ABOVE BOARD

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

VOLUME 10, ISSUE 4 NOVEMBER 2018

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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)

OIPC REMINDERS AND UPDATES

Right to Know Week 2018

This year Right to Know Week was celebrated in Canada from September 24–30. In recognition of its importance, the OIPC created a number of fun activities including a Word Jumble and Word Search.

The OIPC also hosted a public panel discussion to discuss strengthening the right to know without hindering decision-making processes. The panelists included Commissioner Molloy, Rob Antle (CBC), Associate Professor Kelly Blidook (MUN), and Rosemary Thorne (MUN).

Finally, the OIPC held a public information session on the *ATIPPA, 2015* at the Ross King Memorial Library in Mount Pearl.

The OIPC would like to thank everyone who participated in this year's events.

New Tools on OIPC Website

Several new tools have been added to the OIPC website including:

1) a video tutorial providing instructions on how to make an Access Complaint;
2) an Access to Information Complaint Checker which, through a short series of questions, allows individuals to determine whether the OIPC can investigate their complaint; and
3) an Estimated Response Time Calculator which assists individuals in determining the latest date on which a public body must respond to an access to information or correction of personal information request.

These tools are aimed at the general public but can also serve as a resource for Coordinators when responding to inquiries from applicants.

Practice Tip — Time Extensions and Disregards

We encourage Coordinators to reach out to our Office if they are contemplating submitting an application for a time extension or disregard. We are available to provide guidance as to what is required for each application and, possibly, offer advice which may assist Coordinators in finding alternative courses of action.

ATIPP COORDINATORS' TOOLKIT

The OIPC has released a quick-reference guide to be used throughout the process of responding to access to information requests. Its intent is to assist Coordinators in building their access to information request skill-sets and proficiency. It will increase efficiency while ensuring Coordinators are aware of, and meet, the legislative obligations imposed upon their respective public bodies.

The importance of the role of the Coordinator and the deference which should be given to the role was recognized by the 2014 ATIPPA Statutory Review Committee, along with the need for proper training and education:

> *ATIPP coordinators must be regarded as the access and privacy experts in their public body [...] all coordinators must be provided the training and opportunity to develop the necessary expertise to properly apply the provisions of the Act.*

The toolkit provides:

1. A flowchart of the timelines of an access to information request. This document can be posted and referred to throughout the access to information request process so that important deadlines are not overlooked.
2. Simple, abridged descriptions of the exceptions to access contained in the *Act*. This section will allow Coordinators to identify exceptions that may apply to the records they are examining. If a Coordinator believes from the description given that the exception may apply, the Coordinator should then refer to the full language of the provision as contained in the *Act* and consult the OIPC website, and the Access to Information Policy and Procedures Manual for further guidance as to the exceptions' applicability, and if required, research previous decisions of the OIPC on the OIPC website or CanLII.
3. Quick tips and an explanation of the process for requesting disregards and time extensions. The discussion of time extensions and disregards should assist Coordinators in understanding and moving quickly through those processes and ensuring that all the required information is provided.
4. Two checklists which Coordinators can copy and place in each of their Complaint files (both access and privacy) to ensure that their interactions with our Office are conducted in accordance with legislative obligations and timelines. The checklists will help Coordinators keep track of the progress of a file at a glance and allow Coordinators to confirm that all essential steps have been taken.
5. A list of resources available from the OIPC and the ATIPP Office.

The OIPC envisions this document being a desktop resource which Coordinators can easily draw upon. The document contains live links which will immediately direct Coordinators to the relevant resource, Guidance Document, or email address.

REMINDER

Data Privacy Day is January 28, 2019

TRANSITORY RECORDS

A transitory record is defined in the *Management of Information Act* as "a government record of temporary usefulness in any format or medium having no ongoing value beyond an immediate and minor transaction or the preparation of a subsequent record."

Transitory records are needed only for a limited period of time. Transitory records may be used to complete a routine task, to prepare an ongoing document or as copies of reference, for example. Transitory records are records for which there is no legislative requirement to maintain, or which are not required to be maintained for administrative or operational functions such as finances, audits, or human resources. These records can exist in paper or electronic format.

The identification of transitory records cannot be done based on record type or format. For example, not all draft papers are transitory records; if those records are retained as evidence of the decision-making process they are not transitory. Similarly, not all copies are transitory records. Copies may need to be kept to understand related records or provide context. Furthermore, a post-it note or a text message may or may not be transitory depending on the content, rather than the format.

Transitory records are subject to access to information requests if they exist at the time that the request is received. Once an access to information request is received, no responsive records may be destroyed regardless of any records retention schedule or policies that are in place. This prohibition extends to transitory records. Employees must be made aware of this obligation. It is an offence pursuant to section 115 of the *ATIPPA, 2015* to destroy or erase a record with the intent to evade an access to information request.

Outside of access to information/correction of information requests and the related appeal periods, transitory records can and should be destroyed, in accordance with the public body's records retention schedule and policies, when they are no longer needed. However, if personal information in a transitory record was used to make a decision that directly affects the individual, section 65 of the *ATIPPA, 2015* requires public bodies to retain that information for at least one year.

The management of transitory records, including their destruction, is crucial in enabling public bodies to easily determine whether responsive records exist, the extent/volume of the records and where the records are located. This promotes efficiency, makes it easier to establish a reasonable search and allows public bodies to avoid unnecessary costs for storing and processing transitory records.

Transitory Records and Instant Messaging

In Report A-2018-020 the Commissioner held that instant messages that document/record government business are not transitory records. Context and content of records govern whether

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TRANSITORY RECORDS (continued)

they are transitory. The medium of communication is, on its own, never determinative of whether a record is transitory.

The Office of the Chief Information Officer's Instant Messaging Directive was recently updated in response to consultations held with this Office during the investigation leading up to this Report. The Directive now states:

> *Instant messages are subject to legal, audit and responsive to access to information requests and must be managed appropriately. Therefore, where they record government business activities, instant messages must be retained. The information owner must ensure it is converted to a recordkeeping format and managed appropriately.*

The Directive mandates:

i. instant messages must be treated like any other information resource and managed according to the *Management of Information Act*;
ii. individuals are responsible for managing the information they create, receive, or transmit in instant messages;
iii. instant messages are subject to legal, audit and responsive to *ATIPPA, 2015* requests;
iv. instant messages that do not record government business are transitory, and must be deleted as soon as possible, unless an information request has been received; and
v. it is the responsibility of the information owner to transfer instant messages to a proper government recordkeeping system where required.

As noted in Report A-2018-020, once an access request has been received the "preservation of records is particularly critical where they involve BBMs, PINs or similar forms of electronic text communication." The Commissioner further noted that "immediacy of action" is required where instant messages comprise part of an access request. The duty to assist requires Coordinators to take immediate action on receipt of an access request to ensure records are preserved, including "the halting of any manual or automatic destruction measures until the responsive records had been gathered".

For further information please consult our Transitory Records guidance document.

Right to Know Week 2018 panelists Rob Antle, Donovan Molloy, Q.C., Rosemary Thorne and Kelly Blidook discussed how we might strengthen the right to know without hindering decision-making processes.

SECTION 30 AND SETTLEMENT PRIVILEGE

In Report A-2018-022 the Commissioner discussed claims of settlement privilege as they relate to records responsive to an access request. The decision in this matter was the first opportunity presented to this Office to decide whether public bodies can rely on settlement privilege to withhold records pursuant to the *ATIPPA, 2015.*

The Commissioner was faced with two lines of argument related to settlement privilege: i) that section 30(1) should extend to protect settlement privilege; and ii) that settlement privilege is a common law right which applies as an exception to disclosure outside of the *ATIPPA, 2015*.

Does Section 30 Encompass Settlement Privilege as an Exception to the Right of Access?

Access to Information legislation in some other jurisdictions contains language which is broad enough to encompass settlement privilege as an express exception. For example, in Ontario's legislation the language used is "a record … prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". This is a broad provision that the Ontario Court of Appeal found was expansive enough to incorporate settlement privilege.

In contrast, the *ATIPPA, 2015* is more concise:

> *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.*

This Office found that settlement privilege is separate and distinct from the solicitor-client privilege referenced in section 30(1)(a) and while there will be some overlap between records protected by litigation privilege and those afforded settlement privilege, not all settlement records will be captured under litigation privilege. Communications with the other party regarding settlement are shared for the purpose of arriving at a resolution, and clearly the settlement itself, should one be reached, is something that both parties are privy to and is therefore not encompassed by litigation privilege.

As for section 30(1)(b) the language employed is much narrower than that in other jurisdictions where settlement privileged records have been captured. A "legal opinion" is a discrete and distinct subset of the work of a lawyer and does not include settlement documentation.

Is Settlement Privilege a Free-Standing Exception under *ATIPPA, 2015*?

Deciding whether common law settlement privilege is a freestanding exception requires an assessment of whether the *ATIPPA, 2015* constitutes an exhaustive code. In Report A-2018-022 the Commissioner found that the *Act* is an exhaustive code. In reaching this conclusion, the Commissioner pointed to six indicators:

i. Express Indication of Legislative Intent

The *ATIPPA, 2015* contains an expansive purpose section which is limited only by specific exceptions enumerated in the *Act*. Common law privileges were clearly contemplated in the

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SECTION 30 AND SETTLEMENT PRIVILEGE (continued)

creation of the legislation and have been limited to exceptions explicitly included in section 30. Furthermore, there are other exceptions which contemplate records relating to settlement, outside of the concept of privilege.

ii. Legislation Implements a Specific Policy Choice

The comments of the Minister in Hansard, the Terms of Reference provided to the ATIPPA Review Committee, and the draft bill written by the Committee and passed by the House, all point to a clear policy choice that the *Act* was intended to serve as a comprehensive, exhaustive and complete code governing access to information.

iii. To Permit a Common Law Exemption would Defeat the Intention of the Legislature

Settlement privilege is a class-based privilege. Some exceptions in *ATIPPA, 2015* are harms-based, while others are class-based. This is an important element of *ATIPPA, 2015* and it represents a clear legislative choice. Rather than exempt a record from disclosure because it fits into a certain class of records, harms-based exceptions apply when disclosure can reasonably be expected to cause harm.

Certain records, including records of communications between the public body and the opposing party, whether in the course of litigation or settlement negotiations, might be exempt in accordance with section 35(1)(g) on the basis that disclosure could prejudice the financial or economic interests of the pubic body. For this reason, 35(1)(g) is the exception that is most relevant to situations where common law settlement privilege might otherwise apply.

iv. Legislation Offers Comprehensive Scheme

Section 8(2) allows for access to records subject to severing in accordance with the limited exceptions under the *Act.* There is no provision in section 8 to allow for the withholding of information on any other basis.

v. Legislation Offers an Adequate Solution

Settlement privilege has been recognized in law for centuries. Based on the comprehensive review conducted by the Review Committee, including the examination of comparable statutes across Canada and internationally, it is unlikely that this was simply forgotten during the drafting of the *Act*. Rather, information generated in the settlement process is subject to the *ATIPPA, 2015* if it is in the control or custody of a public body and may be protected from disclosure through a combination of other exceptions within the *Act*, but only to the extent necessary to prevent harm to the public body.

vi. Specific Provision Displaces General Common Law

Section 3(1)(c) mandates that the public right of access should only be infringed by limited and specific exceptions listed in the *Act.* Section 8 operationalizes this right and together they leave

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SECTION 30 AND SETTLEMENT PRIVILEGE (CONTINUED)

no room for a common law provision not listed in the *Act*. Having a specific provision speaking to privilege (section 30) would be redundant if the common law also applied. By explicitly listing those common law privileges contained in section 30, the remaining privileges not listed were implicitly excluded.

Conclusion

Section 30(1) of *ATIPPA, 2015* does not encompass settlement privilege and common law settlement privilege does not exist as a free-standing exception overriding the *ATIPPA, 2015*. It is possible, however, for other exceptions in *ATIPPA, 2015* such as section 35(1)(g), depending on the content of the records, to be claimed to protect some of the same information that may otherwise have been protected by settlement privilege.

NEWFOUNDLAND AND LABRADOR v. *NLTA*

In March, 2016 a journalist requested the "name, job title and corresponding taxable income for the 2015 tax year for all English School District employees earning more than $100,000." The Newfoundland and Labrador English School District made a decision to disclose the information subject to any appeal under the *ATIPPA, 2015* by any notified, affected third party. An appeal was commenced by the Newfoundland and Labrador Teachers' Association (NLTA) directly to the Supreme Court, Trial Division to prevent the disclosure in accordance with section 40. The appeal was allowed. Subsequently, the Province appealed that decision to the Court of Appeal.

The NLTA argued that names are personal information and the disclosure of such information in conjunction with position and salary information engages the presumption that the disclosure would be an unreasonable invasion of privacy (section 40(4)) which cannot be rebutted.

The Province argued that section 40(2)(f) mandated the disclosure as the information is about a third party's position, function or remuneration of employees or members of a public body.

The Court of Appeal held that the name of a third party who occupies a position is information about the third party's position in accordance with section 40(2)(f) and the disclosure of that information is primarily concerned with the transparency of information surrounding the spending of public funds. The Court went on to find that there is significant public interest in the information and the public has a "legitimate and significant interest in the identities of the people who receive public money" both to promote meaningful participation in the democratic process and to ensure that public bodies are held accountable for their actions. The Court also focused on the employment and pay equity, and political neutrality in the civil service.

The Appeal Court ruled that while the privacy interests at stake are real, they are outweighed by the public interest in the information. "Section 40(2)(f) is meant to ensure that members of the public can know who is on the public payroll, what their duties are, and how much they are being paid" and once the information is captured by section 40(2), section 40(5) is inapplicable.

ATIPPA, 2015 PRIVACY BREACH STATISTICS July 1 - September 30, 2018

During this reporting period (July 1 — September 30, 2018), the OIPC received 59 privacy breach reports from 19 public bodies under the *ATIPPA, 2015*. This is on par with the 59 reports from 20 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	
City of Mount Pearl	1
City of St. John's	3
College of the North Atlantic	3
Dept. of Advanced Education, Skills and Labour	7
Dept. of Children, Seniors and Social Development	3
Dept. of Education and Early Childhood Development	2
Dept. of Justice and Public Safety	1
Dept. of Service NL	7
Eastern Health	9
Human Resource Secretariat	2
Memorial University	3
Nalcor	3
Newfoundland and Labrador English School District	1
Newfoundland and Labrador Housing Corporation	3
Newfoundland and Labrador Legal Aid Commission	3
Public Service Commission	2
Town of Glenburnie-Birchy Head-Shoal Brook	1
Workplace Health, Safety & Compensation Review Division	2
Workplace NL	3

Summary by Type	
Email	22
Fax	3
In Person	5
Mail Out	13
Other	15
Technical Malfunction	1

The OIPC has issued a Tip Sheet on avoiding inadvertent privacy breaches.