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“The Commissioner’s role is to facilitate the effort of a requestor to seek access to information [...] and is effectively an ombudsman or liaison between the citizen and government in attempting to resolve the request by mediation or otherwise if documents or information known to be existing are being withheld in whole or in part for various reasons”

Justice Harrington, NL CA, NL (Information and Privacy Commissioner) v. NL (Attorney General)

ABOVE BOARD

A QUARTERLY NEWSLETTER PUBLISHED BY THE
OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

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OIPC REMINDERS AND UPDATES

THE OIPC NOW HAS A BLOG

The OIPC has launched a [blog](#). The blog will provide an opportunity for our staff to comment on topics of interest and discuss developments in access and privacy. The entries are the personal comments of staff, do not constitute legal advice and cannot be relied on as such. Any comments or opinions expressed in the blog posts are not binding on the Information and Privacy Commissioner of Newfoundland and Labrador.

Take a look at the inaugural posting [“What is Open Contracting and Why is it a Good Idea?”](#) by Sean Murray, Director of Research and Quality Assurance.

Employee Assistance Program (“EAP”)

The June OIPC Workshop on Mental Health in the Workplace was cancelled due to low registration. However, the OIPC would still like to remind government Coordinators of the EAP. The EAP provides employees of government departments and some agencies with an opportunity to obtain help for personal problems, including workplace stress, that are either affecting or have the potential to affect work performance. The services offered are professional and confidential.

For more information please visit:
<http://www.psc.gov.nl.ca/psc/eap/>

Access and Privacy Oversight Challenges and Opportunities for Small Jurisdictions

The Commissioner was delighted to have been invited and able to attend the Small Jurisdictions Conference in Halifax this past month. Commissioner Molloy met with and gained valuable insights from the Commissioners of Nova Scotia, New Brunswick, P.E.I., the Yukon, Nunavut, the Northwest Territories, the Cayman Islands, and Bermuda.

Sharing a unique perspective, the Commissioners were able to discuss innovations and ideas which can be used in effective oversight of privacy and access laws in small jurisdictions.

BUILDING IN AND REVISITING PRIVACY

As public bodies move forward in creating their Privacy Management Programs, they are reminded that while it is important to ensure that privacy is built into all new programs or services of a public body, the legislative obligations are equally applicable to programs and services already in existence. Public bodies should revisit and reexamine the privacy implications of standing programs and services to ensure that they are in line with the *ATIPPA, 2015*.

THE USE OF APPS BY PUBLIC BODIES

Increasingly public bodies are using software applications (“apps”) in an attempt to streamline processes and provide citizens with an alternative method to interact with public bodies.

Public bodies must be aware that their legislative responsibilities in relation to personal information continue even if the app is created and maintained by an outside vendor. When contemplating whether to use or offer apps, public bodies should consider the following:

What is the Nature of the App?

Will the app be required, recommended, endorsed or simply suggested as an option by the public body?

Offering an app allows individuals to make a choice about whether they want to consent to the use of their personal information by the app.

Requiring, recommending or endorsing the use of an app places a greater obligation on a public body to review the vendor’s privacy statement, terms of use and permissions and to ensure that the vendor’s collection, use and disclosure of users’ personal information is in accordance with the *ATIPPA, 2015*.

What Need will the App Address?

Public bodies must consider whether the use of an app is the most appropriate way to address the specific identified need/gap.

How will Information be Provided to the App?

Will the public body be pushing personal information to the app or will individuals provide the information themselves?

Will the Public Body Pull Information from the App?

If public bodies intend to pull information from an app, this is an indirect collection and public bodies must make certain to put agreements in place that ensure *ATIPPA, 2015* compliance.

Privacy Statements, Terms of Use, Permissions

Public bodies must review the privacy statements of all apps being required, recommended or offered.

Where an app is required, public bodies must ensure that there are no provisions within the privacy statement that are contrary to the obligations set out in the *ATIPPA, 2015* and this process should be documented, preferably through a PIA.

In all instances, the privacy statement of the app must be available to the public. Public bodies should consider encouraging individuals to review the privacy statement and may, in some instances, determine that a summary of key points should be developed.

We will be issuing a detailed guidance document on this topic in the near future.

THE PUBLIC PROCUREMENT REGULATIONS AND THE ATIPPA, 2015

On March 24, 2018, provisions of the new [Public Procurement Regulations](#) came into force. These *Regulations* require all bidders to review their bid documents prior to submission and identify any information that might qualify for exemption under section 39 in the event of an access to information request.

Section 8(2) of the *Public Procurement Regulations* states:

8. (2) A bid received in response to an open call for bids shall identify any information in the bid that may qualify for an exemption from disclosure under subsection 39(1) of the Access to Information and Protection of Privacy Act, 2015.

If bidders do not identify information that may be exempted from disclosure under section 39, public bodies may release bid information without notice. Failing to indicate that information in a bid may be protected from disclosure by section 39 is a failure to indicate that the information is supplied in confidence. This is one of the elements necessary in order to support a claim of section 39. As a result, there is an increased likelihood of disclosure of the bid's contents if an access to information request is received.

If a bidder does identify information that may be exempt from disclosure under section 39, and an access to information request is made for that information, public bodies must still assess the identified information as they normally would under section 39. Identification of information by a bidder is not, in and of itself, determinative of the application of section 39.

Following this assessment, one of the following three outcomes and reactions should occur:

1. if a public body determines that section 39 does not apply, then the records should be released to the applicant without notifying the bidder under section 19;
2. if a public body determines that section 39 does apply, then the records should be withheld from the applicant and no notice to a bidder is required; or
3. if a public body cannot determine with certainty that section 39 applies to the identified information but is of the opinion that it might apply, then notification should be provided to the bidders in accordance with section 19 of the *ATIPPA, 2015*.

If notification occurs and the public body decides to release the information despite the bidder's objections, the bidder must be notified by the public body of the right to file a complaint with this Office. The onus is on the bidder to establish the applicability of section 39.

Public bodies may informally consult with bidders to determine whether the requirements of section 39(1)(c) can be met. These consultations are not notifications under section 19 and bidders are not entitled to make a complaint with this Office based on those consultations alone.

For further information and guidance on section 39 of the *Act* and section 8(1) and 8(2) of the *Regulations*, please consult our [Business Interests of a Third Party](#) and [The Public Procurement Act and ATIPPA, 2015](#) guidance documents.

PROVIDING NOTICE TO AFFECTED INDIVIDUALS

Where public bodies experience a privacy breach which requires notification to be sent to affected individuals, our Office recommends that the notice:

- i. provide the contact information of the employee(s) within the public body who can provide additional information about the breach;
- ii. encourage affected individuals to speak with those employee(s) first if they have questions regarding the breach; and,
- iii. in accordance with the [ATIPP Privacy Manual](#), inform those individuals of their right to complain to the Commissioner if the individual is not satisfied with the response of the public body. The contact information of the OIPC should also be provided.

ESTABLISHING A REASONABLE EXPECTATION OF MATERIAL HARM

Recently in [Air Canada v. Canada \(Attorney General\)](#), the Federal Court offered guidance on establishing a reasonable expectation of material harm. While the language of the *ATIPPA, 2015* is somewhat different, the guidance is still noteworthy.

The Court was influenced by the decisions in [Merck Frosst Canada Ltd v Canada \(Health\)](#), and [Air Atonabee Ltd v Canada \(Minister of Transport\)](#), 27 FTR 194, 1989 CarswellNat 585 (WL Can) (FCTD) which outlined the evidence required to assert a claim of harm.

Relying on *Air Atonabee*, where the Court found that a reasonable expectation of harm does not arise simply because the disclosure could possibly result in a general misunderstanding of the contents, the Court indicated that the potential for misunderstanding or misinterpretation is not, *per se*, sufficient to withhold information. The Court maintained this position in spite of being presented with evidence of the increased likelihood for misunderstanding of the particular information. The Court suggested that such misunderstandings, where possible, could be remedied through an explanatory note upon release of the information.

The Court indicated that quantification of the harm, even in the form of a “ballpark” quantification would be required. It concluded that that evidence of reasonably expected results, along with a logical and compelling basis for accepting that evidence, would be required to establish proof of harm. The Court pointed to various categories of information that could be used to form this logical basis including: expert evidence; evidence of past treatment of similar information; and evidence of past treatment of similar situations. Internally held beliefs and speculative fears were deemed insufficient evidence.

Please consult our [guidance document](#) relating to section 39 for more information specific to the *ATIPPA, 2015*

ATIPPA, 2015 PRIVACY BREACH STATISTICS April 1 - June 30, 2018

During this reporting period (April 1 – June 30, 2018), the OIPC received 59 privacy breach reports from 20 public bodies under the *ATIPPA, 2015*. This is up from the 58 reports from 22 public bodies received in the previous reporting period.

If any public body would like the OIPC to deliver training regarding privacy breaches, or any other topic relating to access or privacy, contact our Office to arrange a time.

Summary by Public Body	
Central Health	1
City of St. John's	2
College of the North Atlantic	2
Dept. of Advanced Education, Skills and Labour	8
Dept. of Children, Seniors and Social Development	5
Dept. of Justice and Public Safety	4
Dept. of Municipal Affairs and Environment	1
Dept. of Service NL	7
Dept. of Transportation and Works	1
Human Resource Secretariat	3
Memorial University	7
Nalcor	1
Newfoundland and Labrador English School District	4
Newfoundland and Labrador Housing Corporation	3
Newfoundland and Labrador Legal Aid Commission	4
NL Centre for Health Information (NLCHI)	1
Town of Happy Valley-Goose Bay	1
Town of Paradise	2
Town of Portugal Cove-St. Philip's	1
Western Health	1

Summary by Type	
Email	22
Fax	3
In Person	10
Mail Out	14
Other	10

The OIPC has issued a [Tip Sheet](#) on avoiding inadvertent privacy breaches.