



# ABOVE BOARD

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## UPDATED Guidance – Public Interest Override

The update to this guidance piece relates to the **burden of proof** and the comments provided by the Supreme Court of Newfoundland and Labrador in two cases, *Mastropietro v. Newfoundland and Labrador (Education)*, [2016 CanLII 64876 \(NL SC\)](#) and *Asphalt Product Industries Inc. v. Town Council of Come by Chance (Town)*, [2023 NLSC 12 \(CanLII\)](#).

The burden of proof in section 9 for clearly demonstrating that the public interest in disclosure outweighs the reason for the exception rests with the person seeking the disclosure. However, the Court in *Mastropietro* commented that this onus cannot be absolute but must be relaxed somewhat in a situation where applicants have not had the benefit of reviewing the document on which they are required to make submissions. As well, the Court commented that there may well be circumstances where the public interest in disclosure is so notorious as to be capable of judicial notice by the Court.

In *Asphalt Product Industries Inc.* Browne J. emphasized the distinction between the person seeking disclosure of information pursuant to the public interest override at section 9 being required to show that there is public interest in disclosure of the information versus the person showing it is a “compelling” public interest, which is not required.

*[86] When interpreting section 9 of the ATIPPA it must be recognized that the Ontario legislation uses the word “compelling” immediately before the phrase “public interest”. The word “compelling” does not appear in the ATIPPA and this distinction is significant. Therefore, in this jurisdiction the 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. There is no requirement to clearly demonstrate that a particular public interest is “compelling”.*

The Court in *Asphalt Product Industries Inc.* found that the burden of proof under section 9 was met stating:

*[89] ... I find Asphalt Product has discharged its onus under section 9 by establishing that there is a sufficient public interest in disclosure of the tax agreements that outweighs the statutory exceptions relied upon by the Town.*

While the burden of proof rests with the person requesting release of information pursuant to the public interest override, the burden is not absolute and must be relaxed as noted above. Those who file a complaint with the OIPC should outline in their submissions why they believe the public interest override applies in the particular circumstances of their case. They should provide any supporting evidence they wish to be considered that shows a public interest, rather than an individual interest.

The public body must show that it considered section 9 in its decision-making process at the time the request was made. A public body is encouraged to provide the OIPC with a detailed explanation as to why it believes section 9 does not apply. Providing submissions to the OIPC that merely state the burden of proof was not met by the complainant may result in a public body's lost opportunity to provide the OIPC with analysis of what factors it believes weighs against the release of information.

To review the full updated guidance piece, please visit our [website](#).

## UPDATED Guidance – Anonymity of Applicants

The original Anonymity of Applicants guidance piece discussed the disclosure of the Applicant's identity during the access request process, anonymity during consultations and anonymity following an access request. However, we found other areas where questions of anonymity were raised such as when responding to a Commissioner's report and in Court proceedings.

### **Anonymity when Responding to a Commissioner's Report**

If a complaint is filed with this Office which results in a Commissioner's Report being issued, then the *Act* requires a public body to provide written notice of its decision, in relation to the recommendations, to the Commissioner and all persons who received a copy of the Commissioner's Report. The notice must be in writing, however, the *Act* is silent as to its format. In instances where more than one individual received a copy of the Report, public bodies must be cautious in copying all parties on one notification letter. In these instances, public bodies must not disclose personal information in the copy line. The copied parties should simply be referred to as "Applicant", "Third Party", etc.

### **Anonymity in Court Proceedings**

Where a public body chooses to seek a declaration not to comply with a recommendation of the Commissioner, a copy of the application for a declaration must be served on the Commissioner, the Minister of the Department of Justice and Public Safety, and all parties who were sent a copy of the Commissioner's Report. While the Complainant must be served with a copy of the application for a declaration, the Complainant is not a Respondent to the application and should not be named in the application. While the Court may later require that the identity of the Complainant be disclosed – and the Complainant should not be assured of anonymity at this stage for that reason – unless

this occurs, the identity of the Complainant should not be provided in the court documents. Furthermore, as with a public body's response to a Commissioner's Report, if more than one party is receiving the same copy of the declaration application, public bodies must not disclose personal information in the copy line.

While the limitation on disclosure extends only until the public body provides its final response to the applicant, it is important to remember that public bodies are still not permitted to disclose the identity of an applicant after this time simply for informational purposes or to confirm speculation. Personal information should only be disclosed as permitted by *ATIPPA, 2015* and using the minimum amount necessary. Unless the identity of the applicant becomes necessary in relation to one of the permitted disclosures, it should not be disclosed.

To review the full updated guidance piece, please visit our [website](#).

## Increase in Deemed Refusals

Our Office has recently received a number of complaints involving deemed refusals from public bodies. While a number of files dealing with deemed refusals were resolved informally, this Office has issued 6 reports on this topic since October 2022, with 5 of those reports being issued since January 2023. The concern is that the majority of these reports involve multiple files with the public body. The public body is therefore not meeting their timeline for multiple access requests, which then turn into multiple complaint files with our Office.

A public body must respond to an access to information request within the legislative time frame set out by section 16 of *ATIPPA, 2015*, which states:

*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.*

### Departments

This Office was advised that resource issues, backlogs and staff turnover contributed to the delay in responding to access requests. We also noticed in some situations that the departments were not applying for time extensions with our Office or in some instances, had received one time extension but did not apply for a second time extension. While approving time extensions is not a guarantee and must be assessed on a case by case basis, not using this as a resource usually results in a public body having a deemed refusal and a resulting complaint, which further taxes the resources of the public body. Remember to reach out to our Office and apply for a time extension if necessary.

Please visit our website to review our guidance [Requesting a Time Extension](#) and our [Time Extension Application Form](#). If you have questions, please contact our Office and we will be happy to help.

## Municipalities

Our Office was advised that staffing issues have had an impact on the ability to respond to access requests. In other instances, municipalities simply ignored access requests or made minimal efforts to respond. Furthermore, our Office has encountered problems during the complaint process with municipalities not engaging with our Office and failing to respond to our requests for a response. Responding to access requests is part of a municipalities' legal obligation as a public body and should a complaint be filed with our Office, it is important to work through the complaint process. Again, our Office has noticed that time extensions were not filed in situations where it could have been used as a resource in dealing with multiple access requests. Please see above for the links to our guidance and form regarding time extensions and contact our Office with any questions about time extensions.

Additionally, the ATIPP Office is a valuable resource that municipalities should take advantage of. The ATIPP Office has staff that can assist in working through an access request should a municipality be inexperienced with access requests or have questions about the process, using exceptions or forms. Please contact the ATIPP Office at [atippoffice@gov.nl.ca](mailto:atippoffice@gov.nl.ca) or by phone (709) 729-7072 or (877) 895-8891.

As well, the ATIPP Office has an [ATIPPA Guide for Municipalities](#), which provides an overview of access and privacy issues specific to municipalities.

## Transitory Records

Transitory records are still responsive records when responding to access requests.

Report [A-2022-030](#) released on December 14, 2022 involved the search for responsive records conducted by the Department of Industry, Energy and Technology in response to an access request. After receiving a response and records from the Department, the Complainant expressed concerns about the completeness of the search for records indicating that there appeared to be significant gaps in the records.

The Department acknowledged that the lack of records was a concern and noted that there was an overall issue regarding record-keeping with some areas needing improvement. The Department stated that there would be additional communications on the importance of records creation, specifically related to meeting minutes, and filing records in the approved recordkeeping system.

During the investigation, the Department raised the notion of transitory records and how certain records may be considered transitory under some legislation (such as the *Management of Information Act (MOIA)*). While *MOIA* may apply, so does *ATIPPA, 2015*, and a transitory record under *ATIPPA, 2015* is still considered a responsive record. The Commissioner commented as follows:

*However, under ATIPPA, 2015, in the context of an access request, there is nothing to distinguish a transitory record from other responsive records. If a record exists during a search per an access to information request, it is deemed to be responsive – the transitory nature is not relevant. The record must be released unless it or information within it is subject to one of the exceptions to access in ATIPPA, 2015.*

*If a record existed prior to receipt of the access request, but was deemed transitory in nature and was destroyed per a record retention schedule, this must be adequately explained.*

Handwritten notes, working folders, and other offline records are commonly mistaken as transitory records and are often not prioritized in searches. While they may be transitory per *MOIA*, particularly if final documents such as meeting minutes exist, they would not be categorized the same under *ATIPPA, 2015* in relation to an access request.

To review our guidance on transitory records, please visit our [website](#).

### *ATIPPA, 2015 Privacy Breach Statistics January 1 – March 31, 2023*

During the first quarter of 2023 (January 1 - March 31, 2023), the OIPC received 59 privacy breach reports from 27 public bodies under *ATIPPA, 2015*. This is an increase from the 49 breaches reported during the previous quarter.

Two intentional breaches were reported, one involved an employee's personal contact information being provided to a member of the public and the other involved a Facebook post which indicated that the person making the post may have either received or accessed personal information. However, emails remain the most common source of inadvertent breaches reported to our Office.

Reminder when sending emails:

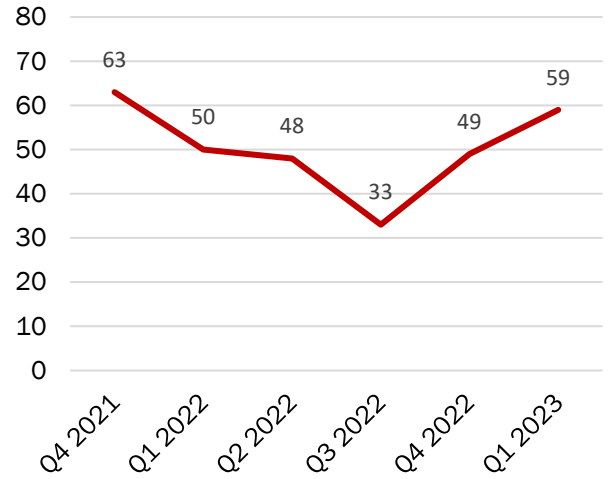
- remember to confirm the full email address before you hit send;
- delete pre-populated addresses;
- add a disclaimer signature line informing the recipient to notify and destroy if not the intended recipient;
- send a test email first to ensure you have the right person; and
- use the bcc field for mass electronic mail outs.

Please review the OIPC's [Tip Sheet](#) on avoiding inadvertent privacy breaches.

Reminder, please forward the completed [Privacy Breach Reporting Form](#) via e-mail to [breachreport@oipc.nl.ca](mailto:breachreport@oipc.nl.ca).

Summary by Public Body	
Central Health	2
City of Mount Pearl	1
City of St. John's	2
College of the North Atlantic	3
Department of Children, Seniors and Social Development	4
Department of Digital Government and Service NL	8
Department of Education	3
Department of Health and Community Services	1
Department of Immigration, Population Growth and Skills	3
Department of Transportation and Infrastructure	1
House of Assembly	1
Labrador - Grenfell Health	1
Legal Aid NL	2
Memorial University	6
Nalcor Energy	2
Newfoundland and Labrador English School District	1
Newfoundland and Labrador Housing Corporation	4
NL Hydro	2
Provincial Information and Library Resources Board	1
Public Service Commission	2
Royal Newfoundland Constabulary	1
Serious Incident Response Team	1
Town of Port au Port East	1
Town of Portugal Cove-St. Philip's	1
Treasury Board Secretariat	1
Western Health	1
Workplace NL	3

### Trends



### Summary by Type

