provisions of the *ATIPPA* had a chilling effect of causing municipal officials to feel they would be exposed to liability if they did not redact all references to personal information in council correspondence and documents.

Journalist Kathryn Welbourn of the Northeast Avalon Times, described the frustration of dealing with local municipal councils and their interpretation of the *ATIPPA*. She told of names of citizens and developers being blacked out on documents tabled at council meetings. This practice often made it impossible to know who was promoting land developments or other projects. Welbourn believed such practices contribute to a lack of transparency and accountability in local government:

> I have first-hand knowledge of the effect of the new privacy legislation on municipal government, which I believe is not only eroding public access to information but redefining public information, discourse and municipal governance, in ways I cannot believe were intended by provincial legislators.
>
> The first impact of the privacy legislation is simply that every name—with the exception of provincial ministers, councillors and town staff—is blacked out on every council document before it is released to the public, and in some cases is blacked out by town staff before the information is given to councillors.
>
> This includes: the names of developers and their

1 OIPC Submission, 16 June 2014, p 11.

> companies on development applications and correspondence; the names of properties on any documentation, study or correspondence; the names of groups and organizations; the names of provincial government officials on reports and correspondence; the names of residents on applications to council and correspondence; the names of family land on maps; the names of groups participating in events; the names of events not run by council; and even the names of citizens on public petitions.[2]

The Committee determined through its own research that various municipalities interpreted the privacy provisions differently. The Committee inquired as to where local officials and politicians went for direction on the issue. An email exchange with the town clerk-manager of Chapel Arm brought some clarity to the matter.

In her initial letter to the committee, dated 8 July 2014,[3] Tracy Smith raised concerns regarding "contradictions" between section 215 of the *Municipalities Act, 1999* and the *ATIPPA*. Section 215 of the Act requires councils to make several types of information available for "public inspection" during normal business hours, including adopted minutes of the council, assessment rolls, opened public tenders, financial statements, contracts, and permits. Section 215 requires a high level of disclosure of information held by councils, in order to ensure transparency in their decisions and actions, so that the people they serve can hold their municipal government accountable.

The correspondence from Tracy Smith arrived at the Committee's offices after journalist Kathryn Welbourn had related her accounts of information being blacked out on documents placed before councils and circulated to the media. Ms. Smith's correspondence suggested the issue was more widespread than the section of the northeast Avalon Peninsula covered by Ms. Welbourn's newspaper. In her initial email, Tracy Smith wrote that her council needed "guidelines and/or training sessions specifically for municipalities." In a follow-up email on 14 August, in response to the Committee's request for additional details on those concerns, she stated that advice regarding interpretation of the *ATIPPA* came from the Department of Municipal Affairs and from the Office of Public Engagement ATIPP Office. She also repeated the nub of Council's concerns regarding how the privacy provisions of the *ATIPPA* affect their work:

> Generally speaking, the biggest issue the Town has is what to include in the meeting minutes…Some towns have opted to omit all identifying information, while some have not. We would very much like to do things right and by the law. Our Council would like to have guidelines, specifically for municipalities, with respect to the minutes and other information that may be requested.[4]

The deputy mayor of Portugal Cove–St. Philip's, Gavin Will, related his frustration as a councillor at having important documents (development applications, applications for subdivisions, and correspondence) placed before him and other elected officials at council meetings, with names redacted. He identified "a culture of secrecy that has crept into public institutions in this province"[5] and indicated privacy legislation is being offered as a reason for non-disclosure of what he considers "publicly relevant information."

He also stated that he had been accused, in a signed letter, of partiality in a matter of rezoning in his municipality. Although the Council sided with him against his accuser and made the decision public, he was told that neither the contents of the letter nor its writer could be publicly identified. He pointed out that this did not give him a fair chance to answer the accusations publicly:

> The province's privacy legislation, or its interpretation at the municipal level, therefore unintentionally abets such attempts at besmirching the reputations of municipal politicians. If a council decides not to table such correspondence, and an accuser opts to remain anonymous, it becomes difficult for the public to assess the merits of a claim. The public requires access to all relevant information when such cases arise.
>
> I request that your Committee recommend all correspondence and development applications presented to municipal councils be publicly disclosed with limited exemptions, which includes staffing, some legal instances,

2 Welbourn Submission, 25 June 2014, p 1.

3 Town of Chapel Arm Submission, 8 July 2014.

4 *Ibid* 14 August 2014.

5 Will Transcript, 23 July 2014, p 51.

> and ongoing contractual matters. When such exemptions are granted, I suggest councils be required to disclose their existence in a timely manner and to broadly document the nature of the exemptions.[6]

Portugal Cove-St. Philip's Mayor Moses Tucker addressed the matter of relaying information to the public about "Development Applications and Applications for Sub-Divisions" that might relate to "Private Business, Financial Matters, Strategic Engineering Designs, and other Negotiations which may not be in the best interest of incorporated Companies or the Town to have delicate information made public." The mayor's statement suggests an underlying concern that harm could be caused (to whom is not clear) if details of such matters should be released before they form part of an "official record." In his words,

> There could be general information which might be released about zoning or other similar Town related information. But I'm sure there has to be limits on what can or ought to be released when it comes to the business world and related negotiations.[7]

Portugal Cove–St. Philip's resident Emir Andrews described a long process to obtain an accounts payable document:

> It took about six months to get a piece of information that was publicly available. It also has required a town resident having to go to the Office of the Privacy Commissioner to get a simple document that under law should be readily available to him or her; and the threat of that resident needing to take it to the Supreme Court if the town had still refused to provide the information requested.[8]

Ms. Andrews highlighted the commonly expressed concern that local municipalities are uncertain about interpreting the *ATIPPA*:

> This was a lot of unnecessary time, effort, and money because someone in a town office did not, apparently, understand the *Privacy Act*. My point in bringing this to your attention is my hope that you may be able to take steps to prevent such wastes of time occurring again.[9]

The effects of overzealous redaction are considerable. One observer argued that the systematic removal of personal information downgrades people participating in the democratic process "to the level of anonymous bloggers" and makes the municipal political process a degradation of public governance.[10]

Several submissions implied that the training of access coordinators across municipalities has not been a priority. Emir Andrews clearly believed training was vital:

> My main concern that really prompted me to… come here was my feeling that either the people responsible for dealing with ATIPP requests didn't understand the Act or didn't understand how to interpret it, or were being advised by someone else in the council office that they shouldn't provide it. Either way, my feeling was that they need better instruction or information, because as far as I'm concerned, several months of time and effort and money were wasted dealing with a request that should not have been contentious.[11]

The Committee followed up on the comments from participants about municipalities' alleged excessive protection of personal information when representatives of the Office of Public Engagement appeared. What follows is an exchange between the Committee Chair and the Director of the Access to Information and Protection of Privacy Office, Victoria Woodworth-Lynas.

> CHAIR: What effort is made through your office to make sure that the Department of Municipal Affairs has the means of getting proper guidance out to the people in the municipalities that are responsible for the administration of the ATIPP requirements?
>
> V. WOODWORTH-LYNAS: We've recognized the need for municipal-specific or municipalities-specific information relating to ATIPP because we do recognize that they have some unique challenges. So one of the things that we have been in the process of undertaking in our office is to work on developing specific materials for those municipalities, bearing in mind that there are other legislations at play besides our legislation, including the *Municipalities Act*. That legislation, of course, oftentimes will say things that may not necessarily be consistent with what our legislation would say, if you looked at it on its face.

6 Will Submission, 7 July 2014, p 2.
7 Tucker Submission, 22 August 2014, p 2.
8 Andrews Submission, June 2014, p 3.
9 *Ibid.*
10 Welbourn Submission, 25 June 2014, p 2.
11 Andrews Transcript, 25 June 2014, p 5.

I'll give you an example of the assessment roles within municipalities. Our legislation, of course, says you wouldn't provide names and addresses of individuals unless it was not an unreasonable invasion to do so. However, when you look at the *Municipalities Act* it specifically says you shall make available for viewing those municipal assessment roles, which include names and addresses. And as you know, our legislation says that where another legislation says it's permitted, then ATIPP is okay with that, basically. I mean, obviously simplified but.

So what we have been trying to do is figure out the types of questions. We do log what we think are the types of questions…that we're hearing from municipalities, we're trying to develop some materials that will answer those unique questions that municipalities are encountering where we have other legislations at play. So that would be something that we would be working with Municipal Affairs on. Once we get our information together we would discuss with them what we believe is kind of an appropriate guidance for those municipalities.

CHAIR: I'm concluding from your answer that there's been no specific effort to provide training programs for ATIPP coordinators in municipalities?

V. WOODWORTH-LYNAS: Not unique to them.[12]

The Commissioner was present at all the hearings. In his closing submission, he commented on the concerns that were raised about practices in some municipalities regarding release of names and other identifying information. OIPC Director of Special Projects Sean Murray acknowledged that the *Municipalities Act* and the *ATIPPA* take different approaches toward disclosing information. "There is an interaction between the *Municipalities Act* and the *ATIPPA* that needs to be looked at closely,"[13] he stated at the closing public hearing. But he said ultimately the problem is with the *ATIPPA*, because it says "only [personal] information that is necessary for the operating program of a public body…should be disclosed."

12 Government NL Transcript, 19 August 2014, pp 38–40.

13 OIPC Transcript, 21 August 2014, p 55.

Analysis

A rigid policy on the redaction of personal information in all circumstances has created situations that are frustrating for the public and even for elected officials of municipalities. This rigidity appears to be neither the spirit nor the letter of the 2012 amendments. The amendments contain provisions that suggest how to deal with the variable and highly contextual use of personal information. Since it began publishing its reports in 2005, the Commissioner's website has listed some eighteen different reports involving a handful of municipalities in the province. These should have provided guidance to municipal officials.

Few participants suggested changes to the provisions dealing with personal information. And no one seemed to envisage a special provision for municipalities. The frustration that was expressed seemed to stem from the interpretation by some municipal employees of the personal protection provisions of the *ATIPPA*. The answer to this issue is already present in the *Municipalities Act, 1999*, and the classes of information it specifies should be disclosed to the public in order that the activities of municipalities are transparent, enabling residents to hold their local governments to account. Protection of personal information is an important principle, but it cannot be permitted to override the accountability principle of local government.

Privacy provisions are notoriously difficult to interpret because their legitimacy depends on culture, social context, and the recipient of the personal information. The *ATIPPA* provides some useful context. The *Act* does not state that mentioning a name in a public context is automatically an invasion of privacy, and it lists a series of examples and criteria for the reasonable disclosure of personal information. Especially relevant in this context

is the principle which states the democratic tradition that public scrutiny is desirable for governments and public bodies. Section 30(5) of the *ATIPPA* is worded as follows:

> 30. (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; and
> (i) the personal information was originally provided to the applicant.

Section 30(5)(a) of the *Act* is especially important in the context of government. It refers to the challenge before municipalities: releasing enough personal information to allow activities to be subjected to public scrutiny.

In his most recent report on how the *ATIPPA* affects municipalities, the Commissioner gave useful guidance on the limits to protecting names in certain contexts.

> The general principle that public bodies should be accountable to the public for expenditure of public funds, including payments to individuals goes to the heart of the purpose of access to information legislation and weighs heavily in favour of disclosure.
>
> Across the country, Commissioners have found that one time payments made to citizens by a public body in settlement of legal claims do not constitute an unreasonable invasion of privacy, even where settlement resulted from arguably sensitive personal matters, such as claims for wrongful dismissal or other employment issues (i.e. Ontario Order MO-1184, Northwest Territories Review Recommendation 09-078), human rights complaints (i.e. Ontario Order M-1160), claims made by a former employee against former co-workers (i.e. British Columbia Order F10-44), and claims made against police agencies (i.e. Ontario Order MO-2040). [14]

The request referenced by Emir Andrews was for information about the amount paid to a named third party in settlement of a claim against the Town. Given the definition noted above, the request clearly encompasses the personal information of a third party. The record, if it exists, would contain the third party's name and, possibly, information about the third party's financial status, as the request is for a record of a payment made to the third party.

The question is this: given that the details constitute personal information, would its disclosure be an unreasonable invasion of privacy? All of the circumstances, including the factors set out in section 30(5), must be considered in this determination. If the disclosure did represent an unreasonable invasion of personal privacy, it would, under section 30(1), not be subject to disclosure.

This principle is even more significant at the municipal level. The *Municipalities Act, 1999* prohibits a large number of activities, even on one's own property without review of, and the grant of permission by, the Council. That is intended to protect the living circumstances and property rights of every citizen. Without having access to information and records submitted by a person seeking a permit, citizens cannot possibly be in a position to protect their own interests. They are also entitled to know full details of payments to or by a citizen in respect of these matters, and in respect of assessments and taxation. Citizens in a municipality are entitled to such information

14 OIPC, *Report A-2013-010*, 7 June 2013, at paras 13–14.

in order to see for themselves that Council is not imposing fees in a discriminatory manner, favourable or unfavourable to another citizen. In short, every person seeking a permit, benefit, tax reduction or exemption from a municipality must expect that all information provided to obtain that permit, tax relief or benefit, and on which the Council will render its decision, should be available for public inspection pursuant to section 215. All such entitlements are required to be decided in a public meeting, and everything necessary to defend the decision should be open to the public.

Those who appeared before the Committee complained of what they saw as excessive protection of personal information, carried out to the point of making some acts of municipal administration meaningless without the personal identifiers. Town meetings are public by tradition and law, and the overlayering of privacy considerations in recent years has created an unwelcome cloud over proceedings.

The Commissioner has attempted to provide guidance on the use of personal information in a public setting in reports of investigations. In a report dealing with, among other issues, the release of personal information by the City of Corner Brook he asks officials to consider the purpose of the information and he refers to his earlier report, P-2011-001:

> Any disclosure of personal information by a municipality at a public meeting of Council must be done in accordance with the provisions of section 39(1) of the *ATIPPA*, and even if such a disclosure is authorized by section 39(1), adherence to section 39(2) will ensure that only the minimum amount of personal information necessary for the purpose will be disclosed. When disclosing personal information, I urge public bodies to be cognizant of the reason for doing so. If the particular goal or purpose can be achieved without the disclosure of personal information, then public bodies should refrain from making the disclosure. This will hopefully clarify the issue and help to minimize any debate concerning how much personal information should be released.[15]

The Commissioner quotes at length from a submission made in this investigation by the Department of Municipal Affairs, outlining the recommended conduct of both public and private meetings. The Department explained that,

> […] privileged meetings should be held for discussion of matters where the holding of a discussion in a public meeting may be detrimental to the public interest or unduly prejudicial to a private interest (such as personnel matters). This must, however, be balanced with the overriding principles of openness and transparency which guide municipal operations. Those principles are recognized by the requirement to ratify at a public meeting any decision of council that was made at a privileged meeting. While the essential substance of the decision must be disclosed when ratifying a motion at a public meeting, the extent of disclosure of the subject matter will vary according to the circumstances.[16]

The Department goes on to set out the "recommended protocol for the holding of privileged meetings," which includes the following:

> Any decision taken at a privileged meeting is not valid until it is adopted at a public meeting of council. A council need not engage in debate at the public meeting but must adopt a decision by way of a motion at a public meeting. The motion should be sufficient in detail so that a third party can suitably understand the subject of the motion, without disclosing information intended to be the subject of privilege. [17]

In relation to the severing of personal information from Council records and meetings, the Department has indicated that,

> [g]enerally, personal information is not severed from documents presented at a council meeting. Should a council wish to consider a document which contains sensitive personal information about an identifiable individual, it may be cause for consideration at a privileged meeting.[18]

The cases considered and quoted by the Commissioner lead to the conclusion that the handling of personal information in the municipal context is not entirely uncharted territory. However, it is an area where judgment and consideration of context are important and

15 OIPC, *Report A-2012-001*, 16 January 2012, p 11.

16 *Ibid* 7–8.

17 *Ibid* 8.

18 *Ibid*.

where automatic approaches, such as a widespread suppression of names in public documents, could distort the intent of the *ATIPPA* and lead to an unnecessary lack of institutional transparency.

Municipal ATIPP coordinators questionnaire

There appears to be a keen interest in the *ATIPPA* in the municipal world, along with a strong desire to serve the public well. Of the 122 survey responses returned from ATIPP coordinators, about half came from coordinators in municipalities. An overwhelming number of municipal ATIPP coordinators (56) noted that their municipal organization supports them in responding to requests for information, and a slightly higher number (57) felt respected in their position as access coordinator.

Two of the significant results were the perceived low level of awareness in municipal public bodies about the purpose and principles of the *ATIPPA*, and only a slightly higher level of understanding of the Act. In respect of awareness, 26 municipal access coordinators said their superiors had a good understanding of the purpose and principles of the *Act*. A far greater number, 43, had either a mixed or negative view. In terms of the level of awareness among other employees, 27 reported those employees had a good understanding of the *Act*, while 36 reported a mixed or negative view on that question.

A couple of other sections of the survey also stood out. Municipal coordinators noted that their superiors were generally unhappy about the changes brought about by Bill 29 (16 said superiors were happy, 46 had mixed or negative views on the question). The survey results showed a general low level of awareness of the role played by the Commissioner, but a very high level of support for working with the Commissioner on his reviews and investigations (48 said their superiors were supportive of working with the Commissioner, while 16 expressed mixed or negative views). Municipal coordinators also expressed the view that they seek help when they have questions about applying the provisions of the *Act*. By far the greatest number would contact the Commissioner's office (47). Fourteen would contact their superior or the OPE and thirteen would contact a legal advisor. Finally, nearly twice as many agreed as disagreed or had mixed views (43 to 22), that the Commissioner should have the power to order release of information in appropriate circumstances. Appendix E provides a summary of the responses to the ATIPP coordinator survey.

The problems the Committee heard about do not originate with the *Act* itself, as the numerous reports of the Commissioner demonstrate. Rather, the problem stems from an interpretation that is not properly sensitive to the realities of municipal governing, particularly in smaller communities, and from lack of guidance and training for municipal ATIPP coordinators, leaving them to interpret the law as best they could in often contentious situations. The problem really stems from the fact that there is no properly defined relationship between the principles and duties underlying municipal governance and principles underlying the *ATIPPA*. The answer is to define in the *Municipalities Act, 1999* all matters that must be available for public inspection, taking into consideration the importance of personal privacy. That defining provision of the *Municipalities Act, 1999* should be added to the list of provisions that prevail over the *ATIPPA*.

Conclusion

Most of the municipalities in this province are small in both area and population. In most, residents know, or know of, the overwhelming majority of the population. And each would be quickly aware if another citizen was seeking a decision as to a permit, a contract, tax relief, a change of property use, or any other benefit from the municipality. Because municipal governments cannot discriminate among citizens, unless specifically authorized by the statute creating them, all must have the fullest possible information of all the factors a municipal council will take into account in making decisions. That requires full disclosure. *The Municipalities Act, 1999* and municipal law generally require that level of transparency.

The problems raised about the interpretation of the *ATIPPA* in the municipal context during the Committee's work are clearly exacerbated by lack of training in addition to the absence of a statutory balancing of the openness requirements for proper municipal governing with the protection of personal privacy. The numerous reports provided by the Commissioner's Office have dealt with the basic principles of how to reconcile openness and the protection of personal information in the municipal context.

It was admitted at the hearings that no particular training had been given to municipal ATIPP coordinators, who number more than two hundred across the province. They face particular challenges because they work on access to information requests as well as many other things. Often, they work in small offices where advice is not readily available. The responsibility for lack of sufficient training lies with the Department of Municipal Affairs, the Department of Justice, which used to administer the *ATIPPA*, and with the Office of Public Engagement, which now has that responsibility.

When they appeared before the Committee, the minister and officials with the Office of Public Engagement indicated that training for municipal coordinators would take place before the end of 2014. The government's subsequent September 2014 announcement of a training initiative for these employees seems to be the first such endeavour in this area.[19] Two information sessions were held during the fall of 2014 — a presentation to 150 municipal administrators, town managers, town clerks and department heads at the Professional Municipal Administrators Convention in Gander, and to 45 local government members at the Municipalities Newfoundland and Labrador Annual Convention in Corner Brook. The Office of Public Engagement ATIPP Office has also developed a draft guide for municipalities on application of the *ATIPPA*, and in early December 2014 released the draft to municipalities for their feedback.

A copy of the draft guide was provided to the Committee. Parts of it emphasize withholding information that might reveal personal information. For example, the guide suggests an expansive view of what can be disclosed under business contact information, including "the name, their address, their contact number, permits granted to businesses, and opinions given on behalf of businesses." However, in respect of personal information, the draft guide advises municipalities to withhold the names of residents "who have sent correspondence, applied for a permit, etc." while allowing that property information "can generally be disclosed." [20]

This guidance raises an important issue. An application for a permit can impact other residents in a municipality, and in the interests of transparency, people should know who is applying for a permit, what property is involved, what is proposed to be done and any other information relevant to the making of the decision by the council. The municipal draft guidelines for Access to Information and Protection of Privacy speak to the provisions of the *Municipalities Act, 1999* which require that all permits should be made available for public inspection, while not addressing applications for building permits. Municipalities are advised to consider a request for information related to a building permit application for a business under the businesses interests

19 Government NL Supplementary Submission, 18 September 2014, p 2.

20 NL Draft Guide for Municipalities, October 2014, pp 5–6.

section of the *ATIPPA* [section 27] and to consider whether a request for information related to an individual's application for a building permit is an unreasonable invasion of privacy (section 30).

The text of the draft guidelines circulated to municipal councils in December 2014 relegates to the last page, the current legislative requirement in the *ATIPPA* that requires public bodies to consider if "the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny." This provision speaks to the importance of transparency and accountability in municipal government. Upon reading the draft guidelines, one can only conclude that those values are to be subordinated to the privacy provisions of the *ATIPPA*. This direction is wrong and must be corrected, if citizens are to be assured that their local governments are carrying out their duties in an open and transparent manner.

The answer is to achieve a better balance between protection of personal information and the legislated duty to subject the activities of a public body to public scrutiny. There is guidance in documents produced by the Alberta[21] and Manitoba[22] Commissioner's Office on disclosure of personal information in the municipal context. For example, both documents stress that people writing letters to councils should have a "reasonable expectation" that their correspondence, including personal information, may be disclosed at a public council or committee meeting.

The Alberta and Manitoba documents also address this issue in the context of the "need to balance the dual objectives of open government and protection of privacy." Local officials are advised that given the fact council and committee meetings are required to be held in public, except where councils have the authority to hold privileged meetings, the public has a right to attend those meetings. It is suggested councils place notices in a brochure and on their website to inform residents that letters and other correspondence may be tabled in an open meeting.

The Committee concludes it is possible to strike a better balance in the Newfoundland and Labrador municipal context, between the need to protect personal information and the goal of open and accountable local government. The current interpretation of the *ATIPPA* in the draft guidelines for municipalities is so restrictive that open and accountable local government is accorded secondary status, and as a result, the balance that should be present does not exist.

The *Municipalities Act, 1999* is a comprehensive regime providing for all aspects of municipal governance. The provisions of that Act should be determinative of the rules respecting disclosure and transparency in municipal governance, not a general statute like the *ATIPPA* that provides for management of personal information across the operation of public bodies generally. The principles respecting protection of personal information cannot be ignored but neither can the principles of good municipal governance.

The Department of Municipal Affairs should take the lead and, perhaps with assistance from Municipalities Newfoundland and Labrador, establish a list of information that should be available to all citizens in the interests of transparency and accountability in municipal governance. In doing so it is important to recognize that when a citizen, individual or corporate, requests a municipal council to grant a permit, tax relief, a license, a rezoning of land, a contract to provide goods or services, or any other benefit, that grant will not be made by some uninvolved detached private enterprise, but rather by all of the other citizens of that municipality, through the agency of the council.

Those other citizens are entitled to be informed as to the basis on which the grant of permit or other benefit was made, to whom, what property was affected, the extent of the rights granted and all other information used by the council to make the decision to grant the permission or other benefit. It is only with that information that all other citizens will be able to assess whether the council has acted within the law and regulations that protect the interests of all citizens of the municipality.

Access to such information is a critical factor in achieving harmony and citizen confidence in the fair management of the municipality. Thus, when a citizen is

21 Alberta IPC, Frequently Asked Questions for Municipalities.

22 Manitoba IPC, Frequently Asked Questions.

applying to a council for the grant of any such benefit, that citizen does so in the full knowledge that any information provided to justify the granting of the requested benefit must be accessible to the rest of the citizens of the municipality and the citizen requesting the benefit is consequently consenting to its release. The Council should only be expected to hold in confidence any information the requesting citizen asks to be kept confidential. The council will then have to decide whether it would be proper to make a decision on the application without that information being available to the public. The other option is that the confidential information be returned to the applicant and the decision made without the benefit of it, unless the applicant agrees to withdraw the request for confidentiality.

Of course, preparation of such a list of information by the Department of Municipal Affairs and Municipalities Newfoundland and Labrador should be done with respect for the importance of protection of personal information. The list should contain only that information that is necessary to ensure accountability and transparency and protection of the rights of other citizens discussed above. Consultation with the Commissioner will be an important factor before finalizing the list. Making the information available in the municipal council offices for the public to examine should, generally, be sufficient. However, municipal public bodies should be mindful of the greater privacy risk of publishing such information on the Internet without a careful examination of the possible consequences for the individuals concerned.

An amendment could then be made to the *Municipalities Act, 1999* based on the conclusion reached to indicate clearly the information that proper municipal governance requires be disclosed. That provision should then be added to the list of legislative provisions that prevail over the *ATIPPA*. By that means the dilemma in which many municipal officials, as well as citizens and journalists, now find themselves can be overcome.

There is one other point that the Committee must address. The Commissioner recommended that the definition of public body be expanded to include a corporation or entity owned by or created by or for a public body or group of public bodies. In support of this, the Commissioner wrote:

> How should the *ATIPPA* deal with entities created by or for a public body or group of public bodies? Separate entities are sometimes created by local public bodies (often municipalities) to carry out public policy objectives and provide public services, usually using public funds to do so. Currently, those entities do not fall within the scope of the *ATIPPA*. Some are created directly by a single municipality, while others may involve an organization of which several municipalities are jointly members. Such entities should be subject to the *ATIPPA* in order to maintain an appropriate level of accountability. [23]

Based on the views expressed by the Commissioner and his emphasis on municipalities, the Committee concludes that the expansion of the definition of public body should be limited to entities owned by or created by or for a local government body or group of local government bodies.

23 OIPC Submission, 16 June 2014, p 11.

Recommendations

The Committee recommends that

71. The Department of Municipal and Intergovernmental Affairs, after consultation with the Office of Public Engagement and the Commissioner, develop a standard for public disclosure generally acceptable in the provision of good municipal governance that takes reasonable account of the importance of personal privacy, but does not subordinate good municipal governance to it.

72. That standard be enacted in a section of the *Municipalities Act*, 1999 and the *ATIPPA* be amended to add that provision to the legislative provisions that prevail over the *ATIPPA*.

73. Additional language be added to the definition of public body under section 2(p) of the *ATIPPA* to include municipally owned and directed corporations.

74. The Office of Public Engagement formalize and provide the necessary support to assist municipalities in conforming with the *ATIPPA*, including

- a help desk at the ATIPP Office
- refresher courses offered through webinars or regional meetings
- *ATIPPA* guidance web pages on municipal council websites

75. That municipal access to information and protection of privacy policies be developed in line with the suggestion in the Municipal Handbook 2014 and be published on municipal council websites.

76. It is urgent that thorough and adapted training be given to municipal ATIPP coordinators throughout the province. The Office of Public Engagement should continue in its training, updating, and resource provision role in consultation with the Department of Municipal and Intergovernmental Affairs and the Commissioner's office.

77. A final version of the Guide to the interpretation of the *ATIPPA* in the context of municipalities, taking account of the concerns raised by this Committee, should be developed by the Office of Public Engagement as soon as possible after implementation of Recommendation 71, in consultation with the Department of Municipal and Intergovernmental Affairs and the Office of the Information and Privacy Commissioner.

Chapter Nine

REQUESTED EXCEPTIONS TO THE ACCESS PRINCIPLE

A few public bodies and professional organizations whose members work for public bodies made submissions to the effect that public access to some types of information should be restricted further. In some cases their representatives attended the public hearings. These public bodies and organizations operated in one of the following publicly-funded sectors: education, animal health, social services, and healthcare. They are:

- Memorial University
- College of the North Atlantic
- Newfoundland and Labrador Veterinary Medical Association
- Newfoundland and Labrador College of Veterinarians
- Department of Child, Youth and Family Services
- Healthcare Insurance Reciprocal of Canada
- Canadian Medical Protective Association

Some of these participants made comments on various aspects of *ATIPPA* reform. This section will discuss the suggestions these public bodies made about how access to information should be restricted. The suggestions include:

- qualifying some of this information as personal
- qualifying it as confidential because it is the opinion of a professional
- creating an exception for information physically held by the client of a public body
- creating an exception for the type of support for the information (for example, paper versus digital records)

The Committee has not recommended that any of these requests to narrow accessibility be accepted for the reasons which are explained in the following pages.

In his work during the last statutory review, John Cummings explored many issues relating to personal information. One of the most contentious was the treatment to be reserved for the opinion of an individual when it refers to a third party. A previous definition resulted in a circumstance where the opinion expressed in that situation could be the personal information of both the individual who expressed the opinion and the individual the opinion was about. Consequently, the approach led to some paradoxical conclusions.

> In a recent decision, the Commissioner's Office pointed out that the "paradox set up by the definition of personal information found in the ATIPPA means that the complainant's opinion about the Applicant is the personal information of both parties."[1]

During the Cummings review, several public bodies argued it was problematic to consider opinions as the personal information of at least two people. The approach recommended by the Commissioner's office referenced the Nova Scotia legislation as a model. It stated that personal views and opinions are an individual's personal information, "except if they are about someone else." The Nova Scotia definition was a way out of the problems inherent in the *ATIPPA* where an opinion could be the personal information of two people. Mr. Cummings adopted the suggestion and made it into a recommendation, which was reflected in the Bill 29 amendments.

1 Cummings Report (2011), p 24.

While several participants expressed ideas about the treatment of personal information in the *Act*, Memorial University and one of its professors, Dr. Thomas Baird, showed particular concern about how the current definition was applied to opinions.

The university took issue with the existing treatment of opinions in the *ATIPPA*, and expressed the view that the opinions of an individual about others should revert to being considered as that individual's personal information. Rosemary Thorne summarized the position of the university in the course of the hearings:

> The ATIPPA's definition of personal information states that "an individual's views or opinions are their personal information except when they are about another individual." And then it is "the personal information of the person the opinion is about."
>
> And so I would like to note here in section 30 [of the Act], which is the mandatory exception to disclosure of personal information, it states, "a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where (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."
>
> And so I would submit to you that this provision presumes two things: 1) that opinions by employees in performing their job responsibilities are not their personal information and are effectively work product. And although that is not a defined term in our legislation, I think it is something that has been considered by other information and privacy commissioners and the courts as well. And 2) it assumes that when an employee records an opinion about another person, it is the personal information of the other person. And I think that that's fairly clear in the legislation.[2]

Ms. Thorne went on to describe three reasons Memorial University believes the treatment of personal opinions under the *ATIPPA* is "problematic."

> And so the first, just speaking not of the legislation but just in broad terms, we would like to say that we think it doesn't really makes sense to say that a personal opinion is not a person's personal information. We often hear people say that's just my opinion. This is just my opinion. And opinions, we believe, are directly related to freedom of expression. And in a highly decentralized environment, like the university, circumscribing opinions is akin to restricting freedom of expression. A person's opinion is closely connected to the values of dignity, integrity and autonomy that underlie personal privacy.
>
> The second point that we would like to make is that the *ATIPPA* assumes that opinions that are expressed by employees in the course of performing services for their public body or for their employer are deemed effectively to be directed by their employer, by the head or by their supervisor, and that the public body — again, the head or whomever — is accountable for the opinions expressed.
>
> The third point I would like to make is — and in particular it speaks to e-mail — [an] employee may express opinions in an e-mail or in another format which are the opinions of the employee only and in no way represent the views of their employer. Indeed, in respect of sometimes the type of opinion that we see expressed in an informal communication like an e-mail, no employer would direct an employee to express opinions that cannot be supported by the public body. And yet, in an ATIPP request an e-mail containing ill-considered and unfounded opinions by an employee would not be the personal information of that employee but would rather be the personal information of the person that opinion that ill-considered and unfounded opinion is about. And then they would also be records for which the public body is accountable. And so we say that this begs the question: why should the public body own an opinion expressed by one employee about another and be responsible for propagating it?[3]

Appendix A of Memorial University's written submission details the *ATIPPA* requests for the twelve-month period ending 31 March 2014. At the public hearing, Rosemary Thorne helped to interpret the table of requests. Of 17 requests, 13 were for personal information. Only three of 17 requests came from outside the university

2 Memorial University Transcript, 20 August 2014, pp 59–60.

3 *Ibid* 60–62.

community.[4] Ms. Thorne clarified that more requests were made by faculty members than by students.

In her view, the fact that requests for information were overwhelmingly requests by faculty for their own personal information reflected the unique composition of this public body. She said, "I think the fact that we receive a lot of questions from our employees speaks to the decentralized nature of the institution."[5]

Memorial University requested that the definition of personal information be changed to the one in the British Columbia law, which states that personal information "means the recorded information about an identifiable individual other than contact information."

Subsequent to the university's presentation, a professor at Memorial University, Dr. Thomas Baird wrote to the Committee to express his disagreement with the position the university took on personal information and on opinions.[6] He thought that the university's recommendations on these topics conflicted with its core values, and expressed the specific concern that implementing Memorial's recommendation would "further restrict access to information at public institutions." He stated that Memorial's submission was not circulated within the university community for comment nor approved by the Senate or the Board of Regents.

Section 38.1

Section 38.1, which was added by Bill 29, enables a post-secondary institution to use personal information in its alumni records for fundraising. There are conditions on this use. Alumni have the right to opt-out by requesting that their information not be used for this purpose. The post-secondary institution is required to notify alumni of their opt-out rights by way of notices, which are to be published periodically in a newspaper of general circulation and in an alumni magazine or other publication. In its submission to the Committee, Memorial University recommends that the requirement to post an opt-out notice in a newspaper be removed because it is no longer effective and adds to the University's costs. The University communicates to alumni by other means, such as the alumni magazine and the monthly e-newsletter. The Committee agrees that the publication of the opt-out notice in a newspaper should be removed from the *Act*.

4 *Ibid* 69–76.
5 *Ibid* 71.
6 Baird Submission, 25 August 2014.

Analysis

Two comments made by Memorial University's presenters will strike a chord with many readers. One is that an assertion in the current law is counter-intuitive: the assertion that individuals' personal opinions are not their own personal information where those opinions are expressed about another individual. The second is that the public body is inappropriately made responsible for records created by an employee who expresses ill-considered and unfounded opinions about others.

Memorial submitted that the *ATIPPA* does not "effectively" account for the University's collaborative governance structure, which is shared between the Board of Regents and the Senate, and that it does not take into consideration other values that are fundamental to the operating of a university:

> The legislation does not effectively account for the unique bi-cameral governance structure that exists at Memorial University, nor the principles of autonomy, academic freedom and collegial decision-making that are embedded in the institution.[7]

Memorial stated that because of these values, it is a unique type of workplace. For example, administrators and the president do not direct the work of the teaching and research staff, as would be the case in most other work environments.

7 Memorial University Submission, 20 August 2014, p 3.

> The *ATIPPA* is designed for an environment where employees' work is deemed to be directed by their supervisors. Many courts and tribunals have considered the distinction between personal information and "work product." Although not a defined term in the *ATIPPA,* work product is covered in two provisions in the *ATIPPA* that illustrate its intended application to environments that presume its employees are acting as its agents.[8]

Memorial's presentation highlighted another issue with respect to access requests at the university. It stated that the majority of *ATIPPA* users belong to one group of employees, the faculty. These faculty members are seeking personal information about themselves that may be held by the university as a public body. This represents a major difference in the origin of access requests referred to by most of the public bodies that took part in the Committee's work. Requests to other public bodies for information almost always originate outside the public body—they may come from individuals, from media, or from political parties.

The challenges of administering the *ATIPP*A in the context described by Memorial University must be considerable: individuals are anxious about information which may be held about them by their employer. The context in which many university employees work is different from other public bodies, which are typically organized along traditional hierarchical rules. The decentralized nature of a university creates the unique set of circumstances described by Memorial.

The Bill 29 amendments

In amending the definition of personal information in Bill 29, the House of Assembly sought to clarify a situation that was difficult to interpret. It chose wording which makes it clear that if an individual records an opinion of another, it is to be considered the other's personal information.

The policy reasons for this are clear. It was an attempt to address the confusion that reigned as a result of the previous definition, where both the person who expressed the opinion and the person whom the opinion is about could claim the record as their own personal information.

Under Memorial's recommendation to this Committee, the person who records an opinion about another could claim it as his or her own personal information, rendering it generally off-limits to the other person. This would oppose the purpose of the *ATIPPA*, which is to create transparency about what information a public body and its employees hold about individuals. Public bodies could accumulate all kinds of opinions on individuals without their knowledge.

The alternate policy position, which is reflected in the current *ATIPPA*, is to define the opinion as the personal information of the individual it is about. This approach creates greater transparency for persons to know what information, including opinions, is held about them.

Memorial suggests following the example of British Columbia in this policy choice. However, it is not clear that adopting the BC definition without the qualifier of section 2(o)(ix) of the *ATIPPA* would protect those who record opinions of others from having these records subject to access in all circumstances, given the explanation for one of the purposes of the *Freedom of Information and Protection of Privacy Act* (BC): "giving individuals a right of access to, and a right to request correction of, personal information about themselves."[9] BC legislation also contains an extensive section 22, entitled "Disclosure harmful to personal privacy," which applies a harms test—the unreasonable invasion of a third party's personal privacy.

Adopting the British Columbia approach seems to be a less straightforward way of defining personal opinions, and it would necessarily involve the consideration of several factors. The current approach in Newfoundland and Labrador has the merit of simplicity. It is more user-friendly because it states clearly that opinions about others are accessible by those others as a general rule.

Certainly, it is possible to sympathize with the university's protest that it finds itself in a position of responsibility for recorded opinions it did not authorize. This is a policy choice by the legislator. In the last several

8 *Ibid.*

9 BC *FIPPA*, s 2(1)(b).

decades, employers have been made responsible for health and safety in the workplace and the respect of human rights, to take two examples, even where they were not aware of any violations of health and safety or human rights taking place. This is a practical approach which puts the highest authority in the workplace, the employer, in charge. It is understandable that a public body with a multi-party governance structure might not favour this approach.

Memorial University also alleges that the *ATIPPA*, as it applies to the university environment, is inimical to freedom of expression. However, no examples were identified, and it is hard to see how such an important public body could not be bound to observe the basic information rights enshrined in the *ATIPPA*.

Conclusion

The new provisions of the *ATIPPA* dealing with opinions have been in force for barely two years, and the Committee has not been persuaded that those provisions should be changed at this time. Given the very long traditions of unfettered freedom of expression from which the university milieu has benefited, the adaptation period may be longer than in other public bodies. The Committee concludes that no changes be made to the definition of personal information in the *ATIPPA*.

Recommendations

The Committee recommends that

78. Section 38.1(2)(c) of the *ATIPPA* respecting the use of personal information by post-secondary educational bodies for fundraising purposes be amended by removing the requirement to publish in a newspaper notice of the right to opt out.

9.2 Professional advice given by veterinarians who are government employees

This matter was brought before the Committee by the Newfoundland and Labrador Veterinary Medical Association (NLVMA), supported by the Canadian Veterinary Medical Association and the Newfoundland and Labrador College of Veterinarians. The NLVMA's position was that animal health records in the offices of public bodies should be kept confidential. In their presentation, they recommended that the *ATIPPA* be amended to that effect. The NLVMA feels such an amendment is needed to protect government-employed veterinarians who have the dual role of regulatory duty for the province and the provision of primary veterinary care in regions of the province where there are few veterinarians. They further argued that providing such information through a general access request under the *ATIPPA* would be a violation of their professional oath to keep animal health information confidential.

Animal health records in public bodies, which may include the professional advice and decisions of veterinarians, are currently subject to *ATIPPA* as a matter of

principle. In practice, some records may be protected from access because, for example, their disclosure would be harmful to the financial or economic interest of a public body (under section 24 of the *Act*) or to the business interests of a third party (section 27). However, the submission to the Committee did not reveal any real-life examples of how veterinarians' records, created in the course of animal health care, are used within a government program or licensing structure.

What we heard

Dr. Kate Wilson, President of the NLVMA, and Dr. Nicole O'Brien, a representative of the same organization, appeared at the public hearings. They made the case that veterinary work, reflected in animal health records, should be exempt from access to information provisions.

The veterinarians explained that, as professionals, they swear to "maintain the highest professional and ethical standards." This applies to the framework in which they function, the veterinarian-client-patient relationship (VCPR), adopted in Canada in 1961. Within this framework, they obtain the health information of animals and practice their profession. They stated the VCPR is a globally accepted ethical code in which animal health records are deemed to be owned by the client. The veterinarians are the custodians of such records.

Veterinarians feared that if clients could not trust them to keep medical information of animals confidential, clients might withhold information necessary for the prevention, detection, or treatment of animal disease. Newfoundland and Labrador veterinarians, particularly those working for the government and in the aquaculture sector, believed their ethical code had been broken by the application of the *ATIPPA*, where they "are constantly being requested …to release health information that would otherwise be held confidential."[10]

According to their submission, most of these requests were denied or given only partial disclosure. But the veterinarians thought that excessive amounts of time, effort, and resources went in to ultimately denying access. They believed that those resources could be used more efficiently if veterinary records were exempt from the *ATIPPA*.

They pointed out that, notwithstanding their code of confidentiality, veterinarians are nonetheless subject, by federal legislation, to mandatory reporting of communicable or reportable diseases. And Newfoundland and Labrador legislation requires them to report evidence of animal abuse or neglect.

They feared the disclosure of confidential information through an access requests could lead to disciplinary action by the Newfoundland and Labrador College of Veterinarians for a breach of their code of ethics. Other professionals, they said, such as physicians, and lawyers claiming solicitor-client privilege, were shielded from the access provisions of the *ATIPPA*. They concluded that unless their work was exempted from the *ATIPPA*, serious consequences would result. This is how they summed up their position:

> The Newfoundland and Labrador Veterinary Medical Association takes the position that Veterinarians employed by the government of Newfoundland and Labrador should not disclose confidential health records upon receipt of an ATIPPA request for such information. The interests of the public and animals are already considered in the federal reporting requirements. To release confidential health information, veterinarians who practice primary clinical care within the structure of government will be forced to breach a global veterinary ethical code. This will result in the loss of client trust and will impact the practice of veterinary medicine in NL. The VCPR exists so that information is freely shared with veterinarians which would allow for rapid detection/treatment/mitigation of disease. If a public health risk or a reportable disease is detected, it will be reported to the federal agencies as

10 NLVMA Submission, 13 August 2014, p 3.

> required. Releasing any other health information to the government or the public will not assist the public. Breaking the confidentiality of health records under the VCPR will result in the clients not being forthcoming with information and early detection of reportable and emerging diseases will be delayed. This will not safeguard the industry, the public or the welfare of animals.
>
> Veterinarians in Newfoundland and Labrador are requesting that their practice and confidential health medical records under the Veterinarian-Client-Patient-Relationship (VCPR) be exempt from queries made through the *Access to Information and Protection of Privacy Act* (ATIPPA).[11]

Dr. O'Brien informed the Committee that of the approximately 13 veterinarians employed by the provincial government, 9 carried on a clinical practice. The Committee Chair and Dr. O'Brien discussed in the hearings the basis for according veterinarians the same level of protection as medical doctors.

> CHAIR: What's the reason for that? I mean, with human beings, medical practitioners who provide for the health of humans, are dealing with private, personal information of the beings whose health they are providing for. Veterinarians are looking after fish and animals as nice and pleasant as animals may be, but there is no expectation of privacy in a fish or cat for that matter, the individual health of that fish or that cat. So there is a distinct difference between the two. Why, on what basis do you suggest that the same level of protection for information should be accorded to veterinarians as for medical practitioners?
>
> N. O'BRIEN: Well, they are the owners or the clients. So it would be the owners that would provide the information much the same as a parent with —
>
> CHAIR: I know they can provide the information but the information is about a fish or a cat. Neither the fish nor the cat has any expectation of privacy in its health information. The human has it, not because a brother or a cousin or a father or mother has an expectation of privacy, but the individual does. The individual that's the patient does. That's a different situation with veterinarians, is it not?
>
> N. O'BRIEN: I don't see it as different.
>
> CHAIR: What expectation of privacy does the owner have?
>
> N. O'BRIEN: The same as you going into your doctor.
>
> CHAIR: Really?
>
> N. O'BRIEN: Yes.[12]

Dr. O'Brien went on to add that the real issue was getting the necessary information from their clients. Apparently, people sometimes had information they were not proud of, and it was hard for veterinarians to uncover the real story.

The concerns of the veterinarians were particularly about the confidentiality of producers, rather than the pet owners. Dr. O'Brien mentioned fish farmers and dairy farms. When the Chair suggested section 27 of the *Act* could apply to a commercial operation, Dr. O'Brien said this section had already been used by the veterinarians several times as a reason for not releasing the information. The problem was that the requests continued and that there was still a lot of dialogue back and forth regarding the requests.

The requests for information under the *ATIPPA* came to the department that employed the veterinarians, either the Department of Fisheries and Aquaculture or the Department of Natural Resources. When requests come to the departments, officials turn to the veterinarians, who are obliged to look through their medical records to produce a summary report. Dr. O'Brien said that although there may have been only 9 requests in the previous 18 months, the process of finding answers to the questions and making others understand why veterinarians are concerned about giving access to the information is very time-consuming.

The result of those nine requests was that minimal information was disclosed. Dr. O'Brien testified that there was only partial disclosure or minimal disclosure in many cases. Many of the published requests for access to information concern fish farming.

An example of the role of veterinarians can be seen in the replies to three requests for information on fish farming that were received by the Department of Fisheries and Aquaculture on 12 March 2013. The answers,

11 *Ibid* 4.

12 NLVMA Transcript, 18 August 2014, pp 14–15.

dated 13 May 2013, are identical.[13]

Three reasons were quoted for the assertion of confidentiality. The first set of reasons for not divulging information all refer to section 27 of the *Act* (disclosure harmful to business interests of a third party). The relevant portions of that section concern information supplied in confidence, implicitly or explicitly; harm to the competitive position of a third party; result in similar information no longer being supplied to the public body; or a result of significant financial loss.

The second reason given is that the information sought is prescribed as confidential in accordance with section 9(4) of the *Aquaculture Act*. This is hard to understand, as the term "prescribed," in its legal sense, usually means "prescribed by regulation." But there is no regulation to be found about the confidentiality of recorded information about fish diseases under the *Aquaculture Act*.

The third reason is given as follows:

> Additionally, under Section 2.8 of the *Veterinary Clinic Standards for Newfoundland and Labrador*, a medical record is considered to be a confidential record that is accessible only to the owner of the animal (or representative) and the attending veterinary clinic. The requested information has been treated as confidential under this provision and shall not be disclosed.[14]

It is hard to understand why the veterinarians are so concerned about their professional relationship in Newfoundland and Labrador, as it appears there is already a clear policy of non-disclosure by the Department concerned.

The NLVMA believed the continuing stream of requests would eat away at the level of confidentiality veterinarians enjoy with their clients. However, they also admitted no one had suggested they would refuse to share information with the veterinarians because of the threat of *ATIPPA* access requests.

13 NL ATIPP Completed Access Requests *FA/5/2013*, *FA/6/2013*, *FA/8/2013*.

14 *Ibid FA/8/2013,* 13 May 2013.

Analysis

The Newfoundland and Labrador College of Veterinarians is the governing body of the veterinary profession. The *Veterinary Medical Act, 2004* sets out the basic rules for the licensing of veterinarians and the standards for practice. It also includes provision for discipline and sanctions for failing to meet the standard of practice. Under section 16, members of the board of the College of Veterinarians can make by-laws which then bind all members.

Three by-laws under the *Veterinary Medical Act, 2004* are of interest here. First, the College's *VCPR by-law* defines the necessary elements for the veterinarian-client-patient relationship but does not appear to extend to the question of confidentiality of records. A second by-law, the Code of Ethics, refers to deportment with the public and colleagues and reporting of harm to animals. Only a third by-law dating from 2007, entitled *Veterinary Clinic Standards for Newfoundland and Labrador*, mentions privacy and confidentiality:

> GENERAL PROVISIONS
>
> The following provisions apply to all forms of veterinary practice covered by these standards with the exception of Public Practice Clinics.
>
> 2.1 RECORDS
>
> 1. There must be a clearly legible, individual medical record maintained for every individual patient administered to by the clinic…
>
> 2. A medical record shall contain all clinical information pertaining to the patient, whether hospitalized or not, together with sufficient information to indicate the patient's assessment, planned treatment and results…
>
> 3. All patient medical records shall be maintained for at

> least five (5) years from the date of last entry, except those of deceased patients which need only be kept for a minimum of three (3) years or other length of time as determined by the *Limitations Act* (Newfoundland and Labrador).

The clinic standards then contain a note following section 2.3, expressed as follows: "The impact of privacy laws on this section must be examined." This cryptic direction presumably means that the privacy interests of the humans, owners of the animals, should be considered in creating and keeping medical records about the animals. But it is far from being a clear statement that the medical records of animals should be kept confidential in all cases to protect the privacy interests of the owners. Only in 2013 was the following subsection added to the clinic standards:

> 8. Unless required for the purposes of a clinic inspection, or other legitimate action of the College, a medical record is considered to be a confidential record that is accessible only to the owner of the animal (or representative) and the attending veterinary clinic.

Some months after the public hearings, the Committee noticed a new Confidentiality by-law dated November 2014, on the website of the College of Veterinarians.

The apprehensions the NLVMA expressed to the Committee, with the support of their national organization, may be fuelled by relatively recent cases across Canada in which veterinarian-authored reports have tended not to be granted an exemption from access to information legislation.

In a 2006 decision, the Federal Court dismissed the argument that inspection reports of abattoirs by veterinarians employed by the Canadian Food Inspection Agency could be kept confidential.[15] Citing clear precedents, the judge held that reports on mandatory inspections could not be claimed to be confidential under the federal *Access to Information Act*, even though they may be treated confidentially within the business.

As for a claim that veterinarians employed by the federal government are subject to the protection of professional secrecy by Quebec law, the judge wrote "In any event, the court is not satisfied that the applicant [the abattoir] is a client of the veterinary inspector..."[16]

Although the veterinarians argued that their clients were the agricultural producers, it is hard to understand the role of their employer, the public body, if not as a client for their professional services too.

The Supreme Court of Canada recently made some relevant observations about third party commercial, financial, scientific or technical information treated as confidential and supplied to the government.[17] The court underlined the difference between information supplied to the government and information gathered by government representatives, such as inspectors, in the course of their work. This is a question of fact, the court stated.

> Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.[18]

Using this criterion, it is not clear that veterinarians working for the government benefit from confidentiality for information they record, based on their own observations.

A case in British Columbia shared many facts with one of the rejected access to information requests[19] discussed above. The requester had asked for sea lice monitoring information collected by employees of the government of British Columbia. The Ministry of Agriculture and Lands refused the request, arguing that it was information supplied in confidence and that harm would result from its disclosure. The adjudicator dismissed this claim:

> There is no evidence in this case of any written confidentiality agreement directly between individual fish farms and the Ministry. The Ministry adduced hearsay evidence

15 *Les Viandes du Breton Inc. v Canada* (*Canadian Food Inspection Agency*), 2006 FC 335.

16 *Ibid* at para 59.

17 *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23.

18 *Ibid* at para 158.

19 NL ATIPP Completed Access Request, *FA/6/2013.*

> that one of its former veterinarians, at some point, verbally advised fish farm operators that information would be treated in a confidential manner as part of the "Veterinary-Client-Patient relationship". The Ministry does not say which operators it advised or when this may have occurred. I can give no substantial weight to this evidence. [20]

The BC adjudicator then explored the process by which information about sea lice came into the hands of government. He found that fish farms were obliged by law to maintain accurate written records about fish mortality. They were subject to auditing of their records and could risk losing their licences for non-compliance. Therefore the information was not voluntarily provided but was the subject of regulatory authority and the exemption for information "supplied, implicitly or explicitly, in confidence"[21] did not apply.

This, then, raises questions in the Newfoundland and Labrador context. Is there a legal framework for aquaculture producers which obliges them, in the same manner as British Columbia, to provide information to the government? Is that information to remain confidential? If so, it does not appear in the *Aquaculture Regulations* passed under the authority of the *Aquaculture Act*.

There is a section in the *Aquaculture Regulations* dealing with the confidentiality of trade practices, technology, and financial status. Here, access to the information is refused to the public. But there is no specific prohibition on the information generated in the course of providing veterinary services.

20 *Ministry of Agriculture and Lands* (1 March 2010), F10-06, at para 78, online: BCIPC <httpp://www.oipc.bc.ca/orders/2010/OrderF10-06.pdf>.

21 BC *FIPPA*, s 21(1)(b).

Conclusion

The request of the veterinarians to be excluded from the provisions of the *ATIPPA* appears to be a fairly recent development. It was not until 2013 that the College of Veterinarians By-Law on clinical practices spelled out the obligation of professional confidentiality for client information.

The NLVMA suggested to the Committee that veterinarians working for a public body found that replying to *ATIPPA* requests laborious and a misuse of their time and professional abilities. At the same time, they could not point to any concrete loss of client trust or confidence in them. Doubtless it is, as they recognized, because almost all the requests possibly involving information created by themselves have been rejected.

The *Aquaculture Act* does provide that some information is confidential, but not the information generated or gathered by veterinarians. The regulation under the *Aquaculture Act* that allows the Registrar to preserve the confidentiality of certain records mentions only two types of records that are to be kept confidential: financial and technological. Neither type would appear to encompass information gathered by or supplied to veterinarians.

Decisions by courts and adjudicators suggest that recorded information created by veterinarians enjoys no special status in the interpretation of access to information legislation. This is because it is given to the government representative, the veterinarian, as a necessary part of the conditions under which the establishment, such as a fish farm, is allowed to operate.

Comparing veterinarians working for the government to physicians remunerated by the public sector is not useful. While physicians treat individual persons, or sometimes families, veterinarians treat various species of animals, which do not have privacy rights under current law. The privacy interest lies rather with the owner of the animal, usually the client. But there appears to be some confusion about whether the client is the

animal or the owner of the animal, as the transcript cited above reveals.

A public body that is involved in the health of animals destined for human consumption hires veterinarians to ensure that these health conditions are maintained. In this context, it is difficult to see an exclusive and confidential professional relationship with the owners of establishments raising animals for food. It is also difficult to see how this relationship could be a barrier to all *ATIPPA* requests unless veterinarians working for the government were specifically exempted from the *ATIPPA*.

The Committee is not persuaded that there is merit in the position taken by the Newfoundland and Labrador Veterinary Medical Association.

9.3 Information about prospective parents in an adoption process

Some of the most significant exceptions to access identified in the *ATIPPA* have to do with the intimate personal details of human lives. Section 30 of the *Act* lists several of these situations, in which disclosure of information is considered an unreasonable invasion of privacy:

> 30.(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…
>
> (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…

These excerpts from the *Act* tend to mirror social conventions about what information people feel it is desirable and appropriate to keep confidential.

What we heard

The deputy minister for the Department of Child, Youth and Family Services, Genevieve Dooling, appeared with the minister responsible for the Office of Public Engagement. The deputy minister voiced a concern about protected information originating in the adoption process. She had recently learned of an apparent loophole involving information about prospective parents who are not considered a suitable match with a particular child, according to the expert evaluations made in the adoption process. OPE's written submission explained the issue:

> Some information contained in child protection records or other records where an adoption of a child or information relating to prospective adoptive parents where an adoption is in progress, may be accessible under the *Act*. The *Child Youth Care and Protection Act* and the *Adoption Act* provide protection for these records; however there are instances where some information contained within these records may be accessible under the *Act*. For example, clinical decisions that are made by social workers in relation to potential adoptive parents under cases that are currently underway. These are records of potential parents and may be accessible under the *Act* as they are not records of children which are protected under the *Child Youth Care and Protection Act*. It is important to note that once an adoption is finalized, these records would be protected under the *Adoption Act*. The protection of these records is seen as critical.[22]

22 Government NL Submission, August 2014, p 21.

Disappointed potential parents could ask for their own evaluations under the *ATIPPA*, as the *Adoption Act, 2013* protects only the information of children in the adoption process. Prospective parents could read evaluations of themselves and adjust their behaviour in subsequent attempts to adopt another child. The deputy minister stated, in response to questions from the Chair, that this could potentially put that other child at risk, and under the current *Act*, the information might have to be released.

> I guess the thing, sir, our fear was that the parents could [make an access request] because it's their personal information [in] the majority of cases…That's why I came forward today to see whether or not it could be addressed through the *ATIPPA* Review.[23]

She indicated that this had not yet happened but there was a recent case where her department was concerned that potential parents would make an access to information request. She asked for an amendment to the *ATIPPA* or to the *Adoption Act, 2013* to prevent this from happening in the future.

A second source of concern for the Department of Child, Youth, and Family Services was the media's interest in child welfare cases. Ms. Dooling referred to a court case between the Department and the CBC.[24] The Department had initially refused access to the information requested. In this case, one of two families involved wished the information requested by the CBC to be made public. Madam Justice Butler of the Trial Division redacted the personal information before the information was released. Ms. Dooling made this request to the Committee:

> I would ask you to respectfully in your deliberations consider whether or not *ATIPPA* was meant to be requesting those sorts of personal family and very traumatic sorts of cases for public consumption. [25]

The deputy minister said the proper accountability forum for such cases is the Child and Youth Advocate, who has the power to request any of the department's files at any time, including all the personal information, in order to make a report. The deputy minister stated: "I guess my view is the advocate has all the information. She could tell a more balanced story about what actually happened."[26]

At his final appearance, Sean Murray, Special Projects Director of the Office of the Information and Privacy Commissioner, addressed the concerns raised by the deputy minister. He cautioned against taking into account only the testimony of the deputy minister on these issues. Mr. Murray thought there might be other perspectives which should be heard by the Committee. He also stated that neither issue raised by the deputy minister had ever been brought to the attention of their office. Mr. Murray said the OIPC would be available for consultation on adoption and children in care.

23 Government NL Transcript, 19 August 2014, pp 217–218.

24 *Canadian Broadcasting Corporation v Newfoundland and Labrador (Child, Youth and Family Services),* 2013 NLTD(G) 175.

25 Government NL Transcript, p 220.

26 *Ibid* 225.

Analysis

The Committee heard of two examples used to make the case to reduce access to information in the adoption and child welfare system, both coming from the Department of Child, Youth and Family Services. The first example, of potential adoptive parents wishing to have access to their own evaluation, was based on an apprehension. An actual case had not yet presented itself to be dealt with. The second case, based on a request from the CBC for a report involving the removal of a child from its biological parents, went to court. The judge released the report, but redacted the personal information.

It is difficult to see how section 30 of the *ATIPPA*

does not provide enough protection for personal information or indeed, enough exceptions to access for particularly sensitive situations. Some of these exceptions would likely apply to the evaluations of potential parents.

In addition, in determining whether the release of personal information would be an unreasonable invasion of a person's privacy, the head of a body is required to consider a series of relevant circumstances. Section 30(5) of the *Act* provides for this:

> 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…
>
> (c) the personal information is relevant to a fair determination of the applicant's rights…
>
> (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; and
>
> (i) the personal information was originally provided to the applicant.

Many protections for personal information appear in the *Act*. The existence of a general harms test for third parties in section 26 could surely be invoked to protect children from harm or to protect their best interests:

> **Disclosure harmful to individual or public safety**
>
> 26. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to
>
> (a) threaten the safety or mental or physical health of a person other than the applicant…

One of the chief purposes of access to information legislation is to allow scrutiny of the workings of government by giving the public a right of access to records. The child welfare and adoption system is an integral part of government. It is important to examine closely how this system functions. The object of scrutiny is not the persons, families, and children as identifiable individuals, but the services they may have received from the public body.

Conclusion

It bears repeating that there appears to be no evidence of the *ATIPPA* negatively affecting the child welfare and adoption system. Indeed, in the two cases cited by the deputy minister, the first involved an apprehension that something might happen. In the second, the judge ordered release of the report with the personal information redacted. It is therefore difficult for the Committee to conclude that changes should be made on the basis of those two examples, and for which the *Act* may already provide a remedy.

The Committee has no reason to doubt the sincerity of the deputy minister and the case she made for placing new exceptions in the *ATIPPA*. But it would be irresponsible of the Committee to take the step of further limiting the right of people to access information only on the basis of this representation. The Department of Child, Youth and Family Services should consult with both the Child and Youth Advocate and the Commissioner to discuss this matter further.

9.4 Opinions given by health professionals in the course of quality or peer reviews

Two submissions were received by the Committee from organizations with similar concerns about privacy in health care. The specific request was that the *ATIPPA* protect information disclosed during peer reviews and quality assurance committees. The organizations, Healthcare Insurance Reciprocal of Canada (HIROC) and Canadian Medical Protective Association (CMPA), did not ask to appear at the hearings.

The organizations described the nature of quality and peer reviews:

> These reviews examine the provision of health care to an individual patient or group of patients while aiming to maintain or improve the quality of care provided and/or the level of skill and knowledge of those involved in providing the care.[27]
>
> During such reviews, participants are asked to speak frankly…Essentially, the process envisioned for a quality or peer review is a 'no holds barred' approach...[28]
>
> The reporting of critical incidents or adverse events to hospital quality assurance or peer review committees is generally part of a much broader initiative aimed at identifying and addressing systemic problems and improving patient safety. The ultimate goal of quality assurance activities is to critically review these incidents and to evaluate the effectiveness of the institution's practices and procedures in order to improve patient safety overall.[29]

27 HIROC Submission, August 2014, p 5.
28 *Ibid.*
29 CMPA Submission, 27 August 2014, p 1.

What we heard

Healthcare Insurance Reciprocal of Canada

The Healthcare Insurance Reciprocal of Canada describes itself as the largest health care liability insurer in Canada, a not-for-profit that provides liability insurance to the four regional health authorities in Newfoundland and Labrador.

HIROC states that quality and peer reviews play a significant role in ensuring patient safety. During peer reviews, participants are encouraged to speak frankly, "freely and without fear of critique or reprisal."[30] According to HIROC, research and policy papers have documented the reluctance of health care professionals to participate in such processes unless they are assured that that their participation will not result in their being sued or disciplined in later legal proceedings.

HIROC raised the issue of section 8.1 of the Newfoundland and Labrador *Evidence Act*. It provides that information such as reports and statements from quality assurance and peer review committees in the hospital and nursing home context cannot be disclosed in a legal proceeding or even in connection with a legal proceeding.

The problem, wrote HIROC, remains insufficient protection. While the Regulations under section 73 of the *ATIPPA* permit section 8.1 of the *Evidence Act* to override access provisions, it shields only information to be used in the context of a legal proceeding. HIROC feels evidence from quality assurance and peer review committees remains subject to the access provisions of the *ATIPPA*, whether it is used in legal proceedings or in other contexts.

HIROC points out the solution may be to mirror what currently exists in the *Personal Health Information Act* (*PHIA*). *PHIA* makes information compiled or created for standards or quality assurance committees inaccessible to the requester (section 58). There is no prerequisite of an existing legal proceeding. HIROC asks that the *ATIPPA* be amended to have the same effect as section 58 of *PHIA* and prevent access to the work of quality assurance and review committees.

30 HIROC Submission, August 2014, p 35.

Canadian Medical Protective Association

Dr. Hartley Stern, Executive Director of the Canadian Medical Protective Association [31], wrote to the Committee to express his concern about the same issue of the protection of peer review and quality assurance records under the *ATIPPA*.

The views of his association were similar to those put forward by HIROC:

> It is generally accepted that, in order for quality assurance programs to be successful and effective, physicians and other health professionals must have satisfactory assurances that the reporting and subsequent investigation of such information will not be used or disclosed outside of the quality assurance process (either to patients or to other hospital departments or committees).[32]

Dr. Stern acknowledged that while the *PHIA* now takes precedence over the *ATIPPA* with respect to the management of personal health information, he believed there are situations where the *ATIPPA* might still apply. CMPA shared HIROC's misgivings about the fact that the *Evidence Act* outweighed the access provisions of the *ATIPPA* only in connection with a legal proceeding.

A recent case added to the nervousness of health professionals about quality assurance activities. Dr. Stern referenced the March 2014 decision of the Supreme Court of Newfoundland and Labrador in the case of *Eastern Regional Integrated Health Authority v Association of Registered Nurses of Newfoundland and Labrador*.[33] This involved a matter where a quality assurance committee had been established in relation to a patient death at the Health Sciences Centre in St. John's. The court ordered that information gathered by the committee be provided to an investigator, since more recent legislation superseded the *Evidence Act* of 1990.

Dr. Stern offered as support the many different jurisdictions where information from such committees was protected. He asked for an amendment to the *ATIPPA* to clearly bar access to this type of information:

> In order to support patient safety initiatives, there must be reassurances for health professionals that the reporting of adverse events and the ensuing investigation by a quality assurance committee will not be used or disclosed outside of the quality assurance process, either to patients, the public, medical regulatory authorities or during legal proceedings.[34]

This could be done, he suggested, by providing in the *ATIPPA* Regulations that section 58 of the *PHIA*, which shields peer review and quality assurance reports, take precedence over section 6 of the *ATIPPA*.

31 The CMPA describes itself as "a not-for-profit mutual defense organization operated for physicians by physicians."

32 CMPA Submission, 27 August 2014, p 1.

33 2014 NLTD(G) 33 (case is currently under appeal).

34 CMPA Submission, 27 August 2014, p 2.

Analysis

The issue of shielding the opinions of health professionals in the context of peer review and quality assurance committee work has been long and intensely debated in Newfoundland and Labrador. Two key contributions to this discussion have been provided by the reports of the 2008 Task Force on Adverse Health Events and the 2009 Commission of Inquiry on Hormone Receptor Testing.

Report of the Task Force on Adverse Health Events

In 2008, the Report of the Task Force on Adverse Health Events briefly discussed the public interest override in section 31 of the *ATIPPA*, underlining the fact that in the case of an adverse event threatening public health, the head of the public body has the obligation to disclose this harm publicly and without delay.[35]

35 NL *Report of the Task Force on Adverse Health Events* (2008), p 19.

However, that report also expressed concern about the limited protection for peer reviews and quality assurance information, which it thought the government must have intended to protect:

> There is no doubt, however, that the intention of government when drafting *ATIPPA* was to exclude peer reviews and quality assurance reviews from access by applicants. If access to such information was permitted, then such reports could end up being published in the media, thereby making them accessible to participants in legal proceedings by a different route.[36]

The report stated that in Nova Scotia, British Columbia, Alberta, Manitoba, and Saskatchewan, specific amendments shield quality assurance reviews and similar investigations from access requests. The report concluded that the *ATIPPA* should be amended to achieve the same. The factors to be balanced were confidentiality, the possibility that opinions and analyses would be subject to disclosure, and the possibility of recourse to the Information and Privacy Commissioner, who is seen as a third party.

> It could be argued that it is unnecessary to close this legislative loophole because the current rules would ensure that any confidential information in the released reports is redacted (e.g., provider and patient information), thereby reducing the risk of a confidentiality breach.
>
> On the other hand, the redaction of personal and private information would not necessarily include analysis and opinions. Furthermore, the discretion to decide what is an appropriate redaction is left to a third party, the Information and Privacy Commissioner. On balance, an amendment to *ATIPPA* is the preferred course of action.[37]

Commission of Inquiry on Hormone Receptor Testing

In 2009, the government received the Report of the Commission of Inquiry on Hormone Receptor Testing. That report looked at the question from another perspective, that of the patient receiving healthcare. In it, among many other issues, Madam Justice Cameron discussed the origins and policy purposes behind the protection for peer review and quality assurance.

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. The obvious assumption was that, unless there was protection for those who had opinions or information about a problem in a healthcare setting, health care providers would be reluctant to come forward, thus ultimately endangering patient safety. She remarked on the obvious weakness of such a system, which prevented information from being shared outside the establishment, let alone across the province or the country.

The patient's right to the disclosure of adverse events was only really recognized after the adoption of the *Evidence Act* in 1990. Indeed, it was not until 2004 that the Code of Ethics of the Canadian Medical Association imposed an ethical duty on physicians to disclose adverse events to their patients. Madam Justice Cameron stated that the *Evidence Act* represented only one perspective, that of the healthcare provider.

After surveying the state of the law at the time (2009), the Cameron Report stated:

> In my opinion, disclosure is now firmly entrenched in health care. There are still questions to be resolved. The common law sometimes moves slowly, but it is unlikely that the patients' right to disclosure will be lessened. Rather, it is more likely this right will be expanded. It is, therefore, necessary to examine in a more balanced way the requirement for section 8.1 of the *Evidence Act* and what steps, if any, are required to reinforce disclosure of adverse events.[38]

She took direct issue with the position, articulated in the Report of the Task Force on Adverse Health Events that doctors would not participate in reviews until they were certain that their opinions and statements would be fully protected by the law, particularly in the case of public inquiries. She comments:

> The import of that statement is astounding. Had such a position been taken in 2005, it would have meant that

36 *Ibid* 81.

37 *Ibid* 81–82.

38 NL Report of the Commission of Inquiry on Hormone Receptor Testing (2009), p 360.

> doctors would have refused to assist in the examination of the ER/PR problem (to determine its cause and thereby assure that future testing was as accurate as possible), because of the chance that they might be called to give evidence at a public inquiry. What is just as troubling is the idea that a physician would refuse to participate in patient safety efforts because there is a very small chance that a public inquiry might be called related to those matters. Surely, that would run counter to every principle of medicine…
>
> Further, in my opinion, disclosure to patients must include, among other things, an explanation of why the adverse event occurred and what is being done to ensure that a similar event does not occur in the future. If there is a peer review or quality assurance report respecting the adverse event, those reports must be provided to the patient upon request… The peer review or quality assurance report may have the names of the individuals who participated removed, prior to disclosure to the patient.[39]

Justice Cameron stated that the circumstances raised important questions about the value of section 8.1:

> ...the question has to be asked whether s. 8.1 of the *Evidence Act* is necessary at all. The underlying policy of the *Evidence Act* prohibition is suspect. Others who deal with safety issues do not have this protection. Pilots are an obvious example of persons whose profession requires them to make decisions affecting the safety of others. They are required to provide information to authorities in the interest of public safety, the opposite approach to the one taken in the *Evidence Act*.[40]

Justice Cameron concludes her Report by making several formal recommendations to enhance transparency and to minimize protection for information originating in peer reviews and quality assurance reports:

> **33.** It is recommended that the Government of Newfoundland and Labrador consider whether section 8.1 of the *Evidence Act* remains relevant.
>
> **34.** It is recommended that any conflict between section 8.1 of the *Evidence Act* and section 12 of the *Public Inquiries Act*, *2006* be resolved in favour of permitting Commissions of Inquiry to have access to peer review and quality assurance reports.
>
> **35.** It is further recommended that legislation be enacted to specify that adverse event disclosure to patients include an explanation of why the adverse event occurred and what is being done to ensure that a similar event does not occur in the future. Disclosure should also involve providing the patient with a copy of any peer review or quality assurance report respecting the adverse event. As explained in this Report, the names of the individuals who participated in the peer review or quality assurance may be removed prior to disclosure. I recommend that these rights be entrenched in legislation and that they be given priority over any prohibition contained in section 8.1 of the *Evidence Act*.[41]

Access requests

An Information and Privacy Commissioner's report from 2009 deals with the possible application of section 8.1 of the *Evidence Act* to a request for access to the records of a doctor employed by the Eastern Regional Integrated Health Authority. The report confirms the apprehensions of HIROC and the CMPA, that the *ATIPPA* can be used to obtain information about physicians. In this case, the public body asserted that the records were shielded by the *Evidence Act*. The Commissioner concluded that this exception to access was restricted to the context of a legal proceeding before the courts. He therefore recommended the release of the information, but requested the severance of information shielded by solicitor-client privilege and information that constituted personal information.[42] However, this report stems from 2009. In 2011, the *PHIA* was declared to be in force. The *PHIA* applies to personal health information held by a public body that is a custodian. Currently, it would appear that section 58 of the *PHIA* would shield the information of peer reviews and quality assurance reports that are held by public bodies that are considered custodians under *PHIA*.

Another piece of information relevant to this ongoing debate about the accessibility of peer reviews and quality assurance information is the 30 July 2014 reply to an access request to the Newfoundland and Labrador Department of Health and Community Services. The

39 *Ibid* 362–363.

40 *Ibid* 363.

41 *Ibid* 469–470.

42 OIPC *Report A-2009-004*, p 27.

request was for an update of the status of all recommendations made by the Cameron Inquiry. In its reply, the Department of Health and Community Service referred, among other things, to previous press releases and updates by itself and Eastern Health. It continued: "Work is ongoing related to recommendations 33, 34 and 35 concerning the *Evidence Act* and legislative change."[43] It is to be concluded that revising the *Evidence Act* in line with the recommendations of the Cameron Inquiry is still the subject of discussion within government.

Cummings report

Finally, it is useful to look at John Cummings' treatment of this topic in his 2011 review of the *ATIPPA*. Mr. Cummings took note of the ongoing debate and of the submission of Eastern Health, which argued that information from peer reviews should be exempt from the *ATIPPA*:

> Two of the main policy considerations are: the need to encourage the production of information from the health care system and frank expression of opinion about adverse events in order to enhance patient safety; and the need to promote a patient's right to disclosure of information.[44]

He noted that two provinces provided for the exemption of this type of information; in Alberta it is mandatory, and in Saskatchewan it is discretionary. Mr. Cummings recommended that government continue to reflect on the recommendation of the Report of the Commission of Inquiry on Hormone Receptor Testing and, if it finds that section 8.1 of the *Evidence Act* is still relevant, that government adopt a discretionary provision like the one found in subsection 17(3) of Saskatchewan's *Freedom of Information and Protection of Privacy Act*.

43 NL ATIPP Completed Access Request, *HCS/25/2014*.

44 Cummings Report (2011), p 71.

Conclusion

In a patient-centred health care system, transparency about information that can affect the quality of care is important. And, as the Newfoundland and Labrador Supreme Court noted, the court may order that information from a quality assurance committee be made available for a disciplinary hearing, in a case where newer legislation is not subordinated to the *Evidence Act*, but set out clear restrictions limiting general public access as may be appropriate.[45]

The *PHIA*, whose content and functioning are outside the mandate of this Committee, already has, since 2011, shielded these committees from access under its section 58. When all the reports quoted above were tabled, the *PHIA* had not yet become law. It is not clear what if any information from peer reviews and quality assurance initiatives in the medical world would not be shielded already by the *PHIA*.

In light of the patient perspective described by Madam Justice Cameron, transparency for patients about the health care system is a value at least as important as shielding the views of health care workers, who are ethically obliged to act in a way which promotes the health and safety of the patients.

The Committee is not persuaded that changes should be made to the *ATIPPA* which would provide any additional grounds for refusing to make information available in the context of peer reviews and quality assurance committees.

45 *Supra* note 33 at para 5.

9.5 College of the North Atlantic

Present status

One of the five organizations seeking exemption from the access provision in the *ATIPPA* was the College of the North Atlantic (CNA), an educational institution that employs over 1,500 staff and has a $150 million dollar operating budget. Its programs are offered in Newfoundland and Labrador and China, and it also operates a technical college for the State of Qatar in the city of Doha.

The College wrote that it had extensive experience with the *ATIPPA* since the *Act* was proclaimed in 2005. The College is identified in its multi-year contract with the State of Qatar as the service provider. Its concern was whether requesters could access information of its client, the State of Qatar, under the present wording of the *ATIPPA*.

The College raised two issues. First, there is no general exemption in the *Act* for information created for a client by a public body acting as a service provider.

The second and more crucial issue for the College was the wording of the *Act* under section 5(1), which states that the *ATIPPA* applies "to all records in the custody of or under the control of a public body." The College said that in its role of service provider to Qatar, it usually has custody of some or all of the information generated or compiled during the contract. However, it does not have control of the information: that control remains with the State of Qatar.

The CNA is concerned that release of any of Qatar's confidential or business information would harm the competitive position of the College. It asked that section 5(1) be amended to state that the public body must both have custody **and** be in control of the information requested. As an example, the College pointed out it may have copies of documents in its custody, but the control and the authority to manage the information would remain with the client, in this case, the State of Qatar.

The Commissioner presented a strongly worded rebuttal to the College in a letter to the Committee. He stated that the purpose of "custody or control" is to "ensure that the accountability purpose of the legislation is not limited or thwarted." He submitted that wording such as that proposed by CNA would "introduce language which would result in large swathes of records to be deemed outside the scope of the *ATIPPA*." The Commissioner argued the approach advocated by the College "is not consistent with the purpose of the *Act* and it is offside in terms of the Canadian context." He concluded the *Act* already has ample protection for the type of relationship the College has with the State of Qatar.

> In terms of the concern expressed by the College that information relating to the State of Qatar that could be in the control of the College might be required to be released to an applicant, the College should be reminded that exceptions exist to the right of access which ensure that information that would harm a third party or which would harm intergovernmental relations, or which would harm the financial or economic interests of a public body already exist in the *ATIPPA*. To amend a provision which affects the fundamental structure of the legislation in a profound way that would reduce the accountability and transparency of public bodies is unnecessary and the wrong approach for this Province to take. If there is a concern that one of the exceptions I referenced are not strong enough to protect certain kinds of information which it believes should be protected, a more productive discussion to have would have been to consider the effective of those exceptions, rather than attempting to remove a large proportion of records from the scope of the *ATIPPA*, which would be the result of the proposed amendment.[46]

46 OIPC Supplementary Submission, 25 September 2014, pp 1–2.

Disregarding requests

The College also made a suggestion which is not about personal information, but which for practical reasons is discussed here. It concerns section 10(1), which compels the public body to reproduce for the applicant records that exist in electronic form where it would not unreasonably interfere with the operations of the public body. The College pointed out that many public bodies still have paper records as well. It believed the provisions of section 10(1) should apply to all records, paper or electronic.

While this might seem to be a sensible suggestion, the Commissioner, in his comments on the College's submission, disagreed. He said "the rationale for the [College's] proposal is that the *ATIPPA* must contain a provision to ensure that public bodies do not have to respond to requests which would interfere unreasonably with their operations."[47] The Commissioner said in his experience, those are requests that would be considered "overly broad," and there is already "a suitable provision" in the *Act* to deal with such circumstances. He referred to section 43.1(2), which allows a public body to ask the Commissioner for authorization to disregard a request that is excessively broad.

47 *Ibid* 4

Analysis

In his letter to the Committee on 25 September 2014, the Commissioner pointed out that many of the issues raised by the College were relevant to a case then before the Supreme Court, Trial Division in Corner Brook. Consequently, the Committee will only comment on provisions as they should be expressed in future legislation.

The *ATIPPA* is meant to cover all public bodies, whatever their functions or activities. Some public bodies, such as Nalcor Energy, are engaged in revenue-creating activities and may need special consideration. If so, this is best done by amending their own legislation which applies only to them, rather than amending the *ATIPPA*, which applies to hundreds of public bodies.

This general observation suggests that the concept of "custody **or** control" in the *ATIPPA* which has been upheld by the courts, should not be diluted to require "custody **and** control" in order to respond to a particular fact situation of one public body at a given time.

Moreover, as the Commissioner noted, a public body struggling to reply to access requests, where its records are partly on paper and partly in electronic form, may make use of section 43.1 if the overall burden of locating information appears too onerous. But it would be contrary to the purpose of the *ATIPPA* to make the results of access requests vary directly depending on the format in which the information is stored.

Conclusion

For the reasons discussed above, it would not be appropriate to change the existing provisions of the *ATIPPA* as requested by the College of the North Atlantic. The Committee concludes that the words "in the custody of or under the control of" should be retained in section 5 of the *Act*, and section 10(1) of the *Act* should remain unchanged.

Chapter Ten

INFORMATION MANAGEMENT

> It has become clear that good records management is essential for the effective and efficient answering of FOI requests. Indeed, the cost of answering a request under FOI in terms of time and resources will often be determined by the quality of information management within the authority.
>
> — *Code of Practice on Records Management by Scottish Public Authorities*[1]

10.1 Information management and duty to document

Introduction

The connection between quality record keeping and the successful completion of access requests is well documented. The issue was addressed in 2011 by John Cummings, in the first statutory review of the *ATIPPA*. He made extensive recommendations to enhance the information management system in public bodies. Mr. Cummings also commented on the state of the information management system:

- Electronic records present new issues for government in terms of access requests. Many officials do not know how to search these records properly.
- Many emails are included in government records when they are in fact transitory records and should be deleted by employees. More training is necessary in this area…
- …the public bodies which have adjusted easily to the implementation of the *ATIPPA*…have a solid records management plan.[2]

The Model Access to Information Law developed by the Organization of American States speaks to the importance of strong information management in its guide for implementing the Model Law:

> Information is being created today at an unprecedented rate…Much of the information being created may be stored in locations outside of the public authority's network…implementing a system by which information is managed and preserved will facilitate ease of access and retrieval, so that this information can ultimately be disseminated for the public good.[3]

The other part of this equation, the *duty to document* is a term gaining status in government and information management circles. It has become a rallying cry for Information and Privacy Commissioners[4] and, it seems, for good reason: how can Information and Privacy Commissioners properly oversee access to information and privacy law in the absence of good records or, in some cases, no records at all?

The "duty to document" issue was also addressed in the UK Justice Committee's review of the *Freedom of Information Act 2000*. The discussion arose in the context of claims that there was a "chilling effect" around the giving and receiving of advice among senior civil servants

1 Scotland, *Code of Practice* (2011), p 3.

2 Cummings Report (2011), p 18.

3 OAS Model Law, June 2010, p 37.

4 Canadian Commissioners and Ombudspersons, *Modernizing Access and Privacy Laws for the 21st Century,* 9 October 2013.

and ministers in the UK government. Lord O'Donnell, who had been Cabinet secretary during the last two years of Tony Blair's prime ministership, testified before the committee that the impact of chilling went far beyond editing and "bowdlerising" of records. He said it could come to mean there would be no record at all, "because ministers may avoid holding formal meetings entirely":

> Tony Blair thought it was a problem. Therefore, how do you avoid this problem arising? You basically find a medium which is not covered by FOI. The cost of mobile phone bills goes up between Ministers. They are going to find ways around it. Things are not going to be written down. That, to me, makes for worse government and it makes it impossible for [historians] to try to recreate accurately what has gone on when there are no records.[5]

Newfoundland and Labrador

The *ATIPPA* assumes that records have already been created and does not address how records should be managed, apart from the duty to protect personal information. A separate piece of legislation applies to records of public bodies excluding municipalities, the *Management of Information Act (MOI)*. Section 6 provides the authority:

> 6.(1) A permanent head of a public body shall develop, implement and maintain a record management system for the creation, classification, retention, storage, maintenance, retrieval, preservation, protection, disposal and transfer of government records.

The *MOI* provides for a process to dispose of government records and a penalty of up to $50,000 for anyone unlawfully damaging, mutilating, or destroying a government record. There is also provision for the retention of electronic records. The information management system is overseen by the Office of the Chief Information Officer (OCIO), under the legal framework of the *MOI*. Accordingly, the OCIO policy framework applies to all records "regardless of physical format or characteristics."[6] A *Frequently Asked Questions* section on the OCIO website explains that instant messages (Pin-to-Pin, Blackberry Messenger, SMS Text Messaging) are to be preserved in this context:

> If you feel that the content…should be retained as a government record, it is your responsibility to transfer it to an appropriate medium.[7]

There is similar guidance from the OCIO with respect to email:

> Thus, email is a government record when it is created or received in connection with the transaction of Government business (e.g. when it records official decisions; communicates decisions about policies, programs and program delivery; contains background information used to develop other Government documents; etc.). Government records may not be destroyed without the authorization of the Government Records Committee, as outlined in the *Management of Information Act*.[8]

The OCIO's policy framework outlines the responsibility "employees and contractors" have in maintaining an effective information management system. It states employees are responsible for managing and protecting records that they have created or collected; it outlines the necessity of employing physical and technical means to protect records from unauthorized access; and it states that employees who willfully breach confidentiality of personal information are open to consequences "up to and including dismissal."[9]

5 UK *Post-legislative scrutiny of the FOI Act* (2012), pp 55–56.

6 NL OCIO, *Information Management and Protection Policy*.
7 NL OCIO, *Instant Messaging FAQ.*
8 NL OCIO, *Email Policy.*
9 NL OCIO, *Information Management and Protection Policy*, p 4.

The Cummings report

In the 2011 review of the *ATIPPA,* John Cummings made recommendations to improve the information management capacity of public bodies. One recommendation was that a mechanism be created to assess information management systems. The Information Management Capacity Assessment Tool (IMCAT) was developed by the OCIO in 2006 and "enables organizations to assess their current [Information Management] state against legislative and policy compliance, and to identify gaps and areas for improvement."[10] Mr. Cummings made several other recommendations:

- adopting a retention and disposal schedule for all paper and electronic records
- taking steps to ensure policies for the management of records, including emails, are understood by all employees
- coordinating the approach to training to make sure access requests and privacy issues are dealt with consistently
- using redaction software to sever documents
- determining if ATIPP coordinators should be considered an Information Management resource
- reviewing organization and reporting structures to make sure access requests are dealt with efficiently and on time
- requiring public bodies serviced by the Office of the Chief Information Officer (OCIO) to consult extensively with the office on all recommendations

The Committee asked public bodies through the Office of Public Engagement to update their progress in complying with Mr. Cummings' recommendations. In his letter (Appendix H) of October 17, 2014, Minister Kent provided the following update to the Committee:

- Between 2007 and 2013, 31 of 34 public bodies supported by the OCIO had completed IMCATs. The Committee was told the result represents "an overall increase in the priority assigned to [Information Management] by departments" and most have assigned accountability for information management to someone at the director level or above.
- Records retention and disposal schedules are in place for 26 of the 34 bodies serviced by the OCIO. 22 of the 34 bodies have applied for permission to implement a system to dispose of common administrative records for which they are not primarily responsible.
- All managers must complete an online information management course; all employees, including new hires, must complete an online best practices course on information management. A one-hour session on cyber security is provided at the request of a department. There are additional courses for people who work full-time in information management, including courses on records and information inventory, education and awareness, and informational technology and processes.
- The OPE provides resources to public bodies, including:
  - policy and procedures manuals for information access and protection of privacy;
  - training sessions for ATIPP coordinators;
  - policy advice;
  - Privacy Impact Assessments in order to ensure new or modified programs or projects conform with privacy protection under the *ATIPPA;* and
  - a review of websites.
- All government departments use redaction software.
- The OPE has impressed on public bodies the need to process access requests on time. It has given the same direction to deputy ministers.
- 18 of 23 ATIPP coordinators come under their department's information management (8) or policy (10) divisions. The remaining five are

10 NL OCIO, *Information Management and Information Protection Glossary of Terms.*

located within communications, Cabinet operations, ATIPP, and public safety.

- The OCIO provides "advice, guidance and knowledge transfer" to departments on their information management programs.

Measuring performance

The Committee was keen to know how these changes have impacted the ability of public bodies to meet their responsibilities under the *ATIPPA*. The OPE states that the IMCAT program, which predated the Cummings review, ensures that information management capacity in all departments "has been assessed in a consistent manner." However, there was also a suggestion that there are some gaps in performance.

The OPE reported development of the information management program "is at varying levels of maturity" in both departments and other public bodies. It states there are many reasons for this, including the size of the organization, how long the information management program has been in place in a public body, the allocation of resources, and the complexity of record holdings.[11] Despite the issues that were identified, the OPE says the IMCATs have meant "an overall increase in the priority assigned to [information management] by departments."

It also cites statistics showing improved response times for access requests. The OPE measured the first six months of 2013 against the same period in 2014, and found on-time responses improved from 69 percent to 96 percent. It also says the number of requests resulting in full disclosure has increased from 30 percent in the pre–Bill 29 period to 40 percent since that time. It reaffirmed a point made by Mr. Cummings nearly four years ago: departments with information management programs "are better positioned to respond to access requests in a timely way."[12]

The Committee also inquired as to what plans are in place to address deficiencies. The OCIO says it will assist by implementing an Information Management Self-Assessment Tool (IMSAT) to allow public bodies to assess their information management progress.

The OCIO and OPE are also cooperating to ensure that people who manage information and those who coordinate access requests are aware of how information management and the access to information system affect their positions. This education is being carried out at meetings where both groups discuss job practices.

11 Minister Kent's Letter of 17 October 2014, *Appendix H* of the Report.

12 *Ibid* 6.

What we heard

Strong information management policies and practices are the foundation for access to information. Without those policies and practices, there is no certainty that the information being requested exists, or that it is usable even if it does exist. Information management was a concern raised by just a few submissions, mostly in the context of the discussion of the duty to document.

Canada's Information Commissioner, Suzanne Legault, recommended a legal duty to document decisions, "including information and processes that form the rationale for that decision."[13] Commissioner Legault noted that without such a legal requirement, there is no way to ensure all information related to the decision-making process is recorded. She was also concerned "the risk is compounded by the advent of new technologies used in government institutions such as instant messaging."

The OIPC also addressed the "duty to document," and promoted the view expressed in a joint resolution

13 Information Commissioner of Canada Submission, 18 August 2014, p 8.

by Canada's Information and Privacy Commissioners,[14] by recommending "the creation of a legislated duty on public bodies to document (that is, create records relating to) any non-trivial decision relating to the functions, policies, decisions, procedures and transactions relating to the public body." The OIPC also emphasized the need for internal policies and procedures to ensure documents created under such a direction are "maintained, protected and retained in proper fashion." The OIPC said the suggested legislative changes could be placed within the *ATIPPA,* in another statute, or on their own in a stand-alone law. [15]

The OIPC noted that a key link in the access to information system, the ATIPP coordinator, is not being fully utilized. John Cummings had asked if all coordinators should be considered Information Management resources. In his supplementary submission, the Commissioner reported that, nearly four years after the Cummings review, there is an inconsistent approach to how the ATIPP coordinators function. He wrote: "Some seem to function at a low level of the departmental hierarchy. They appear to be delegated very little responsibility and are essentially carrying messages back and forth."[16] The Commissioner also reported that his office deals with very knowledgeable and experienced coordinators "who are clearly fully engaged with senior decision makers." He called for ATIPP coordinators to be given a greater leadership role in the ATIPP process.

Private citizen Adam Pitcher advocated a thorough documentation process involving decisions and the various processes related to the decision for all entities covered by the *ATIPPA*.[17] He suggested specific tasks for public bodies:

- create detailed records for all decisions, actions, and factual and policy research
- routinely disclose records that are required to be disclosed
- assign responsibility to individuals for the creation and maintenance of each record
- maintain each record so that it remains easily accessible

The Canadian situation

Even when documents are created and preserved, it may be difficult to ensure they can be accessed by requesters with the legal right to do so. A case in point was revealed in a special report by British Columbia's Information and Privacy Commissioner in July 2014. Elizabeth Denham reported on 33,000 boxes of "valuable government records [that] have been accumulating in warehouses" for a decade. The details of how those documents came to be warehoused are less important for this discussion than the impact of such a practice on access to information:

> Without the proper creation and management of records, any statutory right of access to records will prove unenforceable in practice. Good records management goes beyond the ability to locate records efficiently. It is also concerned with how and which records should be created, how long they should be retained, and with their ultimate disposition—usually destruction or transfer to the archives.[18]

New technology has made it easy to create and store records, and, unfortunately, easy to dispose of them. An example of this was reported on by the Ontario Information and Privacy Commissioner in June 2013. She found there was "indiscriminate deletion" of emails to and from the former Chief of Staff in the Ministry of Energy, related to the cancellation and relocation of gas plants in Ontario. Among other recommendations, Ann Cavoukian recommended Ontario legislate "duty to document communications and business-related activities within [the province's access and protection of privacy laws], including a duty to accurately document key decisions."[19]

The federal government issued a directive on record keeping in June 2009, three years after the Department of Justice reported that "information management in the government of Canada has declined alarmingly over the

14 *Modernizing Access and Privacy Laws*, *supra* note 4.
15 OIPC Submission, 16 June 2014, p 80.
16 OIPC Supplementary Submission, 29 August 2014, p 4.
17 Pitcher Submission, December 2013, p 1.
18 BC IPC, *Special Report: A Failure to Archive,* 22 July 2014, p 6.
19 Ontario IPC News Release, *Deleting Accountability,* 5 June 2013, p 33.

past three decades."[20] The 2009 directive set out the goals for improved record keeping, a system of monitoring, and a promise to review performance within five years.[21]

The federal Department of Justice highlighted some of the issues and challenges in legislating a "duty to document":

> It may be appropriate to make it a criminal offence to fail to create a record if that is done for the purpose of preventing anyone from finding out about a particular decision or action (whether that decision or action was itself improper or not), or to prevent anyone from obtaining access to a record of the decision or action through the ***Access to Information Act***.
>
> On the other hand, good information management practices must be learned, including rules or standards about when records should be created. Public servants who misunderstand the rules or who inadvertently fail to document an action or decision (perhaps they thought someone else at the meeting was taking the minutes, or they were distracted and never returned to document their action) are not engaging in criminal behaviour. Instead, they are failing to meet administrative standards, and should be dealt with accordingly, perhaps through disciplinary measures.
>
> Before any sanction can be applied, there would need to be a wide-scale training effort to ensure that every public servant, at all levels, would be made aware of their responsibilities, and would have the opportunity to clarify the new requirements.[22]

If there were a legislated duty to document, the provincial government could also pursue a range of sanctions to ensure that officials meet their legal duty to create and maintain records, and to discourage wilful attempts to fail to create records. Provincial sanctions could range from administrative disciplinary action to being charged with an offence.

20 Canada, *Strengthening the Access to Information Act,* 11 April 2006.

21 Canada, *Directory on Recordkeeping.*

22 *Supra* note 20.

Analysis

The response by the OPE to the Committee's questions demonstrates progress toward addressing the recommendations made in January 2011 by the Cummings Report. The responses suggest a high level of awareness of the major issues involved in information management, including the need to protect personal information and the threats of cyber espionage. It is significant that all managers must complete an online information management course and that all employees, including new hires, are required to do an online course in best practices.

It is also apparent that more must be done. Some departments and public bodies served by the OCIO have not achieved the same level of proficiency in information management as others, as the OPE told the Committee.

Public bodies do not have a choice about complying with the *ATIPPA*. They have a legal obligation to do it. If some public bodies do not have the necessary resources for a strong information management system, senior leaders have a responsibility to assign the necessary resources to fix the problems. The same holds true for the assessment of the information management system that is being undertaken through the IMSAT tool. The OCIO is confident in the quality of the tools it has developed, and the result should provide sound feedback and advice so that public bodies can develop stronger systems.

Duty to document

The joint resolution of Canada's Information and Privacy Commissioners called on all Canadian jurisdictions to create a legislated duty "requiring all public entities to document matters related to deliberations, actions

and decisions."[23] The OCIO clearly sets its policy in respect of best practices for public officials regarding instant messages. It is worth restating here:

> If you feel that the content…should be retained as a government record, it is your responsibility to transfer it to an appropriate medium.[24]

23 *Supra* note 4.
24 *Supra* note 9.

The OCIO speaks in terms of "responsibility" and it would be logical to assume that all public officials should feel the responsibility to record their decisions and plans. Such a practice is not only useful for the ATIPP system, but provides an accurate record for others who need to take direction from officials. Indeed, it would be irresponsible to expect officials to proceed on matters of public importance only on the basis of oral instructions, and without any documentary backup.

Conclusion

As of January 2015, the *ATIPPA* has been in place for a decade. Most of the public focus has been on the provisions of the *Act* that provides or restricts access, and on the practices around its administration. However, it must be realized that the ultimate success of the ATIPP system rests on its ability to manage and protect information. Senior officials must ensure that appropriate resources are allocated to do the job completely, and that all public bodies understand the essential role that information management plays in ATIPP.

Recommendations

The Committee recommends that

79. The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the *Management of Information Act,* not the *ATIPPA*.

80. Implementation and operation of this new section of the *Management of Information Act* be subject to such monitoring or audit and report to the House of Assembly by the OIPC as the Commissioner considers appropriate.

81. Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems.

10.2 Records in the form requested and machine-readable format

Introduction

In the recent past, some of the information collected by officials found its way into various public documents, such as annual reports, but most information stayed under the control of the public body. The raw data is not usually released. There are now enormous pressures building from outside government to change that dynamic, and governments themselves are responding by

creating open government and open data initiatives.

Requesters want access to government data and datasets that can be analyzed by computer. The term used to describe it is *data in machine-readable format*. Requesters who ask for data in this format know exactly what they want. They want data they can re-use and reformat, not *static data,* which has been defined as a type of information only intended for a human being who can read, print, and take actions based on reading the material.[25] In the words of private citizen Simon Lono, who presented to the Committee in June, records in machine-readable format allow the requester to analyze the data using different methods.[26]

The utility of machine-readable format has been described in this way:

> Machine readability directly influences data usability. Datasets, in particular very large datasets, on their own convey little information to a human. Only when that data is processed in some way — visualized, analyzed, or summarized — does it becomes informative or useful. Thus, to fully realize the potential of open government data, government agencies must release their data in a format that allows processing. Providing innovators, journalists, and other end users with data in this way makes it possible for them to better understand the raw data, to examine it in ways that meet their interests and responds to their questions. It allows them to drive their businesses; in some cases it becomes their businesses.[27]

Using open data

Several Canadian jurisdictions are encouraging the use of open data to create new products and services, including smartphone applications. The City of Ottawa has run contests to "encourage meaningful and productive use"[28] of the data it makes available online. Contestants competed for $38,000 in prizes in 2013 to create smartphone applications. Among the winners was an app that used city bus schedules to create a Bus Tracker. Another winner developed an app to allow residents to find nearby recreation activities. Yet another allows residents to track the awarding of building permits for the most recent three-month period through an interactive map. Other officials in Ontario cite examples of efficiencies and money saved through the use of open data in the fields of health care, transportation, and energy.[29]

Governments pay attention

In June 2013, countries of the G8 adopted the Open Data Charter, which committed them to lay out open data principles and best practices by the end of 2015. Open Data will follow at some point, but these measures are expected to lay the groundwork for release and reuse of government data.[30] The Open Data Charter sets out five essential principles to establish effective Open Data systems in the G8:

1. Open Data by Default: Foster expectations that government data be published openly while continuing to safeguard privacy;
2. Quality and Quantity: Release quality, timely, and well-described open data;
3. Useable by All: Release as much data in as many open formats as possible;
4. Releasing Data for Improved Governance: Share expertise and be transparent about data collection, standards, and publishing processes; and
5. Releasing Data for Innovation: Consult with users and empower future generations of innovators.

Governments are moving forward with new initiatives. US President Barack Obama signed an executive order on 9 May, 2013, a month before the G8 launched its Charter. The order made open data formats a requirement for all new federal government systems. It will take time to arrive at a stage where all information is machine readable, since the order applies to "new and modernized" systems. President Obama stated openness in government strengthens

25 Hendler and Pardo, *A Primer on Machine Readability* (2012).
26 Lono Submission, 24 June 2014, p 10.
27 Hendler and Pardo*, supra* note 27.
28 City of Ottawa, *Apps4Ottawa.*
29 Ontario IPC, *2013 Annual Report,* p. 37.
30 Canada, *G8 Open Data Charter – Canada's Action Plan.*

democracy and he also pointed to broader economic and social value:

> Decades ago, the U.S. Government made both weather data and the Global Positioning System freely available. Since that time, American entrepreneurs and innovators have utilized these resources to create navigation systems, weather newscasts and warning systems, location-based applications, precision farming tools, and much more, improving Americans' lives in countless ways and leading to economic growth and job creation.[31]

In the United States, as well as other places where open data initiatives are in place or being contemplated, open data does not mean all data will be available:

> When implementing the Open Data Policy, agencies shall incorporate a full analysis of privacy, confidentiality, and security risks into each stage of the information lifecycle to identify information that should not be released. These review processes should be overseen by the senior agency official for privacy. It is vital that agencies not release information if doing so would violate any law or policy, or jeopardize privacy, confidentiality, or national security.[32]

In July 2014, the UK government moved forward with a similar plan to provide government documents in open format. Its "digital by default agenda" is expected to be used across all government departments, and as in the US, the implementation will be gradual and apply to "new procurements." The minister, Francis Maude said the open data system will make it easier for all sectors to work with the UK government, including business, voluntary organizations and citizens. The change will also assist government employees.[33] Minister Maude also said open data will spur economic growth and enhance scrutiny of how government works, thereby leading to improved services. But he also warned that data by itself will not be the solution:

> In order for data to be used in this way, it has to be released in a format that will allow people to share it and combine it with other data to use it in their own applications. This is why transparency isn't just about access to data, but also making sure that it is released in an open, reusable format.[34]

The Government of Canada, through its open data portal *(data.gc.ca)* lists nearly 210,000 datasets that are available to the public. More than 200,000 originate with the Department of Natural Resources and include satellite and aerial photography images. But the government has also been adding more "mainstream" datasets, including statistics about GST/HST collection and the number of foreign work permit holders working in various parts of the country. So far, there is no commitment to producing all future government datasets in machine-readable format. The government's own open data website suggests open data is a work in progress:

> Since the launch of its Open Government Initiative in 2011, the Government of Canada has laid the foundation of a successful open data program, including an open data portal and an Open Government License, and is now finalizing the Directive on Open Government to establish mandatory departmental requirements for publishing open data and information.[35]

There is also an indication that the Liberal Party of Canada has focused on open data. In a private member's bill,[36] party leader Justin Trudeau proposes additions to the *Access to Information Act* to address open data issues:

- stating that government information must be openly available and in machine-readable formats
- adding the term "information" in the *Act*, and stating it includes digital and non-digital data
- amending the section on machine readable records and removing the provision that such requests be "subject to such limitations as may be prescribed by regulations"

31 US *Executive Order – Making Open and Machine Readable the New Default,* 9 May 2013.

32 *Ibid*.

33 UK *Open document formats selected to meet user needs,* 22 July 2014.

34 *Ibid*, *Improving the transparency and accountability of government and its services*, 10 July 2014.

35 Canada, *G8 Open Data Charter.*

36 Bill C-613, *An Act to Amend the Parliament of Canada Act and the Access to Information Act (transparency)*, 2nd Sess, 41st Parl, 2014.

Newfoundland and Labrador

The Government of Newfoundland and Labrador launched Open Data on March 20, 2014 as part of its Open Government initiative. Several datasets have already been released, including ferry on-time records, crime by offence type, and births by age of mother. The general terms of the data release policy are stated on the Open Data website:

> The type of open data to be made available will depend upon the requests we receive from data users, and the quality and state of readiness of the data that we have. To ensure quality, the Newfoundland and Labrador Statistics Agency validates all data before it is released.[37]

The government also highlights the potential value of open data:

> Releasing data increases government transparency, promotes economic and business development opportunities, contributes to informed labour market decisions, leads to improved government effectiveness and efficiency, and allows for broader participation in the work and direction of Government.[38]

The *ATIPPA* and open data

Several access to information laws, including the *ATIPPA,* allow requesters to state the form of the records or information they wish to receive. But there is a clause in most laws that make complying with the request conditional. In the case of the *ATIPPA*, it is where the record can be "produced using the normal computer hardware and software and technical expertise of the public body," and where "producing it would not interfere unreasonably with the operations of the public body." Also, "where a record exists, but not in the form requested by the applicant," the head of the public body may decide to "create a record in the form requested" where the head "is of the opinion that it would be simpler or less costly for the public body to do so."

There are similar provisions in other laws. In British Columbia, the record will be provided in the form requested if it is "reasonable." Canada's Information Commissioner advised that there is "some disagreement" about the definition of preferred format in the federal government;[39] internationally, New Zealand will comply unless it would "impair efficient administration" and the United Kingdom will provide information in the form requested if it is "reasonably practicable."

How is "record in form requested" interpreted?

Technological changes have provided significant challenges for public bodies in managing information and responding to access requests. Section 10 of the *Act* attempts to deal with this in respect of electronic records.

> **Access to records in different or electronic form**
>
> **10.** (1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where
>
> (a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and
>
> (b) producing it would not interfere unreasonably with the operations of the public body.
>
> (2) Where a record exists, but not in the form requested by the applicant, the head of the public body may create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

In recognition of these technological challenges, the ATIPP Office *Access to Information Policy and Procedures Manual* provides guidance with respect to this section.[40] In respect of section 10(1), officials are told "applicants will increasingly ask for access to electronic records" as more information is "maintained in electronic form." Public officials are advised they are to treat such requests in the same way as requests for paper records. The record must be provided if it can be produced "using normal computer hardware and software and technical expertise of the public body" and "it would not interfere unreasonably" with the operations of the

37 <http://open.gov.nl.ca/>.

38 *Ibid.*

39 Information Commissioner of Canada, *Materials for the Statutory Review Committee,* 18 August 2014, Section 4 –p. 1.

40 NL *Access to Information Policy and Procedures Manual*, pp 54–55.

public body. There is no guidance in the manual on what "unreasonably interfere" means, although the OIPC has made recommendations on this clause.

In Report 2006-03, the Commissioner concluded "the hurdle which must be cleared by a public body to claim section 10 must be set fairly high because of the potential barrier to access which the use of that section could create." The issue in question was a request that required the College of the North Atlantic to search through more than 6400 emails and 8900 email attachments. Before the College could claim that such a search met the test of "unreasonable level of interference," the Commissioner noted:

> It is therefore important that public bodies are aware of and can utilize the full extent of capabilities of the "normal computer hardware, software and technical expertise" at their disposal.[41]

In other words, it is not the number of records that matters, it is whether the public body has the technical tools to carry out a search efficiently. In this case, the Commissioner allowed the College to rely on section 10(1) to refuse the request, but he cautioned that this was a "case specific" determination:

> I do not believe that anything in this Report in terms of numbers of hours spent by staff or numbers of records involved should be relied upon by any public body as an explicit threshold in order to rely on section 10 in refusing an access request. This decision is not made lightly, and I would caution any public body that I would expect this to be a relatively rare determination on my part.[42]

There have not been any court challenges or OIPC recommendations on section 10(2).

41 OIPC, *Report 2006-015*, 20 November 2006.

42 *Ibid* at para 51.

What we heard

Private citizen Simon Lono made two points regarding data that is under the control of public bodies. The first had to do with the definition of "record" in the *ATIPPA,* and his assertion that it is being interpreted so broadly as to include datasets, which he believes should be released.

> This has become a problematic clause as government has refused access to computer data on the grounds that it is a computer program. I'm sorry to say that the Information Commissioner has frequently accepted the government position.[43]

Lono advocates for the release of data that applicants can analyze on their own computers. He told the Committee the *ATIPPA* is "behind [the] times" in this regard, and he was critical of public bodies that use their authority under the *Act* to create a record in the form requested where the information exists in another format:

> This is an obstructive provision with cases of deliberate efforts to make information useless. Electronic records are printed, scanned as image PDFs, then released likely as printed documents such that they cannot be analysed or evaluated with modern technological methods.[44]

Wallace McLean also advocated making datasets available in a format that people can easily use, and recommended that the *Act* make it clear the right of access extends to a digital record in its original electronic format. He wanted the *Act* to clarify that a computer-generated record is not a computer program, and therefore, should not be withheld for that reason.[45]

The Centre for Law and Democracy (CLD) referred to international standards and suggested requesters' preferences for raw data should be respected by public officials. The Centre also addressed the "optional"

43 Lono Submission, 24 June 2014, p 8.

44 *Ibid* 10.

45 McLean Submission, August 2014, p 7.

characteristic of section 10(2), where if it is simpler or less costly for the public body, the head can create a document in the form requested from information that exists in another format. The Centre concludes "a good RTI law should leave those decisions up to the requester" unless doing so would create "an undue burden" on the public body.[46]

The minister of OPE, Sandy Collins, addressed the government's Open Government Initiative. He talked about releasing information proactively, without waiting for access to information requests.

Canada's Information Commissioner, Suzanne Legault, said that as Canadians enter the era of open data and open government, it is essential that access laws keep up:

> And if we want to have, for instance, open dialogue and open consultation with our citizens under Open Government Initiatives, it doesn't work if your freedom of information legislation actually restricts so much access to any kind of policy development…that there is no information coming out, then you can't engage in an open dialogue with your citizens because they don't have any of the information that they need to actually engage intelligently.[47]

Interpretation and guidance in other jurisdictions

The guidance from Alberta emphasizes that there must be a case-by-case application of responding to a requester who wants a record in a particular format. For example, there was one case where the Alberta Commissioner permitted a public body to provide paper records because it did not have the technical capacity to sever exempted sections from requested emails electronically. In another case, the same Commissioner agreed a health care body did not have to create a record for a requester because compliance would unreasonably interfere with its operations, specialists would be removed from providing patient care, and meeting the request would involve an extensive amount of time and significant staff resources. The Commissioner in Alberta advises FOIP coordinators to consult with program and information technology areas "to assess the time and resources that would be required…and the impact that this use of resources would have on its day-to-day activities."[48]

The United Kingdom has extensive guidance for public officials in dealing with requesters and their preference for a particular form of record. The starting point is that the requester must state a preference when they make the application, and cannot change their mind once the search begins, or after the information has been provided. The UK Act sets out three main ways in which information can be provided. The requester may receive one or more of:

- a copy of the information,
- an opportunity to inspect the information, and
- a digest or summary of the information.[49]

The UK rules also state that the requester is not restricted to one option, and uses the example that a requester "may want to inspect the information and also take a copy." Where it is "reasonably practicable, the public authority shall, as far as reasonably practicable, give effect to the preference." The result is that public bodies must comply with a request, but this duty applies to the form (electronic copy or hard copy) and not the format of the record. For example, a public body is not obliged to meet a request that asks for an electronic document in Microsoft Word rather than as a PDF document.[50]

The UK has also amended its *Freedom of Information Act 2000* by providing for requests of datasets, and requiring public bodies "so far as reasonably practicable" to provide that information "in an electronic form which is capable of re-use."[51] Previously, requesters could ask for such information under FOIA, but did not have the right to re-use it. The changes are in line with the UK government's comments when it released a white paper on open data in 2012:

46 CLD Submission, 14 July, pp 12–13.

47 Information Commissioner of Canada Transcript, 18 August 2014, p 16.

48 Alberta IPC, *FOIP Guidelines and Practices (2009),* p 84.

49 UK ICO, *Means of communicating information (section11),* 20140214, Version 1.0.

50 *Ibid* 6–7.

51 *Freedom of Information Act 2000* (UK), s 11(1A).

> Data is the 21st century's new raw material. Its value is in holding governments to account; in driving choice and improvements in public services; and in inspiring innovation and enterprise that spurs social and economic development.[52]

New developments

Recent developments in Canada, the United States, the United Kingdom, and Newfoundland and Labrador underline the changing nature of government information and how it will be accessed in the future.

It begins with the concept of *open data*, which is defined as "data that can be freely used, reused and redistributed by anyone—subject only, at most, to the requirement to attribute and share alike."[53] The Government of Newfoundland and Labrador defines the term as "the release of government data, with an open license, which is free of charge for anyone to use and reuse for any purpose."[54]

Open data translates into *open knowledge*, "which is what open data becomes when it's useful, usable and used."[55] The Open Knowledge network is an international non-profit organization that advocates for shareable and accessible open data:

We envision a world where:

- knowledge creates power for the many, not the few
- data frees us to make informed choices about how we live, what we buy and who gets our vote
- information and insights are accessible–and apparent–to everyone[56]

Open Knowledge advocates that "the data must be available as a whole and at no more than a reasonable reproduction cost," that ideally it should be downloadable through the internet, that the data "must be provided under terms that permit reuse and redistribution including the intermixing with other datasets," that it must be machine readable, and that it must be universally available with "no discrimination against fields of endeavor or against persons or groups."[57]

Machine-readable format

Of course, data is created in many formats, and it can only be usable and useful if it is easily processed by computers. Hendler and Pardo use the example of the near universal acceptance of bar codes, which now appear on most consumer items, as well as being adapted for other uses, such as inventory control, identifying blood samples, and tracking packages. They argue that the factors that led to the widespread acceptance of the bar code, are now necessary for datasets:

> Uniformity and standardization in data formats and processing are needed. Simplicity in creating and imbedding the formats must be achieved. Cost advantages must be realized through their use to justify their creation. When these conditions are met, machine readable data become more prevalent leading in turn to increased capabilities.[58]

52 UK Open Data White Paper, *Releasing the Potential* (2012).
53 Open Data Handbook, *What is Open Data?*
54 NL *Open Data website.*
55 Open Knowledge, *What is Open?*
56 *Ibid*, *Open Knowledge Mission Statement.*
57 *Ibid.*
58 Hendler and Pardo, *supra* note 27.

Analysis

The advent of machine-readable data combined with requesters expressing preference for raw data, represents an evolution in access to information. That change is made possible by the proliferation of electronic devices, including those used in the creation of records in public bodies, and the widespread use of those devices in the general population. This is happening as governments roll out open government and open data initiatives. The

public is starting to see the types of data held by public bodies, and it is only natural that they will want access to more of it.

Since the unveiling of its Open Government website in the spring of 2014, the Government of Newfoundland and Labrador has placed an assortment of datasets online under various headings, including health, transportation, justice and demographics. Under open information, it has placed online records detailing ministerial expenses, responses to ATIPP requests, and education statistics such as achievement rates by school.

If research from the United Kingdom can be used as a guide, it may take some time for the public to go online and examine these types of information. The Open Data Institute (ODI), an organization that advocates an "open data culture to create economic, environmental and social value" found that direct engagement with government data…is limited, specialised, and low." ODI reported the most common users of open data were "developers, entrepreneurs, some business specialists, and other tech-savvy agents." ODI's conclusion was that ways have to be found to ensure the data can be more widely used by the general population. It said the UK government was placing too much emphasis on putting lots of data online, and not enough on "understanding, generating, and nurturing data demand or data use." [59]

The Committee found that few submissions dealt with the kind of information that might be produced by the Open Government Initiative. Those that did address the matter (Simon Lono, Wallace McLean, and the Centre for Law and Democracy) were either experienced access to information users, involved in public life or in the case of the CLD, an advocacy group with in-depth knowledge of access to information issues.

59 Open Data Institute, *About the ODI.;* Fred Saunderson, *Investigating public participation in open government data.*

Conclusion

If the Open Government and Open Data initiatives are to evolve to the state envisioned by people who made submissions to the Committee, then public bodies will have to become responsive to requests for raw data. On the Open Government website, the Government of Newfoundland and Labrador indicates it wants to engage with the people of the province and identifies the following goals:

> To increase the amount of information and data we release, and to engage with and provide feedback to the people of the province.
>
> Our Open Government Initiative is grounded in the following four pillars:
>
> - Open Information
> - Open Data
> - Dialogue
> - Collaboration

Data is a dynamic commodity with tremendous economic value and social utility. As we have shown from the Ottawa examples cited above, where data is used to create smartphone applications, and in the case of the US, where the release of data led to the creation of electronic navigation systems and GPS with multiple uses, data can be a tool for economic development. Of course, even with the limitless potential for use, data and datasets have to be protected to ensure that personal information is not disclosed.

It will be necessary to view datasets and other machine-readable data in the same ways as other information held by public bodies. This means the same exemptions would apply and information would be disclosed or withheld on the same basis as for information in other records.

Recommendations

The Committee recommends that

82. The *ATIPPA* be amended to:

(a) define "records" in the *ATIPPA* to include datasets and other machine readable records;

(b) require that disclosure of such records be subject only to the limitations applied to all other records of public bodies;

(c) require that datasets be provided to the requester in a re-usable format; and

(d) in relation to section 10(2) of the *ATIPPA*, the head of a public body consult the applicant before creating such a record.

83. As a matter of good practice, public bodies should work with applicants and other groups, so that datasets and other machine readable records can be understood and full use can be made of them.

10.3 Additional powers of the Commissioner—publication schemes

Introduction

This section of the chapter introduces the concept of publication schemes. The Committee believes that use of publication schemes is the best way to ensure consistent and appropriate publication of information by public bodies. This section also discusses what should be the Commissioner's role in that process.

A publication scheme is an outline of the classes of information each public body will publish or intends to publish so it may be read easily by the public.[60] The publication scheme also specifies whether the information is free, or if there is a charge.

An innovative approach to an aspect of the Commissioner's powers would be to borrow from the British model, which gives the Commissioner a leading role in overseeing the publication of information held by public bodies. While the Office of Public Engagement may be planning to occupy this role, an arm's length body might be able to establish publication standards more effectively than a government office.

United Kingdom

Under the UK *Freedom of Information Act 2000*, the Information Commissioner must approve the publication scheme for information held by bodies subject to the Act. The approval of the Commissioner may be for a specific time period. The publication scheme may be subsequently reviewed and revoked by the Commissioner, with reasons given.

The UK Commissioner also publishes guidance as to how to create and structure a publication scheme tailored to different types of public bodies (for example, government departments or local authorities). The scheme commits the authority to routinely make information available to the public, including datasets, and to "review and update on a regular basis."[61] It also requires public bodies to produce a schedule of any fees that might be charged for access to information. The Commissioner also sets out classes of information that should guide public bodies on the types of information they should release:

- Who we are and what we do
- What we spend and how we spend it
- What our priorities are and how we are doing
- How we make decisions

60 UK FOI Act 2000, s 19.

61 UK ICO, *Model Publication Scheme,* p 1.

- Our policies and procedures
- Lists and registers
- The services we offer

This approach forms the backbone of the operation of the access-to-information scheme in the United Kingdom.

The uncompleted information directory

The publication scheme finds an echo in section 69 of the *ATIPPA*, which mandates the creation of an extensive directory of information about public bodies and the information they hold. The government has not, at any time since the *Act* came ino force in 2005, completed a directory of information. The deputy minister of the Office of Public Engagement stated that extensive work on a directory of information was done in mid-2000s but became quickly outdated and was abandoned.[62]

Victoria Woodworth-Lynas, Director of the Access to Information and Protection of Privacy Office, stated at the OPE's appearance before the Committee that the agency and its predecessors seemed unsure how to proceed with such a directory, given the variations in size and function of some 460 public bodies across the province:

> And practically speaking, how do we get that information from them without putting a lot of burden on them to be able to put together such a directory?
>
> Departments, I think, probably are a little bit easier for us to manage, practically speaking, but other public bodies—municipalities, corporations, boards, commissions, educational bodies—I mean there is a quite a number of entities outside of core government that that directory would apply to. So any advice or guidance that you might have I think would be very much appreciated.[63]

Even if the Commissioner were to play a role like the UK Commissioner and define the information that should be published by different public bodies, it is not clear how consigning such a responsibility to the Commissioner can coexist with the government's announced Open Government Initiative.

Open government in general aims to put the knowledge that exists within government, but that is not yet publicly available, into the open, in a usable format. There it can be used to create more knowledge and thus add value to public and private innovation and the general welfare of society. The Government of Newfoundland and Labrador has already created an open information website where it posts "information that is routinely or proactively disclosed by specific departments."

A glance at the topic of education on the provincial open government website reveals how valuable this information can be for decision makers. For example, statistics on student attendance and absentee rates by district and gender could be very useful for planners, trustees, and teachers.[64]

In 2013, the UK Information Commissioner made this statement in releasing an updated publication scheme for the current administrative year:

> The ICO intends to continue to ensure the pro-active dissemination of information by public authorities… The Commissioner strongly supports the open data initiative across the public sector, seeing it as a way to enhance and build upon the transparency achieved by FOIA (*Freedom of Information Act*). It is therefore important that publication schemes are updated to support and sustain open data.[65]

62 Government NL Transcript, 19 August 2014, pp 195–196.
63 *Ibid* 198.
64 NL Open Government website.
65 UK ICO, *Publication scheme plan for 2013/2014*.

What we heard

The Newfoundland and Labrador Commissioner did not address the matter of publication schemes directly, focusing instead on the uncompleted Information Directory. The OIPC recommended the directory be "commenced and maintained," and noted that the Alberta guide would be a useful model because it was "the most clear, succinct and user-friendly."[66]

The Information Commissioner of Canada, Suzanne Legault, specifically recommended the addition of publication schemes to the *ATIPPA* as a guide for public bodies, and commented on the benefit of taking this approach:

> Publication schemes can promote a pro-disclosure culture; transform the access network from a reactive to a proactive system; limit government costs because it results in decreases in access requests and reduces delays for the public looking for information. Embedding publication schemes in the *ATIPPA* would also be consistent with the government's open government initiative.[67]

Several participants warned the Committee about the perils of substituting open data initiatives for effectively functioning and liberally administered access-to-information provisions in the legislation.

The Centre for Law and Democracy was critical about the limits to claims of truly open government in certain situations where governments pick and choose the information to be made public according to their own changing political priorities. Michael Karanicolas warned that open government could never be, in his opinion, a substitute for a robust access to information regime:

> [O]pen government is not a replacement for RTI. And I can tell you why. Because this is something that we see at the federal level and this is something that we see in a lot of different jurisdictions, particularly with the open government partnership. Open government is a great development and it brings people into the system. It allows for greater insight into the system but it doesn't allow a full accountability because you will never see the government proactively putting out their documents that are a little bit sensitive or a little bit embarrassing. Documents that should still be disclosed under international standards of a proper exceptions regime but would be a little bit embarrassing.[68]

The Office of Public Engagement stated at the public hearings of August 2014 that it would be publishing in the coming months an outline of its intended publication of information held by government.

There is evidently a tension between a suggested proactive role of the Commissioner in this area and ongoing open government initiatives which are at the discretion of ministers.

66 OIPC Submission, 24 June 2014, p 81.

67 Information Commissioner of Canada Submission, 18 August 2014, pp 7–8.

68 CLD Transcript, 24 July 2014, p 149.

Analysis

The UK experience over ten years suggests that the initiative for deciding what information is to be made public is best left to an arms-length agency such as the office of the Commissioner. The Commissioner has no direct interest in whether certain information is to be revealed to the public or not. As in the UK, the Commissioner could lessen the burden on smaller public bodies by devising publication schemes to be implemented gradually, first by the biggest bodies with the most capacity. As experience is gained with the publication of information, the smaller public bodies could benefit from it in following the examples already created.

Publication schemes go well beyond a directory of information, although a directory of information is the first step in deciding what information should be published and what should be available through access-to-information requests.

The over-centralization of the present approach may be a reason for its failure. The current recommendation aims at making each public body responsible for the publication of its own information, as defined by the Commissioner, within a time period to be determined by the Minister.

Conclusion

Section 69 of *ATIPPA* should be revised to shift the responsibility for publishing information from the Minister responsible for the administration of the *Act* to the head of each public body with the Minister remaining generally responsible for compliance. He should advise Cabinet to make regulations to specify which public bodies must make their information available and when. This would allow a gradual coming into force of the practice of publishing information, the larger public bodies presumably being able to comply most readily.

As in the UK, the Commissioner could develop a model publication scheme and set out what minimal information is necessary, including lists of personal information databases. Much of this is already set out in section 69 of the *Act*. The model publication scheme would be a standard template which each public body would adapt to its particular functions. The responsibility for developing the model should be added to the Commissioner's list of powers and duties.

Recommendations

The Committee recommends that

84. Section 69 of the *ATIPPA* should be revised to:

(a) give the Commissioner the responsibility for creating a standard template for the publication of information by public bodies;

(b) give each public body the obligation of adapting the standard template to its functions and publishing its own information.

85. A new regulation-making power be added to the *Act* to enable Cabinet to prescribe which public bodies are required to comply with Section 69 of the *Act*.

Chapter Eleven

OTHER ISSUES

11.1 The Commissioner's recommendations for specific amendments

Section 22—Disclosure harmful to law enforcement

Section 22 describes the powers of a public body to refuse to disclose records that could be harmful to law enforcement.

The Commissioner recommends two alternatives for amending section 22(1)(h):

> **Disclosure harmful to law enforcement**
>
> 22(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to
>
> (h) deprive **a person other than a public body** of the right to a fair trial or impartial adjudication;
>
> **OR**
>
> (h) deprive **a person or public body** of the right to a fair trial or impartial adjudication;

The Commissioner gives the following explanation for the proposed amendment:

> "If it is the government's wish that public bodies be covered by this provision, we note that "public body" is a defined term, and it should therefore be explicitly included. Otherwise, we recommend that it be explicitly excluded, for the sake of clarity."[1]

The Committee concludes that the limited information provided by the Commissioner is not a sufficient basis on which we could recommend legislative changes without a fuller assessment of all factors bearing on the issues.

1 OIPC Submission, 16 June 2014, pp 91–92.

Section 22.2—Information from a workplace investigation

Section 22.2 deals with circumstances under which information that would reveal the substance of records collected or made during a workplace investigation are to be withheld or may be disclosed. Subsection (2) requires the head of a public body to refuse to disclose "information that would reveal the substance of records" collected during a workplace investigation. Subsection (3) requires the head to disclose to an applicant who is a party to a workplace investigation "information referred to in subsection (2)."

The Commissioner proposes to repeal subsection (2) and revise subsection (3), and gives two reasons for his proposed amendment.

One is that the phrase "substance of records" is not well understood and it is difficult for public bodies to decide which records should be withheld and which records should be released. He also suggests that in the case of a request from a party to a workplace investigation, it is not clear whether the phrase means "all the information collected or made during an investigation" or something else.

The second reason effectively suggests that subsection (2) is not necessary to prevent disclosure of such records to a person not connected with the workplace investigation. He explained that if a person who is not a party requests records, "section 30 and/or other exceptions will likely apply."

The Commissioner's concerns clearly have merit. As to the difficulties public bodies experience in deciding

what information would reveal the substance of records collected or made during a workplace investigation, it is appropriate that those issues be addressed by amendment to section 22.2.

However, the Committee is not satisfied that the second amendment proposed by the Commissioner is the appropriate one in the circumstances. The Commissioner proposes that both subsections (2) and (3) be repealed and replaced with a single subsection providing only for requiring the head of a public body to disclose all relevant information to an applicant who is a party to a workplace investigation. As a result, there would be no provision in section 22.2 to prevent disclosure of such records to an applicant who is not a party to a workplace dispute.

The Commissioner's assertion that section 30 and/or other exceptions "will likely apply" does not provide a basis on which the Committee can, with confidence, accept the specific proposal of the Commissioner.

The Committee prefers a less risky approach to address the Commissioner's valid concerns about the difficulties of public bodies in applying the substance of records standard. That can be achieved by replacing the words "information that would reveal the substance of records" in the present section 22.2(2) with the words "all relevant information."

Re section 30.1—Disclosure of House of Assembly service and statutory office records

Section 30.1 deals with the powers of the Speaker of the House of Assembly, or an officer of a statutory office, to refuse to disclose certain records as described in the section.

The Commissioner notes that because of correspondence between an officer of a statutory office and heads of public bodies, there are occasions when heads of public bodies may receive information that section 30.1 requires not be disclosed. He suggests this concern be addressed by adding **"or the head of a public body"** to the list of parties who are required to refuse to disclose.

Section 72—Offence

Section 72 is the offence provision of the *ATIPPA*. In its initial submission, the OIPC expressed concern about a limitation on its ability to seek prosecution in circumstances where it was believed that course was warranted. They wrote that:

> there have been situations where the language of the offence provision itself has barred any serious consideration of contacting the Attorney General, despite circumstances which could be considered serious and otherwise appropriate for such a step.[2]

The OIPC then comments on the reasons why it is important to have a workable offence provision in the statute. The office expressed the view that:

> It is in the interest of all public bodies to support a meaningful offence provision, so that they can make it clear to the public that the responsibility for the breach, in certain cases, is on the individual who committed the act because that individual acted contrary to all of the preventative measures which the public body had in place. The public body is then in a better position to continue to receive the cooperation and good will of citizens who are asked to provide their personal information for legitimate purposes, because the public body is seen to be cooperating in a process which will bring the rogue employee to justice. This helps to ensure and maintain continued public confidence in the information handling practices of the public body.
>
> If it is accepted that a workable, practical offence provision is an essential element in a statute such as the *ATIPPA*, we must then look to see what elements such a provision should contain. As it happens, this Office has some experience in laying charges under the offence provision of the *Personal Health Information Act* (*PHIA*), having had occasion to do so twice. Section 88 of *PHIA* sets out the offences and penalties under that *Act*. Section 88(1), is similar in many respects to section 72 of *ATIPPA*. The main difference is that in section 88(1)(a), the offence relates to a person who "obtains or attempts to obtain another individual's personal health information," whereas in *ATIPPA* section 72(a) comes into play when a person "discloses information contrary to Part IV."
>
> That distinction is significant when we look at the breadth of coverage of the offence provisions. For example,

2 OIPC Submission, 16 June 2014, p 46.

> we have encountered an incident whereby an employee of a public body, on his own initiative and without the knowledge or consent of his employer, accessed a database and obtained information about an individual in the database for personal reasons. This occurrence had potentially serious implications, and when discovered, was greatly alarming to the individual whose information was obtained. The individual who obtained the information did not disclose the information outside of the public body, nor did he do anything which would trigger any of the other offence provisions currently in force. Nevertheless, it was an incident which, broadly speaking, we believe may have triggered a decision to prosecute had the enabling language been present in the statute. For this reason, we have looked across the country at other offence provisions, and we now propose additional language which would enable prosecution of a broader range of offences, in order to ensure that this particular tool is available if necessary for situations such as the one described.[3]

The Committee agrees with the submission of the Office of the Information and Privacy Commissioner. The arguments favouring such an amendment are sufficiently well expressed in the OIPC submission that it is unnecessary for the Committee to provide further discussion.

3 *Ibid* 47.

Recommendations

86. The Committee recommends that the present subsection 22.2(2) of the *Act* be replaced with a subsection reading "The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation."

87. The Committee agrees with the Commissioner that where the head of a public body is in possession of records of a statutory office, section 30.1 of the *Act* should apply and recommends that section 30.1 be so amended.

88. The Committee recommends that section 72 of the *Act* be amended to provide for an offence provision that reflects the Commissioner's recommendation.

11.2 Sunset clause

> A provision in a Bill that gives it an 'expiry date' once it is passed into law. 'Sunset clauses' are included in legislation when it is felt that Parliament should have the chance to decide on its merits again after a fixed period.
>
> —UK Parliament website

Introduction

The *ATIPPA* provides for a mandatory review of the legislation every five years. And while this is not the classic sunset clause described above, it does provide for a comprehensive review of the legislation. The terms of reference for this Committee make it clear that all aspects of the *Act* are to be reviewed and recommendations made.

Three submissions to the Committee recommended some version of a sunset clause, to force the re-examination of various provisions of the *ATIPPA,* such as the legislative and regulatory provisions that prevail over the *Act*. None recommended a general sunset clause for the *ATIPPA,* since that would suggest the law itself might not have merit after a period of time. The people who mentioned sunset provisions referred to certain time limits prescribed for particular information protected under the exceptions, or in the case of OIPC, a recommendation that a careful study be made of the legislative provisions that prevail over the *ATIPPA*.

The sunset clause was promoted as a modern concept by political theorist Theodore Lowi in his 1969 book *The End of Liberalism*. Lowi's basic idea was that bloated government bureaucracies were ineffective at overseeing the interests they regularly did business with and, perversely, ended up "catering to the established interests."[4] His goal was not to have those agencies disappear, but to use an end date on their legislated lives to force politicians to take a new look at the agencies and their mandate, and decide if they were still necessary.

Existing provisions

Protection for certain classes of information listed in the *ATIPPA* expires after a prescribed time. The classes of information and their expiry dates are as follows:

- *50 years* where the Provincial Archives may release information that is in a record for that period or longer
- *50 years* for information related to labour relations of the public body as an employer, either in the control of the Provincial Archives of Newfoundland and Labrador or in the archives of a public body
- *50 years* for business interests of a third party, or tax information of a business interest, where the information is either in the control of the Provincial Archives or in the archives of a public body
- *20 years* after death, for the personal information of the deceased
- *20 years* where the Provincial Archives may disclose information about an individual who has been dead for that period or longer
- *20 years* for Cabinet records
- *15 years* for records involving local public body confidences
- *15 years* for policy advice or recommendations
- *15 years* for documents related to intergovernmental relations or negotiations
- *No limit* on disclosure that is harmful to financial or economic interests of a public body, or, to conservation

The practice

The effect of these provisions in the *Act* is that the protection expires after the prescribed period, but information may continue to be withheld because of other exceptions. For example, under section 18, Cabinet records cannot be withheld after 20 years. However, the *Access to Information Policy and Procedures Manual* advises officials that "a line-by-line review" of the record must be done and "any exceptions that may apply to information contained in the record would be considered and applied, as necessary."[5] There is similar guidance with respect to advice from officials under section 20.[6] However, the discretion to withhold information does not apply to tax records after 50 years under section 27 or labour relations information after 50 years under 26.1.

4 Mooney, *A Short History of Sunsets* (2004), and Jantz and Veit, *Sunset Legislation and Better Regulation* (2010).

5 NL *Access to Information Policy and Procedures Manual* (2013), p 62.

6 *Ibid* 92.

What we heard

Three submissions discussed the concept of a sunset clause in relation to the *ATIPPA*. The OIPC is concerned about specific provisions of 24 statutes and regulations that are listed in section 5 of the *ATIPPA* Regulations as taking precedence over the *ATIPPA*. It recommended the *ATIPPA* be changed to include a sunset clause so that those designations would automatically expire unless each statutory review of the *ATIPPA* recommended renewal of that protection.[7] The OIPC also expressed concern about the current section 30(2)(m), which states it is not an unreasonable invasion of a third party's privacy to release the personal information of someone who has been dead for 20 years or more. The Commissioner stated that such release "raises issues of personal dignity for the deceased as well as surviving family members," and recommended "no firm cut-off date, after which the privacy rights of the deceased are completely extinguished."[8]

The Information Commissioner of Canada and the Centre for Law and Democracy advocated sunset clauses that would apply to the various exceptions in the *ATIPPA*. Commissioner Suzanne Legault claimed such exemptions should be "of general application and be time limited."[9] The Centre for Law and Democracy suggested sunset clauses with protection periods of 15 to 20 years, that it would apply to all exemptions, and that "protected information would be available after that time."[10]

Sunset in practice

An article in the *Washington Post* in December 2012 described sunset clauses as "democracy's snooze button,"[11] often used by the US Congress and extended with little if any further debate. As examples, the paper cited seven extensions for the US Parole Commission between 1992 and 2014, and a failed attempt in 2011 to repeal three provisions of the *Patriot Act,* which gave law enforcement broad surveillance powers in the wake of the terrorist attacks on 11 September 2001. It also traced the debate and lobby effort to extend the Bush tax credits of 2003, beyond their intended "sunset" date of 2010.

In the United Kingdom, Parliament passed a law in July 2014 "to put beyond doubt" that requests by British law enforcement to intercept communications data to overseas companies operating in the UK would be subject to the *Regulation of Investigatory Powers Act 2000.*[12] Various sections are subject to a sunset clause, and are to be repealed on 31 December 2016.[13] The amendments were partly a reaction to a decision by the European Court of Justice [ECJ], which struck down provisions in the law allowing communications companies to "retain communications data for law enforcement purposes for a limited period."[14]

Privacy interest groups criticized the UK government for the amendments. The Open Rights Group complained the government was re-legislating without Parliamentary scrutiny, in a way that would breach fundamental rights, and in the process, setting a "dangerous precedent."[15]

Value of sunset clauses

In a paper commissioned for Bertelsmann Stiftung, a non-profit founded by Reinhard Mohn in 1977,[16] authors Bastian Jantz and Dr. Sylvia Veit pointed to two main attributes of sunset legislation: (1) it shifts the burden of proof from those who would terminate a policy

7 Government NL Submission, 16 June 2014, p 86.

8 *Ibid* 33.

9 Information Commissioner of Canada Submission, 20 August 2014, pp 3–4.

10 CLD Submission, July 2014, pp 8–9.

11 Farenthold, *In Congress, sunset clauses are commonly passed but rarely followed through*, 12 December 2012.

12 UK *The Data Retention and Investigatory Power Bill* (2014), p 1.

13 UK *Data Retention and Investigatory Powers Act 2014*, s 8(3).

14 *Supra* note 12, p 2.

15 Open Rights Group *Briefing to MPs*, 14 July 2014.

16 The organization is funded out of profits from Bertelsmann AG, Germany's largest media company. Bertelsmann says it is guided by the principle that ownership of capital brings an obligation to contribute to society. Since its founding in 1977, it claims to have invested more than $1 billion US in over 700 projects.

program to those who would renew it, and (2) it requires a review and evaluation of the usefulness of specific programs and features. The authors add an important caveat —ideally, sunset legislation "fosters evaluation of activities and policy learning," although that does not appear to have happened in the US cases cited above. [17]

The Bertelsmann Stiftung paper advises against "general sunset clauses." The authors give two primary reasons for their position:

- General sunset clauses, "especially for primary legislation," can lead to drawn-out decisions without in-depth study and evaluation before the expiry date.
- Such regimes "diminish the certainty of the law."[18]

The study also examined the diminishing support for sunset clauses and provisions in the United States. The authors' findings are consistent with the conclusion of the *Washington Post* article cited above. Administering sunset clauses increases the legislative workload; lobbying intensifies as the expiration date looms; there is a general lack of evaluation criteria; and there are limited time and resources to do the massive amount of work that must be completed.

This is the case in Switzerland, a nation with a constitutional requirement that "effectiveness of federal measures" be evaluated. The authors cite "an empirical analysis of 45 federal offices and agencies" that showed "one third of all agencies do not carry out any evaluation at all."[19]

Canadian access to information laws

Canadian provinces and the federal government have typically followed the European practice of applying sunset clauses to particular provisions of legislation, rather than entire programs or agencies. The Canadian *Charter of Rights and Freedoms* contains its own particular sunset provision in section 33(3) and 33(4), better known as the *notwithstanding clause*:

> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Canadian access laws have specific provisions that *may* keep certain government records off-limits for specified periods of time, ranging from five years in Nova Scotia for policy and advice to a public body or minister to 25 years for decisions of the Conseil du trésor in Quebec, to a similar period for Cabinet documents in Saskatchewan. The common element in Canadian access laws is that the specified time-sensitive exemptions typically apply to Cabinet records and policy advice and recommendations to ministers.

For example in the federal government, the protection is 20 years for Cabinet confidences, advice or recommendations, and some law enforcement records. Discussion papers for Cabinet have no protection if the related decision has been made public, or if more than four years have passed since the decision.

Nova Scotia and British Columbia have the shortest exclusion periods for records involving policy advice and recommendations and Cabinet confidences. Nova Scotia protects those records for 5 years and 10 years respectively; British Columbia for 10 years and 15 years. Saskatchewan is at the other end of the scale, with protection of 25 years for both types of records. Newfoundland and Labrador is near the middle with protection of 15 years for policy advice and 20 years for Cabinet confidences.

17 *Supra* note 4, p 3.
18 *Ibid* 19.
19 *Ibid* 15.

Issues

The *ATIPPA* gives rise to two issues related to sunset clauses—the *Act* creates categories of information that are exempt from being disclosed for specified periods of time, and it allows the Cabinet to specify sections of laws that prevail over the *ATIPPA,* without any discussion of how long that protection should last, or whether the protected status should be reviewed.

The matter of those sections prevailing over the *ATIPPA* is discussed elsewhere in the Committee's report. However, it is useful to state here that the OIPC speaks directly to the issue in the context of the need for a sunset provision in the *ATIPPA*. The OIPC says any such exemption should automatically expire unless it is expressly renewed.[20]

The *ATIPPA* protects several types of information for periods ranging from five years for ministerial briefing records to 50 years for business tax information and for labour relations involving the province as an employer. 50 years is a long time to protect public documents, and those examples point to the need to review such time limits to validate the term. It is worthwhile to ask if those time limits can be defended, given the kind of information they protect.

20 OIPC Submission, 16 June 2014, p 86.

Conclusion

The purpose of the *ATIPPA* is to make government accountable to the people, to make information available with limited exceptions, and to protect and manage personal information collected by and held under the control of public bodies. Therefore, where the *ATIPPA* establishes a time limit for the exception protecting a specific type of information, the length of the time limit for the exception should be defensible as a necessary protection.

For example, there is widespread agreement that Cabinet deliberations should be protected, and that there should be protection for the advice officials provide for their ministers. But how long should that protection last? Protection of 15 years for policy advice and 20 years for Cabinet confidences puts Newfoundland and Labrador around the midpoint for Canadian provinces. The OIPC suggested the Committee consider recommending 15 years for Cabinet confidences, as this is the most common protection period in Canada.[21] The Centre for Law and Democracy thought 15 years "seems somewhat reasonable," but also said "20 years is not bad."[22]

Records in the Archives related to business interests of a third party and labour relations of the public body as an employer are protected for 50 years. This is extraordinary protection for these categories of records, and while it may be necessary to protect some information such as business tax records for this period, there should be a review to determine if such long term protection is warranted, and if it is in keeping with the spirit of the *ATIPPA*.

The Commissioner made a recommendation about one specific time limit attached to personal information, and that relates to a person who has been deceased for 20 years. The OIPC suggested such information not have a fixed cut-off date.

These particular sections of the *Act* would benefit from additional scrutiny. However, the limited expression of public interest regarding protected disclosure periods during this review, and the lack of information on which to exercise judgement on the issues makes it inappropriate for the Committee to draw conclusions at this time.

21 *Ibid* 16.

22 CLD Transcript, 24 July 2014, p 76.

89. The Committee recommends that the next five-year statutory review of the *Act* be expressly mandated to assess the time limits for provisions that have specific protection periods.

11.3 Extractive industries transparency initiative (EITI)

> "The public has the right to know what value they are deriving from contracts government makes on their behalf with companies that profit from the extraction of publicly owned resources."
>
> —Gerry Rogers, MHA, Submission to the Committee

Origin of the EITI

Economists studying large-scale oil and mining projects in the developing world in the 1980s and 1990s encountered a puzzling set of circumstances. Despite the development of their vast oil and mining resources, many of those countries remained poor. In 1993, British economist Richard Auty developed the term "resource curse thesis" to describe the situation:

> The new evidence suggests that not only may resource-rich countries fail to benefit from a favourable endowment, they may actually perform worse than less well-endowed countries. This counterintuitive outcome is the basis of the resource curse thesis.[23]

A recent article on the *Forbes* website described the resource curse in this way:

> The term refers to the commonly observed paradox of a country or region with significant resource "wealth" becoming poorer, less competitive, less stable and more corrupt as result of the resource endowment. Most commonly, the resource curse is observed in developing countries with weak mechanisms of government accountability and transparency.[24]

Groups such as Human Rights Watch and Oxfam America lobbied politicians in developed countries to take the lead and demonstrate a commitment to bring transparency to the relationship between giant corporations and the national governments of the countries in which they operate. The idea gained traction in 2002 when United Kingdom Prime Minister Tony Blair supported the concept, and convened a conference in London a year later. The initiative is supported by a broad group, including governments, civil society groups, and companies in the mining and oil sectors. The statement of EITI Principles includes these beliefs:

- "The prudent use of natural resource wealth should be an important engine for sustainable economic growth."
- "Management of natural resource wealth for the benefit of a country's citizens is…to be exercised in the interests of their national development."
- "A public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development."
- "Payments' disclosure in a given country should involve all extractive industry companies operating in that country."[25]

23 Auty, *Sustaining Development in Mineral Economies* (1993), p 1.

24 Runde, "EITI's Silent Revolution" (2014).

25 EITI, *The EITI Principles*, June 2003.

The EITI

The international organization that oversees the Extractive Industries Transparency Initiative (EITI) headquartered in Oslo, Norway, claims that 80 of the world's biggest oil, gas, and mining companies "are committed to supporting the EITI."[26] Norway was the first nation to publicly require disclosure of the various payments made to governments by individual oil companies. In the four and a half years since, nearly four dozen other countries have joined, either by becoming compliant with the new reporting regime or by becoming candidates to join the program.

Many of the EITI countries are resource-rich but economically poor; they include Burkina Faso, Niger, Ghana, Sierra Leone, Zambia, Kazakhstan, Kyrgyz Republic, and Republic of the Congo. Norway is the exception to this group, a rich country with long-developed social policies and a thriving democracy. Among the candidates for entry are Honduras, Indonesia, Ukraine, the United Kingdom, and the United States. Several other countries are preparing for entry, including Italy and Germany. Canada has adopted the EITI principles in its new Act, but has not committed to joining the organization.

Canada

In December 2014, Canada joined the growing international movement mandating oil, gas, and mining companies to publish an account of the taxes (other than income and consumption), royalties, and other payments they make to governments and other entities, when Royal Assent was given to Bill C-43, which enacted the *Extractive Sector Transparency Measures Act*.[27] Canada announced its commitment to establish mandatory reporting for the extractive industries two and a half years ago at the G8 conference in London.

The government has stated that the purpose of the Act is to "implement Canada's international commitments to participate in the fight against corruption" with "measures that enhance transparency and measures that impose reporting obligations."[28] The Act applies to a company that falls within either or two categories. One is a company that is listed on a stock exchange in Canada. The other is a company that has a place of business in Canada, does business in Canada, or has assets in the Canada, and that has met at least two of the following conditions in at least one of the two preceding years:

- $20 million CAD in assets
- $40 million CAD in revenue
- an average of at least 250 employees[29]

The Act requires companies to publish an annual report setting out their payments that total at least $100,000, or another prescribed amount, within a category of payment to the same government or government body. The Act lists the following categories of payments in relation to commercial development of oil, gas, or minerals:

- taxes, other than consumption taxes and personal income taxes
- royalties
- fees, including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licenses, permits or concessions;
- production entitlements;
- bonuses, including signature, discovery and production bonuses;
- dividends, other than dividends paid to ordinary shareholders;
- infrastructure improvement payments; or
- any other prescribed category of payment.[30]

The Act stipulates that a payment must be reported, whether it is monetary or in kind. The Act is not yet in force, and some matters may need to be addressed before it is implemented. For example, the requirement to disclose payments is subject to regulations that the federal Cabinet may make respecting the payments that are to be

26 EITI *Factsheet* 2014.

27 *Extractive Sector Transparency Measures Act*, being Part 4, Division 28 of the *Economic Action Plan 2014 Act*, *No. 2*, SC 2014, c 39. As of the writing of this report, not proclaimed in force.

28 *Ibid* s 6.

29 *Ibid* s 8.

30 *Ibid* s 2.

disclosed. There may also need to be some definition in the provision allowing a company that reports in another jurisdiction to be considered as having met the reporting requirements under the Act, provided the requirements of the other jurisdiction are an acceptable substitute.[31]

Similar to legislation in the United Kingdom, the Canadian legislation sets out a range of offences and penalties. Companies can be fined up to $250,000 for failing to make an annual report, failing to comply with a ministerial audit, knowingly making false or misleading statements, or providing false or misleading information. The company can also be fined if it structures payments, other financial obligations, or gifts "with the intention of avoiding the requirement to report those payments, obligations or gifts in accordance with the Act."[32]

Consultations

The Canadian legislation was developed after the government consulted with the provinces and territories, aboriginal entities, industry, and various civil society groups.[33] The consultation produced general support for the initiative. However, differences emerged between the oil and gas industry and civil society groups. Through their industry association, the Canadian Association of Petroleum Producers (CAPP), oil and gas companies expressed concern about the reporting detail that will be required in order to comply with the Act, especially at the provincial level. The industry prefers reporting only "publicly available data" below the subnational level, which suggests maintaining the status quo reporting requirement where only aggregate data is reported. CAPP argued that this approach is "both warranted and defensible," and preferable to reporting in all jurisdictions across the country.

> [R]equiring subnational reporting at the provincial and municipal levels will only result in unnecessary complexity, duplication and administrative burden on an industry that is one of the leading drivers of the national economy. Consequently, CAPP recommends that an "Adaptive Implementation" approach for sub-federal reporting, similar to the U.S., be adopted by the government of Canada.[34]

Publish What You Pay-Canada, part of a global network of civil society organizations lobbying for universal adoption of EITI standards, rejected the argument by CAPP and others that companies should be exempt from disclosing payments made to provincial governments within Canada:

> Providing an exemption for domestic payment reporting would deprive Canadians of critical information about their extractive sector, which generates 16.5% of Canada's GDP and close to 1.5 million jobs. Payment disclosure in Canada will have the same anti-corruption and resource governance impacts as it does in other countries around the world. Firstly, domestic payment disclosure will highlight the economic benefits of extraction. Canadians have a right to clear, accurate information about the payments received by governments for the development of their resources. Secondly, it will inform public debates about resource extraction.[35]

Current status

The United Kingdom enacted EITI compliance regulations[36] in the fall of 2014. Companies will have to comply with effect from the financial year starting on or after 1 January 2015. The government faced criticism that standard EITI frameworks are hard to enforce, and therefore easy for extractive industries to ignore. As a result of a consultation it carried out between March and May 2014, the government decided that a public approach to enforcement would be best. Presumably companies would want to avoid "reputational damage that could result from publicity" as well as penalties.[37] If a company fails to report, it will receive a letter from Companies House, the registrar of the company registration body in the UK. The registrar will request that the company comply within 28 days unless the company shows it is not

31 *Ibid* s 10(2).

32 *Ibid* s 24(3).

33 Canada *Consultation – Mandatory Reporting Standards for the Extractive Sector.*

34 CAPP, *Response to the Federal Government's Consultation Paper* (2014).

35 Publish What You Pay-Canada, Letter to Natural Resources Canada on EITI, 9 May 2014.

36 *The Report on Payments to Governments Regulations 2014*, SI 2014/3209.

37 "*UK Implementation of EU Accounting Directive*" (2010), p 17.

required to do so. The company's response to the registrar's letter is then posted on the Companies House website. If a company that is required to report EITI compliance fails to do so within 28 days of the registrar's letter, it and every director of that company commits an offence. A person found guilty of an offence is subject to a fine.

The United States was accepted as an EITI candidate in March 2014 and has two years to produce its first report.[38] However, its plan to implement the initiative has met with legal challenges. Some industry and business organizations were successful at the District Court level in opposing the requirement that they disclose payments made to foreign governments or the US federal government.[39] The judge in the case ordered the Securities and Exchange Commission (SEC) to redraft its order on reporting payments.

Civil society groups became concerned when the SEC left EITI off its list of priorities for 2014.[40] In the spring of 2014, several groups called on the Commission to swiftly reissue "a strong implementing rule" to require reporting of oil, gas, and mining payouts to governments.[41] In the latest development, Oxfam America has sued the SEC "to force it to finish rewriting congressionally mandated rules" with respect to the EITI.[42]

38 www.eiti.org.

39 Judge Vacates SEC Dodd-Frank Rule for Extractive Industries, *Just Anti-Corruption*, July 2013.

40 "SEC omits extractive industry rules from its 2014 priority list," Thompson Reuters Foundation, 9 December 2013.

41 "*Civil society urges SEC to reissue a strong rule*," Publish What You Pay.

42 "SEC sued over delay in oil payment transparency rule," Houston Chronicle, 18 September 2014.

Despite not having joined the EITI, the Canadian government supports the EITI organization financially. During its consultations, Canada proposed to develop regulations during the winter of 2015, and have the legislation come into force by 1 April 2015. However, it is unclear how or whether the new reporting regime will affect the provinces and territories, or how they will legislate in this area. The federal government has stated it prefers having provincial and territorial securities regulators implement the standards, since provinces have jurisdiction over resource royalties and securities law. The federal law is expected to establish the legislative pattern for the provinces "that would allow for provincial/territorial equivalency."[43]

Currently, the *ATIPPA* expressly forbids the public release of tax and royalty information in the kind of detail advocated in the EITI initiative. Consequently, in Newfoundland and Labrador, payments from the extractive sector are reported in aggregated form in the public accounts. For example, offshore oil royalties are reported in the Newfoundland and Labrador budget estimates under a single heading, "Offshore Royalties."[44] Revenue from several mines operating in the province is reported in the same manner, and classified as "Mining Tax and Royalties." There is no breakdown by company or mine. Section 27(2) of the *Act* sets out the rules:

> The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.

43 *Supra* note 33.

44 NL *Estimates*, 2014, v.

What we heard

At the hearings, Suzanne Legault, the Information Commissioner of Canada, raised the EITI issue with the Committee. She noted that access legislation should be consistent with such initiatives:

> These are initiatives that are occurring in the context of Open Government, which I think have an impact on what we put in, in our legislation. If the international movement is that this kind of information should be disclosed…when we do look at our freedom of information legislation, we should make sure we're consistent with that.[45]

The New Democratic Party advocated repealing the present section 27(2) and returning to the pre–Bill 29 version. The NDP also stated its position on royalty information as it relates to publicly owned resources:

> It is outrageous that the public is denied knowledge of what value they are receiving for their resources—especially in the case where those resources are non-renewable.[46]

Provincial officials in the Department of Natural Resources told the Committee they are delaying action until they can study the federal legislation.

45 Information Commissioner of Canada Transcript, 18 August 2014, pp 15–16.

46 New Democratic Party Submission, 26 June 2014, p 12.

Conclusion

While the Government of Canada has passed the *Extractive Sector Transparency Measures Act*, it still must develop regulations and bring the new law into force. And it is uncertain what legislative provisions other Canadian jurisdictions will enact.

What is clear is that Section 27(2) of the *ATIPPA* runs counter to both the concept described in the federal Act and the developing international reporting framework, since it forbids the head of a public body from releasing disaggregated royalty information, or other information contained on a tax return.

This matter involves a policy decision for the government of Newfoundland and Labrador, and as such, it is outside the mandate of this Committee to make a recommendation. However, given the developments in implementing the EITI worldwide, including in Canada, the Committee believed it was important in the review of an access to information statute to discuss the issue and draw public attention to it.

Chapter Twelve

RECOMMENDED STATUTORY CHANGES

Early in its work, the Committee concluded that addressing the various issues raised by the many concerns of citizens, as well as the concerns of the Commissioner, would require a major overhaul of the existing *ATIPPA*. The Committee decided that, when writing its report and explaining its conclusions, it would be best to express its recommendations in general terms instead of trying to specify the precise statutory language for each change being proposed. The Committee would later draft the precise legislative provisions based on those recommendations.

There were two reasons for this approach. The first is that the proposed changes are sufficiently extensive that expressing the recommendations in precise statutory amendment language could cause the recommendations to appear disjointed and make the report considerably more difficult for readers to follow. The second reason is that having the final recommendations expressed in the context of a draft bill would make it easier for readers to assess the overall impact of each statutory change being recommended.

As a result the provisions of the draft bill should be viewed as the Committee's specific recommendations.

The Committee acknowledges that the content of the draft bill is not totally new. The workload of the Committee has been reduced significantly because we have been able to simply transfer to the revised statute the many provisions of the existing *ATIPPA* that work quite well. Existing provisions have been retained to the maximum extent consistent with providing for the major changes the Committee is recommending.

The Committee recognizes that it has made recommendations involving a wide variety of changes to statutory provisions and to the existing approach to providing access to publicly held information and protection of personal information held by public bodies. Implementing those changes will likely result in substantial adjustment to existing practices and procedures of public bodies and the Office of the Information and Privacy Commissioner, and may well involve some increase in cost to Government.

The Committee was sensitive to those possibilities when it was considering the information before it and the recommendations it would make. However, the Committee's mandate included making recommendations that would produce a user-friendly statute which, when measured against international standards, will rank among the best. This we have endeavoured to do.

It may be necessary to implement the recommendations in stages, in order to allow time for development of new or significantly adjusted practices and procedures, or the making of budgetary decisions for any increased costs. That is a policy decision for Government and not a matter on which the Committee should make further comment.

What follows is the full text of the proposed bill that the Committee recommends be submitted to the House of Assembly to achieve the desired improvements in the practices and procedures in place to provide for access to information and protection of privacy.

The Committee recommends that

90. The draft bill attached, be presented to the House of Assembly for consideration, and that

(a) The Commissioner be consulted on the draft bill but care should be taken to ensure that the Committee's concerns respecting timeliness and practices and procedures in the Office of the Information and Privacy Commissioner are addressed.

(b) Consideration be given to phasing in the provisions of any resulting enactment in a manner that will allow appropriate time for implementation.

(c) Where the House of Assembly enacts any of the Committee's recommendations, the Minister of the Office of Public Engagement report to the House of Assembly, within one year of such enactment, on the progress of its implementation.

THE DRAFT BILL

EXPLANATORY NOTES

This Draft Bill would revise the law respecting access to records and protection of personal information held by public bodies. The Bill would maintain the ombuds model for access and personal information protection but give the commissioner decision-making power in certain procedural matters. With respect to access to a record or correction of personal information, the Bill would

- provide a public interest override for specified discretionary exceptions to access;
- require anonymity in most requests;
- require the access and privacy coordinator to be the only person on behalf of a public body to communicate with an applicant or third party;
- enable disclosure of datasets;
- require the commissioner's approval before a public body disregards a request;
- provide for extensions of time beyond 20 business days only where approved by the commissioner, whose decision is final;
- eliminate application fees and reduce the costs to access records, with disputes respecting an estimate or waiver of costs to be determined by the commissioner, whose decision is final;
- remove the mandatory exemption from disclosure of briefing materials created for ministers assuming new portfolios or preparing for a sitting of the House of Assembly;
- revise the exceptions to access in the provisions respecting cabinet confidences, policy advice or recommendations, legal advice, information from a workplace investigation, third party business interests, disclosure harmful to personal privacy, and disclosure of statutory office records;
- provide for and require a more expeditious complaint and investigation process;
- allow a third party to complain to the commissioner or commence an appeal directly in the Trial Division of a public body's decision to disclose the third party's business information or personal information to an applicant;
- where the commissioner recommends access to a record or correction of personal information, require the head of a public body either to comply with the commissioner's recommendation or seek a declaration in the Trial Division that the head is not required by law to comply; and
- enable the commissioner to file an order of the court in the circumstances where the head of a public body fails to comply with the commissioner's recommendation to grant access to a record or make a correction to personal information or fails to seek a declaration.

With respect to privacy, the Bill would

- require public bodies to notify affected individuals of a privacy breach that creates a risk of significant harm to the individual and to report all privacy breaches to the commissioner;
- require government departments to prepare privacy impact assessments during the development of programs or services unless a preliminary assessment of the program or service indicates a full assessment is not necessary;

- provide for privacy investigations on the commissioner's own motion or on receipt of a complaint by an individual or by a representative of a group of individuals;
- require the commissioner to prepare a report following a privacy investigation and require the head of a public body to respond to that report, and enable certain recommendations to be filed as orders of the court;
- where the commissioner recommends that a public body stop collecting, using or disclosing personal information in contravention of the Act or destroy personal information collected in contravention of the Act, require the head of a public body either to comply with the commissioner's recommendation or seek a declaration in the Trial Division that the head is not required by law to comply; and
- provide for an order that the Trial Division may make.

The Bill would strengthen the role of the Office of the Information and Privacy Commissioner as an advocate for access and protection of personal information. The Bill would

- provide an appointment process, term and salary that supports the independence of the commissioner;
- give the commissioner the power to review cabinet records, solicitor-client privileged records and other records in the custody or under the control of a public body, except for some of the records to which the Act does not apply;
- give the commissioner the power to carry out investigations and audits and make special reports to the House of Assembly; and
- require the commissioner to create a standard template for the publication of information by public bodies and to review proposed bills that could have implications for access to information and protection of privacy.

The Bill would make further changes to

- expand the application of the Act to corporations and other entities that are owned by or created by or for municipalities; and
- strengthen the offence provision.

A DRAFT BILL
AN ACT TO PROVIDE THE PUBLIC WITH ACCESS TO INFORMATION AND PROTECTION OF PRIVACY

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6. Relationship to *Personal Health Information Act*

7. Conflict with other Acts

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POWERS OF THE COMMISSIONER

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SCHEDULE I

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title

1. This Act may be cited as the *Access to Information and Protection of Privacy Act, 2015*.

PART I
INTERPRETATION

Definitions

2. In this Act

(a) "applicant" means a person who makes a request under section 11 for access to a record, including a record containing personal information about the person, or for correction of personal information;

(b) "business day" means a day that is not a Saturday, Sunday or a holiday;

(c) "Cabinet" means the executive council appointed under the *Executive Council Act*, and includes a committee of the executive council;

(d) "commissioner" means the Information and Privacy Commissioner appointed under section 85;

(e) "complaint" means a complaint filed under section 42;

(f) "coordinator" means the person designated by the head of the public body as coordinator under subsection 110(1);

(g) "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection

(i) has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or the carrying out of another function of the public body,

(ii) is factual information

(A) which is not the product of analysis or interpretation other than calculation, and

(B) to which section 13 of the *Statistics Agency Act* does not apply, and

(iii) remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adopted or otherwise materially altered since it was obtained or recorded;

(h) "educational body" means

(i) Memorial University of Newfoundland,

(ii) College of the North Atlantic,

(iii) Centre for Nursing Studies,

(iv) Western Regional School of Nursing,

(v) a school board, school district constituted or established under the *Schools Act, 1997,* including the conseil scolaire francophone, and

(vi) a body designated as an educational body in the regulations made under section 116;

(i) "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;

(j) "head", in relation to a public body, means

(i) in the case of a department, the minister who presides over it,

(ii) in the case of a corporation, its chief executive officer,

(iii) in the case of an unincorporated body, the minister appointed under the *Executive Council Act* to administer the Act under which the body is established, or the minister who is otherwise responsible for the body,

(iv) in the case of the House of Assembly the speaker and in the case of the statutory offices as defined in the *House of Assembly Accountability, Integrity and Administration Act,* the applicable officer of each statutory office, or

(v) in another case, the person or group of persons designated under section 109 or in the regulations as the head of the public body;

(k) "health care body" means

(i) an authority as defined in the *Regional Health Authorities Act*,

(ii) the Mental Health Care and Treatment Review Board,

(iii) the Newfoundland and Labrador Centre for Health Information, and

(iv) a body designated as a health care body in the regulations made under section 116;

(l) "House of Assembly Management Commission" means the commission continued under section 18 of the *House of Assembly Accountability, Integrity and Administration Act*;

(m) "judicial administration record" means a record containing information relating to a judge, master or justice of the peace, including information respecting

(i) the scheduling of judges, hearings and trials,

(ii) the content of judicial training programs,

(iii) statistics of judicial activity prepared by or for a judge,

(iv) a judicial directive, and

(v) a record of the Complaints Review Committee or an adjudication tribunal established under the *Provincial Court Act, 1991*;

(n) "law enforcement" means

(i) policing, including criminal intelligence operations, or

(ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment;

(o) "local government body" means

(i) the City of Corner Brook,

(ii) the City of Mount Pearl,

(iii) the City of St. John's,

(iv) a municipality as defined in the *Municipalities Act, 1999*, and

(v) a body designated as a local government body in the regulations made under section 116;

(p) "local public body" means

(i) an educational body,

(ii) a health care body, and

(iii) a local government body;

(q) "minister" means a member of the executive council appointed under the *Executive Council Act*;

(r) "minister responsible for this Act" means the minister appointed under the *Executive Council Act* to administer this Act;

(s) "officer of the House of Assembly" means the Speaker of the House of Assembly, the Clerk of the House of Assembly, the Chief Electoral Officer, the Auditor General of Newfoundland and Labrador, the Commissioner for Legislative Standards, the Citizens' Representative, the Child and Youth Advocate and the Information and Privacy Commissioner, and a position designated to be an officer of the House of Assembly by the Act creating the position;

(t) "person" includes an individual, corporation, partnership, association, organization or other entity;

(u) "personal information" means recorded information about an identifiable individual, including

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

(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,

(iii) the individual's age, sex, sexual orientation, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, blood type or inheritable characteristics,

(vi) information about the individual's health care status or history, including a physical or mental disability,

(vii) information about the individual's educational, financial, criminal or employment status or history,

(viii) the opinions of a person about the individual, and

(ix) the individual's personal views or opinions, except where they are about someone else;

(v) "privacy complaint" means a privacy complaint filed under subsection 73(1) or (2) or an investigation initiated on the commissioner's own motion under subsection 73(3);

(w) "privacy impact assessment" means an assessment that is conducted by a public body as defined under subparagraph (x)(i) to determine if a current or proposed program or service meets or will meet the requirements of Part III of this Act;

(x) "public body" means

(i) a department created under the *Executive Council Act*, or a branch of the executive government of the province,

(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,

(iv) a local public body,

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

(vi) a corporation or entity owned by or created by or for a local government body or group of local government bodies,

and includes a body designated for this purpose in the regulations made under section 116, but does not include

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

(viii) the Court of Appeal, the Trial Division, or the Provincial Court, or

(ix) a body listed in Schedule II;

(y) "record" means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

(z) "remuneration" includes salary, wages, overtime pay, bonuses, allowances, honorariums, severance pay, and the aggregate of the contributions of a public body to pension, insurance, health and other benefit plans;

(aa) "request" means a request made under section 11 for access to a record, including a record containing personal information about the applicant, or correction of personal information, unless the context indicates otherwise;

(bb) "Schedule II" means the schedule of bodies excluded from the definition of public body; and

(cc) "third party", in relation to a request for access to a record or for correction of personal information, means a person or group of persons other than

(i) the person who made the request, or

(ii) a public body.

Purpose

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;

(e) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and

(f) providing for an oversight agency that

(i) is an advocate for access to information and protection of privacy,

(ii) facilitates timely and user friendly application of this Act,

(iii) provides independent review of decisions made by public bodies under this Act,

(iv) provides independent investigation of privacy complaints,

(v) makes recommendations to government and to public bodies as to actions they might take to better achieve the objectives of this Act, and

(vi) educates the public and public bodies on all aspects of this Act.

(3) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.

Schedule of excluded public bodies

4. When the House of Assembly is not in session, the Lieutenant-Governor in Council, on the recommendation of the House of Assembly Management Commission, may by order amend Schedule II, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.

Application

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

(a) a record in a court file, a record of a judge of the Court of Appeal, Trial Division, or Provincial Court, a judicial administration record or a record relating to support services provided to the judges of those courts;

(b) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;

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

(d) records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act;*

(e) a personal or constituency record of a minister;

(f) a record of a question that is to be used on an examination or test;

(g) a record containing teaching materials or research information of an employee of a post-secondary educational institution;

(h) material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person other than a public body;

(i) material placed in the archives of a public body by or for a person other than the public body;

(j) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

(k) a record relating to an investigation by the Royal Newfoundland Constabulary if all matters in respect of the investigation have not been completed;

(l) a record relating to an investigation by the Royal Newfoundland Constabulary that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter; or

(m) a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

(2) This Act

(a) is in addition to existing procedures for access to records or information normally available to the public, including a requirement to pay fees;

(b) does not prohibit the transfer, storage or destruction of a record in accordance with an Act of the province or Canada or a by-law or resolution of a local public body;

(c) does not limit the information otherwise available by law to a party in a legal proceeding; and

(d) does not affect the power of a court or tribunal to compel a witness to testify or to compel the production of a document.

Relationship to *Personal Health Information Act*

6. (1) Notwithstanding section 5, but except as provided in sections 92 to 94, this Act and the regulations shall not apply and the *Personal Health Information Act* and regulations under that Act shall apply where

(a) a public body is a custodian; and

(b) the information or record that is in the custody or control of a public body that is a custodian is personal health information.

(2) For the purpose of this section "custodian" and "personal health information" have the meanings ascribed to them in the *Personal Health Information Act*.

Conflict with other Acts

7. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.

(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in Schedule I, that provision shall prevail over this Act or a regulation made under it.

(3) When the House of Assembly is not in session, the Lieutenant-Governor in Council may by order amend Schedule I, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.

PART II
ACCESS AND CORRECTION

DIVISION 1 THE REQUEST

Right of access

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.

(3) The right of access to a record may be subject to the payment, under section 25, of the costs of reproduction, shipping and locating a record.

Public interest

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), 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.

(2) Subsection (1) applies to the following sections:

(a) section 28 (local public body confidences);

(b) section 29 (policy advice or recommendations);

(c) subsection 30(1) (legal advice);

(d) section 32 (confidential evaluations);

(e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

(g) section 36 (disclosure harmful to conservation); and

(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

(3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or

to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

(4) Subsection (3) applies notwithstanding a provision of this Act.

(5) Before disclosing information under subsection (3), the head of a public body shall, where practicable, give notice of disclosure in the form appropriate in the circumstances to a third party to whom the information relates.

Right to request correction of personal information

10. (1) An individual who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) A cost shall not be charged for a request for correction of personal information or for a service in response to that request.

Making a request

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

(2) A request shall

(a) be in the form set by the minister responsible for this Act;

(b) provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify and locate the record containing the information with reasonable efforts; and

(c) indicate how and in what form the applicant would prefer to access the record.

(3) An applicant may make an oral request for access to a record or correction of personal information where the applicant

(a) has a limited ability to read or write English; or

(b) has a disability or condition that impairs his or her ability to make a request.

(4) A request under subsection (2) may be transmitted by electronic means.

Anonymity

12. (1) The head of a public body shall ensure that the name and type of the applicant is disclosed only to the individual who receives the request on behalf of the public body, the coordinator, the coordinator's assistant and, where necessary, the commissioner.

(2) Subsection (1) does not apply to a request

(a) respecting personal information about the applicant; or

(b) where the name of the applicant is necessary to respond to the request and the applicant has consented to its disclosure.

(3) The disclosure of an applicant's name in a request referred to in subsection (2) shall be limited to the extent necessary to respond to the request.

(4) The limitation on disclosure under subsection (1) applies until the final response to the request is sent to the applicant.

Duty to assist applicant

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

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

Transferring a request

14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it, where it appears that

(a) the record was produced by or for the other public body; or

(b) the record or personal information is in the custody of or under the control of the other public body.

(2) The head of the public body to which a request is transferred shall respond to the request, and the provisions of this Act shall apply, as if the applicant had originally made the request to and it was received by that public body on the date it was transferred to that public body.

Advisory response

15. (1) The head of a public body shall, not more than 10 business days after receiving a request, provide an advisory response in writing to

(a) advise the applicant as to what will be the final response where

(i) the record is available and the public body is neither authorized nor required to refuse access to the record under this Act, or

(ii) the request for correction of personal information is justified and can be readily made; or

(b) in other circumstances, advise the applicant of the status of the request.

(2) An advisory response under paragraph (1)(b) shall inform the applicant about one or more of the following matters, then known:

(a) a circumstance that may result in the request being refused in full or in part;

(b) a cause or other factor that may result in a delay beyond the time period of 20 business days and an estimated length of that delay, for which the head of the public body may seek approval from the commissioner under section 23 to extend the time limit for responding;

(c) costs that may be estimated under section 26 to respond to the request;

(d) a third party interest in the request; and

(e) possible revisions to the request that may facilitate its earlier and less costly response.

(3) The head of the public body shall, where it is reasonable to do so, provide an applicant with a further advisory response at a later time where an additional circumstance, cause or other factor, costs or a third party interest that may delay receipt of a final response, becomes known.

Time limit for final response

16. (1) The head of a public body shall respond to a request in accordance with section 17 or 18, without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23.

(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.

Content of final response for access

17. (1) In a final response to a request for access to a record, the head of a public body shall inform the applicant in writing

(a) whether access to the record or part of the record is granted or refused;

(b) if access to the record or part of the record is granted, where, when and how access will be given; and

(c) if access to the record or part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based, and

(ii) that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52, and advise the applicant of the applicable time limits and how to file a complaint or pursue an appeal.

(2) Notwithstanding paragraph (1)(c), the head of a public body may in a final response refuse to confirm or deny the existence of

(a) a record containing information described in section 31;

(b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy under section 40; or

(c) a record that could threaten the health and safety of an individual.

Content of final response for correction of personal information

18. (1) In a final response to a request for correction of personal information, the head of a public body shall inform the applicant in writing

(a) whether the requested correction has been made; and

(b) if the request is refused,

(i) the reasons for the refusal,

(ii) that the record has been annotated, and

(iii) that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52, and advise the applicant of the applicable time limits and how to file a complaint or pursue an appeal.

(2) Where no correction is made in response to a request, the head of the public body shall annotate the information with the correction that was requested but not made.

(3) Where personal information is corrected or annotated under this section, the head of the public body shall notify a public body or a third party to whom that information has been disclosed during the one year period before the correction was requested.

(4) Where a public body is notified under subsection (3) of a correction or annotation of personal information, the public body shall make the correction or annotation on a record of that information in its custody or under its control.

Third party notification

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.

(2) The time to notify a third party does not suspend the period of time referred to in subsection 16(1).

(3) The head of the public body may provide or describe to the third party the content of the record or part of the record for which access is requested.

(4) The third party may consent to the disclosure of the record or part of the record.

(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.

(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.

(7) The head of the public body shall not give access to the record or part of the record until

(a) he or she receives confirmation from the third party or the commissioner that the third party has exhausted any recourse under this Act or has decided not to file a complaint or commence an appeal; or

(b) a court order has been issued confirming the decision of the public body.

(8) The head of the public body shall advise the applicant as to the status of a complaint filed or an appeal commenced by the third party.

(9) The third party and the head of the public body shall communicate with one another under this Part through the coordinator.

Provision of information

20. (1) Where the head of a public body informs an applicant under section 17 that access to a record or part of a record is granted, he or she shall

(a) give the applicant a copy of the record or part of it, where the applicant requested a copy and the record can reasonably be reproduced; or

(b) permit the applicant to examine the record or part of it, where the applicant requested to examine a record or where the record cannot be reasonably reproduced.

(2) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and

(b) producing it would not interfere unreasonably with the operations of the public body.

(3) Where the requested information is information in electronic form that is, or forms part of, a dataset in the custody or under the control of a public body, the head of the public body shall produce the information for the applicant in an electronic form that is capable of re-use where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body;

(b) producing it would not interfere unreasonably with the operations of the public body; and

(c) it is reasonably practicable to do so.

(4) Where information that is, or forms part of, a dataset is produced, the head of the public body shall make it available for re-use in accordance with the terms of a licence that may be applicable to the dataset.

(5) Where a record exists, but not in the form requested by the applicant, the head of the public body may, in consultation with the applicant, create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

Disregarding a request

21. (1) The head of a public body may, not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard the request where the head is of the opinion that

(a) the request would unreasonably interfere with the operations of the public body;

(b) the request is for information already provided to the applicant; or

(c) the request would amount to an abuse of the right to make a request because it is

(i) trivial, frivolous or vexatious,

(ii) unduly repetitive or systematic,

(iii) excessively broad or incomprehensible, or

(iv) otherwise made in bad faith.

(2) The commissioner shall, without delay and in any event not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(3) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16(1).

(4) Where the commissioner does not approve the application, the head of the public body shall respond to the request in the manner required by this Act.

(5) Where the commissioner approves the application, the head of a public body who refuses to give access to a record or correct personal information under this section shall notify the person who made the request.

(6) The notice shall contain the following information:

(a) that the request is refused because the head of the public body is of the opinion that the request falls under subsection (1) and of the reasons for the refusal;

(b) that the commissioner has approved the decision of the head of a public body to disregard the request; and

(c) that the person who made the request may appeal the decision of the head of the public body to the Trial Division under subsection 52(1).

Published material

22. (1) The head of a public body may refuse to disclose a record or part of a record that

(a) is published and is available to the public whether without cost or for purchase; or

(b) is to be published or released to the public within 30 business days after the applicant's request is received.

(2) The head of a public body shall notify an applicant of the publication or release of information that the head has refused to give access to under paragraph (1)(b).

(3) Where the information is not published or released within 30 business days after the applicant's request is received, the head of the public body shall reconsider the request as if it were a new request received on the last day of that period, and access may not be refused under paragraph (1)(b).

Extension of time limit

23. (1) The head of a public body may, not later than 15 business days after receiving a request, apply to the commissioner to extend the time for responding to the request.

(2) The commissioner may approve an application for an extension of time where the commissioner considers that it is necessary and reasonable to do so in the circumstances, for the number of business days the commissioner considers appropriate.

(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16(1).

(5) Where the commissioner does not approve the application, the head of the public body shall respond to the request under subsection 16(1) without delay and in any event not later than 20 business days after receiving the request.

(6) Where the commissioner approves the application and the time limit for responding is extended, the head of the public body shall, without delay, notify the applicant in writing

(a) of the reason for the extension;

(b) that the commissioner has authorized the extension; and

(c) when a response can be expected.

Extraordinary circumstances

24. (1) The head of a public body, an applicant or a third party may, in extraordinary circumstances, apply to the commissioner to vary a procedure, including a time limit imposed under a procedure, in this Part.

(2) Where the commissioner considers that extraordinary circumstances exist and it is necessary and reasonable to do so, the commissioner may vary the procedure as requested or in another manner that the commissioner considers appropriate.

(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, make a decision to vary or not vary the procedure.

(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16(1).

(5) Where the commissioner decides to vary a procedure upon an application of a head of a public body or a third party, the head shall notify the applicant in writing

(a) of the reason for the procedure being varied; and

(b) that the commissioner has authorized the variance.

(6) Where the commissioner decides to vary a procedure upon an application of an applicant to a request, the commissioner shall notify the head of the public body of the variance.

(7) An application cannot be made to vary a procedure for which the commissioner is responsible under this Part.

Costs

25. (1) The head of a public body shall not charge an applicant for making an application for access to a record or for the services of identifying, retrieving, reviewing, severing or redacting a record.

(2) The head of a public body may charge an applicant a modest cost for locating a record only, after

(a) the first 10 hours of locating the record, where the request is made to a local government body; or

(b) the first 15 hours of locating the record, where the request is made to another public body.

(3) The head of a public body may require an applicant to pay

(a) a modest cost for copying or printing a record, where the record is to be provided in hard copy form;

(b) the actual cost of reproducing or providing a record that cannot be reproduced or printed on conventional equipment then in use by the public body; and

(c) the actual cost of shipping a record using the method chosen by the applicant.

(4) Notwithstanding subsections (2) and (3), the head of the public body shall not charge an applicant a cost for a service in response to a request for access to the personal information of the applicant.

(5) The cost charged for services under this section shall not exceed either

(a) the estimate given to the applicant under section 26; or

(b) the actual cost of the services.

(6) The minister responsible for the administration of this Act may set the amount of a cost that may be charged under this section.

Estimate and waiver of costs

26. (1) Where an applicant is to be charged a cost under section 25, the head of the public body shall give the applicant an estimate of the total cost before providing the services.

(2) The applicant has 20 business days from the day the estimate is sent to accept the estimate or modify the request in order to change the amount of the cost, after which time the applicant is considered to have abandoned the request, unless the applicant applies for a waiver of all or part of the costs or applies to the commissioner to revise the estimate.

(3) The head of a public body may, on receipt of an application from an applicant, waive the payment of all or part of the costs payable under section 25 where the head is satisfied that

(a) payment would impose an unreasonable financial hardship on the applicant; or

(b) it would be in the public interest to disclose the record.

(4) Within the time period of 20 business days referred to in subsection (2), the head of the public body shall inform the applicant in writing as to the head's decision about waiving all or part of the costs and the applicant shall either accept the decision or apply to the commissioner to review the decision.

(5) Where an applicant applies to the commissioner to revise an estimate of costs or to review a decision of the head of the public body not to waive all or part of the costs, the time period of 20 business days referred to in subsection (2) is suspended until the application has been considered by the commissioner.

(6) Where an estimate is given to an applicant under this section, the time within which the head of the public body is required to respond to the request is suspended until the applicant notifies the head to proceed with the request.

(7) On an application to revise an estimate, the commissioner may

(a) where the commissioner considers that it is necessary and reasonable to do so in the circumstances,

revise the estimate and set the appropriate amount to be charged and a refund, if any; or

(b) confirm the decision of the head of the public body.

(8) On an application to review the decision of the head of the public body not to waive the payment of all or part of the costs, the commissioner may

(a) where the commissioner is satisfied that paragraph (3)(a) or (b) is applicable, waive the payment of the costs or part of the costs in the manner and in the amount that the commissioner considers appropriate; or

(b) confirm the decision of the head of the public body.

(9) The head of the public body shall comply with a decision of the commissioner under this section.

(10) Where an estimate of costs has been provided to an applicant, the head of a public body may require the applicant to pay 50% of the cost before commencing the services, with the remainder to be paid upon completion of the services.

DIVISION 2 EXCEPTIONS TO ACCESS

Cabinet confidences

27. (1) In this section, "cabinet record" means

(a) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;

(b) draft legislation or regulations submitted or prepared for submission to the Cabinet;

(c) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;

(d) a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material;

(e) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;

(f) a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy;

(g) a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet;

(h) a record created during the process of developing or preparing a submission for the Cabinet; and

(i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).

(2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record; or

(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.

(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

(4) Subsections (1) and (2) do not apply to

(a) information in a record that has been in existence for 20 years or more; or

(b) information in a record of a decision made by the Cabinet on an appeal under an Act.

Local public body confidences

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

(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts;

(b) a draft of a private Bill; or

(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.

(2) Subsection (1) does not apply where

(a) the draft of a resolution, by-law or other legal instrument, a private Bill or the subject matter of deliberations has been considered, other than incidentally, in a meeting open to the public; or

(b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.

Policy advice or recommendations

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made by the head within 65 business days of delivery of the report; or

(c) draft legislation or regulations.

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

(a) factual material;

(b) a public opinion poll;

(c) a statistical survey;

(d) an appraisal;

(e) an environmental impact statement or similar information;

(f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;

(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;

(h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a report on the results of field research undertaken before a policy proposal is formulated;

(j) a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body;

(k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;

(l) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or

(m) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

Legal advice

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.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

Disclosure harmful to law enforcement

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

(a) interfere with or harm a law enforcement matter;

(b) prejudice the defence of Canada or of a foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;

(c) reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement;

(d) reveal the identity of a confidential source of law enforcement information or reveal information provided by that source with respect to a law enforcement matter;

(e) reveal law enforcement intelligence information;

(f) endanger the life or physical safety of a law enforcement officer or another person;

(g) reveal information relating to or used in the exercise of prosecutorial discretion;

(h) deprive a person of the right to a fair trial or impartial adjudication;

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) facilitate the commission or tend to impede the detection of an offence under an Act or regulation of the province or Canada;

(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;

(m) reveal technical information about weapons used or that may be used in law enforcement;

(n) adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

(o) reveal information in a correctional record supplied, implicitly or explicitly, in confidence; or

(p) harm the conduct of existing or imminent legal proceedings.

(2) The head of a public body may refuse to disclose information to an applicant if the information

(a) is in a law enforcement record and the disclosure would be an offence under an Act of Parliament;

(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record; or

(c) is about the history, supervision or release of a person who is in custody or under supervision and the disclosure could reasonably be expected to harm the proper custody or supervision of that person.

(3) The head of a public body shall not refuse to disclose under this section

(a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act; or

(b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to interfere with or harm the matters referred to in subsection (1) or (2); or

(c) statistical information on decisions to approve or not to approve prosecutions.

Confidential evaluations

32. The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of

(a) determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body;

(b) determining suitability, eligibility or qualifications for admission to an academic program of an educational body;

(c) determining suitability, eligibility or qualifications for the granting of tenure at a post-secondary educational body;

(d) determining suitability, eligibility or qualifications for an honour or award to recognize outstanding achievement or distinguished service; or

(e) assessing the teaching materials or research of an employee of a post-secondary educational body or of a person associated with an educational body.

Information from a workplace investigation

33. (1) For the purpose of this section

(a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are

known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;

(b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and

(c) "workplace investigation" means an investigation related to

(i) the conduct of an employee in the workplace,

(ii) harassment, or

(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

which may give rise to progressive discipline or corrective action by the public body employer.

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.

Disclosure harmful to intergovernmental relations or negotiations

34. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:

(i) the government of Canada or a province,

(ii) the council of a local government body,

(iii) the government of a foreign state,

(iv) an international organization of states, or

(v) the Nunatsiavut Government; or

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.

(2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of

(a) the Attorney General, for law enforcement information; or

(b) the Lieutenant-Governor in Council, for any other type of information.

(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.

Disclosure harmful to the financial or economic interests of a public body

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

(a) trade secrets of a public body or the government of the province;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

(e) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;

(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

(h) information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.

(2) The head of a public body shall not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for that public body, unless the testing was done

(a) for a fee as a service to a person or a group of persons other than the public body; or

(b) for the purpose of developing methods of testing.

Disclosure harmful to conservation

36. The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of

(a) fossil sites, natural sites or sites that have an anthropological or heritage value;

(b) an endangered, threatened or vulnerable species, sub-species or a population of a species; or

(c) a rare or endangered living resource.

Disclosure harmful to individual or public safety

37. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to

(a) threaten the safety or mental or physical health of a person other than the applicant, or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

Disclosure harmful to labour relations interests of public body as employer

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

(a) labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or

(b) labour relations information the disclosure of which could reasonably be expected to

(i) harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer,

(ii) result in significant financial loss or gain to the public body as an employer, or

(iii) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.

(2) Subsection (1) does not apply where the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Disclosure harmful to business interests of a third party

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

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax

return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or

(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Disclosure harmful to personal privacy

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.

Disclosure of House of Assembly service and statutory office records

41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information

(a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;

(b) that is advice or a recommendation given to the speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; or

(c) in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act,* records connected with the investigatory functions of the statutory office.

DIVISION 3 COMPLAINT

Access or correction complaint

42. (1) A person who makes a request under this Act for access to a record or for correction of personal information may file a complaint with the commissioner respecting a decision, act or failure to act of the head of the public body that relates to the request.

(2) A complaint under subsection (1) shall be filed in writing not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16(2).

(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.

(4) A complaint under subsection (3) shall be filed in writing not later than 15 business days after the third party is informed of the decision of the head of the public body.

(5) The commissioner may allow a longer time period for the filing of a complaint under this section.

(6) A person or third party who has appealed directly to the Trial Division under subsection 52(1) or 53(1) shall not file a complaint with the commissioner.

(7) The commissioner shall refuse to investigate a complaint where an appeal has been commenced in the Trial Division.

(8) A complaint shall not be filed under this section with respect to

(a) a request that is disregarded under section 21;

(b) a decision respecting an extension of time under section 23;

(c) a variation of a procedure under section 24; or

(d) an estimate of costs or a decision not to waive a cost under section 26.

(9) The commissioner shall provide a copy of the complaint to the head of the public body concerned.

Burden of proof

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.

Investigation

44. (1) The commissioner shall notify the parties to the complaint and advise them that they have 10 business days from the date of notification to make representations to the commissioner.

(2) The parties to the complaint may, not later than 10 business days after notification of the complaint, make a representation to the commissioner in accordance with section 96.

(3) The commissioner may take additional steps that he or she considers appropriate to resolve the complaint informally to the satisfaction of the parties and in a manner consistent with this Act.

(4) Where the commissioner is unable to informally resolve the complaint within 30 business days of receipt of the complaint, the commissioner shall conduct a formal investigation of the subject matter of the complaint where he or she is satisfied that there are reasonable grounds to do so.

(5) Notwithstanding subsection (4), the commissioner may extend the informal resolution process for a maximum of 20 business days where a written request is received from each party to continue the informal resolution process.

(6) The commissioner shall not extend the informal resolution process beyond the date that is 50 business days after receipt of the complaint.

(7) Where the commissioner has 5 active complaints from the same applicant that deal with similar or related records, the commissioner may hold an additional complaint in abeyance and not commence an investigation until one of the 5 active complaints is resolved.

Authority of commissioner not to investigate a complaint

45. (1) The commissioner may, at any stage of an investigation, refuse to investigate a complaint where he or she is satisfied that

(a) the head of a public body has responded adequately to the complaint;

(b) the complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this Act;

(c) the length of time that has elapsed between the date when the subject matter of the complaint arose and

the date when the complaint was filed is such that an investigation under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or

(d) the complaint is trivial, frivolous, vexatious or is made in bad faith.

(2) Where the commissioner refuses to investigate a complaint, he or she shall

(a) give notice of that refusal, together with reasons, to the person who made the complaint;

(b) advise the person of the right to appeal to the Trial Division under subsection 52(3) or 53(3) the decision of the head of the public body that relates to the request; and

(c) advise the person of the applicable time limit and how to pursue an appeal.

Time limit for formal investigation

46. (1) The commissioner shall complete a formal investigation and make a report under section 48 within 65 business days of receiving the complaint, whether or not the time for the informal resolution process has been extended.

(2) The commissioner may, in extraordinary circumstances, apply to a judge of the Trial Division for an order to extend the period of time under subsection (1).

Recommendations

47. On completing an investigation, the commissioner may recommend that

(a) the head of the public body grant or refuse access to the record or part of the record;

(b) the head of the public body reconsider its decision to refuse access to the record or part of the record;

(c) the head of the public body either make or not make the requested correction to personal information; and

(d) other improvements for access to information be made within the public body.

Report

48. (1) On completing an investigation, the commissioner shall

(a) prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and

(b) send a copy of the report to the person who filed the complaint, the head of the public body concerned and a third party who was notified under section 44.

(2) The report shall include information respecting the obligation of the head of the public body to notify the parties of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.

Response of public body

49. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

(3) The written notice shall include notice of the right

(a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or

(b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in section 51(1).

Head of public body seeks declaration in court

50. (1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

(a) grant the applicant access to the record or part of the record; or

(b) make the requested correction to personal information.

(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because

(a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;

(b) the head of the public body is required under this Part to refuse access to the record or part of the record; or

(c) the decision of the head of the public body not to make the requested correction to personal information is in accordance with this Act or the regulations.

(3) The head shall, within the time frame referred to in subsection (2), serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(4) The commissioner, the minister responsible for this Act, or a person who was sent a copy of the commissioner's report may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

(5) Sections 57 to 60 apply, with the necessary modifications, to an application by the head of a public body to the Trial Division for a declaration.

Filing an order with the Trial Division

51. (1) The commissioner may prepare and file an order with the Trial Division where

(a) the head of the public body agrees or is considered to have agreed under section 49 to comply with a recommendation of the commissioner referred to in subsection 50(1) in whole or in part but fails to do so within 15 business days after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply under section 50 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body either

(a) to grant the applicant access to the record or part of the record; or

(b) to make the requested correction to personal information.

(3) An order shall not be filed with the Trial Division until the later of the time periods referred to in paragraph (1)(a) and section 54 has passed.

(4) An order shall not be filed with the Trial Division under this section if the applicant or third party has commenced an appeal in the Trial Division under section 54.

(5) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

DIVISION 4 APPEAL TO THE TRIAL DIVISION

Direct appeal to Trial Division by an applicant

52. (1) Where an applicant has made a request to a public body for access to a record or correction of personal information and has not filed a complaint with the commissioner under section 42, the applicant may appeal the decision, act or failure to act of the head of the public body that relates to the request directly to the Trial Division.

(2) An appeal shall be commenced under subsection (1) not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16(2).

(3) Where an applicant has filed a complaint with the commissioner under section 42 and the commissioner has refused to investigate the complaint, the applicant may commence an appeal in the Trial Division of the decision, act or failure to act of the head of the public body that relates to the request for access to a record or for correction of personal information.

(4) An appeal shall be commenced under subsection (3) not later than 15 business days after the applicant is notified of the commissioner's refusal under subsection 45(2).

Direct appeal to Trial Division by a third party

53. (1) 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 appeal the decision directly to the Trial Division.

(2) An appeal shall be commenced under subsection (1) not later than 15 business days after the third party is informed of the decision of the head of the public body.

(3) Where a third party has filed a complaint with the commissioner under section 42 and the commissioner has refused to investigate the complaint, the third party may commence an appeal in the Trial Division of the decision of the head of the public body to grant access in response to a request.

(4) An appeal shall be commenced under subsection (3) not later than 15 business days after the third party is notified of the commissioner's refusal under subsection 45(2).

Appeal of public body decision after receipt of commissioner's recommendation

54. An applicant or a third party may, not later than 10 business days after receipt of a decision of the head of the public body under section 49, commence an appeal in the Trial Division of the head's decision to

(a) grant or refuse access to the record or part of the record; or

(b) not make the requested correction to personal information.

No right of appeal

55. An appeal does not lie against

(a) a decision respecting an extension of time under section 23;

(b) a variation of a procedure under section 24; or

(c) an estimate of costs or a decision not to waive a cost under section 26.

Procedure on appeal

56. (1) Where a person appeals a decision of the head of a public body, the notice of appeal shall name the head of the public body involved as the respondent.

(2) A copy of the notice of appeal shall be served by the appellant on the commissioner and the minister responsible for this Act.

(3) The minister responsible for this Act, the commissioner, the applicant or a third party may intervene as a party to an appeal under this Division by filing a notice to that effect with the Trial Division.

(4) Notwithstanding subsection (3), the commissioner shall not intervene as a party to an appeal of

(a) a decision of the head of the public body under section 21 to disregard a request; or

(b) a decision, act or failure to act of the head of a public body in respect of which the commissioner has refused under section 45 to investigate a complaint.

(5) The head of a public body who has refused access to a record or part of it shall, on receipt of a notice of appeal by an applicant, make reasonable efforts to give written notice of the appeal to a third party who

(a) was notified of the request for access under section 19; or

(b) would have been notified under section 19 if the head had intended to give access to the record or part of the record.

(6) Where an appeal is brought by a third party, the head of the public body shall give written notice of the appeal to the applicant.

(7) The record for the appeal shall be prepared by the head of the public body named as the respondent in the appeal.

Practice and procedure

57. The practice and procedure under the *Rules of the Supreme Court, 1986* providing for an expedited trial, or such adaption of those rules as the court or judge considers appropriate in the circumstances, shall apply to the appeal.

Solicitor and client privilege

58. The solicitor and client privilege or litigation privilege of a record in dispute shall not be affected by disclosure to the Trial Division.

Conduct of appeal

59. (1) The Trial Division shall review the decision, act or failure to act of the head of a public body that relates to a request for access to a record or correction of personal information under this Act as a new matter and may receive evidence by affidavit.

(2) The burden of proof in section 43 applies, with the necessary modifications, to an appeal.

(3) In exercising its powers to order production of documents for examination, the Trial Division shall take reasonable precautions, including where appropriate, receiving representations without notice to another person, conducting hearings in private and examining records in private, to avoid disclosure of

(a) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record; or

(b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2).

Disposition of appeal

60. (1) On hearing an appeal the Trial Division may

(a) where it determines that the head of the public body is authorized to refuse access to a record under this Part and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, dismiss the appeal;

(b) where it determines that the head of the public body is required to refuse access to a record under this Part, dismiss the appeal; or

(c) where it determines that the head is not authorized or required to refuse access to all or part of a record under this Part,

(i) order the head of the public body to give the applicant access to all or part of the record, and

(ii) make an order that the court considers appropriate.

(2) Where the Trial Division finds that a record or part of a record falls within an exception to access under

this Act and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, the court shall not order the head to give the applicant access to that record or part of it, regardless of whether the exception requires or merely authorizes the head to refuse access.

(3) Where the Trial Division finds that to do so would be in accordance with this Act or the regulations, it may order that personal information be corrected and the manner in which it is to be corrected.

PART III
PROTECTION OF PERSONAL INFORMATION

DIVISION 1 COLLECTION, USE AND DISCLOSURE

Purpose for which personal information may be collected

61. No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by or under an Act;

(b) that information is collected for the purposes of law enforcement; or

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

How personal information is to be collected

62. (1) A public body shall collect personal information directly from the individual the information is about unless

(a) another method of collection is authorized by

(i) that individual,

(ii) the commissioner under paragraph 95(1)(c), or

(iii) an Act or regulation;

(b) the information may be disclosed to the public body under sections 68 to 71;

(c) the information is collected for the purpose of

(i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary,

(ii) an existing or anticipated proceeding before a court or a judicial or quasi-judicial tribunal,

(iii) collecting a debt or fine or making a payment, or

(iv) law enforcement; or

(d) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual.

(2) A public body shall tell an individual from whom it collects personal information

(a) the purpose for collecting it;

(b) the legal authority for collecting it; and

(c) the title, business address and business telephone number of an officer or employee of the public body

who can answer the individual's questions about the collection.

(3) Subsection (2) does not apply where

(a) the information is about law enforcement or anything referred to in subsection 31(1) or (2); or

(b) in the opinion of the head of the public body, complying with it would

(i) result in the collection of inaccurate information, or

(ii) defeat the purpose or prejudice the use for which the information is collected.

Accuracy of personal information

63. Where an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body shall make every reasonable effort to ensure that the information is accurate and complete.

Protection of personal information

64. (1) The head of a public body shall take steps that are reasonable in the circumstances to ensure that

(a) personal information in its custody or control is protected against theft, loss and unauthorized collection, access, use or disclosure;

(b) records containing personal information in its custody or control are protected against unauthorized copying or modification; and

(c) records containing personal information in its custody or control are retained, transferred and disposed of in a secure manner.

(2) For the purpose of paragraph (1)(c), "disposed of in a secure manner" in relation to the disposition of a record of personal information does not include the destruction of a record unless the record is destroyed in such a manner that the reconstruction of the record is not reasonably foreseeable in the circumstances.

(3) Except as otherwise provided in subsections (6) and (7), the head of a public body that has custody or control of personal information shall notify the individual who is the subject of the information at the first reasonable opportunity where the information is

(a) stolen;

(b) lost;

(c) disposed of, except as permitted by law; or

(d) disclosed to or accessed by an unauthorized person.

(4) Where the head of a public body reasonably believes that there has been a breach involving the unauthorized collection, use or disclosure of personal information, the head shall inform the commissioner of the breach.

(5) Notwithstanding a circumstance where, under subsection (7), notification of an individual by the head of a public body is not required, the commissioner may recommend that the head of the public body, at the first reasonable opportunity, notify the individual who is the subject of the information.

(6) Where a public body has received personal information from another public body for the purpose of

research, the researcher may not notify an individual who is the subject of the information that the information has been stolen, lost, disposed of in an unauthorized manner or disclosed to or accessed by an unauthorized person unless the public body that provided the information to the researcher first obtains that individual's consent to contact by the researcher and informs the researcher that the individual has given consent.

(7) Subsection (3) does not apply where the head of the public body reasonably believes that the theft, loss, unauthorized disposition, or improper disclosure or access of personal information does not create a risk of significant harm to the individual who is the subject of the information.

(8) For the purpose of this section, "significant harm" includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property.

(9) The factors that are relevant to determining under subsection (7) whether a breach creates a risk of significant harm to an individual include

(a) the sensitivity of the personal information; and

(b) the probability that the personal information has been, is being, or will be misused.

Retention of personal information

65. (1) Where a public body uses an individual's personal information to make a decision that directly affects the individual, the public body shall retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

(2) A public body that has custody or control of personal information that is the subject of a request for access to a record or correction of personal information under Part II shall retain that information for as long as necessary to allow the individual to exhaust any recourse under this Act that he or she may have with respect to the request.

Use of personal information

66. (1) A public body may use personal information only

(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose as described in section 69;

(b) where the individual the information is about has identified the information and has consented to the use, in the manner set by the minister responsible for this Act; or

(c) for a purpose for which that information may be disclosed to that public body under sections 68 to 71.

(2) The use of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.

Use of personal information by post-secondary educational bodies

67. (1) Notwithstanding section 66, a post-secondary educational body may, in accordance this section, use personal information in its alumni records for the purpose of its own fundraising activities where that personal information is reasonably necessary for the fundraising activities.

(2) In order to use personal information in its alumni records for the purpose of its own fundraising activities, a post-secondary educational body shall

(a) give notice to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be used for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, give notice to the individual to whom the personal information relates of his or her right to request that the information cease to be used for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, publish in an alumni magazine or other publication, a notice of the individual's right to request that the individual's personal information cease to be used for fundraising purposes.

(3) A post-secondary educational body shall, where requested to do so by an individual, cease to use the individual's personal information under subsection (1).

(4) The use of personal information by a post-secondary educational body under this section shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.

Disclosure of personal information

68. (1) A public body may disclose personal information only

(a) in accordance with Part II;

(b) where the individual the information is about has identified the information and consented to the disclosure in the manner set by the minister responsible for this Act;

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose as described in section 69;

(d) for the purpose of complying with an Act or regulation of, or with a treaty, arrangement or agreement made under an Act or regulation of the province or Canada;

(e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information;

(f) to an officer or employee of the public body or to a minister, where the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister;

(g) to the Attorney General for use in civil proceedings involving the government;

(h) for the purpose of enforcing a legal right the government of the province or a public body has against a person;

(i) for the purpose of

(i) collecting a debt or fine owing by the individual the information is about to the government of the province or to a public body, or

(ii) making a payment owing by the government of the province or by a public body to the individual the information is about;

(j) to the Auditor General or another person or body prescribed in the regulations for audit purposes;

(k) to a member of the House of Assembly who has been requested by the individual the information is about to assist in resolving a problem;

(l) to a representative of a bargaining agent who has been authorized in writing by the employee, whom the information is about, to make an inquiry;

(m) to the Provincial Archives of Newfoundland and Labrador, or the archives of a public body, for archival purposes;

(n) to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding, or

(ii) from which a law enforcement proceeding is likely to result;

(o) where the public body is a law enforcement agency and the information is disclosed

(i) to another law enforcement agency in Canada , or

(ii) to a law enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority;

(p) where the head of the public body determines that compelling circumstances exist that affect a person's health or safety and where notice of disclosure is given in the form appropriate in the circumstances to the individual the information is about;

(q) so that the next of kin or a friend of an injured, ill or deceased individual may be contacted;

(r) in accordance with an Act of the province or Canada that authorizes or requires the disclosure;

(s) in accordance with sections 70 and 71;

(t) where the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40;

(u) to an officer or employee of a public body or to a minister, where the information is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or minister to whom the information is disclosed; or

(v) to the surviving spouse or relative of a deceased individual where, in the opinion of the head of the public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy.

(2) The disclosure of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.

Definition of consistent purposes

69. A use of personal information is consistent under section 66 or 68 with the purposes for which the information was obtained or compiled where the use

(a) has a reasonable and direct connection to that purpose; and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

Disclosure for research or statistical purposes

70. A public body may disclose personal information for a research purpose, including statistical research, only where

(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form;

(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest;

(c) the head of the public body concerned has approved conditions relating to the following:

(i) security and confidentiality,

(ii) the removal or destruction of individual identifiers at the earliest reasonable time, and

(iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body; and

(d) the person to whom that information is disclosed has signed an agreement to comply with the approved conditions, this Act and the public body's policies and procedures relating to the confidentiality of personal information.

Disclosure for archival or historical purposes

71. The Provincial Archives of Newfoundland and Labrador, or the archives of a public body, may disclose personal information for archival or historical purposes where

(a) the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40;

(b) the disclosure is for historical research and is in accordance with section 70;

(c) the information is about an individual who has been dead for 20 years or more; or

(d) the information is in a record that has been in existence for 50 years or more.

Privacy impact assessment

72. (1) A minister shall, during the development of a program or service by a department or branch of the executive government of the province, submit to the minister responsible for this Act

(a) a privacy impact assessment for that minister's review and comment; or

(b) the results of a preliminary assessment showing that a privacy impact assessment of the program or service is not required.

(2) A minister shall conduct a preliminary assessment and, where required, a privacy impact assessment in accordance with the directions of the minister responsible for this Act.

(3) A minister shall notify the commissioner of a common or integrated program or service at an early stage of developing the program or service.

(4) Where the minister responsible for this Act receives a privacy impact assessment respecting a common or integrated program or service for which disclosure of personal information may be permitted under paragraph

68(1)(u), the minister shall, during the development of the program or service, submit the privacy impact assessment to the commissioner for the commissioner's review and comment.

DIVISION 2 PRIVACY COMPLAINT

Privacy complaint

73. (1) Where an individual believes on reasonable grounds that his or her personal information has been collected, used or disclosed by a public body in contravention of this Act, he or she may file a privacy complaint with the commissioner.

(2) Where a person believes on reasonable grounds that personal information has been collected, used or disclosed by a public body in contravention of this Act, he or she may file a privacy complaint with the commissioner on behalf of an individual or group of individuals, where that individual or those individuals have given consent to the filing of the privacy complaint.

(3) Where the commissioner believes that personal information has been collected, used or disclosed by a public body in contravention of this Act, the commissioner may on his or her own motion carry out an investigation.

(4) A privacy complaint under subsection (1) or (2) shall be filed in writing with the commissioner within

(a) one year after the subject matter of the privacy complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant; or

(b) a longer period of time as permitted by the commissioner.

(5) The commissioner shall provide a copy or summary of the privacy complaint, including an investigation initiated on the commissioner's own motion, to the head of the public body concerned.

Investigation – privacy complaint

74. (1) The commissioner may take the steps that he or she considers appropriate to resolve a privacy complaint informally to the satisfaction of the parties and in a manner consistent with this Act.

(2) Where the commissioner is unable to informally resolve a privacy complaint within a reasonable period of time, the commissioner shall conduct a formal investigation of the subject matter of the privacy complaint where he or she is satisfied that there are reasonable grounds to do so.

(3) The commissioner shall complete a formal investigation and make a report under section 77 within a time that is as expeditious as possible in the circumstances.

(4) Where the commissioner has 5 active privacy complaints from the same person that deal with similar or related records, the commissioner may hold an additional complaint in abeyance and not commence an investigation until one of the 5 active complaints is resolved.

Authority of commissioner not to investigate a privacy complaint

75. The commissioner may, at any stage of an investigation, refuse to investigate a privacy complaint where he or she is satisfied that

(a) the head of a public body has responded adequately to the privacy complaint;

(b) the privacy complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this Act;

(c) the length of time that has elapsed between the date when the subject matter of the privacy complaint arose and the date when the privacy complaint was filed is such that an investigation under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or

(d) the privacy complaint is trivial, frivolous, vexatious or is made in bad faith.

Recommendations – privacy complaint

76. (1) On completing an investigation of a privacy complaint, the commissioner may recommend that the head of a public body

(a) stop collecting, using or disclosing personal information in contravention of this Act; or

(b) destroy personal information collected in contravention of this Act.

(2) The commissioner may also make

(a) a recommendation that an information practice, policy or procedure be implemented, modified, stopped or not commenced; or

(b) a recommendation on the privacy aspect of the matter that is the subject of the privacy complaint.

Report – privacy complaint

77. (1) On completing an investigation of a privacy complaint, the commissioner shall

(a) prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and

(b) send a copy of the report to the person who filed the privacy complaint and the head of the public body concerned.

(2) The report shall include information respecting the obligation of the head of the public body to notify the person who filed the privacy complaint of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.

Response of public body – privacy complaint

78. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

Head of public body seeks declaration in court

79. (1) Where the head of the public body decides under section 78 not to comply with a recommendation of the commissioner under subsection 76(1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation,

(a) apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because the collection, use or disclosure of the personal information is not in contravention of this Act, and

(b) serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(2) The commissioner or the minister responsible for this Act may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

Filing an order with the Trial Division

80. (1) The commissioner may prepare and file an order with the Trial Division where

(a) the head of the public body agrees or is considered to have agreed under section 78 to comply with a recommendation of the commissioner under subsection 76(1) in whole or in part but fails to do so within one year after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply under section 79 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body to do one or more of the following:

(a) stop collecting, using or disclosing personal information in contravention of this Act; or

(b) destroy personal information collected in contravention of this Act.

(3) An order shall not be filed with the Trial Division until the time period referred to in paragraph (1)(a) has passed.

(4) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

DIVISION 3 APPLICATION TO THE TRIAL DIVISION FOR A DECLARATION

Practice and procedure

81. The practice and procedure under the *Rules of the Supreme Court, 1986* providing for an expedited trial, or such adaption of those rules as the court or judge considers appropriate in the circumstances, shall apply to an application to the Trial Division for a declaration.

Solicitor and client privilege

82. The solicitor and client privilege or litigation privilege of a record which may contain personal information shall not be affected by disclosure to the Trial Division.

Conduct

83. (1) The Trial Division shall review the act or failure to act of the head of a public body that relates to the collection, use or disclosure of personal information under this Act as a new matter and may receive evidence by affidavit.

(2) In exercising its powers to order production of documents for examination, the Trial Division shall take reasonable precautions, including where appropriate, receiving representations without notice to another person, conducting hearings in private and examining records in private, to avoid disclosure of

(a) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record; or

(b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2).

Disposition

84. On hearing an application for a declaration, the Trial Division may

(a) where it determines that the head of the public body is authorized under this Act to use, collect or disclose the personal information, dismiss the application;

(b) where it determines that the head is not authorized under this Act to use, collect or disclose the personal information,

(i) order the head of the public body to stop using, collecting or disclosing the information, or

(ii) order the head of the public body to destroy the personal information that was collected in contravention of this Act; or

(c) make an order that the court considers appropriate.

PART IV
OFFICE AND POWERS OF THE INFORMATION AND PRIVACY COMMISSIONER

DIVISION 1 OFFICE

Appointment of the Information and Privacy Commissioner

85. (1) The office of the Information and Privacy Commissioner is continued.

(2) The office shall be filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly.

(3) Before an appointment is made, the Speaker shall establish a selection committee comprising

(a) the Clerk of the Executive Council or his or her deputy;

(b) the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly;

(c) the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and

(d) the President of Memorial University or a vice-president of Memorial University designated by the President.

(4) The selection committee shall develop a roster of qualified candidates and in doing so may publicly invite expressions of interest for the position of commissioner.

(5) The selection committee shall submit the roster to the Speaker of the House of Assembly.

(6) The Speaker shall

(a) consult with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission; and

(b) cause to be placed before the House of Assembly a resolution to appoint as commissioner one of the individuals named on the roster.

Status of the commissioner

86. (1) The commissioner is an officer of the House of Assembly and is not eligible to be nominated for election, to be elected, or to sit as a member of the House of Assembly.

(2) The commissioner shall not hold another public office or carry on a trade, business or profession.

(3) In respect of his or her interactions with a public body, whether or not it is a public body to which this Act applies, the commissioner has the status of a deputy minister.

Term of office

87. (1) Unless he or she sooner resigns, dies or is removed from office, the commissioner shall hold office for 6 years from the date of his or her appointment.

(2) The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the commissioner for one further term of 6 years.

(3) The Speaker shall, in the event of a tie vote on either or both sides of the House of Assembly, cast the deciding vote.

(4) The commissioner may resign his or her office in writing addressed to the Speaker of the House of Assembly, or, where there is no Speaker or the Speaker is absent, to the Clerk of the House of Assembly.

Removal or suspension

88. (1) The Lieutenant-Governor in Council, on a resolution of the House of Assembly passed by a majority vote of the members of the House of Assembly actually voting, may remove the commissioner from office or suspend him or her because of an incapacity to act, or for neglect of duty or for misconduct.

(2) When the House of Assembly is not in session, the Lieutenant-Governor in Council may suspend the

commissioner because of an incapacity to act, or for neglect of duty or for misconduct, but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

Acting commissioner

89. (1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting commissioner if

(a) the commissioner is temporarily unable to perform his or her duties;

(b) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is not in session; or

(c) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is in session, but the House of Assembly does not pass a resolution to fill the office of the commissioner before the end of the session.

(2) Where the office of the commissioner becomes vacant and an acting commissioner is appointed under paragraph (1)(b) or (c), the term of the acting commissioner shall not extend beyond the end of the next sitting of the House of Assembly.

(3) An acting commissioner holds office until

(a) the commissioner returns to his or her duties after a temporary inability to perform;

(b) the suspension of the commissioner ends or is dealt with in the House of Assembly; or

(c) a person is appointed as a commissioner under section 85.

Salary, pension and benefits

90. (1) The commissioner shall be paid a salary that is 75% of the salary of a Provincial Court judge, other than the Chief Judge.

(2) The commissioner is eligible for salary increases at the same time and in the same manner as salary increases of a Provincial Court judge, other than the Chief Judge, and in the proportion provided in subsection (1).

(3) The commissioner is subject to the *Public Service Pensions Act, 1991* where he or she was subject to that Act prior to his or her appointment as commissioner.

(4) Where the commissioner is not subject to the *Public Service Pensions Act, 1991* prior to his or her appointment as commissioner, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (3) applicable.

(5) The commissioner is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (4) applies.

Expenses

91. The commissioner shall be paid the travelling and other expenses, at the deputy minister level, incurred by him or her in the performance of his or her duties that may be approved by the House of Assembly Management Commission.

Commissioner's staff

92. (1) The commissioner may, subject to the approval of the House of Assembly Management Commission, and in the manner provided by law, appoint those assistants and employees that he or she considers necessary to enable him or her to carry out his or her functions under this Act and the *Personal Health Information Act* .

(2) Persons employed under subsection (1) are members of the public service of the province.

Oath of office

93. Before beginning to perform his or her duties, the commissioner shall swear an oath, or affirm, before the Speaker of the House of Assembly or the Clerk of the House of Assembly that he or she shall faithfully and impartially perform the duties of his or her office and that he or she shall not, except as provided by this Act and the *Personal Health Information Act*, divulge information received by him or her under this Act and the *Personal Health Information Act*.

Oath of staff

94. Every person employed under the commissioner shall, before he or she begins to perform his or her duties, swear an oath, or affirm, before the commissioner that he or she shall not, except as provided by this Act and the *Personal Health Information Act*, divulge information received by him or her under this Act and the *Personal Health Information Act*.

DIVISION 2 POWERS OF THE COMMISSIONER

General powers and duties of commissioner

95. (1) In addition to the commissioner's powers and duties under Parts II and III, the commissioner may

(a) conduct investigations to ensure compliance with this Act and the regulations;

(b) monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities and duties under this Act;

(c) review and authorize the collection of personal information from sources other than the individual the information is about;

(d) consult with any person with experience or expertise in any matter related to the purpose of this Act; and

(e) engage in or commission research into anything relating to the purpose of this Act.

(2) In addition to the commissioner's powers and duties under Parts II and III, the commissioner shall exercise and perform the following powers and duties:

(a) inform the public about this Act;

(b) develop and deliver an educational program to inform people of their rights and the reasonable limits on those rights under this Act and to inform public bodies of their responsibilities and duties, including the duty to assist, under this Act;

(c) provide reasonable assistance, upon request, to a person;

(d) receive comments from the public about the administration of this Act and about matters concerning access to information and the confidentiality, protection and correction of personal information;

(e) comment on the implications for access to information or for protection of privacy of proposed legislative schemes, programs or practices of public bodies;

(f) comment on the implications for protection of privacy of

(i) using or disclosing personal information for record linkage, or

(ii) using information technology in the collection, storage, use or transfer of personal information;

(g) take actions necessary to identify, promote, and where possible cause to be made adjustments to practices and procedures that will improve public access to information and protection of personal information;

(h) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants;

(i) make recommendations to the head of a public body or the minister responsible for this Act about the administration of this Act;

(j) inform the public from time to time of apparent deficiencies in the system, including the office of the commissioner; and

(k) establish and implement practices and procedures in the office of the commissioner to ensure efficient and timely compliance with this Act.

(3) The commissioner's investigation powers and duties provided in this Part are not limited to an investigation under paragraph (1)(a) but apply also to an investigation in respect of a complaint, privacy complaint, audit, decision or other action that the commissioner is authorized to take under this Act.

Representation during an investigation

96. (1) During an investigation, the commissioner may give a person an opportunity to make a representation.

(2) An investigation may be conducted by the commissioner in private and a person who makes representations during an investigation is not, except to the extent invited by the commissioner to do so, entitled to be present during an investigation or to comment on representations made to the commissioner by another person.

(3) The commissioner may decide whether representations are to be made orally or in writing.

(4) Representations may be made to the commissioner through counsel or an agent.

Production of documents

97. (1) This section and section 98 apply to a record notwithstanding

(a) paragraph 5(1)(c), (d), (e), (f), (g), (h) or (i);

(b) subsection 7(2);

(c) another Act or regulation; or

(d) a privilege under the law of evidence.

(2) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*.

(3) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.

(4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

(5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where

(a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;

(b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or

(c) it is not practicable to make a copy of the record.

(6) The head of a public body shall not place a condition on the ability of the commissioner to access or examine a record required under this section, other than that provided in subsection (5).

Right of entry

98. The commissioner has the right

(a) to enter an office of a public body and examine and make copies of a record in the custody of the public body; and

(b) to converse in private with an officer or employee of the public body.

Admissibility of evidence

99. (1) A statement made, or answer or evidence given by a person in the course of an investigation by or proceeding before the commissioner under this Act is not admissible in evidence against a person in a court or at an inquiry or in another proceeding, and no evidence respecting a proceeding under this Act shall be given against a person except

(a) in a prosecution for perjury;

(b) in a prosecution for an offence under this Act; or

(c) in an appeal to, or an application for a declaration from, the Trial Division under this Act, or in an appeal to the Court of Appeal respecting a matter under this Act.

(2) The commissioner, and a person acting for or under the direction of the commissioner, shall not be required to give evidence in a court or in a proceeding about information that comes to the knowledge of the commissioner in performing duties or exercising powers under this Act.

Privilege

100. (1) Where a person speaks to, supplies information to or produces a record during an investigation by the commissioner under this Act, what he or she says, the information supplied and the record produced are privileged in the same manner as if they were said, supplied or produced in a proceeding in a court.

(2) The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner.

Section 8.1 of the *Evidence Act*

101. Section 8.1 of the *Evidence Act* does not apply to an investigation conducted by the commissioner under this Act.

Disclosure of information

102. (1) The commissioner and a person acting for or under the direction of the commissioner, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information that is necessary to

(a) perform a duty or exercise a power of the commissioner under this Act; or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(3) In conducting an investigation and in performing a duty or exercising a power under this Act, the commissioner and a person acting for or under his or her direction, shall take reasonable precautions to avoid disclosing and shall not disclose

(a) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record; or

(b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2).

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence under this or another Act of the province or Canada, where the commissioner has reason to believe an offence has been committed.

(5) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information in the course of a prosecution or another matter before a court referred to in subsection 99(1).

Delegation

103. The commissioner may delegate to a person on his or her staff a duty or power under this Act.

Protection from liability

104. An action does not lie against the commissioner or against a person employed under him or her for anything he or she may do or report or say in the course of the exercise or performance, or intended exercise or performance, of his or her functions and duties under this Act, unless it is shown he or she acted in bad faith.

Annual report

105. The commissioner shall report annually to the House of Assembly through the Speaker on

(a) the exercise and performance of his or her duties and functions under this Act;

(b) a time analysis of the functions and procedures in matters involving the commissioner in a complaint, from the date of receipt of the request for access or correction by the public body to the date of informal resolution, the issuing of the commissioner's report, or the withdrawal or abandonment of the complaint, as applicable;

(c) persistent failures of public bodies to fulfil the duty to assist applicants, including persistent failures to respond to requests in a timely manner;

(d) the commissioner's recommendations and whether public bodies have complied with the recommendations;

(e) the administration of this Act by public bodies and the minister responsible for this Act; and

(f) other matters about access to information and protection of privacy that the commissioner considers appropriate.

Special report

106. The commissioner may at any time make a special report to the House of Assembly through the Speaker relating to

(a) the resources of the office of the commissioner;

(b) another matter affecting the operations of this Act; or

(c) a matter within the scope of the powers and duties of the commissioner under this Act.

Report – investigation or audit

107. On completing an investigation under paragraph 95(1)(a) or an audit under paragraph 95(1)(b), the commissioner

(a) shall prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations;

(b) shall send a copy of the report to the head of the public body concerned; and

(c) may make the report public.

PART V
GENERAL

Exercising rights of another person

108. A right or power of an individual given in this Act may be exercised

(a) by a person with written authorization from the individual to act on the individual's behalf;

(b) by a court appointed guardian of a mentally disabled person, where the exercise of the right or power relates to the powers and duties of the guardian;

(c) by an attorney acting under a power of attorney, where the exercise of the right or power relates to the powers and duties conferred by the power of attorney;

(d) by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy; or

(e) where the individual is deceased, by the individual's personal representative, where the exercise of the right or power relates to the administration of the individual's estate.

Designation of head by local public body

109. (1) A local public body shall, by by-law, resolution or other instrument, designate a person or group of persons as the head of the local public body for the purpose of this Act, and once designated, the local public body shall advise the minister responsible for this Act of the designation.

(2) A local government body or group of local government bodies shall

(a) by by-law, resolution or other instrument, designate a person or group of persons, for the purpose of this Act, as the head of an unincorporated entity owned by or created for the local government body or group of local government bodies; and

(b) advise the minister responsible for this Act of the designation.

Designation and delegation by the head of a public body

110. (1) The head of a public body shall designate a person on the staff of the public body as the coordinator to

(a) receive and process requests made under this Act;

(b) co-ordinate responses to requests for approval by the head of the public body;

(c) communicate, on behalf of the public body, with applicants and third parties to requests throughout the process including the final response;

(d) educate staff of the public body about the applicable provisions of this Act;

(e) track requests made under this Act and the outcome of the request;

(f) prepare statistical reports on requests for the head of the public body; and

(g) carry out other duties as may be assigned.

(2) The head of a public body may delegate to a person on the staff of the public body a duty or power of the head under this Act.

Publication scheme

111. (1) The commissioner shall create a standard template for the publication of information by public bodies to assist in identifying and locating records in the custody or under the control of public bodies.

(2) The head of a public body shall adapt the standard template to its functions and publish its own information according to that adapted template.

(3) The published information shall include

(a) a description of the mandate and functions of the public body and its components;

(b) a description and list of the records in the custody or under the control of the public body, including personal information banks;

(c) the name, title, business address and business telephone number of the head and coordinator of the public body; and

(d) a description of the manuals used by employees of the public body in administering or carrying out the programs and activities of the public body.

(4) The published information shall include for each personal information bank maintained by a public body

(a) its name and location;

(b) a description of the kind of personal information and the categories of individuals whose personal information is included;

(c) the authority and purposes for collecting the personal information;

(d) the purposes for which the personal information is used or disclosed; and

(e) the categories of persons who use the personal information or to whom it is disclosed.

(5) Where personal information is used or disclosed by a public body for a purpose that is not included in the information published under subsection (2), the head of the public body shall

(a) keep a record of the purpose and either attach or link the record to the personal information; and

(b) update the published information to include that purpose.

(6) This section or a subsection of this section shall apply to those public bodies listed in the regulations.

Amendments to statutes and regulations

112. (1) A minister shall consult with the commissioner on a proposed bill that could have implications for access to information or protection of privacy, as soon as possible before, and not later than, the date on which notice to introduce the bill in the House of Assembly is given.

(2) The commissioner shall advise the minister as to whether the proposed bill has implications for access to information or protection of privacy.

(3) The commissioner may comment publicly on a draft bill any time after that draft bill has been made public.

Report of minister responsible

113. The minister responsible for this Act shall report annually to the House of Assembly on the administration of this Act and shall include information about

(a) the number of requests for access and whether they were granted or denied;

(b) the specific provisions of this Act used to refuse access;

(c) the number of requests for correction of personal information;

(d) the costs charged for access to records; and

(e) systemic and other issues raised by the commissioner in the annual reports of the commissioner.

Limitation of liability

114. (1) An action does not lie against the government of the province, a public body, the head of a public body, an elected or appointed official of a local public body or a person acting for or under the direction of the head of a public body for damages resulting from

(a) the disclosure of or a failure to disclose, in good faith, a record or part of a record or information under this Act or a consequence of that disclosure or failure to disclose; or

(b) the failure to give a notice required by this Act where reasonable care is taken to ensure that notices are given.

(2) An action does not lie against a Member of the House of Assembly for disclosing information obtained from a public body in accordance with paragraph 68(1)(k) while acting in good faith on behalf of an individual.

Offence

115. (1) A person who wilfully collects, uses or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.

(2) A person who wilfully

(a) attempts to gain or gains access to personal information in contravention of this Act or the regulations;

(b) makes a false statement to, or misleads or attempts to mislead the commissioner or another person performing duties or exercising powers under this Act;

(c) obstructs the commissioner or another person performing duties or exercising powers under this Act;

(d) destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records; or

(e) alters, falsifies or conceals a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records,

is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.

(3) A prosecution for an offence under this Act shall be commenced within 2 years of the date of the discovery of the offence.

Regulations

116. The Lieutenant-Governor in Council may make regulations

(a) designating a body as a public body, educational body, health care body or local government body under this Act;

(b) designating a person or group of persons as the head of a public body;

(c) prescribing procedures to be followed in making, transferring and responding to requests under this Act;

(d) permitting prescribed categories of applicants to make requests under this Act orally instead of in writing;

(e) limiting the costs that different categories of persons may be charged under this Act;

(f) authorizing, for the purposes of section 28, a local public body to hold meetings of its elected officials, or of its governing body or a committee of the governing body, to consider specified matters in the absence of the public unless another Act

(i) expressly authorizes the local public body to hold meetings in the absence of the public, and

(ii) specifies the matters that may be discussed at those meetings;

(g) prescribing for the purposes of section 36 the categories of sites that are considered to have heritage or anthropological value;

(h) authorizing the disclosure of information relating to the mental or physical health of individuals to medical or other experts to determine, for the purposes of section 37, if disclosure of that information could reasonably be expected to result in grave and immediate harm to the safety of or the mental or physical health of those individuals;

(i) prescribing procedures to be followed or restrictions considered necessary with respect to the disclosure and examination of information referred to in paragraph (h);

(j) prescribing special procedures for giving individuals access to personal information about their mental or physical health;

(k) prescribing, for the purposes of section 68, a body to whom personal information may be disclosed for audit purposes;

(l) prescribing the public bodies that are required to comply with all or part of section 111;

(m) requiring public bodies to provide to the minister responsible for this Act information that relates to its administration or is required for preparing the minister's annual report;

(n) providing for the retention and disposal of records by a public body if the *Management of Information Act* does not apply to the public body;

(o) exempting any class of public body from a regulation made under this section; and

(p) generally to give effect to this Act.

Review

117. (1) After the expiration of not more than 5 years after the coming into force of this Act or part of it and every 5 years thereafter, the minister responsible for this Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operation of this Act or part of it.

(2) The committee shall review the list of provisions in Schedule I to determine the necessity for their continued inclusion in Schedule I.

Transitional

118. (1) This Act applies to

(a) a request for access to a record that is made on or after the day section 8 comes into force;

(b) a request for correction of personal information that is made on or after the day section 10 comes into force; and

(c) a privacy complaint that is filed by an individual or commenced by the commissioner on or after the day section 73 comes into force.

(2) Part IV, Division 1 applies to and upon the appointment of the next commissioner.

Consequential amendments

119. [It is anticipated consequential amendments will be prepared by Government]

Repeal

120. (1) The *Access to Information and Protection of Privacy Act* is repealed.

(2) Sections 4 and 5 of the *Access to Information Regulations,* Newfoundland and Labrador Regulation 11/07, are repealed.

Commencement

121. This Act or a section, subsection, paragraph or subparagraph of this Act comes into force on a day or days to be proclaimed by the Lieutenant-Governor in Council.

SCHEDULE I

(a) sections 64 to 68 of the *Adoption Act, 2013*;

(b) section 29 of the *Adult Protection Act*;

(c) section 115 of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*;

(d) sections 69 to 74 of the *Children and Youth Care and Protection Act*;

(e) section 5.4 of the *Energy Corporation Act*;

(f) section 8.1 of the *Evidence Act*;

(g) subsection 24(1) of the *Fatalities Investigations Act*;

(h) subsection 5(1) of the *Fish Inspection Act*;

(i) section 4 of the *Fisheries Act*;

(j) sections 173, 174 and 174.1 of the *Highway Traffic Act*;

(k) section 15 of the *Mineral Act*;

(l) section 16 of the *Mineral Holdings Impost Act*;

(m) subsection 13(3) of the *Order of Newfoundland and Labrador Act*;

(n) sections 153, 154 and 155 of the *Petroleum Drilling Regulations*;

(o) sections 53 and 56 of the *Petroleum Regulations*;

(p) section 21 of the *Research and Development Council Act*;

(q) section 12 and subsection 62(2) of the *Schools Act, 1997*;

(r) sections 19 and 20 of the *Securities Act*;

(s) section 13 of the *Statistics Agency Act*; and

(t) section 18 of the *Workplace Health, Safety and Compensation Act*.

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News Releases
Executive Council
March 18, 2014

Open and Accountable

Premier Announces Committee Members for Independent Review of the Access to Information and Protection of Privacy Act

The Honourable Tom Marshall, Premier of Newfoundland and Labrador, has appointed three individuals with expertise in law, privacy legislation, and journalism to conduct the independent statutory review of the Access to Information and Protection of Privacy (ATIPP) Act.

In making the announcement, Premier Marshall noted that government is committed to ensuring that Newfoundland and Labrador has a strong statutory framework for access to information and protection of privacy, which when measured against international standards, will rank among the best.

"I am pleased to announce today that our committee will be comprised of Clyde Wells, who will serve as chair, Jennifer Stoddart, and Doug Letto. Mr. Wells is a lawyer, former Chief Justice, and a former Premier of Newfoundland and Labrador, Ms. Stoddart is a former Privacy Commissioner of Canada, and Mr. Letto is a journalist with over 30 years of experience. We are fortunate that such highly qualified and respected individuals have agreed to undertake this important review. I have every confidence in their capabilities."

- *The Honourable Tom Marshall, Premier of Newfoundland and Labrador*

Biographical information for the committee members and terms of reference are provided in the backgrounders below.

The appointments follow Premier Marshall's announcement that an independent review of the ATIPP Act would be initiated earlier than required by legislation. Over the next several months, the committee members will conduct a comprehensive review, including examination of amendments made through Bill 29. Meaningful engagement of residents and stakeholder groups will form an important part of the process.

"We want to give the public an opportunity for direct input through this review. If there are specific concerns for residents, we want the committee to hear them. Through this process, we will gain valuable insight into ways in which we can improve our access to information and protection of privacy legislation."

- *The Honourable Steve Kent, Minister Responsible for the Office of Public Engagement*

The final report will be released publicly and all recommendations carefully considered by government.

The Government of Newfoundland and Labrador is committed to listening to residents and to engaging youth, the volunteer sector, families and communities to build a vibrant and prosperous province.

QUICK FACTS

- Premier Marshall has appointed three individuals to conduct an independent statutory review of the Access to Information and Protection of Privacy (ATIPP) Act: Clyde Wells (Chair), lawyer, former Chief Justice, and former Premier of Newfoundland and Labrador; Jennifer Stoddart, former Privacy Commissioner of Canada; and Doug Letto, a 30-year journalism veteran.
- Proclaimed in January 2005, Section 74 of the ATIPP Act requires a review of the legislation every five years. The next review was due to occur in 2015; Premier Marshall initiated an earlier review.
- The final report will be released publicly and all recommendations carefully considered by government.

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BACKGROUNDER
Biographical Information on Committee Members

Clyde Wells, QC

Clyde Wells has had an extensive legal and political career. A graduate of Dalhousie Law School, Mr. Wells built a thriving legal practice before serving as the fifth Premier of Newfoundland and Labrador from 1989-1996. He has served as a justice of the Supreme Court of Newfoundland and Labrador (Court of Appeal) and was appointed Chief Justice of the province in 1999. Mr. Wells became a major figure on the national political stage at the time of the Meech Lake Accord for his opposition to several of its provisions and also participated in discussions that led to the development of a set of constitutional proposals known as the Charlottetown Accord.

Jennifer Stoddart

Jennifer Stoddart was Canada's Privacy Commissioner from 2003 to 2013. She is a privacy leader nationally and internationally and has overseen a number of important investigations, including those concerning Facebook's privacy policies and practices. Ms. Stoddart has extensive experience on global privacy issues through her work with several international organizations and was selected as the 2010 recipient of the International Association of Privacy Professionals' Privacy Vanguard Award for her role in establishing Canada as a leading regulator on privacy issues. Ms. Stoddart holds a Bachelor of Civil Law degree from McGill University, as well as a Master of Arts degree in history from the University of Québec at Montréal and a Bachelor of Arts degree from the University of Toronto's Trinity College. She was called to the Québec Bar in 1981. In 2013, Ms. Stoddart was awarded an honorary doctorate from the University of Ottawa for her contributions in the privacy field, both in Canada and around the world.

Doug Letto

Doug Letto is a communications professional, writer and accomplished journalist. He recently retired from the CBC, where he was a political reporter, co-host of Here and Now and most recently, senior producer. Mr. Letto has hosted provincial elections and leadership convention broadcasts, special programming and newscasts, and has also taught graduate and undergraduate courses in Political Science at Memorial University of Newfoundland. Mr. Letto has a Master of Arts (Political Science) degree and a Bachelor of Education and Bachelor of Arts (English History) degrees from Memorial University.

BACKGROUNDER
Statutory Review of the Access to Information and Protection of Privacy Act

Terms of Reference

The Access to Information and Protection of Privacy Act, SNL2002, c. A-1.1 (ATIPPA) came into force on January 17, 2005, with the exception of Part IV (Protection of Privacy) which was subsequently proclaimed on January 16, 2008. Pursuant to section 74 of the ATIPPA, the Minister Responsible for the Office of Public Engagement is required to refer the legislation to a committee for a review after the expiration of not more than five years after its coming into force and every five years thereafter. The first legislative review of ATIPPA commenced in 2010 and resulted in amendments that came into force on June 27, 2012. The current review constitutes the second statutory review of this legislation.

1. Overview

The Committee will complete an independent, comprehensive review of the Access to Information and Protection of Privacy Act, including amendments made as a result of Bill 29, and provide recommendations arising from the review to the Minister Responsible for the Office of Public Engagement (the Minister), Government of Newfoundland and Labrador. This review will

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be conducted in an open, transparent and respectful manner and will engage citizens and stakeholders in a meaningful way. Protection of personal privacy will be assured.

2. Scope of the Work

2.1 The Committee will conduct a comprehensive review of the provisions and operations of the Act which will include, but not be limited to, the following:

- Identification of ways to make the Act more user friendly so that it is well understood by those who use it and can be interpreted and applied consistently;
- Assessment of 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;
- Examination of the provisions regarding "Reviews and Complaints" (Part V) including the powers and duties of the Information and Privacy Commissioner, to assess whether adequate measures exist for review of decisions and complaints independent of heads of public bodies;
- Time limits for responses to access to information requests and whether current requirements are appropriate;
- Whether there are any additional uses or disclosures of personal information that should be permitted under the Act or issues related to protection of privacy (Part IV); and
- Whether the current ATIPPA Fee Schedule is appropriate.

2.2 Consideration of standards and leading practices in other jurisdictions:

- The Committee will conduct an examination of leading international and Canadian practices, legislation and academic literature related to access to information and protection of privacy legislative frameworks and identify opportunities and challenges experienced by other jurisdictions;
- The Committee will specifically consult with the Information and Privacy Commissioner for Newfoundland and Labrador regarding any concerns of the Commissioner with existing legislative provisions, and the Commissioner's views as to key issues and leading practices in access to information and protection of privacy laws.

3. Committee processes

3.1 For the purpose of receiving representations from individuals and stakeholders, the Committee may hold such hearings in such places and at such times as the Committee deems necessary to hear representations from those persons or entities who, in response to invitations published by the Committee, indicate in writing a desire to make a representation to the Committee, and make such other arrangements as the Committee deems necessary to ensure that it will have all of the information necessary for it to fully respond to the requirements of these terms of reference.

3.2 The Committee may arrange for such accommodation, administrative assistance, legal and other assistance as the Committee deems necessary for the proper conduct of the review.

4. Final Committee Report and Recommendations

The Committee will prepare a final report for submission to the Minister. The report will include:

- An executive summary;
- A summary of the research and analysis of the legislative provisions and leading practices in other jurisdictions;
- A detailed summary of the public consultation process including aggregate information regarding types and numbers of participants, issues and concerns, emerging themes, and recommendations brought forward by citizens and stakeholders; and
- Detailed findings and recommendations, including proposed legislative amendments, for the Minister's consideration.

2014 03 18 12:45 p.m.

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List of Submissions on the ATIPPA Review Committee Website (www.parcnl.ca)

Public Hearings – Presentations and Written Submissions

- Office of the Information and Privacy Commissioner, June 2014
- Office of the Information and Privacy Commissioner, August 29, 2014 (Supplementary)
- Office of the Information and Privacy Commissioner Supplementary Submission, September 25, 2014
- Canadian Federation of Independent Business, June 2014
- Canadian Federation of Independent Business – August 2014 (Supplementary
- Simon Lono, June 2014
- Ed Hollett, June 2014
- Emir Andrews, June 2014
- Kathryn Welbourn, June 2014
- James McLeod, June 2014
- New Democratic Party Caucus, June 2014
- Official Opposition Leader Dwight Ball, July 2014
- Gavin Will, July 2014
- Centre for Law and Democracy, July 2014
- Barry Tilley (Dicks & Co.), July 2014
- Barry Tilley (Dicks & Co.), August 2014 (Supplementary)
- Terry Burry, July 2014
- Information Commissioner of Canada, August 2014
- Présentation de la commissaire à l'information du Canada, Le lundi 18 août 2014
- Information Commissioner of Canada, August 20, 2014 (Supplementary)
- CBC / Radio-Canada Submission, August 2014
- CBC / Radio-Canada, September 2014 (Supplementary Information)
- Newfoundland and Labrador Veterinary Medical Association, August 2014
- Newfoundland and Labrador Veterinary Medical Association, September 2, 2014 (Additional Information)
- Office of Public Engagement, Government of Newfoundland and Labrador, August 2014
- Office of Public Engagement, Government of Newfoundland and Labrador, September 2014 (Additional Information)
- Memorial University, August 2014
- Nalcor Energy, August 2014
- Nalcor Energy, August 29, 2014 (Supplementary)
- Ken Kavanagh, August 2014

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Other Written Submissions

- Adam Pitcher, December 2013
- Jordan Willis Lester, April 2014
- Adam Case, May 2014
- Peter Shapter, June 2014
- Alex Marland, July 2014
- Town of Chapel Arm, July 2014 (updated August 14, 2014)
- Save our People Action Committee, July 2014
- Pam Frampton, July 2014
- Scarlet Hann, July 2014
- William Fagan, June 2014
- Frank Murphy, July 2014
- Fred Cole, May 2014
- Ashley Fitzpatrick, July 2014
- William Fagan, August 2014
- Newfoundland and Labrador College of Veterinarians, August 2014
- Daniel Therrien, Privacy Commissioner of Canada, August 2014
- Ross Wiseman, MHA, Speaker of the House of Assembly, August 2014
- Michael Connors, August 2014
- Deborah Moss, June-July 2014
- Dr. Thomas Baird, August 2014
- W. E. Mercer, August 2014
- Moses Tucker, August 2014
- Martin B. Hammond, August 2014
- BC Freedom of Information and Privacy Association, August 2014
- Healthcare Insurance Reciprocal of Canada (HIROC), August 2014
- Canadian Medical Protective Association (CMPA), August 2014
- Richard H. Ellis, August 2014
- Richard Hiscott, August 2014
- Dr. Gail Fraser, August 2014
- Wallace McLean, August 2014
- College of the North Atlantic, August 2014
- Anand M. Sharan, June 2014

Schedule of Public Hearings

Independent Statutory Review Committee
Access to Information and Protection of Privacy Act
Newfoundland and Labrador

Ramada (Cabot Room), 102 Kenmount Road, St. John's, NL

	Date	Time	Individual / Organization Presenting	Presenter(s)
	Tuesday, June 24, 2014			
		10:00 a.m.	Opening Remarks from the Chair	Mr. Clyde K. Wells
1		10:15 a.m.	Office of the Information and Privacy Commissioner	Mr. Ed Ring, Information and Privacy Commissioner and Mr. Sean Murray, Director of Special Projects (OIPC)
	11:15 a.m. Nutrition Break			
2		11:30 a.m.	Office of the Information and Privacy Commissioner	Mr. Sean Murray, Director of Special Projects (OIPC)
	12:30 p.m. Lunch Break			
		2:00 p.m.	Office of the Information and Privacy Commissioner	Mr. Sean Murray, Director of Special Projects (OIPC)
	Wednesday, June 25, 2014			
		9:30 a.m.	Opening Remarks from the Chair	Mr. Clyde K. Wells
3		9:35 a.m.	Canadian Federation of Independent Business	Mr. Vaughn Hammond, Director of Provincial Affairs (NL)
4		10:15 a.m.	Mr. Simon Lono	
	11:00 a.m. Nutrition Break			
5		11:15 a.m.	Mr. Ed Hollett	
	12:30 p.m. Lunch Break			
6		2:00 p.m.	The Northeast Avalon Times	Ms. Kathryn Welbourn, Publisher
7		3:00 p.m.	Ms. Emir Andrews	
	Thursday, June 26, 2014			
		9:30 a.m.	Opening Remarks from the Chair	Mr. Clyde K. Wells
8		9:35 a.m.	The Telegram	Mr. James McLeod, Reporter
	10:45 a.m. Nutrition Break			
9		11:00 a.m.	New Democratic Party	Ms. Gerry Rogers, Member for St. John's Centre
	12:30 p.m. Lunch Break			
10		2:00 p.m.	Office of the Information and Privacy Commissioner	Mr. Sean Murray, Director of Special Projects (OIPC) and Mr. Ed Ring, Information and Privacy Commissioner
				Revised: June 24, 2014

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Schedule of Public Hearings

Independent Statutory Review Committee
Access to Information and Protection of Privacy Act
Newfoundland and Labrador

Ramada (Cabot Room), 102 Kenmount Road, St. John's, NL

	Date / Time	Individual / Organization Presenting
	Tuesday, July 22, 2014	
	9:30 a.m.	Opening Remarks from the Chair
1	10:00 a.m.	Mr. Dwight Ball, Leader of the Official Opposition (Member of the House of Assembly, Humber Valley)
	Wednesday, July 23, 2014	
2	2:00 p.m.	Mr. Gavin Will, Municipal Councillor
	Thursday, July 24, 2014	
3	9:30 a.m.	Mr. Michael Karanicolas, Centre for Law and Democracy
	12:30 p.m.	Lunch Break
4	2:00 p.m.	Mr. Barry Tilley, Dicks & Co.
5	3:00 p.m.	Mr. Terry Burry, Private Citizen

7/23/2014

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Schedule of Public Hearings

Independent Statutory Review Committee
Access to Information and Protection of Privacy Act
Newfoundland and Labrador

Ramada (Cabot Room), 102 Kenmount Road, St. John's, NL

	Date / Time	Individual / Organization Presenting
	Monday, August 18, 2014	
	9:30 a.m.	Opening Remarks from Clyde K. Wells, Chair
1	9:45 a.m.	Suzanne Legault, Information Commissioner of Canada Jacqueline Strandberg, Policy Analyst (OICC)
	12:30 p.m.	Lunch Break
2	2:00 p.m.	Peter Gullage, Executive Producer, CBC News NL Sean Moreman, Legal Counsel, CBC
3	3:30 p.m.	Newfoundland and Labrador Veterinary Medical Association Dr. Nicole O'Brien, ATIPPA Committee Representative Dr. Kate Wilson, President
	Tuesday, August 19, 2014	
4	9:30 a.m.	Hon. Sandy Collins, Minister Responsible for Office of Public Engagement Representatives from various Government Departments
	12:30 p.m.	Lunch Break
	2:00 p.m.	Hon. Sandy Collins, Minister Responsible for Office of Public Engagement Representatives from various Government Departments
	Wednesday, August 20, 2014	
5	9:30 a.m.	Memorial University Rosemary Thorne, University Privacy Officer Morgan Cooper, Associate Vice-President (Academic) Faculty Affairs Shelley Smith, Chief Information Officer
6	11:00 a.m.	Lynn Hammond, Private Citizen
	12:30 p.m.	Lunch Break
7	2:00 p.m.	Nalcor Energy Jim Keating, Vice-President (Nalcor Oil) Tracey Pennell, Legal Counsel & ATIPP Coordinator
8	3:30 p.m.	Ken Kavanagh, Private Citizen
	Thursday, August 21, 2014	
9	9:30 a.m.	Ed Ring, Information and Privacy Commissioner Sean Murray, Director of Special Projects (OIPC)
	11:30 a.m.	Closing Remarks from Clyde K. Wells, Chair

8/18/2014

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List of Transcripts available on ATIPPA Review Committee Website (www.parcnl.ca)

June 24, 2014
Office of the Information and Privacy Commissioner
Ed Ring, Commissioner
Sean Murray, Director of Special Projects

June 25, 2014
Canadian Federation of Independent Business
Vaughn Hammond, Director of Provincial Affairs (NL)

Simon Lono, Private Citizen

Edward Hollett, Private Citizen

The Northeast Avalon Times
Kathryn Welbourn, Publisher

Emir Andrews, Private Citizen

June 26, 2014
The Telegram
James McLeod, Reporter

New Democratic Party
Gerry Rogers, MHA
Ivan Morgan, Researcher

Office of the Information and Privacy Commissioner
Ed Ring, Commissioner
Sean Murray, Director of Special Projects

July 22, 2014
Office of the Official Opposition
Dwight Ball, MHA
Joy Buckle, Chief Researcher

July 23, 2014
Gavin Will, Municipal Councillor

July 24, 2014
Centre for Law and Democracy
Michael Karanicolas

Dicks & Co. Ltd.
Barry Tilley, President
David Read, Vice-President

Terry Burry, Private Citizen

August 18, 2014

Information Commissioner of Canada
- Suzanne Legault, Commissioner
- Jacqueline Strandberg, Policy Analyst

Canadian Broadcasting Corporation – Radio Canada
- Sean Moreman, Senior Legal Counsel
- Peter Gullage, Executive Producer (NL)

Newfoundland and Labrador Veterinary Medical Association
- Nicole O'Brien, ATIPPA Committee Representative
- Kate Wilson, President

August 19, 2014

Government of Newfoundland and Labrador
- Honourable Sandy Collins, Minister Responsible for the Office of Public Engagement
- Rachelle Cochrane, Deputy Minister, Office of Public Engagement
- Victoria Woodworth-Lynas, ATIPP Office, Office of Public Engagement
- Alastair O'Rielly, Deputy Minister, Department of Innovation, Business and Rural Development
- Paul Noble, Deputy Minister and Deputy Attorney General, Department of Justice
- Genevieve Dooling, Deputy Minister, Department of Child, Youth and Family Services
- Ellen MacDonald, Chief Information Officer, Office of the Chief Information Officer

August 20, 2014

Memorial University
- Rosemary Thorne, University Privacy Officer
- Morgan Cooper, Associate Vice-President (Academic) Faculty Affairs
- Shelley Smith, Chief Information Officer

Lynn Hammond, Private Citizen

Nalcor Energy
- Jim Keating, Vice-President (Oil & Gas)
- Tracey Pennell, Legal Counsel and ATIPP Coordinator

Ken Kavanagh, Private Citizen

August 21, 2014

Office of the Information and Privacy Commissioner
- Ed Ring, Commissioner
- Sean Murray, Director of Special Projects

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Summary Report on Responses to ATIPPA Coordinator Questionnaire

S. 1	About the Process	Mostly Yes	Mixed	Mostly No	No Recordable Answer	Total
1	Applicants find the system created by the ATIPPA easy to use	55	47	4	16	122
2	Applicants are not bothered by the $5 application fee	54	20	28	20	122
3	Generally, applicants find the processing fees reasonable	63	37	4	18	122
4	Generally, applicants are satisfied with the time it takes to process a request	60	35	8	19	122
5	Generally, applicants inquire about the progress of their outstanding access requests	26	30	48	18	122

S.2	ATIPPA in the Public Body You Work For	Mostly Yes	Mixed	Mostly No	No Recordable Answer	Total
1	My superiors in the public body I work for have a good understanding of the purpose and principles of the ATIPPA	63	32	21	6	122
2	Other employees in the public body I work for have a good understanding of the ATIPPA	44	41	25	12	122
3	All new employees are helped to acquire a good understanding of the ATIPPA	49	26	35	12	122
4	My superiors in the public body I work for are proactive in making information available	67	33	12	10	122

Summary Report on Responses to ATIPPA Coordinator Questionnaire

		Mostly Yes	Mixed	Mostly No	No Recordable Answer	Total
5	Steps are taken to ensure that all existing employees are up-to-date on ATIPPA practices and procedures	58	31	27	6	122
6	My superiors in the public body I work for consistently show their support for the ATIPPA to employees	62	37	16	7	122
7Q	Which one of the following statements best describes how the superiors in the public body you work for treat requests made under the ATIPPA?	**Answer**			**No Recordable Answer**	**Total**
7A.1	My superiors in the public body have made it clear to all employees that ATIPPA requests must be responded to in the initial 30-day time frame	63				
7A.2	My superiors in the public body have made it clear to all employees that ATIPPA requests must be met in the initial 30-day time frame	25				
7A.3	My superiors in the public body are slow in responding to ATIPPA requests	11				
7A.4	My superiors in the public body have asked me or others to find exceptions that will delay or prevent the disclosure of information	1				
		100			**22**	**122**

		Mostly Yes	**Mixed**	**Mostly No**	**No Recordable Answer**	**Total**
8	My superiors in the public body I work for are generally happy with the changes brought about by Bill 29	36	59	10	17	122
S.3	**The Role of the Commissioner**	**Mostly Yes**	**Mixed**	**Mostly No**	**No Recordable Answer**	**Total**
1	The public body I work for is aware of the role played by the Information and Privacy Commissioner in respect of ATIPPA	59	38	18	7	122
2	The public body I work for is supportive of the role the Commissioner plays	68	35	6	13	122
3	My superiors in the public body I work for have made it clear to all employees that they must co-operate with the Commissioner in his reviews and investigations	84	15	9	14	122
4	My superiors in the public body I work for encourage co-operative discussions with the Commissioner to facilitate release of information (informal resolution)	72	25	9	16	122
5	My superiors in the public body I work for would welcome increased powers for the Commissioner, including the power to make orders that would compel the public body to release the requested information	31	54	17	20	122

		Yes	No		No Recordable Answer	Total
6	As an ATIPPA coordinator, do you think giving the Commissioner power to order release in appropriate circumstances would improve the ATIPPA process?	63	45		14	122
S.4	**Timeliness**	**Mostly Yes**	**Mixed**	**Mostly No**	**No Recordable Answer**	**Total**
1	My public body regards the statutory timelines as guides, rather than absolute deadlines for providing information	30	34	48	10	122
2	My public body considers it a matter of pride to meet the legislated timelines for responding to access requests	79	31	3	9	122
3	My superiors in the public body I work for frequently remind staff of the necessity to meet timelines for responding to access requests	63	29	18	12	122
4	Access requests are attended to promptly by staff of the public body I work for	92	19	1	10	122
5	Superiors in the public body I work for make speedy decisions when they are asked to have input into access requests	62	38	8	14	122
S.5	**Delays In Processing**	**Mostly Yes**	**Mixed**	**Mostly No**	**No Recordable Answer**	**Total**
1	My superiors in the public body provide extra support to meet the demands resulting from access requests	50	35	22	15	122

		Mostly Yes	Mixed	Mostly No	No Recordable Answer	Total
2	My superiors in the public body show concern when access timelines are not met	74	21	9	18	122
3	My superiors in the public body check the progress of access requests	44	34	29	15	122
S.6	**Political Involvement**					
Q:	Which one or more of the following statements best describes how access to information requests are handled in the public body you work for *(Check as many as apply)*	**Answer**			**No Recordable Answer**	**Total**
A.1	When an access request is received, it is dealt with only by the officials concerned	85				
A.2	Political staff expect to be consulted on access requests	16				
A.3	There is a requirement that political staff be consulted on access requests	10				
A.4	The minister expects to be consulted on access requests	12				
A.5	There is a requirement that the minister be consulted on access requests	10				
A.6	Political staff and ministers have input into whether information is released or withheld	8				
A.7	Officials have the final say over what information is released	38				
A.8	The minister and political officials have the final say over what information is released	12				
		191			**20**	**211**

Summary Report on Responses to ATIPPA Coordinator Questionnaire

S.7	Access Coordinators	Yes	No	No Recordable Answer	Total
1	I feel that the public body I work for supports me and co-operates fully in the fulfillment of requests for access to information	100	10	12	122
2	I feel my public body respects my position as access coordinator	100	10	12	122
3	I feel my pay and position reflects the importance of my position as access coordinator	61	44	17	122
4	I feel up-to-date on the Practices and Procedures for coordinating access requests	80	30	12	122
5	If I have a question or issue in coordinating a request, there is someone I can ask for help	103	11	8	122
6	If the answer to 5 is yes, identify the source of help (ATIPP Coordinators could choose multiple answers)				
6.1	Office of Public Engagement	43			
6.2	Office of the Information and Privacy Commissioner	70			
6.3	Legal Adviser	39			
6.4	My Superior	40			
6.5	Political Staff	3			
6.6	Other	2			
	(Other responses include: ATIPP Office, Other Coordinators, Co-Worker, Other Public Body, Policy / Program Official, Communications Director, Cabinet Secretariat, House of Assembly, Privacy Analyst / Manager)				

Summary Report on Responses to ATIPPA Coordinator Questionnaire

		Yes	No		No Recordable Answer	Total
7	I do other work in addition to my role as access coordinator	111	5		6	122
8	I have been given direction that my access coordinator duties take priority over my other assigned duties	35	78		9	122
9	If I suggest the public body should be making more effort toward fulfilling an access request, I am listened to	93	12		17	122
10	If I disagree with the use of exceptions in denying or diminishing an access request made to the public body I work for, I am listened to	90	15		17	122
11	I feel I am effective in my position as access coordinator	92	15		15	122
12	I take pride in my position as access coordinator	98	7		17	122
S.8	**Type of public body you work for**	**Government Department**	**Government Agency**	**Municipality**	**No Recordable Answer**	**Total**
	Answer	24	19	69	10	122

Timelines for Access to Information Requests resulting in a Report by the OIPC (for 2008 to 2014)

Public Body Access Application Process Timelines				Office of Information & Privacy Commissioner Review Process Timelines							
Public Body	Application Received at Public Body	Total Days	Interval Days	Report	Review Started	Days for Informal Resolution	Formal Review Started	Days for Formal Review	Review Closed	Total Days	Combined Total Days
College of North Atlantic	10-Nov-2006	76	5	A-2008-001	29-Jan-2007	211	27-Aug-2007	185	28-Feb-2008	396	472
Public Service Commission	22-Jan-2007	61	7	A-2008-002	30-Mar-2007	124	31-Jul-2007	244	31-Mar-2008	368	429
House of Assembly	27-Nov-2007	25	12	A-2008-003	2-Jan-2008	43	13-Feb-2008	63	16-Apr-2008	106	131
College of North Atlantic	14-Jun-2007	30	0	A-2008-004	13-Jul-2007	230	27-Feb-2008	71	8-May-2008	301	331
Transportation & Works	15-Jun-2007	43	5	A-2008-005	1-Aug-2007	112	20-Nov-2007	171	9-May-2008	283	326
Memorial University	1) 1-Nov-2007 2) 8-Nov-2007	64	11	A-2008-006	14-Jan-2008	81	3-Apr-2008	49	22-May-2008	130	194
College of North Atlantic	4-May-2007	56	29	A-2008-007	27-Jul-2007	160	2-Jan-2008	142	23-May-2008	302	358
Innovation, Trade & Rural Development	16-May-2007	37	21	A-2008-008	12-Jul-2007	141	29-Nov-2007	176	23-May-2008	317	354
Town of Steady Brook	21-Jan-2008	31	8	A-2008-009	28-Feb-2008	62	29-Apr-2008	28	27-May-2008	90	121
Newfoundland Liquor Corporation	22-Oct-2007	30	7	A-2008-010	27-Nov-2007	122	27-Mar-2008	64	30-May-2008	186	216
House of Assembly	12-Oct-2007	57	5	A-2008-011	12-Dec-2007	30	10-Jan-2008	176	4-Jul-2008	206	263
Municipal Affairs	10-Jan-2008	30	18	A-2008-012	26-Feb-2008	64	29-Apr-2008	83	21-Jul-2008	147	177
Memorial University	12-Jul-2007	68	22	A-2008-013	19-Oct-2007	81	7-Jan-2008	212	6-Aug-2008	293	361
College of North Atlantic	15-May-2008	30	8	A-2008-014	1-Aug-2008	97	5-Nov-2008	48	23-Dec-2008	145	175
Executive Council	25-Apr-2008	18	4	A-2009-001	16-May-2008	89	12-Aug-2008	153	12-Jan-2009	242	260
Memorial University	1) 15-Nov-2006 2) 28-Aug-2007	307	44	A-2009-002	31-Oct-2007	224	10-Jun-2008	226	22-Jan-2009	450	757

Timelines for Access to Information Requests resulting in a Report by the OIPC (for 2008 to 2014)

Public Body Access Application Process Timelines				Office of Information & Privacy Commissioner Review Process Timelines							
Public Body	Application Received at Public Body	Total Days	Interval Days	Report	Review Started	Days for Informal Resolution	Formal Review Started	Days for Formal Review	Review Closed	Total Days	Combined Total Days
Executive Council	25-Apr-2008	67	2	A-2009-003	2-Jul-2008	120	29-Oct-2008	98	4-Feb-2009	218	285
Eastern Health	19-Jul-2007	29	22	A-2009-004	7-Sep-2007	362	2-Sep-2008	199	20-Mar-2009	561	590
Labrador & Aboriginal Affairs	17-Sep-2008	28	17	A-2009-005	31-Oct-2008	109	16-Feb-2009	46	3-Apr-2009	155	183
Atlantic Lottery Corporation* *not a public body	13-Nov-2007	140	53	A-2009-006	23-May-2008		23-May-2008	377	4-Jun-2009	377	517
Environment & Conservation	24-Jul-2008	37	10	A-2009-007	8-Sep-2008	199	25-Mar-2009	96	29-Jun-2009	295	332
Western Health	2-Sep-2008	31	13	A-2009-008	15-Oct-2008	164	27-Mar-2009	97	2-Jul-2009	261	292
Memorial University	17-Jan-2008	42	12	A-2009-009	11-Mar-2008	106	24-Jun-2008	378	7-Jul-2009	484	526
Memorial University	17-Jan-2008	68	101	A-2009-010	4-Jul-2008	232	20-Feb-2009	214	22-Sep-2009	446	514
College of North Atlantic	16-Feb-2007	19	37	A-2009-011	12-Apr-2007	418	2-Jun-2008	515	30-Oct-2009	933	952
Environment & Conservation	19-Dec-2008	32	9	A-2010-001	28-Jan-2009	269	23-Oct-2009	97	28-Jan-2010	366	398
Business	29-May-2008	33	3	A-2010-002	3-Jul-2008	106	16-Oct-2008	517	17-Mar-2010	623	656
College of North Atlantic	18-May-2007	32	7	A-2010-003	6-Jul-2007	924	14-Jan-2010	64	19-Mar-2010	988	1020
Justice	29-Oct-2008	29	30	A-2010-004	24-Dec-2008	76	9-Mar-2009	409	22-Apr-2010	485	514
Memorial University	17-Apr-2008	170	3	A-2010-005	6-Oct-2008	211	4-May-2009	358	27-Apr-2010	569	739
Town of Logy Bay-Middle Cove-Outer Cove	30-Oct-2009	32	31	A-2010-006	31-Dec-2009	56	24-Feb-2010	72	7-May-2010	128	160
Office of the Citizen's Representative	28-Jan-2010	1	12	A-2010-007	10-Feb-2010	31	12-Mar-2010	88	8-Jun-2010	119	120

Prepared by the ATIPPA Review Committee Office **2**

Timelines for Access to Information Requests resulting in a Report by the OIPC (for 2008 to 2014)

Public Body Access Application Process Timelines				Office of Information & Privacy Commissioner Review Process Timelines							
Public Body	Application Received at Public Body	Total Days	Interval Days	Report	Review Started	Days for Informal Resolution	Formal Review Started	Days for Formal Review	Review Closed	Total Days	Combined Total Days
College of North Atlantic	28-Oct-2008	106	10	A-2010-008	20-Feb-2009	165	3-Aug-2009	310	9-Jun-2010	475	581
College of North Atlantic	15-Jan-2009	30	35	A-2010-009	20-Mar-2009	354	8-Mar-2010	93	9-Jun-2010	447	477
College of North Atlantic	15-Jun-2007	28	35	A-2010-010	16-Aug-2007	891	22-Jan-2010	145	16-Jun-2010	1036	1064
Justice	8-Feb-2010	61	11	A-2010-011	21-Apr-2010	57	16-Jun-2010	63	18-Aug-2010	120	181
Town of St. George's	1) 9-Mar-2010 2) 13-Apr-2010	65	2	A-2010-012	1) 9-Apr-2010 2) 19-May-2010	67	1) 19-May-2010 2) 14-Jun-2010	92	19-Aug-2010	159	224
Health & Community Services	1) 31-Mar-2010 2) 31-Mar-2010	41	49	A-2010-013	14-Jun-2010	65	17-Aug-2010	50	6-Oct-2010	115	156
Transportation & Works	9-Jun-2010	31	13	A-2010-014	22-Jul-2010	50	9-Sep-2010	34	13-Oct-2010	84	115
Justice	14-May-2010	34	27	A-2010-015	13-Jul-2010	59	9-Sep-2010	34	13-Oct-2010	93	127
Memorial University	No Date Provided	0	12	A-2010-016	26-Oct-2009	222	4-Jun-2010	172	23-Nov-2010	394	394
Environment & Conservation	14-Jul-2010	14	15	A-2011-001	11-Aug-2010	59	October 8.2010	110	26-Jan-2011	169	183
Executive Council	15-Jan-2008	3	14	A-2011-002	31-Jan-2008	239	25-Sep-2008	908	22-Mar-2011	1147	1150
Memorial University	19-Apr-2010	60	55	A-2011-003	10-Aug-2010	53	1-Oct-2010	174	24-Mar-2011	227	287
Royal Newfoundland Constabulary	15-Sep-2010	11	75	A-2011-004	9-Dec-2010	48	25-Jan-2011	65	31-Mar-2011	113	124
College of North Atlantic	7-Mar-2007	62	37	A-2011-005	12-Jun-2007	907	4-Dec-2009	482	31-Mar-2011	1389	1451
Town of Brigus	29-Mar-2010	18	2	A-2011-006	27-Apr-2010	274	25-Jan-2011	71	6-Apr-2011	345	363
Atlantic Lottery Corporation	28-May-2010	61	22	A-2011-007	18-Aug-2010		no date given		12-Apr-2011	238	299
Premier's Office	13-Jul-2010	28	14	A-2011-008	23-Aug-2010	156	25-Jan-2011	100	5-May-2011	256	284

Timelines for Access to Information Requests resulting in a Report by the OIPC (for 2008 to 2014)

Public Body Access Application Process Timelines				Office of Information & Privacy Commissioner Review Process Timelines							
Public Body	Application Received at Public Body	Total Days	Interval Days	Report	Review Started	Days for Informal Resolution	Formal Review Started	Days for Formal Review	Review Closed	Total Days	Combined Total Days
Health & Community Services	20-Apr-2010	16	12	A-2011-009	17-May-2010	115	8-Sep-2010	266	1-Jun-2011	381	397
Public Service Commission	13-Dec-2010	56	18	A-2011-010	24-Feb-2011	65	29-Apr-2011	74	12-Jul-2011	139	195
Public Service Commission	15-Dec-2010	65	7	A-2011-011	24-Feb-2011	65	29-Apr-2011	74	12-Jul-2011	139	204
Public Service Commission	20-Dec-2010	64	3	A-2011-012	24-Feb-2011	65	29-Apr-2011	74	12-Jul-2011	139	203
Town of St. George's	1) 9-Feb-2010 2) 14-Jun-2010	155	8	A-2011-013	1) 11-March-2010 2) 21-July 21-2010	496	19-Jul-2011	64	21-Sep-2011	560	715
Town of St. George's	13-Sep-2010	61	54	A-2011-014	6-Dec-2010	226	19-Jul-2011	64	21-Sep-2011	290	351
College of North Atlantic	14-Jun-2007	33	30	A-2011-015	16-Aug-2007	770	23-Sep-2009	733	26-Sep-2011	1503	1536
Child Youth & Family Services	1) 17-Feb-2011 2) 7-Apr-2011	50	4 28	A-2011-016	1) 7-Mar-2011 2) 4-May-2011	220	1) 6-Apr-2011 2) 12-Oct-2011	251	13-Dec-2011	471	521
College of North Atlantic	27-Feb-2008	17	111	A-2011-017	3-Jul-2008	1136	12-Aug-2011	125	15-Dec-2011	1261	1278
City of Corner Brook	26-Aug-2010	25	9	A-2012-001	28-Sep-2010	219	4-May-2011	257	16-Jan-2012	476	501
City of Corner Brook	24-Nov-2010	387	27	A-2012-002	10-Jan-2011	89	8-Apr-2011	285	18-Jan-2012	374	761
College of North Atlantic	12-Apr-2010	29	9	A-2012-003	19-May-2010	289	3-Mar-2011	322	19-Jan-2012	611	640
Environment & Conservation	26-Feb-2010	106	11	A-2012-004	22-Jun-2010	98	27-Sep-2010	514	23-Feb-2012	612	718
Town of Portugal Cove-St. Philip's	17-Jan-2012	0	10	A-2012-005	27-Jan-2012		no date given		30-Mar-2012	63	63
College of North Atlantic	7-Apr-2009	57	27	A-2012-006	29-Jun-2009	506	16-Nov-2010	513	12-Apr-2012	1019	1076
College of North Atlantic	10-Nov-2011	33	7	A-2012-007	19-Dec-2011	94	21-Mar-2012	71	31-May-2012	165	198
Memorial University	29-Sep-2011	69	1	A-2012-008	6-Dec-2011	126	9-Apr-2012	52	31-May-2012	178	247

Prepared by the ATIPPA Review Committee Office **4**

Timelines for Access to Information Requests resulting in a Report by the OIPC (for 2008 to 2014)

Public Body Access Application Process Timelines				Office of Information & Privacy Commissioner Review Process Timelines							
Public Body	Application Received at Public Body	Total Days	Interval Days	Report	Review Started	Days for Informal Resolution	Formal Review Started	Days for Formal Review	Review Closed	Total Days	Combined Total Days
Memorial University	22-Feb-2011	39	35	A-2012-009	6-May-2011	211	2-Dec-2011	236	25-Jul-2012	447	486
Environment & Conservation	6-Oct-2010	31	19	A-2012-010	24-Nov-2010		no date given		13-Sep-2012	659	690
College of North Atlantic	19-Dec-2011	39	14	A-2012-011	9-Feb-2012	70	18-Apr-2012	216	20-Nov-2012	286	325
Health & Community Services	26-Mar-2012	110	91	A-2012-012	4-Jul-2012	107	18-Oct-2012	74	31-Dec-2012	181	291
Natural Resources	16-May-2012	13	0	A-2013-001	1-Oct-2012	73	12-Dec-2012	44	25-Jan-2013	117	130
Justice	26-Mar-2012	25	61	A-2013-002	19-Jun-2012	140	5-Nov-2012	86	30-Jan-2013	226	251
Justice	20-Jun-2012	66	0	A-2013-003	10-Oct-2012	45	23-Nov-2012	83	14-Feb-2013	128	194
Justice	5-Jan-2009	22	7	A-2013-004	2-Feb-2009	1376	8-Nov-2012	117	5-Mar-2013	1493	1515
Eastern School District	1) 8-Dec-2011 2) 3-Feb-2012	75	21	A-2013-005	12-Mar-2012	141	30-Jul-2012	225	12-Mar-2013	366	441
Memorial University	16-Dec-2011	61	3	A-2013-006	17-Feb-2012	194	28-Aug-2012	231	16-Apr-2013	425	486
Royal Newfoundland Constabulary	4-Aug-2011	48	22	A-2013-007	12-Oct-2011	497	19-Feb-2013	58	18-Apr-2013	555	603
Government Purchasing Agency	18-Sep-2012	31	4	A-2013-008	22-Oct-2012	59	19-Dec-2012	157	17-May-2013	216	247
Memorial University	5-Sep-2012	62	2	A-2013-009	7-Nov-2012	78	23-Jan-2013	132	4-Jun-2013	210	272
Town of Portugal Cove-St. Philips	29-Nov-2012	20	35	A-2013-010	22-Jan-2013	51	13-Mar-2013	86	7-Jun-2013	137	157
Royal Newfoundland Constabulary	30-Apr-2012	39	14	A-2013-011	21-Jun-2012	265	12-Mar-2013	119	9-Jul-2013	384	423
Eastern Health	20-Nov-2012	59	21	A-2013-012	7-Feb-2013	119	5-Jun-2013	75	19-Aug-2013	194	253
College of North Atlantic	22-Mar-2012	58	13	A-2013-013	31-May-2012	321	16-Apr-2013	133	27-Aug-2013	454	512
Environment & Conservation	30-May-2012	55	7	A-2013-014	30-Jul-2012	135	11-Dec-2012	295	2-Oct-2013	430	485
College of North Atlantic	7-Dec-2012	13	0	A-2013-015	19-Dec-2012	220	26-Jul-2013	87	21-Oct-2013	307	320

Timelines for Access to Information Requests resulting in a Report by the OIPC (for 2008 to 2014)

Public Body Access Application Process Timelines				Office of Information & Privacy Commissioner Review Process Timelines							
Public Body	Application Received at Public Body	Total Days	Interval Days	Report	Review Started	Days for Informal Resolution	Formal Review Started	Days for Formal Review	Review Closed	Total Days	Combined Total Days
College of North Atlantic	20-Nov-2012	30	0	A-2013-016	19-Dec-2012	220	26-Jul-2013	87	21-Oct-2013	307	337
Eastern Health	14-Feb-2013	42	19	A-2013-017	15-Apr-2013	124	16-Aug-2013	74	29-Oct-2013	198	240
Royal Newfoundland Constabulary	31-Dec-2012	24	30	A-2013-018	21-Feb-2013	182	21-Aug-2013	99	28-Nov-2013	281	305
Premier's Office	4-Jun-2013	58	9	A-2013-019	9-Aug-2013	62	9-Oct-2013	50	28-Nov-2013	112	170
College of North Atlantic	16-Apr-2008	59	21	A-2013-020*	24-Mar-2010	986	3-Dec-2012	361	29-Nov-2013	1347	
				* Review Request received 3-Jul-2008 and placed in abeyance under OIPC banking policy. Review was reopened on 24-Mar-2010.							1406
Health & Community Services	19-Apr-2013	29	31	A-2014-001	17-Jun-2013	144	7-Nov-2013	74	20-Jan-2014	218	247
Eastern Health	25-Jul-2013	26	15	A-2014-002	3-Sep-2013	140	20-Jan-2014	16	5-Feb-2014	156	182
Finance	6-Aug-2012	116	0	A-2014-003*	27-Nov-2012	182	27-May-2013	255	6-Feb-2014	437	553
*Applicant filed 9 ATIPPA Requests with Public Body and requested a review of 8 by the OIPC.				1) 27-Nov-2012 for #1, #2, #4, #5, #6, #7 2) 15-Apr-2013 for #8 and #9 (#3 not reviewed)							
Advanced Education & Skills	3-Oct-2012	115	7	A-2014-004	1-Feb-2013	50	22-Mar-2013	321	6-Feb-2014	371	486
College of North Atlantic	16-Dec-2010	61	8	A-2014-005	22-Feb-2011	386	13-Mar-2012	706	17-Feb-2014	1092	1153
Justice	14-Dec-2010	63	15	A-2014-006	1-Mar-2011	511	23-Jul-2012	590	5-Mar-2014	1101	1164
Tourism, Culture & Recreation	22-Nov-2012	148	1	A-2014-007	19-Apr-2013	242	16-Dec-2013	134	29-Apr-2014	376	524
Transportation & Works	30-Aug-2013	81	14	A-2014-008	2-Dec-2013	86	25-Feb-2014	136	11-Jul-2014	222	303
Nova Central School District	21-Dec-2011	57	5	A2014-009	20-Feb-2012	583	24-Sep-2013	321	11-Aug-2014	904	961
Nova Central School District	3-Apr-2012	17	13	A2014-010	2-May-2012	511	24-Sep-2013	321	11-Aug-2014	832	849
Fire & Emergency Services	18-Feb-2014	29	17	A2014-011	4-Apr-2014	60	2-Jun-2014	79	20-Aug-2014	139	168

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

November 19, 2014

Ms. Virginia Connors
Chief Administrative Officer
ATIPPA Review Committee
Suite C, 83 Thorburn Road
St. John's, NL
A1B 3M2

Dear Ms. Connors:

Please find attached a list of files which were resolved informally and the respective time frames for the resolution of each file. After receiving this request, we thought that the numbers themselves might be misleading on their own, and we were concerned that any conclusions which the Committee may draw from the numbers might result in recommendations which may not be based on an accurate assessment of the informal resolution process.

The time frame within which we do our work is a matter of concern for me, because I believe the mission of our Office is one of public service. Any unnecessary delay in the provision of that service is a failure to deliver that service as it should be done. Certainly there have been delays caused by workload, vacations, illness, transition periods in and out of maternity leave, normal employee turnover, the inexperience of new staff, etc. There have also on occasion been delays, whether in the completion of formal reports or of informal resolution efforts, which have resulted from a failure to complete work in as timely a manner as should be expected by staff of this Office. As the supervisor of the Analysts who do the vast majority of this work, I take responsibility for these failures and delays. I try to ensure that such delays are kept to a minimum by meeting with the Analysts on a regular basis to review the progress being made on their files, in an effort to help them stay on track and address any stumbling blocks they may have encountered in moving files forward.

That being said, I am of the view that most of the time frames noted in the attached schedule are as long as they are for a number of diverse and in most cases, valid reasons. In the limited amount of time available to us, we have gathered the necessary statistics for you, but we have also used the time available to examine those files which have been open for the longest period of time before being resolved informally. These include files being banked in accordance with the Trial Division decision of Judge Seaborne, as well as files which were held in abeyance pending the resolution of other processes – typically, these were court cases and subsequent appeals which were relevant to the issue to be determined in our Review.

First of all, I should explain that "informal resolution" is the default stage for files. As soon as we receive a request for review, before we get the records, and before any work is done, we are at day 1 of the informal resolution process. The numbers you see reflect that, even though we may not get our first look at the records for 2 weeks. Although we have not had time to go through each file and

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provide an explanation as to why it took as long as it did to resolve, we have reviewed those files which took the longest to close, and briefly noted the reason in the attached table. I would now like to take this opportunity to explain those reasons a little more fully.

This Office instituted a Banking Policy following the comments of Mr. Justice Seaborn in *McBrearity v. Information and Privacy Commissioner,* 2008 NLTD 65 (Can LII) where he suggested a banking system to manage the workload of this Office. Our Banking Policy (Policy 2) is available on our web site at http://www.oipc.nl.ca/pdfs/Policy2-Banking_Policy.pdf . Those files which were banked are indicated on the attached list. I will note that it has not been necessary for this Office to use the banking process for any new files for a few years.

This Office has had difficulty over the years with obtaining records responsive to an access request that is under review, and we have also been challenged on points of jurisdiction, resulting in long periods of delay in resolving the matters. One such difficulty involved obtaining records for which public bodies were claiming the solicitor and client privilege exception to disclosure set out in section 21 of the *ATIPPA*. This difficulty arose following the decision of Madam Justice Marshall given in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 31 (CanLII) on February 16, 2010. Justice Marshall ruled that the *ATIPPA* does not empower this Office to compel the production of records for which there has been a claim of solicitor and client privilege. As a result of this ruling, public bodies refused to provide this Office with such records, resulting in this Office holding a number of files in abeyance pending an appeal of the decision of Justice Marshall.

On October 26, 2011, the Court of Appeal rendered its decision in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General)*, 2011 NLCA 69 (CanLII) ruling that this Office does have authority to require public bodies to produce for review records for which solicitor and client privilege has been claimed. Subsequently, this Office was able to obtain the responsive records for the files which had been held in abeyance. There is a notation on the attached list for a number of those files which were resolved informally following a review of the responsive records by this Office.

Another category of files which this Office has had difficulty obtaining are those for which public bodies have claimed the exemption in section 5. There are two files on the attached listed for which there was litigation in relation to the section 5 exemption. This litigation developed from a refusal by the Department of Justice to provide this Office with records for which it was claiming the exemption in section 5, resulting in the decision of Mr. Justice Fowler in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner),* 2010 NLTD 19 (CanLII). The Department's refusal and the subsequent litigation resulted in the long time period for completion of these two files.

There are two other files noted on the attached list where this Office was unable to obtain records from a public body. In those two instances, the public body was quite uncooperative and refused to provide the information requested by this Office. The result was this Office issuing to the public body a Summons to Produce under the powers given to this Office in the *Public Inquiries Act.* The public body complied with the summons and upon review of the information provided this Office was able to resolve the two matters informally.

There are other notations on the attached lists indicating that the delay in resolving matters was due to the following:

1. the large number of records which had to be reviewed and discussed with the public body (which can go into thousands of pages),
2. the applicant being out of the country for several months which interfered with the informal resolution process, and
3. an amendment to the *ATIPPA* which occurred during the informal resolution process. The effect of this amendment was discussed among the parties and eventually resulted in the applicant and the public body agreeing that the applicant could file a new access request taking advantage of the legislative change which allowed the applicant to obtain more information from the public body.

In addition to the notations provided on the attached list of files, there are many other considerations which feed into the length of time it takes to resolve a file informally. It is our judgment, based on our experience over the years, that there would be little value in immediately moving a file to the formal stage and issuing a Commissioner's Report if the matter cannot be resolved in the 30 day period set out in the *ATIPPA*. For one thing, very few files would be resolved informally, and there would soon be a serious backlog of pending Commissioner's Reports to draft. More importantly, however, the reality is that public bodies must be convinced that our recommendations are correct, and grounded in a well-reasoned application of the law, before they are going to release information whether informally, or following a formal Report. We believe that the process of dialogue with public bodies is more productive in terms of the Applicant getting all information to which he or she is entitled under the *ATIPPA* than issuing a Report with recommendations. Furthermore, although we have a fairly good record of having public bodies follow the recommendations in our Reports, it must be remembered that for each file we have had the benefit, through the informal resolution process, of thoroughly working through the claims relating to each piece of redacted information, and often resolving the majority of such claims. The Report, then, only needs to deal with the remaining redactions. In practical terms, this might mean that an initial document of 100 pages containing redactions on each page, with 4 different exceptions being claimed, might be whittled down, for the formal Report stage, to 20 pages with 2 exceptions being claimed.

If we did not have the benefit of a thorough informal resolution process, our Reports would be more detailed and lengthy, because each of the exceptions claimed would have to be considered in relation to the information being withheld. Essentially, the work on our end needs to be done regardless of whether the file is in the informal stage or the formal stage in terms of ensuring that we have arrived at the correct decision in relation to each redacted piece of information. Having to present that to the parties in a formal Report simply adds to the amount of time required for the process, so we believe it is better to wring whatever results we can out of the informal process.

I also wish to note that informal resolution requires willing parties. If any of the parties are no longer willing to continue, or if they see no value in continuing, and indeed if we see no value in continuing the informal resolution process, it is discontinued. Typically, however, the informal resolution process continues because progress is being made on a file resulting in additional information being released to the Applicant. With larger files, this often occurs incrementally as we work through the issues. Again, I will use the 100 page record as an example. The file begins with 100 pages being fully or partially redacted. Assuming that there are no difficulties with us obtaining the complete record

from the public body (as referenced earlier in this letter), we typically receive the record at or just before the 14 day mark from the public body. An initial review of the record will usually take place, as well as telephone conversations with the public body coordinator and the applicant. Sometimes a third party is involved as well. The record is then reviewed in detail. During this process, the Analyst may, through e-mails and phone calls, seek clarification from the Coordinator of certain exceptions claimed. This can yield quick results, or it could involve an extended back and forth dialogue where there is an exchange of interpretations of the law, explanations and discussions about the nature of the information withheld and whether it is meant to be protected by an exception, etc. This can involve face-to-face meetings between our Analyst and the Coordinator where the record is on the table before them and the exceptions claimed are discussed in detail. Parties may also take time to conduct research on case law, they may engage legal counsel, there may be meetings scheduled within the public body with executive decision-makers or subject-matter experts (particularly when a harms-based exception is claimed), and on other occasions there are times when the Coordinator is waiting for someone at an executive level to review and sign off on a decision to release additional information. In many files, there are also situations where we must question, in the case of discretionary exceptions, whether the public body has in fact fully considered whether or not to exercise its discretion to release the information, which again tends to involve consultations with senior officials within a public body.

Once this process has occurred, it often results in additional information being sent to the Applicant. In a 100 page file, we might have recommended during informal resolution that the public body release an additional 40 pages with no redactions, while, as a result of our dialogue, the public body is convinced to release an additional 30 pages. These additional pages are then sent to the applicant. The applicant will often contact us after receiving these pages, but sometimes they want to take some time to review them first. If we don't hear from them, we will contact them. It is worth noting that not all Applicants are in a mad rush to get the records. The most important thing for them is that they get as much of the information they are entitled to as they can, rather than getting less information more quickly. When we have our discussion, they will know that it is our view that an additional 10 pages should be released, however, the key information which they were hoping to find within the original 100 pages may have been released to them with the additional 30 page disclosure, so the file may be resolved at that point. Alternatively, they may come back to us with more specific points, raising new questions to be posed to the public body. We've also had applicants many times suggest at this point that certain information must exist which has not been disclosed, and this leads to questions about the sufficiency of the initial search for records, which we will then inquire about, and we may launch off into a new area of inquiry altogether. All of this occurs within the informal resolution process. The number of issues which can emerge during this process is surprising, and again, I am just sketching a basic scenario here.

This process can take a number of months. Each public body is different as well, as some of them may have inexperienced Coordinators or decision-makers engaged in the process. We believe the best approach is to work through these difficulties, because the dialogue and the process of setting forth convincing arguments during the informal resolution process is in our view the best means of ensuring that applicants receive whatever information they have a right to receive. To "pull the plug" on informal resolution without this level of engagement, when we only have recommendation power through a Commissioner's Report, will simply extend the process be adding to and necessitating the Report writing stage. Furthermore, a Report, no matter how convincingly written, cannot replace the dialogue of the informal resolution process, and will not be as effective in

achieving results for the Applicant, because we carry no real "stick". A Report with Order power might be different altogether, but that is not the tool we are working with at present.

It is also worth noting that some jurisdictions place no time limits on informal resolution. A time limit may be a useful yardstick in terms of performance by our Office, but at the complaint/appeal stage, if a time limit was strictly enforced and the necessary work was not completed, I am not sure as to how strict enforcement of an informal resolution time limit would help ensure that applicants receive the information they are entitled to under the *ATIPPA*. I should also point out that the Supreme Court, Trial Division has considered the issue of the Commissioner's time limit in the *ATIPPA* in terms of completion of a review: *Oleynik v. (Newfoundland and Labrador) Information and Privacy Commissioner*, 2011 NLTD(G) 34. The court determined that the time limit was directory, not mandatory.

I trust that this letter has helped somewhat in explaining the statistics we are providing to you. Please do not hesitate to contact me if further explanation is required.

Yours truly,

[redacted] Section 30

Sean Murray
Director of Special Projects

	File #	Date Received	Date Closed	Days to Complete	Comments
2013-2014					
1	0020-060-11-023	2011-07-12	2013-04-16	644 539*	Informal resolution was delayed by this file being held in abeyance pending the Court of Appeal decision regarding solicitor and client privilege records. Also delayed due to the necessity to issue a Summoms to Produce to public body for failure to provide records following Court of Appeal decision. * Net days after file was removed from abeyance.
2	0020-060-11-024	2011-07-12	2013-04-16	644 539*	Informal resolution was delayed by this file being held in abeyance pending the Court of Appeal decision regarding solicitor and client privilege records. Also delayed due to the necessity to issue a Summoms to Produce to public body for failure to provide records following Court of Appeal decision. * Net days after file was removed from abeyance.
3	0005-084-11-008	2011-02-24	2013-04-18	784	This informal resolution process was delayed due to change in departmental Coordinators resulting in five different Coordinators being involved in the process. In addition there were a large number of detailed records being reviewed.
4	0005-070-12-002	2012-11-29	2013-04-19	141	
5	0005-096-13-002	2013-04-10	2013-04-19	9	
6	0005-096-13-003	2013-04-10	2013-04-19	9	
7	0005-084-11-009	2011-02-24	2013-05-07	803	This informal resolution process was delayed due to changes in departmental Coordinators resulting in five different Coordinators being involved in the process. In addition there were a large number of detailed records being reviewed.
8	0010-076-13-003	2013-02-01	2013-05-07	95	
9	0020-060-12-036	2012-11-02	2013-05-08	187	
10	0020-068-12-003	2012-02-20	2013-05-15	450	
11	0020-070-12-001	2012-03-13	2013-05-15	428	
12	0005-062-12-003	2012-11-08	2013-06-07	211	
13	0005-062-12-004	2012-11-08	2013-06-07	211	
14	0020-066-13-005	2013-04-07	2013-07-12	96	
15	0025-106-12-001	2012-12-10	2013-07-23	225	

	File #	Date Received	Date Closed	Days to Complete	Comments
16	0020-066-12-002	2012-12-03	2013-08-08	248	
17	0005-100-13-007	2013-07-17	2013-08-19	33	
18	0010-062-13-001	2013-04-24	2013-09-25	154	
19	0005-104-13-001	2013-02-04	2013-10-24	262	
20	0010-084-13-001	2013-04-11	2013-10-25	197	
21	0010-068-13-003	2013-05-14	2013-10-29	168	
22	0020-062-13-026	2013-09-11	2013-11-13	63	
23	0005-092-13-002	2013-08-09	2013-11-15	98	
24	0015-066-13-003	2013-10-22	2013-11-19	28	
25	0010-082-13-001	2013-03-22	2013-11-26	249	
26	0025-060-12-002	2012-10-22	2013-12-04	408	
27	0005-070-13-003	2013-05-23	2013-12-05	196	
28	0005-070-13-005	2013-05-23	2013-12-05	196	
29	0015-064-13-002	2013-11-22	2013-12-09	17	
30	0005-062-13-006	2013-07-30	2014-01-08	162	
31	0015-060-13-013	2013-08-16	2014-02-04	172	
2012-2013					
1	CR2007-0075	2007-08-20	2012-11-22	1921	Banked
2	CRA2008-0101	2008-12-15	2012-11-28	1444	Large number of records to be reviewed
3	CRA2009-0004	2009-01-06	2012-05-10	1220	Banked
4	0010-076-11-001	2011-02-24	2013-03-14	749	Long period of informal resolution resulting in Applicant making new request under new provision of ATIPPA
5	0020-060-10-020	2010-09-03	2012-08-29	726	Held in Abeyance pending litigation involving solicitor-client privilege
6	0010-070-10-003	2010-10-15	2012-05-11	574	Held in Abeyance pending litigation involving solicitor-client privilege
7	0005-084-11-012	2011-07-12	2012-08-21	406	Held in Abeyance pending litigation involving solicitor-client privilege
8	0015-060-12-007	2012-03-02	2012-12-21	294	
9	0020-060-12-033	2012-06-06	2013-03-08	275	
10	0020-062-12-016	2012-02-17	2012-11-06	263	

	File #	Date Received	Date Closed	Days to Complete	Comments
11	0005-064-11-030	2011-08-25	2012-05-09	258	
12	0005-064-11-031	2011-08-25	2012-05-09	258	
13	0010-060-12-008	2012-03-26	2012-11-20	239	
14	0020-060-12-030	2012-04-13	2012-11-28	229	
15	0020-062-12-014	2012-02-07	2012-09-19	225	
16	0005-082-11-007	2011-10-25	2012-04-20	178	
17	0005-098-12-002	2012-02-15	2012-07-06	142	
18	0005-064-12-038	2012-07-27	2012-12-11	137	
19	0025-098-12-005	2012-03-08	2012-07-19	133	
20	0005-100-12-002	2012-02-29	2012-07-06	128	
21	0010-068-12-001	2012-11-13	2013-03-05	112	
22	0005-064-12-037	2012-07-26	2012-11-02	99	
23	0025-074-12-016	2012-01-25	2012-04-26	92	
24	0020-062-12-019	2012-07-25	2012-10-03	70	
25	0010-068-13-002	2013-01-03	2013-03-07	63	
26	0005-100-13-003	2013-01-24	2013-03-15	50	
27	0005-100-13-004	2013-01-24	2013-03-15	50	
2011-2012					
1	CR2007-0070	2007-08-16	2011-09-16	1492	Banked
2	CR2007-0069	2007-08-16	2011-09-06	1482	Banked
3	CR2007-0072	2007-08-16	2011-09-06	1482	Banked
4	0005-078-09-003	2009-04-16	2012-02-06	1026	
5	0005-082-09-001	2009-05-19	2012-01-25	981	Held in Abeyance pending litigation involving solicitor-client privilege
6	0020-062-09-001	2009-07-20	2011-10-17	819	Applicant out of country for several months during informal resolution period
7	0020-062-09-003	2009-10-22	2011-12-15	784	Applicant out of country for several months during informal resolution period
8	0020-060-10-005	2010-02-02	2012-02-02	730	Held in Abeyance pending litigation involving solicitor-client privilege
9	0020-060-10-006	2010-02-02	2011-11-28	664	

	File #	Date Received	Date Closed	Days to Complete	Comments
10	0010-070-10-002	2010-04-08	2011-12-29	630	Held in Abeyance pending litigation involving solicitor-client privilege
11	0020-062-10-005	2010-07-21	2012-03-08	596	
12	0005-082-10-004	2010-07-13	2012-02-22	589	Held in Abeyance pending litigation involving solicitor-client privilege
13	0005-084-10-006	2010-07-14	2012-02-22	588	Held in Abeyance pending litigation involving solicitor-client privilege
14	0020-060-10-017	2010-09-03	2012-03-30	574	
15	0025-074-10-001	2010-03-11	2011-09-21	559	Public Body not providing responsive records until issuance of Summons to Produce under Public Inquiries Act
16	0020-060-10-019	2010-09-03	2012-02-08	523	
17	0020-060-10-021	2010-09-08	2012-02-08	518	
18	0005-064-10-022	2010-06-22	2011-11-09	505	
19	0005-064-10-012	2010-03-26	2011-07-29	490	
20	0025-074-10-004	2010-03-11	2011-06-22	468	
21	0025-074-10-002	2010-03-11	2011-05-30	445	Public Body not providing responsive records until issuance of Summons to Produce under Public Inquiries Act
22	0005-064-10-024	2010-07-13	2011-09-06	420	
23	0005-064-10-021	2010-06-22	2011-06-08	351	
24	0005-064-10-020	2010-06-22	2011-04-27	309	
25	0005-062-11-001	2011-05-12	2012-01-18	251	
26	0020-062-11-008	2011-03-22	2011-11-04	227	
27	0025-074-10-015	2010-12-06	2011-07-15	221	
28	0005-064-10-027	2010-11-03	2011-05-10	188	

	File #	Date Received	Date Closed	Days to Complete	Comments
29	0020-060-11-025	2011-07-12	2012-01-10	182	
30	0010-070-10-004	2010-12-13	2011-05-18	156	
31	0025-084-11-008	2011-02-01	2011-06-28	147	
32	0025-100-11-001	2011-02-01	2011-06-28	147	
33	0025-076-11-001	2011-04-06	2011-08-31	147	
34	0010-060-11-006	2011-06-20	2011-10-17	119	
35	0010-060-11-005	2011-01-05	2011-04-20	105	
36	0005-084-11-013	2011-07-29	2011-11-03	97	
37	0010-070-11-005	2011-09-09	2011-12-02	84	
38	0015-060-11-006	2011-08-19	2011-11-07	80	
39	0005-062-11-002	2011-11-24	2012-02-09	77	
40	0015-060-11-005	2011-08-30	2011-11-08	70	
41	0020-062-11-011	2011-11-24	2012-02-02	70	
42	0025-062-12-001	2012-01-05	2012-03-15	70	
43	0015-060-11-003	2011-03-08	2011-05-12	65	
44	0005-090-11-005	2011-02-01	2011-04-04	62	
45	0005-090-11-006	2011-08-24	2011-10-17	54	
46	0015-066-12-002	2012-02-08	2012-03-28	49	
47	0020-062-11-010	2011-09-21	2011-11-08	48	
48	0005-098-12-001	2012-01-04	2012-02-17	44	
49	0005-064-11-034	2011-10-31	2011-12-05	35	
50	0005-084-12-014	2011-12-29	2012-01-24	26	
51	0005-074-11-012	2011-11-07	2011-12-02	25	
52	0025-060-11-001	2011-05-06	2011-05-30	24	
53	0005-080-11-015	2011-06-09	2011-06-21	12	
54	0025-084-11-010	2011-10-31	2011-11-07	7	
2010-2011					
1	CR2007-0050	2007-07-06	2011-01-04	1278	Banked
2	CRA2008-0051	2008-07-03	2011-03-18	988	
3	CRA2008-0061	2008-08-01	2011-03-09	950	
4	CR2007-0101	2007-11-20	2010-06-18	941	
5	CR2007-0100	2007-11-20	2010-06-17	940	

	File #	Date Received	Date Closed	Days to Complete	Comments
6	CRA2008-0074	2008-09-08	2011-03-29	932	Public Body refusing to provide responsive records claiming s. 5 - litigation in Supreme Court
7	CRA2008-0084	2008-10-20	2010-10-21	731	Public Body refusing to provide responsive records claiming s. 5 - litigation in Supreme Court
8	CRA2008-0105	2008-12-23	2010-09-29	645	
9	CRA2008-0094	2008-11-07	2010-08-03	634	
10	0005-078-09-001	2009-03-31	2010-10-13	561	
11	CRA2008-0093	2008-11-06	2010-04-12	522	
12	0005-080-09-003	2009-05-13	2010-08-02	446	
13	0020-064-09-001	2009-08-28	2010-06-28	304	
14	0020-064-09-002	2009-08-28	2010-06-28	304	
15	0020-064-09-003	2009-08-28	2010-06-28	304	
16	0020-064-09-004	2009-08-28	2010-06-28	304	
17	0015-060-09-001	2009-11-23	2010-09-13	294	
18	0005-080-09-007	2009-07-22	2010-05-04	286	
19	0005-064-09-008	2009-09-23	2010-06-15	265	
20	0005-072-09-005	2009-09-16	2010-05-19	245	
21	0025-074-10-010	2010-08-26	2011-03-31	217	
22	0020-064-09-005	2009-11-30	2010-06-28	210	
23	0010-060-09-001	2009-11-23	2010-06-07	196	
24	0005-060-10-002	2010-04-09	2010-09-16	160	
25	0010-060-10-003	2010-09-09	2011-02-15	159	
26	0010-060-10-002	2010-05-06	2010-09-28	145	
27	0015-060-10-002	2010-01-21	2010-06-07	137	
28	0005-078-10-007	2010-06-22	2010-10-29	129	
29	0005-074-10-004	2010-05-07	2010-09-09	125	
30	0005-064-10-014	2010-04-21	2010-08-16	117	
31	0010-074-10-001	2010-04-27	2010-08-11	106	
32	0005-078-10-006	2010-06-07	2010-09-17	102	
33	0010-074-10-002	2010-05-10	2010-08-11	93	
34	0005-082-10-002	2010-05-27	2010-08-19	84	

	File #	Date Received	Date Closed	Days to Complete	Comments
35	0005-078-10-008	2010-06-22	2010-09-09	79	
36	0020-068-10-001	2010-01-27	2010-04-15	78	
37	0025-084-10-006	2010-03-31	2010-06-15	76	
38	0005-072-10-006	2010-01-28	2010-04-13	75	
39	0025-096-10-001	2010-05-27	2010-08-02	67	
40	0025-084-10-007	2010-06-14	2010-08-16	63	
41	0020-060-10-007	2010-02-11	2010-04-13	61	
42	0005-080-10-014	2010-03-12	2010-05-12	61	
43	0005-076-10-001	2010-03-09	2010-05-05	57	
44	0005-082-11-005	2011-02-08	2011-03-31	51	
45	0025-074-10-007	2010-07-21	2010-09-08	49	
46	0025-098-10-001	2010-08-31	2010-10-12	42	
47	0025-092-10-001	2010-04-15	2010-05-17	32	
48	0010-070-10-001	2010-03-16	2010-04-14	29	
49	0005-084-10-007	2010-11-01	2010-11-26	25	
50	0020-060-10-012	2010-06-04	2010-06-28	24	
51	0005-074-10-009	2010-07-15	2010-08-06	22	
52	0025-082-10-002	2010-05-19	2010-06-08	20	
53	0005-064-10-016	2010-06-14	2010-06-25	11	
54	0005-064-10-017	2010-06-14	2010-06-23	9	
55	0005-064-10-018	2010-06-14	2010-06-23	9	
56	0005-064-10-019	2010-06-14	2010-06-23	9	
57	0005-090-10-003	2010-07-13	2010-07-22	9	
58	0005-076-10-002	2010-04-27	2010-04-29	2	
2009-2010					
1	CR2007-0029	2007-04-12	2010-01-26	1020	
2	CR2007-0047	2007-07-06	2009-10-19	836	
3	CRA2008-0040	2008-06-05	2010-01-12	586	
4	CRA2008-0076	2008-09-24	2010-01-14	477	
5	CRA2008-0042	2008-06-13	2009-04-30	321	
6	CRA2008-0079	2008-09-30	2009-06-25	268	

	File #	Date Received	Date Closed	Days to Complete	Comments
7	CRA2008-0075	2008-09-09	2009-05-05	238	
8	0020-060-09-002	2009-06-17	2010-01-29	226	
9	CRA2008-0090	2008-10-27	2009-05-29	214	
10	CRA2008-0083	2008-10-20	2009-05-06	198	
11	0005-078-09-002	2009-04-16	2009-10-27	194	
12	CRA2008-0088	2008-10-21	2009-04-15	176	
13	CRA2008-0106	2008-12-24	2009-06-09	167	
14	CRA2008-0095	2008-11-20	2009-04-30	161	
15	0005-064-09-001	2009-03-31	2009-09-04	157	
16	CRA2009-0002	2009-01-05	2009-05-29	144	
17	0005-068-09-001	2009-09-02	2010-01-20	140	
18	0005-080-09-006	2009-07-20	2009-12-04	137	
19	0015-066-09-001	2009-11-02	2010-03-01	119	
20	0005-088-09-003	2009-12-11	2010-03-30	109	
21	0005-072-09-003	2009-07-27	2009-11-10	106	
22	0005-084-09-001	2009-10-14	2010-01-27	105	
23	CRA2009-0007	2009-01-19	2009-04-30	101	
24	0005-064-09-007	2009-09-02	2009-12-11	100	
25	0005-072-09-004	2009-08-04	2009-11-10	98	
26	0025-084-09-005	2009-12-23	2010-03-25	92	
27	CRA2009-0009	2009-01-30	2009-04-30	90	
28	0005-080-09-009	2009-08-12	2009-11-10	90	
29	0005-064-09-002	2009-08-17	2009-11-10	85	
30	0005-064-09-003	2009-08-17	2009-11-10	85	
31	0005-064-09-004	2009-08-17	2009-11-10	85	
32	0005-064-09-005	2009-08-19	2009-11-10	83	
33	0005-064-09-006	2009-08-19	2009-11-10	83	
34	CRA2009-0013	2009-02-25	2009-05-18	82	
35	0030-060-09-001	2009-07-27	2009-10-06	71	
36	0005-072-09-002	2009-07-08	2009-09-16	70	
37	0005-074-10-003	2010-01-21	2010-03-31	69	

	File #	Date Received	Date Closed	Days to Complete	Comments
38	0025-084-09-004	2009-12-14	2010-02-17	65	
39	0005-072-09-006	2009-12-14	2010-02-17	65	
40	0005-072-09-001	2009-05-26	2009-07-27	62	
41	0005-064-10-011	2010-01-13	2010-03-16	62	
42	0025-080-09-001	2009-07-27	2009-09-24	59	
43	CRA2009-0015	2009-03-04	2009-04-30	57	
44	0005-064-09-009	2009-10-30	2009-12-11	42	
45	0020-060-10-004	2010-01-07	2010-02-12	36	
46	0005-064-10-010	2010-01-13	2010-02-17	35	
47	0005-084-10-003	2010-01-13	2010-02-17	35	
48	0020-060-10-008	2010-02-11	2010-03-17	34	
49	0005-080-09-005	2009-06-23	2009-07-22	29	
50	0005-074-09-001	2009-09-02	2009-10-01	29	
51	0025-088-10-001	2010-01-13	2010-02-04	22	
52	0025-070-10-001	2010-01-13	2010-02-03	21	
53	0020-062-09-002	2009-10-21	2009-11-02	12	
54	0025-090-10-001	2010-01-13	2010-01-25	12	
55	0005-080-09-001	2009-04-15	2009-04-22	7	
56	0005-080-09-002	2009-04-15	2009-04-22	7	
57	0005-080-09-010	2009-09-16	2009-09-23	7	
58	0025-084-09-001	2009-10-01	2009-10-07	6	
59	0025-084-09-002	2009-10-01	2009-10-07	6	
60	0005-080-09-011	2009-09-16	2009-09-18	2	
61	0005-080-09-012	2009-09-16	2009-09-18	2	
62	0005-080-09-013	2009-09-16	2009-09-18	2	
2008-2009					
1	CR2007-0028	2007-04-12	2008-08-21	497	
2	CR2007-0078	2007-09-10	2009-01-14	492	
3	CR2007-0087	2007-10-01	2008-12-04	430	
4	CR2007-0077	2007-09-10	2008-11-12	429	
5	CR2007-0084	2007-09-26	2008-11-07	408	
6	CR2007-0041	2007-06-12	2008-07-03	387	

	File #	Date Received	Date Closed	Days to Complete	Comments
7	CR2007-0042	2007-06-12	2008-07-03	387	
8	CR2007-0080	2007-09-17	2008-09-03	352	
9	CR2007-0065	2007-08-16	2008-07-03	322	
10	CRA2008-0031	2008-05-06	2009-01-19	258	
11	CRA2008-0032	2008-05-06	2009-01-19	258	
12	CR2007-0088	2007-10-11	2008-06-19	252	
13	CRA2008-0017	2008-03-11	2008-11-14	248	
14	CRA2008-0052	2008-07-03	2009-03-06	246	
15	CR2007-0105	2007-12-03	2008-06-19	199	
16	CR2007-0092	2007-10-31	2008-04-22	174	
17	CR2007-0096	2007-11-16	2008-05-05	171	
18	CR2007-0097	2007-11-16	2008-05-05	171	
19	CR2007-0099	2007-11-19	2008-05-05	168	
20	CRA2008-0058	2008-07-18	2008-12-19	154	
21	CRA2008-0059	2008-07-18	2008-12-19	154	
22	CRA2008-0023	2008-04-07	2008-09-04	150	
23	CRA2008-0007	2008-02-01	2008-06-19	139	
24	CRA2008-0038	2008-06-03	2008-10-14	133	
25	CRA2008-0039	2008-06-03	2008-10-14	133	
26	CRA2008-0026	2008-04-15	2008-08-22	129	
27	CRA2008-0041	2008-06-10	2008-10-14	126	
28	CRA2008-0027	2008-04-23	2008-08-22	121	
29	CRA2008-0062	2008-08-01	2008-11-12	103	
30	CRA2008-0004	2008-01-15	2008-04-22	98	
31	CRA2008-0057	2008-07-16	2008-10-21	97	
32	CRA2008-0010	2008-02-25	2008-05-28	93	
33	CRA2008-0100	2008-12-10	2009-02-25	77	
34	CRA2008-0043	2008-06-27	2008-09-11	76	
35	CRA2008-0029	2008-04-30	2008-07-11	72	
36	CRA2008-0067	2008-08-18	2008-10-28	71	
37	CRA2008-0011	2008-02-25	2008-04-30	65	
38	CRA2008-0014	2008-02-29	2008-04-30	61	
39	CRA2008-0068	2008-08-20	2008-10-14	55	

	File #	Date Received	Date Closed	Days to Complete	Comments
40	CRA2008-0064	2008-08-04	2008-09-25	52	
41	CRA2008-0045	2008-07-02	2008-08-22	51	
42	CRA2008-0044	2008-06-27	2008-08-12	46	
43	CRA2008-0016	2008-03-05	2008-04-15	41	
44	CRA2008-0047	2008-07-02	2008-08-12	41	
45	CRA2008-0022	2008-04-02	2008-05-08	36	
46	CRA2008-0015	2008-03-03	2008-04-07	35	
47	CRA2009-0001	2009-01-05	2009-02-09	35	
48	CRA2008-0036	2008-05-23	2008-06-24	32	
49	CRA2008-0037	2008-05-27	2008-06-27	31	
50	CRA2008-0070	2008-09-04	2008-10-03	29	
51	CRA2008-0071	2008-09-08	2008-10-03	25	
52	CRA2008-0046	2008-07-02	2008-07-25	23	
53	CRA2008-0020	2008-03-24	2008-04-15	22	
54	CRA2008-0025	2008-04-15	2008-05-07	22	
55	CRA2009-0006	2009-01-19	2009-02-10	22	
56	CRA2009-0014	2009-03-04	2009-03-25	21	
57	CRA2009-0005	2009-01-15	2009-02-04	20	
58	CRA2008-0024	2008-04-11	2008-04-16	5	

Newfoundland Labrador

Government of Newfoundland and Labrador
Office of Public Engagement
Office of the Minister

Mr. Doug Letto
ATIPPA Review Committee
Suite C
83 Thorburn Road
St. John's, NL A1B 3M2

OCT 17 2014

Dear Mr. Letto:

In response to your letter dated September 29, 2014, please find below the additional information you have requested with respect to records and information management within government departments. the OCIO advises that the Cummings recommendations (i.e. 1, 2, 3, 5, 8) for the public bodies (mainly departments) receiving OCIO information technology services has been completed. OPE advises that recommendations 4, 6 and 7 have been completed for departments and implementation is ongoing for other public bodies (e.g. municipalities).

I. J. Cummings Recommendations

1) **All public bodies should have an IMCAT (Information Management Capacity Assessment Tool) carried out by an information management specialist.**

It should be noted that the definition of "public bodies" under *ATIPP Act* includes government departments, agencies, crown commissions, health authorities, educational bodies and municipalities. The *Management of Information Act* has a similar definition (s.2(d)) however it does not include municipalities (see attached).

The *Management of Information Act* establishes the responsibility for setting information management (IM) policies and standards under the OCIO and the public bodies are responsible for establishing IM programs using these standards and policies. In meeting its responsibilities, the OCIO provides IM services to those public bodies who receive information technology services (see attached). For other public bodies, they can avail of the advisory services of the OCIO such as Information Management Community of Practice sessions and online training, however direct IM services are not provided.

In 2007, the OCIO commenced implementation of the Information Management Capacity Assessment (IMCAT) program to provide those public bodies receiving IM services with a tool to systematically assess their IM capacity which was used in the development of a departmental IM program. This process was completed by independent IM strategists contracted by the OCIO. Between 2007 and 2013, of the 34 public bodies supported by the OCIO, 31 have completed 35 IMCATs (see attached). These IMCATs have resulted in an overall increase in the priority assigned to IM by departments and most departments have assigned accountability for IM at the director level or above (see attached).

P.O. Box 8700, St. John's, NL, Canada A1B 4J6 t 709.729.3124 f 709.729.0121

In 2013, an assessment of the progress of public bodies with respect to implementation of the IMCATs commenced and the OCIO is developing an Information Management Self-Assessment Tool (IMSAT) to allow public bodies to measure their IM progress.

2) All public bodies should have retention and disposal schedules for all paper and electronic records in their possession, including e-mail.

The Government Records Committee (GRC) has approved records retention and disposal schedules for 26 of the 34 public bodies for a total of 141 schedules (see attached). Additionally, 22 of the 34 public bodies have applied to the GRC for permission to implement the Corporate Records and Information Management Standard (CRIMS) (see attached). This schedule provides public bodies with the ability to dispose of common administrative records for which they are not the office of primary responsibility. This work is ongoing.

3) All public bodies should take additional steps to ensure that all records management policies, including policies on e-mails, are clearly understood by all employees.

Information respecting information management and protection is included in Government's onboarding and orientation package supported by the Human Resource Secretariat and Departments are responsible to ensure new staff receive orientation. The OCIO offers the following IM training to support employees, managers, IM practitioners and administrative staff as follows:

- Managers:
  - All managers are required to complete *Information Management: A Guide for Managers* which is available online.
- Employees:
  - All employees are required to complete IM@Work, the OCIO's online course on IM best practices. For new employees, this is included in onboarding and is a encouraged.
  - Building Good Habits for IM@Work: This one hour session provides an overview of IM and provides a set of habits employees can start right away to improve IM and is provided onsite at the request of a department.
  - Cyber Security: This one hour session that provides an overview of Cyber Security, an essential topic for all employees and is provided onsite at the request of a department.

- IM Practitioners:
  There are many courses that have been developed and delivered by the OCIO for IM practitioners:
  - Information Technology for IM Practitioners is a two day course providing an overview of concepts that help practitioners support IM programs.
  - Introduction to IM Processes for IM Practitioners is a two day course providing a foundation in IM program requirements.
  - Records and Information Inventory Workshop is a one day course instructing practitioners on how to plan and execute a records and information inventory.

    - IM Education and Awareness Workshop is a two day workshop on how to develop an IM Education and Awareness program for your department.
- Administrative Professionals:
    - Half day Introduction to IM Processes for Support Staff provides an overview of IM processes for support staff that perform IM functions but are not IM professionals.

The OCIO also promotes best practices using marketing campaigns including in October during Cyber Security Month and in April during Records and Information Management Month.

Additionally, the OCIO supports IM practitioners through a Community of Practice that meets quarterly and there is an IM module in the executive training orientation. The OCIO also chairs a forum for IM Government Directors to discuss issues of mutual interest and it provides consultation and advisory services to departments.

In 2009, Treasury Board approved an Information Management and Protection Policy which authorized the OCIO to establish mandatory information management and protection directives and standards for departments and public bodies supported by the OCIO. Extensive policy instruments related to information management and protection (available on-line) have been established and communicated to staff. Examples include email policies and guidelines, best practices related to information handling, security, and password protection.

4) There must be greater coordination and training to ensure that requests for information and privacy issues are dealt with consistently across the public sector.

The OPE oversees the implementation and coordination of the *ATIPP Act*, and as such, it provides a number of resources to public bodies, including:

- An Access to Information Policy and Procedures Manual;
- A Privacy Policy and Procedures Manual;
- An ATIPP training module available through PS Access;
- A Privacy Breach Protocol;
- ATIPP Coordinator Training Sessions;
- Community of Practice meetings;
- Staff to provide policy advice;
- Privacy training/presentations;
- A Privacy Reference Guide;
- Providing privacy impact reports for completed Preliminary Privacy Impact Assessments and Privacy Impact Assessments for new or modified projects or programs;
- Website reviews; and
- Departmental Privacy Assessments.

The resources listed above contribute to consistency when responding to access to information requests and dealing with privacy issues.

In addition to these resources, the ATIPP training module is available through PS Access and this training is available to all government department employees with over 900 employees having completed to-date.

The OPE also holds regular Community of Practice meetings for ATIPP professionals to provide advice and guidance on a variety of topics, including recent OIPC reports, areas requiring clarification and issues raised by Coordinators. Each Community of Practice also includes a redaction exercise portion where Coordinators will review a document and apply redactions which are then discussed as a group.

5) **All public bodies should use redaction software in the severance process when responding to requests for information.**

Every government department uses redaction software.

6) **All public bodies should review their organization and especially their reporting structures to ensure that access to information requests are dealt with in a timely manner.**

While each department is responsible for processing their access to information requests, the OPE has reinforced that processing requests in a timely manner is essential. Direction has been given to Deputy Ministers during their regular meetings of the importance of meeting these timelines. In order to ensure a timely response appropriate staff are made aware of their responsibilities including those who process departmental mail, those required to search for records, and any staff required to review the records (ATIPP Coordinator, Executive, etc.) prior to final approval from the Deputy Minister.

7) **Currently, several public bodies designate the ATIPP Coordinator role to their Information Management resource. Public bodies not having this practice should evaluate if this pairing of duties is appropriate for them.**

The majority of ATIPP Coordinators for government departments either fall under their departments' IM or policy divisions. There are 23 ATIPP coordinators: eight are located within IM divisions, 10 within policy divisions and five within other divisions (communications, cabinet operations, ATIPP and public safety).

Please note, since Government tabled its August brief to the Review Committee, the number of ATIPP Coordinators has changed from 24 to 23 as Municipal and Intergovernmental Affairs now have one Coordinator for the entire department.

8) **All public bodies served by the Office of the Chief Information Officer (OCIO) should consult extensively with that office on all the above recommendations.**

The OCIO operates an IM Advisory Services Division that provides advice, guidance and knowledge transfer to departments on IM programs. In addition, as noted in the response to question #4, the OPE provides resources and guidance to government departments and public bodies in relation to the *ATIPP Act*. This includes materials such as the Access and Privacy Policy and Procedures Manuals, Privacy Breach Protocol, and several other resources available

on the ATIPP website. Training is provided through an e-learning module as well as in-person sessions. During the 2013-14 fiscal year, 21 ATIPP Coordinator training sessions were provided as well as one Community of Practice meeting. As well, 1,000 phone calls were responded to from departments and public bodies concerning the legislation.

II. Additional Topics

a.) Whether there is a consistent information management system across government departments.

The OCIO has developed a Guide to Information Management for public bodies that provides the foundation for an IM program and supports consistency across programs. Core foundational elements include Governance, Accountability and Organization; Vision, Mission and Guiding Principles; Legal and Regulatory Framework; and Program Plan. Operational program components include Information Protection; Physical Records Storage Development and Use; IM Education and Awareness for Government Employees; Education and Awareness for Information Management Practitioners; Performance Measurement and Policy Instruments. IM tools include Record Imaging Services; Disposal of Records; Records Classification Plan Implementation; Classification Plan Development for Operational Records; and Records and Information Inventory.

As set out in the response to question #1, departments and public bodies complete the IMCAT with IM strategists contracted by the OCIO in order to assess their capacity and establish systems and program needs. Once established, departments and public bodies work with the OCIO to address IT requirements.

Through these efforts, the OCIO advises that consistency is being developed across government's departments and IM is now recognized as an essential program and all departments have accountability assigned at director level or above. Capacity has been assessed in a consistent manner and each department has a program plan. Each department has the opportunity to use TRIM; the government standard for electronic document and records management. The OCIO has established extensive policies, directives, standards and best practices and the OCIO's centralized model provides direct service delivery of which IM is an integral part.

For those public bodies not receiving direct OCIO IM services, the OCIO provides them with access to advisory services.

b.) Whether all departments are at the same level in terms of creating, protecting, and in their ability to provide timely and full access to records.

In terms of IM, program development is at varying levels of maturity in departments and public bodies. There are many variables that influence IM capacity including organization size, length of the IM program operation, IM resource allocation and the volume and complexity of record holdings. Departments and public bodies that have completed IMCATs and maintained an IM program over time are further advanced than those where an IMCAT has recently been completed and the development of the IM program has begun. It should be noted that a majority of public bodies supported by the OCIO have completed IMCATs (of the 34 public bodies

supported by the OCIO, 31 have completed 35 IMCATs). These IMCATs have resulted in an overall increase in the priority assigned to IM by departments.

Statistics regarding response times for access requests by government departments indicate that departments are responding to the majority within the legislated timelines. During the first six months of 2013, government departments responded to, on average, 30 requests per month with 69% meeting the legislated timelines. This compares to a monthly average of 23 requests in the first six months of 2014 with 96% meeting the legislated timelines, indicating in the majority of instances departments are providing timely access to records. The number of requests resulting in full information disclosure has increased - from 30% pre 2012 average to 40% post 2012.

c.) How the current information management system impacts the ability to respond in a timely way to access requests.

As noted in (b) above, response timelines have been improving; from a monthly average of 69% in the first six months of 2013 to 96% for the same period in 2014. More detail concerning departmental response timelines to access requests can be found at http://www.open.gov.nl.ca/information/timelines.html. Those departments that have IM programs are better positioned to respond to access requests in a timely way.

d.) If deficiencies exist in the information management system, what plans are being contemplated or are in place to address identified issues?

The OCIO is in the process of implementation of the IMSAT to assess the impacts of IMCATs. In addition, the OCIO and the OPE are working to ensure that IM specialists and ATIPP Coordinators are aware of the implications of IM and ATIPP on their respective positions. This is being completed by incorporating ATIPP presentations at IM and ATIPP Community of Practice meetings.

If you have any further questions please let me know.

Respectfully, I remain

[redacted] Section 30

STEVE KENT
Minister

Appendix A
Information Management Overview

	OCIO Supported Public Bodies	Completed IMCATs[1]	Responsibility for IM	Retention Schedules[2]	C-RIMS[3]
1	Advanced Education and Skills	Yes	Director	Yes	Yes
2	Child, Youth and Family Services	Yes	Director	In progress	Yes
3	Education	Yes	Director	Yes	Yes
4	Environment and Conservation	Yes	Director	Yes	Yes
5	Executive Council	Yes	Director	Yes	Yes
6	Finance	Yes	Director	Yes	No
7	Fire and Emergency Services	Yes	Director	Yes	No
8	Fisheries and Aquaculture	Yes	Director	Yes	Yes
9	Forestry and Agrifoods Agency	Yes	Director	Yes	Yes
10	Government Purchasing Agency	Yes	Director	Yes	No
11	Health and Community Services	Yes	Director	Yes	Yes
12	House of Assembly and Statutory Offices (except Auditor General)	Yes	Director	Yes	Yes
13	Innovation, Business and Rural Development[4]	Yes	Director	Yes	Yes
14	Justice	Yes	Director	Yes	Yes
15	Labour Relations Agency	Yes	ADM	In progress	Yes
16	Labour Relations Board	Yes	Deputy Chief Executive Officer	No	No
17	Legal Aid Commission	No	Director	Yes	No
18	Municipal Affairs	Yes	Director	Yes	Yes
19	Municipal Assessment Agency	No	Undelegated	No	No
20	Natural Resources	Yes	Director	Yes	Yes
21	Office of the Chief Electoral Officer	Yes	HOA Director	Yes	Yes
22	Office of the Child and Youth Advocate	Yes	HOA Director	Yes	Yes
23	Office of the Citizens' Representative	Yes	HOA Director	No	Yes
24	Office of the Information and Privacy Commissioner	Yes	HOA Director	Yes	Yes
25	Public Service Commission	Yes	Director	Yes	Yes
26	Provincial and Supreme Courts	Yes	Provincial - Director; Supreme - Chief Administrative Officer	Yes	Yes
27	Research and Development Corporation	Yes	Director	No	N/A
28	The Rooms Corporation	Yes	Undelegated	Yes	N/A
29	The Royal Newfoundland Constabulary	Yes -as part of Justice	Director	Yes	N/A
30	Service NL	Yes	Director	Yes	Yes
31	Tourism, Culture and Recreation	Yes	Director	Yes	No
32	Transportation and Works	Yes	Director	Yes	Yes
33	Workplace Health, Safety and Compensation Review Division	No	No	No	No
34	Office of the Auditor General	Yes	Director	N/A	N/A

Note 1: A total of 35 individual IMCATs were completed by March 31, 2013, these have been allocated in the table above to align with the public body as of August 2014.
Note 2 : Where public bodies are denoted to have completed a Retention Schedule, this does not mean all records are fully scheduled. This work is on-going.
Note 3: Only public bodies serviced by both the Department of Finance and Human Resources Secretariat are eligible to use C-RIMS - N/A denotes those bodies where this is not applicable.
Note 4: IBRD accounted for two of IMCATs as part of Government restructuring.

	Public Bodies for Newfoundland and Labrador
	Departments
1	Office of the Auditor General
2	Provincial and Supreme Courts
3	Advanced Education and Skills
4	Business, Tourism, Culture and Rural Development
5	Child Youth & Family Services
6	Education and Early Childhood Development
7	Environment and Conservation
8	Executive Council
9	Cabinet Secretariat
10	Communications Branch
11	Human Resource Secretariat
12	Labrador and Aboriginal Affairs Office
13	Office of the Chief Information Officer
14	Office of Climate Change and Energy Efficiency
15	Office of Public Engagement
16	Task Force on Adverse Health Events
17	Women's Policy Office
18	Finance
19	Fisheries and Aquaculture
20	Health and Community Services
21	Justice and Public Safety
22	Municipal and Intergovernmental Affairs
23	Natural Resources
24	Premier's Office
25	Seniors, Wellness and Social Development
26	Service NL
27	Transportation and Works
	Agencies
28	Income and Employment Support Appeal Board
29	Labour Relations Board
30	Private Training Corporation
31	Provincial Apprenticeship Board
32	Student Financial Assistance Appeal Board
33	Student Loan Corporation of Newfoundland and Labrador
34	Business Investment Corporation
35	EDGE Evaluation Board
	Marystown Shipyard Limited
36	Newfoundland Hardwoods Limited
37	Newfoundland Ocean Enterprises Limited
38	Arts and Letters Committee
39	Commemorations Board
40	Government Records Committee
41	Heritage Foundation of Newfoundland & Labrador
42	Marble Mountain Development Corp.
43	Newfoundland and Labrador Arts Council
44	Newfoundland and Labrador Film Development Corporation

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45 The Rooms Corporation
46 Provincial Information and Library Resources Board
47 Teachers Certification Board of Appeals
48 Teachers Certification Committee
49 Teachers Certification Review Board
50 C.A. Pippy Park Commission
51 Multi-Materials Stewardship Board
52 Newfoundland and Labrador Geographical Names Board
53 Species Status Advisory Committee
54 Standing Fish Price-Setting Panel
55 Wilderness & Ecological Reserves Advisory Council
56 Classifications Appeal Board
57 Management Classification Review Committee
58 Newfoundland and Labrador Youth Advisory Council
59 Order of Newfoundland and Labrador Advisory Council
60 Provincial Advisory Council on the Status of Women
61 Provincial Bravery Award Review Panel
62 Public Service Commission
63 Research & Development Corporation
64 Volunteer Service Medal Selection Committee
65 Government Money Purchase Pension Plan
66 Newfoundland Government Fund Limited
67 Newfoundland and Labrador Consolidated Sinking Fund
68 Newfoundland and Labrador Industrial Development Corporation
69 Newfoundland and Labrador Liquor Corporation
70 Newfoundland and Labrador Municipal Financing Corporation
71 Pension Investment Committee
72 Pension Policy Committee
73 Public Sector Pension Plan Joint Trusteeship Transition Committee
74 Professional Fish Harvesters Certification Board
75 Health Research Ethics Authority
76 Central Newfoundland Regional Appeal Board
77 Eastern Newfoundland Regional Appeal Board
78 Eastern Regional Service Board
79 Labrador Regional Appeal Board
80 Municipal Assessment Agency
81 West Newfoundland Regional Appeal Board
82 Chicken Farmers of Newfoundland and Labrador
83 Churchill Falls (Labrador) Corporation
84 Farm Industry Review Board
85 Forest Land Tax Appeal Board
86 Forestry and Agrifoods Agency
87 Gull Island Power Company Limited
88 Land Consolidation Review Committee
89 Land Development Advisory Board
90 Livestock Owners Compensation Board
91 Lower Churchill Development Corporation Limited

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92	Mineral Rights Adjudication Board
93	NALCOR
94	Newfoundland and Labrador Crop Insurance Agency
95	St. John's Appeal Board
96	Chief Medical Examiner
97	Criminal Code Mental Disorder Review Board
98	Commissioner of Lobbyists
99	Departmental Board of Corrections
100	Fire and Emergency Services
101	Human Rights Commission of Newfoundland and Labrador
102	Judicial Council of the Provincial Court of Newfoundland and
103	Labour Relations Agency
104	Legal Appointments Board
105	Newfoundland and Labrador Electoral Districts Boundaries Commission
106	Newfoundland and Labrador Law Reform Commission
107	Newfoundland and Labrador Legal Aid Commission
108	Office of the High Sheriff
109	Public Utilities Board
110	Royal Newfoundland Constabulary
111	Royal Newfoundland Constabulary Public Complaints Commission
112	Building Accessibility Advisory Board
113	Building Accessibility Appeal Tribunal
114	Credit Union Deposit Guarantee Corp
115	Financial Services Appeal Board
116	Government Purchasing Agency
117	Occupational Health & Safety Advisory Council
118	Office of the Superintendent of Insurance
119	Radiation Health and Safety Advisory Committee
	Real Estate Foundation of Newfoundland
120	Workplace Health, Safety & Compensation Commission
121	Workplace Health, Safety & Compensation Review Division
122	Newfoundland and Labrador Housing Corporation
	Education Bodies
123	College of the North Atlantic
124	Conseil scolaire francophone provincial de Terre-Neuve-et-Labrador
125	NL English School District
126	Memorial University of Newfoundland
	Health Care Bodies
127	Central Health Authority
128	Eastern Health Authority
129	Western Health Authority
130	Labrador Health Authority
131	Mental Health Review Board
132	Newfoundland and Labrador Centre for Health Information
	HOA and Statutory Bodies
133	House of Assembly ATIPP Coordinator

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134 Office of the Information and Privacy Commissioner
135 Office of the Citizens' Representative
136 Office of the Child and Youth Advocate
137 Office of the Chief Electoral Officer
138 Commissioner for Legislative Standards

Municipalities
Admiral's Beach
Anchor Point
Appleton
Aquaforte
Arnold's Cove
Avondale
Badger
Baie Verte
Baine Harbour
Bauline
Bay Bulls
Bay de Verde
Bay L'Argent
Bay Roberts
Baytona
Beachside
Bellburns
Belleoram
Birchy Bay
Bird Cove
Bishop's Cove
Bishop's Falls
Bonavista
Botwood
Branch
Brent's Cove
Brighton
Brigus
Bryant's Cove
Buchans
Burgeo
Burin
Burlington
Burnt Islands
Campbellton
Cape Broyle
Cape St. George
Carbonear
Carmanville
Cartwright

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Centreville/Wareham/Trinity
Chance Cove
Change Islands
Channel-Port aux Basques
Chapel Arm
Charlottetown, Labrador
Clarenville
Clarke's Beach
Coachman's Cove
Colinet
Colliers
Come By Chance
Comfort Cove - Newstead
Conception Bay South
Conception Harbour
Conche
Cook's Harbour
Cormack
Corner Brook
Cottlesville
Cow Head
Cox's Cove
Crow Head
Cupids
Daniel's Harbour
Deer Lake
Dover
Duntara
Eastport
Elliston
Embree
Englee
English Harbour East
Fermeuse
Ferryland
Flatrock
Fleur de Lys
Flower's Cove
Fogo Island
Forteau
Fortune
Fox Cove-Mortier
Fox Harbour
Frenchman's Cove
Gallants
Gambo
Gander

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Garnish
Gaskiers-Point LaHaye
Gaultois
Gillams
Glenburnie/Birchy Head/Shoal Brook
Glenwood
Glovertown
Goose Cove East
Grand Bank
Grand Falls-Windsor
Grand Le Pierre
Greenspond
Hampden
Hant's Harbour
Happy Adventure
Happy Valley - Goose Bay
Harbour Breton
Harbour Grace
Harbour Main-Chapel's Cove-Lakeview
Hare Bay
Hawkes Bay
Heart's Content
Heart's Delight - Islington
Heart's Desire
Hermitage-Sandyville
Holyrood
Hopedale
Howley
Hughes Brook
Humber Arm South
Indian Bay
Irishtown -Summerside
Isle aux Morts
Jackson's Arm
Keels
King's Cove
King's Point
Kippens
La Scie
Labrador City
Lamaline
L'Anse au Clair
L'Anse au Loup
Lark Harbour
Lawn
Leading Tickles
Lewin's Cove

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Lewisporte
Little Bay
Little Bay East
Little Bay Islands
Little Burnt Bay
Logy Bay-Middle Cove-Outer Cove
Long Harbour - Mount Arlington Heights
Lord's Cove
Lourdes
Lumsden
Lushes Bight - Beaumont
Main Brook
Makkovik
Mary's Harbour
Marystown
Massey Drive
McIvers
Meadows
Middle Arm
Miles Cove
Millertown
Milltown/Head of Bay D'Espoir
Ming's Bight
Morrisville
Mount Carmel/Mitchell's Brook/St. Catherine's
Mount Moriah
Mount Pearl
Musgrave Harbour
Musgravetown
Nain
New Perlican
New-Wes-Valley
Nippers Harbour
Norman's Cove - Long Cove
Norris Arm
Norris Point
North River
North West River
Northern Arm
Old Perlican
Pacquet
Paradise
Parker's Cove
Parsons Pond
Pasadena
Peterview
Petty Harbour/ Maddox Cove

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Pilley's Island
Pinware
Placentia
Point au Gaul
Point Lance
Point Leamington
Point May
Point of Bay
Pool's Cove
Port Anson
Port au Choix
Port au Port East
Port au Port West - Aguathuna - Felix Cove
Port Blandford
Port Hope Simpson
Port Kirwan
Port Rexton
Port Saunders
Portugal Cove South
Portugal Cove - St. Phillip's
Postville
Pouch Cove
Raleigh
Ramea
Red Bay
Red Harbour
Reidville
Rencontre East
Renews - Cappahayden
Rigolet
River of Ponds
Riverhead
Robert's Arm
Rocky Harbour
Roddickton-Bide Arm
Rose Blanche - Harbour Le Cou
Rushoon
St. Alban's
St. Anthony
St. Bernard's - Jacques Fontaine
St. Brendan's
St. Bride's
St. George's
St. Jacques - Coombs Cove
St. John's
St. Joseph's
St. Lawrence

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St. Lewis
St. Lunaire - Griquet
St. Mary's
St. Paul's
St. Shott's
St. Vincent's - St. Stephen's - Peter's River
Salmon Cove
Salvage
Sandringham
Sandy Cove
Seal Cove (Fortune Bay)
Seal Cove (White Bay)
Small Point - Broad Cove - Blackhead - Adams Cove
South Brook
South River
Southern Harbour
Spaniard's Bay
Springdale
Steady Brook
Stephenville
Stephenville Crossing
Summerford
Sunnyside
Terra Nova
Terrenceville
Tilt Cove
Torbay
Traytown
Trepassey
Trinity
Trinity Bay North
Triton
Trout River
Twillingate
Upper Island Cove
Victoria
Wabana
Wabush
West St. Modeste
Westport
Whitbourne
Whiteway
Winterland
Winterton
Witless Bay
Woodstock
Woody Point

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York Harbour

Note:

Green = public bodies under the *Management of Information Act*; not under ATIPPA

Yellow = public bodies under ATIPPA only; not under the *Management of Information Act*

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Independent Statutory Review Committee
Access to Information and Protection of Privacy Act
Newfoundland and Labrador

September 29, 2014

Ms. Rachelle Cochrane
Deputy Minister
Office of Public Engagement
Government of Newfoundland and Labrador
P.O. Box 8700
St. John's, NL A1B 4J6

Dear Rachelle,

Further to the minister's letter of September 18, 2014, containing the ***Supplement to OPE Brief to ATIPPA Review Committee,*** we are writing to request some additional details on records and information management within government departments.

The literature on access to information underlines that the quality of information management systems is essential to allowing public bodies to respond fully and appropriately to access requests. This point was addressed in the 2011 *ATIPPA* Review by John Cummings. He commented on the apparent ease with which some public bodies adapted to *ATIPPA,* and noted that these bodies "have a solid records management plan." He also noted that some public bodies were "struggling" with records management.

Under Recommendation 3 in the section on *Records Management,* Mr. Cummings listed 8 specific points he felt should be addressed:

Recommendation 3

1) **All public bodies should have an IMCAT (Information Management Capacity Assessment Tool) carried out by an information management specialist;**

2) **All public bodies should have retention and disposal schedules for all paper and electronic records in their possession, including e-mail;**

3) **All public bodies should take additional steps to ensure that all records management policies, including policies on e-mails, are clearly understood by all employees;**

4) **There must be greater co-ordination and training to ensure that requests for information and privacy issues are dealt with consistently across the public sector;**

5) **All public bodies should use redaction software in the severance process when responding to requests for information;**

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6) **All public bodies should review their organization and especially their reporting structures to ensure that access to information requests are dealt with in a timely and efficient manner;**

7) **Currently, several public bodies designate the ATIPP Co-ordinator role to their Information Management resource. Public bodies not having this practise should evaluate if this pairing of duties is appropriate for them;**

8) **All public bodies serviced by the Office of the Chief Information Officer (OCIO) should consult extensively with that office on all the above recommendations.**

The Review Committee wishes to know if some or all of these recommendations were implemented and their relative impact on the information management system.

In addition, the Review Committee would appreciate commentary on the following topics:

- Whether there is a consistent information management system across government departments;
- Whether all departments are at the same level in terms of creating, protecting, and in their ability to provide timely and full access to records;
- How the current information management system impacts the ability to respond in a timely way to access requests; and
- If deficiencies exist in the information management system, what plans are being contemplated or are in place to address identified issues?

We realize this request creates extra work, but it is an important part of the Committee's research.

Your assistance with this request is greatly appreciated. We look forward to your reply.

Sincerely,

[redacted] Section 30

Doug Letto
Committee Member

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