



ABOVE BOARD

A quarterly newsletter published by the Office of the Information and Privacy
Commissioner

Volume 14, Issue 3

July 2022

Contact Information

Office of the Information
and Privacy Commissioner

3rd Floor, 2 Canada Drive
Sir Brian Dunfield Building
P.O. Box 13004, Station A
St. John's, NL A1B 3V8

Telephone:

709-729-6309

Fax:

709-729-6500

Toll Free in Newfoundland
and Labrador:

1-877-729-6309

Email:

commissioner@oipc.nl.ca

www.oipc.nl.ca

This Issue:

- OIPC Hosting National Meeting in September
- APSIM 2022 a Success
- Section 30 (Legal Advice)
- Privacy Commissioner of Canada Update
- OIPC Alberta Update
- *ATIPPA*, 2015 Privacy Breach Statistics April 1 – June 30, 2022

OIPC Hosting National Meeting in September

Commissioner Harvey is looking forward to welcoming his counterparts from across the country this September as he hosts the 2022 Meeting of the Federal, Provincial and Territorial (FPT) Information and Privacy Commissioners and Ombudspersons.

These meetings provide an opportunity to discuss jurisdictional reports, legislative updates and joint resolutions, along with topics of mutual interest. This year's tentative agenda includes sessions on cybersecurity, developments in employee privacy, challenges to access to information, use of privacy invasive technologies by law enforcement, oversight of biometric data collection regulations, digital ID, and experience of frequent users of access to information, among other topics.

APSIM 2022 a Success

The virtual Access, Privacy, Security and Information Management (APSIM) conference was held from April 26 – 28, 2022. OIPC would like to take this opportunity to thank all presenters and participants, as well as all individuals and entities involved in planning the conference. This is a collaborative effort and it would not be possible without you!

This year we introduced a new subtheme with our APSIM conference: PIVOT – Privacy, Innovation, Virtual, Operations, Technology. The last few years have added numerous challenges to the areas of access, privacy, security, and information management. Because of these challenges, adaptability and flexibility has become an invaluable skill.

Conference attendees were offered two days of sessions and one day of workshops by presenters from across the country. Our topics, workshops, and sessions dealt with practical solutions to new and ongoing issues, as well as addressing emerging issues. A variety of sessions were offered on topics including enterprise security programs, privacy assessments, privacy management programs, duty to document, handling access requests for beginners, privacy tips and tricks, privacy in the health sector, and an education and careers panel.

The keynote on the first day of the conference was delivered by Carole Piovesan and David Goodis, both with INQ Law; the keynote on the second day was delivered by Greg Simmonds, with the Canadian Centre for Cyber Security. The workshops were delivered by Lori Collins from the College of the North Atlantic (topic: Creating IM Policies for Beginners) and Heather White, who is with the Public Service Commission (topic: Difficult Communication Dynamics, Mental Health and Dealing with Difficult Content).

The full agenda is available on the conference website at: [APSIM Conference 2022 – We Are Connected \(gov.nl.ca\)](#).

APSIM was presented in partnership with Memorial University and its conference services through the Signal Hill Campus. This conference is built by key stakeholders working collaboratively, pooling resources and ensuring the quality of content that you have come to expect. In particular, OIPC would like to thank Memorial University, Eastern Health, College of the North Atlantic, Professional Municipal Administrators, the City of Mount Pearl and the Government of Newfoundland and Labrador (especially their ATIPP Office) for their contributions to the planning of the conference.

Section 30 (Legal Advice)

Recently, OIPC issued two separate reports that examined section 30 (legal advice): [Report A-2022-010](#) and [Report A-2022-011](#). These two reports were the first reports issued following the decision in *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2022 NLSC 59. That decision, which is currently under appeal, found that this Office does not have an ability to compel records, for the purposes of examination in the course of an investigation, over which a public body claims that the solicitor-client privilege exception in section 30 applies. Despite that finding, the burden of proving that the applicant has no right of access to the records remains with the public body, even when section 30 is claimed. While context dependent, there may be ways other than providing the records to the Commissioner that a public body can use to meet its burden of proof. In the two above-noted Reports, however, the public bodies neither provided the records nor sufficient other evidence to discharge that burden. In both cases, outlined in more detail below, we were therefore forced to recommend the release of records to the complainants. The Commissioner found that this Office's inability to compel such records has led to significant gaps in his independent oversight capability. Both public bodies have subsequently applied to the Supreme Court for a declaration that they need not follow the Commissioner's recommendations in these Reports. Although the Court's review of the records would provide the necessary oversight, the process involved in having the Court conduct such a review is time consuming, burdensome, and contrary to the purpose of *ATIPPA, 2015* in that it undermines the timely and user friendly oversight process described in section 3(2)(f)(ii).

In Report A-2022-010, the complainant made an access request for records relating to the province's mandatory vaccination policy. The Department provided some records (22 pages) to the

complainant, but withheld the remaining 496 pages, claiming various exceptions under *ATIPPA, 2015*, including section 30. For some information, multiple exceptions to access were applied. During the complaint investigation, the Department provided only a small number of the withheld pages to the OIPC for review, but otherwise withheld 485 pages over which it claimed the section 30 exception applied. Due to the Department not providing sufficient alternative evidence to support its application of section 30, and the presence of at least one error in its application of section 30 in the records that were available to the Commissioner, the Commissioner concluded the Department had not met the burden of proving that section 30 applied, nor had the Department met the burden for any of the sections claimed that overlapped with section 30 information.

In Report A-2022-011, the complainant made an access request for records relating to an employment issue. The Public Body provided records to the complainant, but withheld some information claiming section 30. The withheld information consisted of emails between several parties, none of whom were lawyers, and it was unclear how solicitor-client privilege applied. During the complaint investigation, the Public Body refused to provide the withheld information to the Commissioner for review, and declined to take part in an alternative process of providing a description of the information and an explanation of how the exception applied. The Commissioner concluded that the Public Body had not met the burden of proving that section 30 applied, and recommended that the withheld information be provided to the complainant.

Report A-2022-10 states, at paragraph 40, expectations if records are not being provided for review:

[40] Our Office must adhere to the established place that solicitor-client privilege holds within our legal system. However, our Office is also required to ensure its legislated obligations and duties are met. In the absence of a review of the actual records, the appropriate method of providing meaningful oversight with respect to records over which solicitor-client privilege is claimed is to require evidence that would otherwise be required to establish such a claim before a court. This necessarily requires affidavit evidence, sworn statements, not consisting of broad or vague claims of privilege over page numbers, but consisting of sufficient details necessary to ground the claim of privilege. To accept anything less than evidence of this nature, in the absence of the actual records, would remove the very reason for which our Office exists.

Report A-2022-011 provides background on recent events impacting section 30:

[13] In case there was any uncertainty on the part of the public body about whether records could be disclosed to this Office, the MacDonald decision does not, however, require public bodies to withhold records. It only addresses whether our Office has the power to compel a public body to produce certain records to our Office for review.

[14] Even if the records are properly subject to solicitor-client privilege, the privilege belongs to the client, which is the public body (in this case, WGE). The head is therefore empowered to disclose them to our Office.

*[15] Accordingly, our Office requested that WGE provide us with the records in unredacted form for review. We advised WGE that section 100 of *ATIPPA, 2015* provides that solicitor-client privilege is not affected by production to the*

Commissioner. Therefore, our review does not operate as a waiver of any privilege. The request to provide the unredacted records was declined.

[16] While we can accept the decision of the public body to decline to provide us with the actual redacted text in accordance with the MacDonald decision, we must have something to review. The Act says, at section 43(1), and as discussed in further detail below, that the burden of proof to demonstrate the applicability of an exception rests with the public body and the MacDonald decision does not change that. While it may be short of the record or information itself, we must have something to assess rather than a simple assurance. We therefore proposed an alternative method of providing us with the information we needed to assess the application of section 30 and the claim of solicitor-client privilege: a description of the content of each redacted passage; details of the roles of the sender and recipient of the communication; and an explanation for why the exception applies. We asked that this description be accompanied by a signed statement from a solicitor who has examined the records stating that, in their opinion, the redactions meet the test for solicitor-client privilege.

[17] We proposed that alternative because, if the description were sufficiently detailed, it might have been a basis on which our Office could conclude whether the section 30 exception applies. This has proved to be an acceptable alternative in other cases. WGE, however, declined to follow that alternative. Without the records, and without any alternative information being provided by WGE to discharge its burden of proof, we must therefore proceed with this investigation on the basis of the information and evidence that we have before us.

The OIPC accepts that at this time, pending its appeal or the statutory amendment that both the Commissioner and the 2015 Statutory Review Committee have called for, the Commissioner cannot compel records over which public bodies have claimed the section 30 exception. However, the burden of proof still rests on the public body to demonstrate that the exception applies. The OIPC must have sufficient evidence to consider in order to conclude that this burden has been met. To simply rely on assurances is contrary to the nature of oversight that was established as a purpose of ATIPPA, 2015.

The OIPC encourages public bodies that are applying section 30 exceptions to continue to participate in the complaint resolution process and work with us to identify an appropriate means of providing evidence to discharge this burden.

Privacy Commissioner of Canada Update

On June 3rd, Daniel Therrien ended his term as Privacy Commissioner of Canada. As his term neared completion, then Commissioner Therrien took the time to participate in a podcast with Commissioner Harvey, discussing his eight-year tenure, some of the major issues he encountered as federal Commissioner, and what he believes are the issues that Canada will face in the future. To listen to the podcast, please click [here](#).

Philippe Dufresne has been appointed as the next Privacy Commissioner of Canada; his term started on Monday, June 27th. Mr. Dufresne previously served as the Law Clerk and Parliamentary Counsel of the House of Commons. As required under the *Privacy Act*, his appointment was approved by resolution of the Senate and the House of Commons.

OIPC NL looks forward to working with Commissioner Dufresne and wishes former Commissioner Therrien well.

OIPC Alberta Update

Change is also happening in Alberta. Jill Clayton, who has served as Alberta's Information and Privacy Commissioner since 2012, announced that she would not be seeking a third term. The Select Special Information and Privacy Commissioner Search Committee tabled its report with the Legislative Assembly of Alberta on May 24 recommending the appointment of Diane McLeod as Alberta's Information and Privacy Commissioner effective August 1, 2022. Diane is currently the Yukon Ombudsman and Information and Privacy Commissioner, a role she has held since 2013.

OIPC NL looks forward to working with Commissioner McLeod in her new capacity and wishes Commissioner Clayton well in her future endeavours.

ATIPPA, 2015 Privacy Breach Statistics April 1 – June 30, 2022

Between April 1 – June 30, OIPC received 48 privacy breach reports from 23 public bodies under *ATIPPA, 2015*. One intentional breach was reported by the Royal Newfoundland Constabulary. The breach involved a work call received on an employee's personal cell phone. As it is suspected that the number was provided by another staff member in error, members were reminded not to provide personal contact information to callers.

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