ABOVE BOARD

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This Issue:

NL Access to Information System – A Beacon of Transparency

There have been two recent pieces in the Globe and Mail describing Newfoundland and Labrador's struggles and ultimate success with the access to information system, resulting in our Provincial access system now being dubbed a "Beacon of Transparency."

While we are fortunate to live in a democratic society, protecting and maintaining the principles of accountability and transparency found in our access to information legislation is a continuous responsibility of citizens of the Province of Newfoundland and Labrador. Requesting records from public bodies informs individuals and helps ensure that government, public bodies, municipalities, and agencies, etc., keep those principles of accountability and transparency front of mind.

Newfoundland and Labrador went through a significant struggle with the access to information system approximately a decade ago with the enactment of Bill 29. Responses to access requests were subject to long extensions meaning they had no strict response timeline, there were fees associated with making requests, and when individuals received records, if provided records at all, there were often excessive redactions and the entire system failed. The Commissioner could not review claims of solicitor-client privilege or cabinet confidence when public bodies withheld records. Furthermore, recommendations in reports issued by the Commissioner were easily ignored. The principles of accountability and transparency had died and citizens were outraged. Citizens demanded better from government and they were heard

with the launch of the Statutory Review of the *Access to Information and Protection of Privacy Act* in 2014 which resulted in a complete overhaul of the access to information system. The committee in charge of the statutory review undertook extensive consultations with organizations, public bodies, individuals, interest groups, receiving over 60 written submissions, and holding public hearings over a 10-day period. The result was a new piece of legislation, the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*).

Below are excerpts from the Globe editorial: An island of transparency in a sea of government secrecy - The Globe and Mail, published July 8, 2023:

> ...
>
> *Newfoundland's access to information system was designed cleverly and elegantly. But the reason it works – and the reason it was designed well in the first place – is because it's underpinned by norms that dictate that public information belongs to citizens, and they should have access to it as quickly and simply as possible.*
>
> ...
>
> *Newfoundland's reset was sparked by public outrage over a 2012 access-to-information bill seen as egregiously secretive and tight-fisted, and which became such a political liability that the government executed an about-face. The indignation about what was kept from the public was further inflamed by massive delays and cost overruns in the Muskrat Falls project around the same time.*
>
> *There was also a happy accident of political cynicism: the party that updated the ATI system knew it was about to be cooling its heels on the opposition benches, so having a robust way to pry information out of the government suddenly looked politically advantageous.*
>
> *But the key element feeding all of these developments was a public that had had enough and forced a change in what was acceptable.*
>
> ...
>
> *The people with the power to change that calculation are the ones who were supposed to wield the clout in these systems all along: citizens who should be able to find out what their governments are doing, and who should feel entitled to be given that information and crankily indignant when it's kept from them.*
>
> *Amazing things can happen when government secrecy and manipulation tips over from being a useful instrument to an ugly liability. Canadians should cast a glance to that transparency beacon on the East Coast, make like the Rock and say enough is enough.*
>
> ...

ATIPPA, 2015 has tighter timelines for responding to access requests and no fees for filing a request, but one of the biggest changes was the novel "hybrid" power where the Commissioner would still issue recommendations, but if an public body wanted to disregard them, it would need to go to court and make its case. In practice, this meant recommendations would effectively become binding orders. Public bodies had to prove they made the right call and the onus was now on them.

Toby Mendel, Executive Director of the Centre for Law and Democracy, a Halifax-based, human-rights organization that scores and ranks the world's access laws, says that the new law rocketed Newfoundland and Labrador into 23rd place globally on the Centre for Law and Democracy's Global Right To Information rating scale. This is ahead of Sweden, Britain and New Zealand, and well ahead of any other Canadian jurisdiction (the federal government's law ranks 51st).

Below are excerpts from A political scandal in Newfoundland gave rise to the country's most transparent FOI system - The Globe and Mail, published July 3, 2023.

> ...
>
> *The Globe and Mail recently launched Secret Canada, an investigation into the country's broken access systems. The probe revealed that public institutions are routinely breaking these laws by overusing redactions and failing to meet statutory timelines, and that they face few – if any – consequences for ignoring precedents set by courts and appeal bodies.*
>
> *The story of Newfoundland and Labrador serves as a powerful example that access systems do not have to embrace the entropy and culture of secrecy that seems to pervade virtually every other province, territory and the federal government. In most jurisdictions, access only ever moves inexorably in one direction: toward greater delays, more redactions and less transparency for the public.*
>
> *Instead, a confluence of events – a scandal, a troubled and infamous infrastructure project and a lame-duck government – allowed the province to break from the same downward spiral traced by Canada's other access systems.*
>
> ...
>
> *Toby Mendel, executive director of the Centre for Law and Democracy, a Halifax-based human-rights organization that scores and ranks the world's access laws, says that Newfoundland's sweeping reforms were only possible because access to information had "political traction" – and because the government knew the law could benefit it, too.*
>
> *By the time the bill was passed, an election was less than six months away, and the current government's odds were bleak. In a poll conducted in June, 2015 by Abacus Data, the provincial Liberals held 42 per cent of voter support. The Progressive Conservatives trailed 25 points behind, at 17 per cent.*
>
> *"Governments which have a little bit more foresight understand that they're only going to be in government for a while, and then they're going to be in opposition," Mr. Mendel says.*
>
> *Opposition parties are frequent users of access systems, which they use to hold governments accountable; in this case, he says, the government knew enhanced access could be useful if it lost the election.*
>
> *The impact of Newfoundland's new law is remarkable.*
>
> ...

Since 2015, the number of access requests has grown significantly and encouragingly many of the requests are coming from individuals, not just the media, businesses or political parties. At the Province's first review of the law since 2015, various government institutions told the reviewing committee that they were now overloaded with access requests. Individuals using the access to information system is a good thing, showing that people are engaging and availing of their rights, however, we understand that the dedicated work of access coordinators and other public body staff are the real heroes who make this law function on a daily basis. The reality is that very few access requests result in complaints, which is a testament to their good work.

It's largely due to the citizens of the Province of Newfoundland and Labrador who demanded change that we now have one of the most modern and robust access to information systems anywhere. This is a great accomplishment for our Province and everyone who helped drive this change should feel proud. However, now it's about keeping the important elements of our law that make it so effective, and maintaining a strong foothold for access to information.

Note: Both articles by the Globe and Mail and only available if you have a subscription to the Globe and Mail and as such we are unable to provide the entire article.

Benefits of Proactive & Informal Release of Information

The purpose of *ATIPPA, 2015* is to facilitate democracy with section 3 outlining how:

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.

When reflecting on the purpose, the words that stand out are "ensuring", "increasing" and "accountable". Proactive release of information and informal release of information will help achieve these standards.

What is Proactive Release of Information?

Proactive release of information involves a public body making information publicly available, on its own accord, without an individual making an access to information request. This can involve a public body publishing certain information, reports, submissions or other documents on its website.

Many public bodies already proactively release information. For example, the City of St. John's, like many municipalities, publishes Public Council Meeting Minutes on its website, the Government of Newfoundland and Labrador publishes Ministerial Reimbursement Expense Reports, Cabinet Secretariat publishes Orders in Council, and the Newfoundland and Labrador Liquor Corporation publishes Annual Reports reporting on its financial performance. The Government of Newfoundland and Labrador has an Open Information website where individuals can browse through reports, updates, search for information on different topics, etc., although this website has unfortunately

not been maintained to its original extent for several years. These are all examples of public bodies engaging in proactive release.

Proactive release promotes government transparency and accountability by increasing the public's access to government information. This then allows individuals to participate and engage with government, helping facilitate democracy which all ties back to *ATIPPA, 2015*'s purpose.

In addition to promoting open and accountable government, proactive release of information can reduce the need for formal access to information requests if the information sought is already available publicly. Proactive release can also enhance the public's trust in government by providing more information about public bodies, what they do, and how they operate.

What is Informal Release of Information?

Informal release involves a public body receiving a request for information or even a verbal request and providing access to the relevant information outside of the formal access to information request process under *ATIPPA, 2015*.

Informal release may involve public bodies providing access to a copy of a requested record without processing the request under *ATIPPA, 2015* or even communicating requested information over the telephone in response to an inquiry. Informal release should generally not be used if the public body intends to redact information from what is being disclosed. If it is expected that redactions will be required, it is best to treat a request as a formal ATIPP request, which allows the requester to avail of the OIPC complaint process.

A public body may decide to set up an information release scheme where it identifies a significant number of requests for a particular type of information. Instead of processing the same type of request over and over, the public body can decide to informally release it. Informal release can be a simpler and more efficient process than responding to a formal access to information request under *ATIPPA, 2015*.

Ultimately proactive release and informal release should enhance the access to information system. Less formal access requests hopefully means that individuals are getting access to information more easily, with less waiting and with fewer obstacles. A more streamlined system can lead to a more satisfied outcome for the individuals making the access requests and for the public bodies that are responding to those access requests.

Reminders from OIPC Reports

Reasonable Search

A number of recent reports have dealt with the issue of reasonable search and some shortcomings of public bodies when they search for records in response to an access to information request.

It is generally understood that a reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the access request. Usually, the access to information and protection of privacy (ATIPP) coordinator is the employee conducting the search or coordinating the search with other employees.

The standard is reasonableness, not perfection, and it is possible to have conducted a reasonable search without locating every possible responsive record to an access request or without locating a specific record an applicant believes exists. However, under the duty to assist section (section 13 of *ATIPPA, 2015*), reasonable efforts must be made when searching for records.

If the OIPC receives a complaint involving a review of a public body's search for records, the OIPC will ask the following questions during the investigation.

- What steps were taken to identify and locate records?
- What areas were searched (paper files, databases, emails, off-site storage locations)?
- What types of searches were conducted (i.e. keyword search of email or database, manual search of paper files, etc.)?
- When the search took place?
- Who conducted the search?
- Why the public body believes no records/no further records exist?

These questions serve as a great checklist for ATIPP coordinators when conducting initial searches. Documenting efforts taken during a search will help public bodies show that it has fulfilled its obligations under *ATIPPA, 2015*. As well, if an applicant questions a search, the public body can easily explain the search conducted.

We would like to remind public bodies that we have a Practice Bulletin on Reasonable Search. Please review this guidance and feel free to contact our office with any questions.

Definition of Public Body

A number of recent reports have dealt with issues surrounding the applicability of *ATIPPA, 2015* to organizations and the definition of public body. The definition of public body is found under section 2(x) of *ATIPPA, 2015* as follows:

2(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 other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility, 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 B;

Whether an organization is a public body and whether records are within an organization's custody or control are separate but interrelated considerations when dealing with access to information requests.

In some instances an access request is made to a public body for records that one would think belong to that public body but actually belong to another entity with connections to or association with that public body, and that entity may or may not be considered a public body under *ATIPPA, 2015*. The following two Reports are examples of this where requests were made to Memorial University, a public body, for records related to associated organizations. The question became whether those associated organizations are public bodies in their own right and if not, does Memorial have custody or control over the records in question.

Report A-2023-20 involved a request to Memorial for records related to discounts, reduced fees, credits, and registration at Memorial's Childcare Centre. The Commissioner concluded that the Childcare Centre is not a public body under *ATIPPA, 2015* and that the requested records were not within Memorial's custody or control.

In Report A-2023-029, Memorial received an access request related to pool chemicals purchased for the Aquarena. Memorial is a public body under *ATIPPA, 2015* and the Aquarena is part of the Memorial University Recreation Complex Inc. (MURC). In response to the access request, Memorial stated that MURC is not a public body under *ATIPPA, 2015* and furthermore that Memorial did not have custody or control of the requested records. Both the definition of public body as well as the issue of custody and control had to be examined. Unlike with the previous example, where child care was not a "departmental concern" of Memorial, MURC is more closely involved with the core mandate of Memorial because of its connection with the School of Human Kinetics and Recreation and its involvement with varsity athletics. In the end, however, the Commissioner agreed that MURC did not meet the definition of a public body under *ATIPPA, 2015* and after examining all the relevant factors, the Commissioner determined that while there was some degree of connection between MURC and Memorial, on a balance of probabilities, ultimately the records were not in the custody or control of Memorial.

Report A-2023-025 examined the definition of public body under *ATIPPA, 2015* when an access to information request was made to Executive Council seeking information about communications between the Lieutenant Governor, employees of Government House, a member of the public, and a private company. The Executive Council asserted that Government House was not a public body pursuant to *ATIPPA, 2015*, however the Commissioner disagreed stating that Government House is clearly covered by *ATIPPA, 2015*, section 2(x)(i) "a branch of the executive government of this province". Examining the issue of custody and control, the Commissioner determined that ultimately Government House is no different than Confederation Building in that the work performed therein is part of the provincial government. Among other considerations, the primary difference is that employees work directly for Government House, however, they are still employees of the Government of Newfoundland and Labrador and are being paid out of provincial funds. The Commissioner reasoned that since Government House employees are provincial employees, then the provincial government would have to retain custody and control over all documents created or received by these employees. Pursuant to the *Management of Information Act*, the Government of Newfoundland and Labrador does have custody and control of all documents created and received by the employees of Government House. Logically, given the connections between Government

House and Executive Council, the ATIPP Coordinator for Executive Council should be able to conduct the appropriate search and retrieve any responsive records. The Commissioner recommended that Executive Council perform the search for records.

Workplace Investigation – Employee vs. Elected Official

In Report A-2023-034 the issue of "employee" was examined in relation to section 33 of *ATIPPA, 2015* (information from a workplace investigation). The key issue was the employment status of the named elected official and if they were considered an employee of the Town for the purposes of section 33 of *ATIPPA, 2015*.

A workplace investigation is an investigative process leading to a finding on whether or not there was misconduct on the part of an employee in the workplace that may give rise to progressive discipline or corrective action. Whether an individual is considered an "employee" is important as section 33 provides for a mandatory right of access to relevant information created or gathered for the purpose of a workplace investigation if the applicant is a party to an investigation.

The Supreme Court of Newfoundland and Labrador discussed the issue of elected officials' status as employees for the purposes of *ATIPPA, 2015* in *Kirby v. Chaulk, 2021 NLSC 86*. In its decision, the court stated:

> *[69] The meaning of employee as it has been interpreted under ATIPPA does not support that it includes elected members to the legislature. Nor does the meaning of "employee" as it has been interpreted under the common law support such an interpretation. When I consider the purposes of ATIPPA, including that it limits access to information where the proper functioning of government is at stake, the extension of the meaning of employee to include elected members of the legislature is strained, at best, and not supportable.*
>
> *[70] ATIPPA defines "employee" under section 2(i), as it relates to a public body, as "includes a person retained under a contract to perform services for the public body". Although "member" is not defined under ATIPPA, the Act nonetheless distinguishes between "elected officials" and "employees". For example, section 3(1)(b) of ATIPPA, in the statement of the purposes of the Act, states:*
>
> > *3. (1) The purpose of this Act is to facilitate democracy through*
> >
> > *...*
> >
> > *(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; Emphasis added.*
>
> *[71] The reference to "elected officials" and "employees" in the statement of purposes of ATIPPA under section 3(1)(b) supports that the legislation distinguishes between these two categories of individuals. The distinction between "elected official", "officer" and "employee" in the statement of the purposes of Act, also supports that for the purposes of interpretation of the ensuing sections, a distinction is to be made between individuals under the Act that are referred to as "employees" versus an "elected official". The distinction also supports that the extent to which there may be increased "transparency" in government may depend on whether the subject of the access request is an*

"employee", "officer" or "elected official". What may be appropriate for an employee may not be appropriate for an elected official.

An elected official of a municipality does not get the same protections under *ATIPPA, 2015* as those afforded to an employee. Investigations involving elected officials do not constitute a "workplace investigation" as defined by *ATIPPA, 2015* and therefore section 33 would not apply.

Yukon Information and Privacy Commissioner – Privacy Compliance Audit Involving Student Personal Information

The Office of the Yukon Information and Privacy Commissioner (IPC) conducted a privacy compliance audit of the Yukon Department of Education (the Department) to assess the Department's use of student personal information on internet platforms. Images and videos of children and youth going about their daily activities in school is sensitive personal information and considering the possible privacy risks associated with using internet platforms and social media, the IPC felt that it was appropriate to examine the Department's policies, procedures, practices, and information security.

The IPC determined that some Yukon schools collect, use and disclose photos, videos and audio of students on internet platforms, including social media, as part of their outreach to parents and the community. Under Yukon's *Access to Information and Protection of Privacy Act* (*ATIPPA*), these images are considered the students' personal information.

The IPC found that the Department is sharing information about students in ways that are not compliant with Yukon's *ATIPPA*. The audit found:

- that the Department could not demonstrate that it has authority to collect, use or disclose students' personal information for the purpose of posting it to internet platforms;
- that the Department did not demonstrate that it is protecting students' personal information in accordance with its obligations under ATIPPA;
- that some Department employees are using their work contact information to create and maintain social media pages and may be collecting, using and disclosing student personal information without authority under the ATIPPA and contrary to the Department's policies and procedures;
- that the Department does not currently have a department-specific 'privacy breach protocol' or a 'privacy management program' that is sufficient to meet the requirements of the *ATIPPA* and the Regulation.

The IPC made six recommendations.

Recommendation 1

The Department must immediately cease the collection, use and disclosure of students' personal information on internet platforms until it has clearly established that it has authority under the ATIPPA to do so.

Recommendation 2

The Department must, within a reasonable timeframe, purge all students' personal information from its official internet platforms.

Recommendation 3

If the Department wishes to resume collecting, using and disclosing students' personal information on internet platforms, then it must conduct a 'Privacy Impact Assessment' (PIA) to address and mitigate the associated privacy risks. This work effort must include an assessment of the unique privacy risks associated with internet platforms, as well as meaningfully addressing and mitigating these risks through appropriate policy and procedure.

Pursuant to section 11, the Department may be required to submit a copy of its PIA to our office for review, though our office remains available on request, to provide comments on non-mandatory PIAs.

Recommendation 4

The Department must undertake a review of all school social media identified in the excel spreadsheet provided to our office to assess for any privacy breaches that may have occurred involving the unauthorized collection, use or disclosure of students' personal information by Department employees.

Recommendation 5

The Department must immediately notify all its employees of their obligations with respect to the collection, use or disclosure of students' personal information under the ATIPPA.

Recommendation 6

If the Department wishes, as part of its current work effort, to resume collecting, using and disclosing students' personal information for the purpose of posting in on internet platforms, then it must address the issues identified in this Privacy Compliance Audit including, but not limited to, the following.

a) Develop and implement an accountability framework that clearly outlines roles, responsibilities and oversight with respect to the collection, use and disclosure of students' personal information on internet platforms.

b) Ensure that the above framework is outlined in written policies and procedures.

c) Ensure that the above written policies and procedures are periodically evaluated for effectiveness and audited for compliance.

d) Establish a data management framework that ensures students' personal information is collected, used and disclosed in compliance with the ATIPPA at all stages of the data lifecycle (i.e., collection, use, disclosure, retention, destruction).

In June 2023, the IPC indicated that the Department accepted the IPC's recommendations #3, 4, 5 and 6.

To read the full privacy compliance audit please follow this link.

ATIPPA, 2015 Privacy Breach Statistics April 1 – June 30, 2023

During the second quarter of 2023 (April 1 – June 30, 2023), the OIPC received 39 privacy breach reports from 17 public bodies under *ATIPPA, 2015*. This is a noteworthy decrease from the 59 breaches reported during the previous quarter.

Email breaches continue to be the most common types of breaches and in this past quarter account for over half the breaches. When sending emails remember to confirm the full email address before you hit send, delete pre-populated addresses and use the bcc field for mass electronic mail outs.

Summary by Public Body	
City of Mount Pearl	2
City of St. John's	2
College of the North Atlantic	5
Department of Children, Seniors and Social Development	2
Department of Digital Government and Service NL	5
Department of Fisheries, Forestry and Agriculture	1
Department of Industry, Energy and Technology	1
Department of Justice and Public Safety	2
Eastern Health	1
Labour Relations Board	1
Memorial University	5
Nalcor Energy	1
NL Hydro	3
Royal Newfoundland Constabulary	2
Town of Pilley's Island	1
Treasury Board Secretariat	3
Workplace NL	2