



# ABOVE BOARD

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## Right to Know Week 2023

Like many of our counterparts across Canada, we celebrated and highlighted the importance of access to information during Right to Know Week (RTK Week) which took place during the week of September 25, 2023.

We kicked off the week by extending a friendly challenge to our province's Access to Information and Protection of Privacy (ATIPP) Coordinators in the form of our Crossword Puzzle and True or False Quiz. Congratulations to Angela Moyse, the coordinator for the Royal Newfoundland Constabulary on winning our random prize draw! While the challenge is over, for anyone who may have missed out, feel free to test your knowledge by visiting these activities on our [website](#). We are also happy to hear friendly RTK challenges occurred elsewhere, with the Town of Portugal Cove - St. Philips drawing upon our True or False Quiz to issue their own RTK challenge to staff!

We also issued a [News Release](#) highlighting the importance of freedom of information and raising awareness of how essential access rights are to our democracy.

It is important to note that while the media, businesses and political parties use the access to information system regularly, individual Newfoundlanders and Labradorians are filing more and more access to information requests. Individuals are the most engaged category of applicants in our access to information system, on average making up more than 60% of the requests filed each year. This is extremely positive, reflecting an engaged population and a well-functioning access to information system.



Towards the end of the week, on September 28, 2023, known as International Right to Know Day, Commissioner Michael Harvey spoke on the importance of access to information laws in discussions with Adam Walsh on CBC Radio's [The Signal](#) (at the 09:35 mark), and with Linda Swain on VOXM radio's [News Talk](#) (September 28<sup>th</sup> Episode at the 26:00 mark).

While Newfoundland and Labrador (NL) has one of the most modern and robust access to information systems, not only in Canada but also worldwide, we must continue to protect and maintain the principles of accountability and transparency found in our access to information law.

For those wanting to know more about Right to Know Week, the Information Commissioner of Canada has further information available on their [website](#).

## Annual Meeting - Federal, Provincial and Territorial Information and Privacy Commissioners and Ombudspersons

The annual meeting of the federal, provincial and territorial Information and Privacy Commissioners and Ombudspersons took place in Québec City, Québec from October 3-6, 2023.

### General Overview

All provinces and territories as well as the Information Commissioner of Canada and the Privacy Commissioner of Canada shared jurisdictional updates highlighting developments over the past year. A number of working groups including the Health Information working group, the Digital Identity working group and the Legal Working Group also presented updates.

Presentations on Privacy in the Age of Artificial Intelligence (AI) and Investigative Genetic Genealogy helped emphasize how privacy is changing and how privacy challenges are evolving. AI is driven by information, therefore, privacy laws and legislation addressing AI will become more important to help protect personal information. Journalist Tom Cardoso from the Globe and Mail discussed access to information challenges across the country, stating that some processes have become too complex or overly legalistic. While the public does have an interest in accessing information, decisions by public bodies to withhold information can leave people believing that government is not working for them or serving functional purposes. In order to restore a sense of trust in public institutions, Canadians must be able to rely upon an accurate and truthful source of facts and evidence about present and historical events.

A total of three joint resolutions were signed by the federal, provincial and territorial Information and Privacy Commissioners and Ombudspersons, one relating to access to information and two relating to privacy.

### Joint Resolution to Enhance Access to Government Information

The federal, provincial and territorial Information Commissioners and Ombudspersons signed a joint resolution aimed at enhancing and reinforcing the public's right to access government-held information titled [Facilitating Canadians' access to government records to help restore trust in our institutions](#).

Freedom of information regimes across Canada have faced persistent challenges, underscoring the need to implement efficient mechanisms for providing access to records, including through proactive disclosure.

It has never been more important for Canadians to have access to official government records, including historical records, if we are to maintain confidence in our democratic institutions. In our modern digital world, disinformation and misinformation spread very quickly. Regulators are again calling upon their respective governments to modernize policies and information management practices to advance transparency and ensure the preservation and dissemination of Canada's documentary heritage, so that all Canadians can better understand the nation's past and present, and together chart a future path towards reconciliation. Regulators are also calling upon federal, provincial and territorial governments to ensure the creation and retention of records to document historical facts and decisions.

While the NL access to information laws are among the strongest in Canada, the provincial government has indicated that amendments to *ATIPPA, 2015* are on the way. Therefore, we call upon the Government of Newfoundland and Labrador to preserve and strengthen our legislation, and ensure that our province continues to have the strongest access to information system in Canada.

In the [news release](#) our Office issued in relation to this resolution, Commissioner Harvey stated:

Newfoundland and Labrador has been widely recognized and lauded as a leader in Canada when it comes to access to information, but there are areas where we can improve. I hope we can continue to earn our reputation as a beacon of transparency among Canadian jurisdictions.

### **Joint Resolution on Privacy of Young People**

The federal, provincial and territorial Privacy Commissioners and Ombudspersons signed a joint resolution dealing with the privacy of young people, titled [\*Putting best interests of young people at the forefront of privacy and access to personal information\*](#).

Youth have a right to privacy across all sectors. Privacy authorities say that governments and businesses must put young people's interests first by setting clear limits on when and how their personal information may be used or shared.

This resolution focuses on the responsibility of organizations across all sectors to actively safeguard young people's data through responsible measures, including minimized tracking, regulated data sharing, and stringent control over commercial advertising. It also calls on organizations to safeguard their rights to access, correction, and appeal regarding personal data.

The resolution notes that while the digital environment presents many opportunities for young people, it has also brought well-documented harms, including the impact of social media on physical and mental health. Regulators say that special protections are essential for younger generations, because their information can live online for a long time, and may become a life-long reputational burden.

The resolution also calls on organizations to adopt practices that promote the best interests of young people, ensuring not only the safeguarding of young people's data, but also empowering them with the knowledge to navigate digital platforms and manage their data safely, and with autonomy. Initial steps include identifying and minimizing privacy risks at the design stage. Other recommendations include making the strongest privacy settings the default; turning off location tracking; and rejecting deceptive practices and incentives that influence young people to make poor privacy decisions or to engage in harmful behaviours.

In the [news release](#) our Office issued in relation to this resolution, Commissioner Harvey stated:

Young people are growing up in a digital world that continues to change around them at a rapid pace. It is our responsibility to them to ensure that our privacy laws and practices be updated to match this technological evolution and keep the rights and best interests of children at the forefront.

### **Joint Resolution on Employee Privacy**

The federal, provincial and territorial Privacy Commissioners and Ombudspersons signed a second joint resolution dealing with privacy, titled [Protecting Employee Privacy in the Modern Workplace](#).

This resolution addresses the recent proliferation of employee monitoring software and how it has revealed that laws protecting workplace privacy are either out-of-date or absent altogether. In our increasingly digital work environments, there needs to be robust and relevant privacy protections in place to safeguard workers from overly intrusive monitoring by employers.

The privacy authorities called on governments to develop or strengthen laws to protect employee privacy. They also urged employers to be more transparent and accountable in their workplace monitoring policies and practices.

Employee monitoring has undergone substantial expansion in its use, technological capabilities and application in recent years. Many employers have accelerated the use of monitoring technologies as they seek new ways of tracking employee's performance and activities on-premises or remotely, whether during work or off hours.

Although some level of information collection is reasonable and may even be necessary to manage the employer-employee relationship, the adoption of digital surveillance technologies can have disproportionate impacts on employees' privacy and can significantly impact an employee's career and overall well-being, including heightened stress levels and other adverse mental health effects, not to mention reduced autonomy and creativity.

The resolution calls for a collective effort from governments and employers to address statutory gaps, respect and protect employee rights to privacy and transparency, and ensure the fair and appropriate use of electronic monitoring tools and AI technologies in the modern workplace.

In the [news release](#) our Office issued in relation to this resolution, Commissioner Harvey stated:

Privacy in the workplace is important to employee morale, safety and mutual trust. Laws that protect employee privacy rights are essential in a world where technological advancement offers employers easy-to-use monitoring tools that can be overly invasive, harmful, and contrary to the notion of privacy as a basic human right.

## **OIPC Annual Report Highlights**

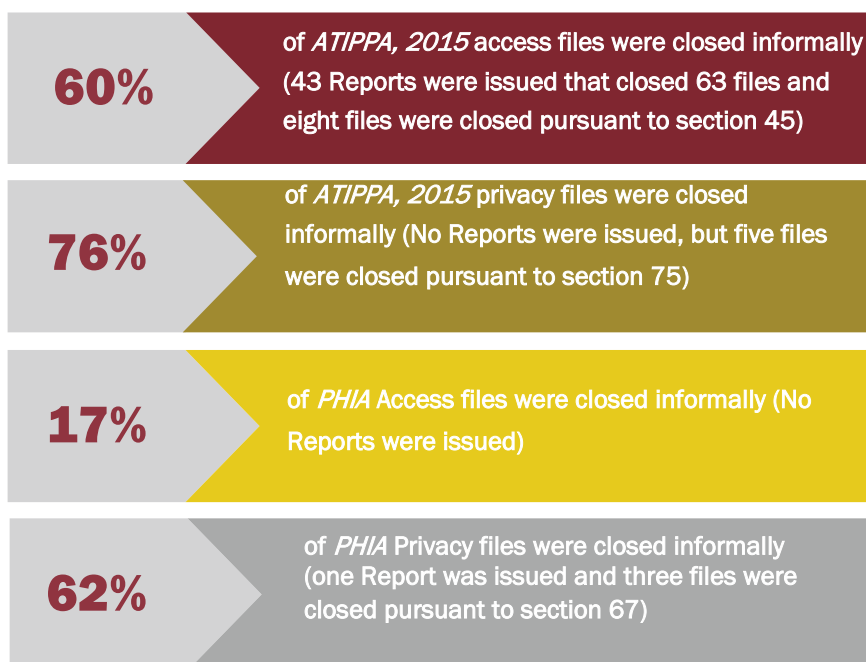
OIPC issued its 2022-2023 Annual Report, which is available on our [website](#).

### **Increased Complaints and Statistics on Reports**

In the 2022-2023 reporting period, the number of complaints our Office received increased considerably. We received 217 complaints, approximately 66 percent greater than the previous

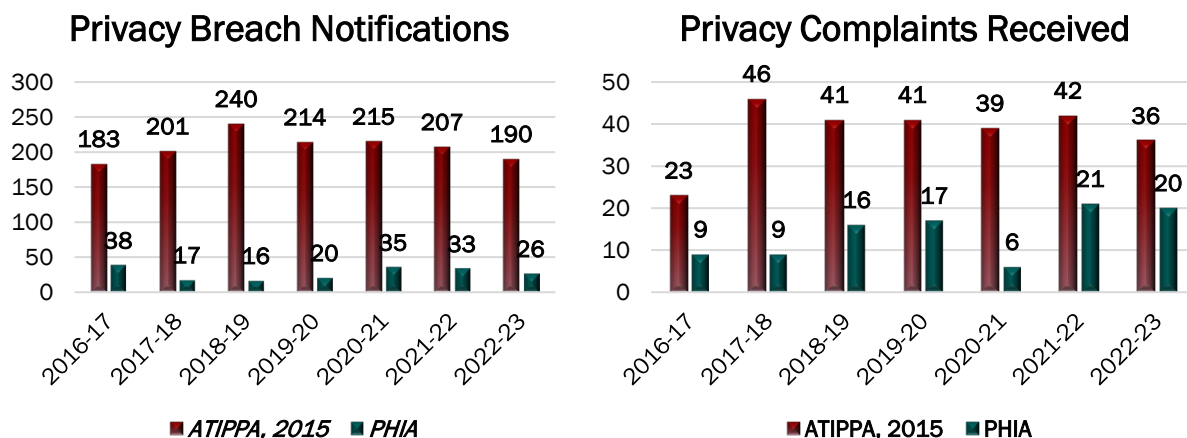
year. It is difficult to know exactly what may be driving this increased rate of complaints, however, one reasonable hypothesis is that the complaint level corresponds to a sustained increase in the overall number of access requests. If true, this is, in general, a positive thing. The access request rate is an indication of an engaged public. While the number of complaints, which is dominated by individuals rather than the media, opposition or other types, may in part be an indication of dissatisfaction with the responses that individuals get from public bodies, it may also be an indication of the awareness and efficacy of the oversight function.

In 2022-2023, this Office issued 43 reports that closed 63 access investigation files with the majority of our complaints continuing to be resolved by informal resolution. There were no access reports under *PHIA*, no privacy reports under *ATIPPA, 2015* and only one privacy report under *PHIA*.



### Overview of Breach Reporting

Under both *ATIPPA, 2015* and *PHIA*, public bodies and custodians are required to maintain the security of personal information and personal health information in their custody or control. Further, *ATIPPA, 2015* and *PHIA* require public bodies and custodians to notify OIPC in the event that personal information or personal health information has been improperly accessed, disclosed, stolen, lost, or disposed of. In 2022-2023, public bodies reported 190 breaches to this Office under *ATIPPA, 2015*. In the same period, custodians reported 26 breaches under *PHIA*. These figures represent modest decreases from the 207 breaches reported under *ATIPPA, 2015* and 33 breaches reported under *PHIA* in 2021-2022.



Of the breaches reported to this Office under *ATIPPA, 2015*, the majority (56.8%) continue to involve personal information being sent to the wrong person through email. This is followed by personal information being sent to the wrong addressee through the mail (16.3%).

While rare, intentional privacy breaches – where an individual (usually an employee of the public body or custodian) has willfully collected, used, or disclosed personal information or personal health information – are of particular concern to this Office. In 2022-2023, public bodies and custodians reported eight such breaches.

### Systemic Issue

This Office does not normally raise systemic issues, but finds it necessary to comment on repeat and persistent issues regarding the administration of *ATIPPA, 2015* by municipalities in this province.

Section 105 of *ATIPPA, 2015* requires the Commissioner, in its Annual Report, to note, among other things:

- persistent failures of public bodies to fulfil the duty to assist applicants, including persistent failures to respond to requests in a timely manner;
- the administration of this Act by public bodies and the Minister responsible for this Act; and
- other matters about access to information and protection of privacy that the Commissioner considers appropriate.

Section 113 requires the Minister responsible for *ATIPPA, 2015* to report to the House of Assembly on systemic and other issues raised by the Commissioner.

The past year has seen numerous complaints to OIPC regarding municipalities, totaling 77 complaints against 21 municipalities (59 access and 18 privacy under *ATIPPA, 2015*). Several municipalities have been the subject of multiple complaints, with one the subject of 24 complaints and another named in 11 complaints.

The issue with municipalities, however, is not the number of complaints. A spike in complaints can happen to any public body when there are contentious matters ongoing or a very active and determined applicant. Our concern is that some municipalities struggle to comply with their basic statutory obligations, in some cases simply ignoring correspondence and emails from this Office during the complaint investigation process.

While the ATIPP Office and the Department of Municipal and Provincial Affairs do admirable work in outreach and training, the issue appears to be one of capacity. In many cases, small municipalities only have one person available to perform the duties of Coordinator, and that same individual fills many roles, often carrying the entire administrative workload of the Town. Basic information management practices may be lacking, along with other capacity issues, not to mention elected officials who do not understand or wish to cooperate with the Town's *ATIPPA, 2015* obligations.

The majority of access complaints involved deemed refusals, as municipalities fail to respond to access requests within the 20 business days set by section 16. In virtually all cases, the intervention of this Office was necessary for complainants to receive a response from the municipality and responses took considerably longer than the 20 business days the Act provides. Typically, there has also been a failure by the municipality to request from this Office an extension of the 20-business day deadline as well, even though approval of such requests is granted in the vast majority of cases. Privacy complaints brought to this Office have included complaints about councils discussing personal information at public council meetings and disclosing personal information through tabled documents and in minutes. Communications between municipalities and residents have also been sources of improper disclosures of personal information.

While the ATIPP Office under the Government of Newfoundland and Labrador has a position dedicated to providing support and assistance to municipalities and has provided considerable assistance to these smaller public bodies, it appears that more resources are needed. In almost all cases, persistent failures by municipalities can be attributed to a lack of awareness of *ATIPPA, 2015* and their municipality's obligations, a lack of training for staff, and a lack of resources – staff and time – to handle access to information requests. That being said, we acknowledge the capacity issues inherent in the municipal sector that contribute to these circumstances, which make it difficult to resolve these issues within current municipal structures.

### **Update on Statutory Review of *ATIPPA, 2015* and *PHIA***

The 2020 Statutory Review of *ATIPPA, 2015* was completed by Chair the Honourable David Orsborn in the previous reporting period when he recommended 102 statutory amendments, proposed 23 administrative measures and added 13 suggestions in a Report to the Minister of Justice and Public Safety. As of the conclusion of this reporting period, his Report remains with the Minister of Justice and Public Safety where we understand his officials are studying the recommendations.

The first statutory review of *PHIA* was initiated in 2016 and issued its Report in 2017, though no amendments were brought forward as a result. On February 8, 2023, the Department of Health and Community Services announced that INQ Consulting/INQ Law had been appointed to assist the provincial government in the second statutory review of *PHIA*. OIPC met with INQ twice during the reporting period as it began its work, and we made a written submission. Our submission, along with others, is available on the *PHIA* Review [website](#). It is our understanding that INQ has provided its report to the Minister of Health and Community Services.

### **Tip of the Hat to Rod Hynes**

We would like to tip our hat to one of our former staff members Rod Hynes! Rod has been working in the access and privacy field for over a decade and has plenty of experience in dealing with challenging situations.

Rod Hynes initially came to OIPC on a secondment from the Office of the Citizens' Representative in 2010 and made important contributions to our work. In 2016, Rod took a position with Eastern

Health as a Regional Manager at the Information, Security and Privacy Office. This was Rod's first time stepping into an ATIPP Coordinator role and he gained valuable experience in managing the release of information under both *PHIA* and *ATIPPA, 2015*.

In 2017, Rod then became the ATIPP Coordinator of the Department of Natural Resources (NR), a Department known for its high number of access requests. Rod continued working in this Department throughout its expansion and transformation into the Department of Industry, Energy and Technology (IET) in 2020. During Rod's tenure there, NR/IET consistently had one of the highest number of access requests, yet was a public body with one of the lowest complaints filed with our Office. Rod fostered good relationships with applicants and they trusted his judgement in providing them with information as well as applying exceptions to those records. In the seven years that Rod worked there, he processed over 1,000 ATIPP requests.

In 2022, Rod then moved into the role in which he finds himself today. He is now the Municipal Access and Privacy Analyst with the ATIPP Office. In this role, Rod provides municipalities with ATIPP resources, training and trouble shooting. It is clear that Rod has continued to build strong relationships through his work with the hundreds of municipalities in our province. When a town is in "ATIPP trouble", the question of "who are you going to call?" is easily answered – Rod Hynes!

To any towns out there who are struggling with access to information requests, we cannot stress enough, Rod's been through it all, he knows his stuff, he is one of the most approachable people out there, and he is just a phone call away. The municipalities in this province are in good hands. We tip our hat to you Rod!

### Update: Solicitor and Client Privilege (Section 30 Legal Advice)

On September 7, 2023, the Newfoundland and Labrador Court of Appeal ruled that the Commissioner cannot require a public body to provide certain records to this Office during an access to information investigation. The Court's decision concluded that *ATIPPA, 2015* does not contain "sufficiently clear, explicit and unequivocal" language to allow the Information and Privacy Commissioner to require that public bodies provide him with records during an investigation of an access to information complaint where the public body has claimed that the records contain information protected by solicitor and client privilege.

Commissioner Michael Harvey explained that the ability to review such records is necessary in order to ensure that the government and public bodies are being open and transparent as required by law. The ability of the Commissioner to demand to examine documents during an investigation that a public body claims are subject to solicitor and client privilege – that is, legal advice – is central to how OIPC performs its independent oversight function. If OIPC cannot examine the documents to ensure that the privilege applies, how can requesters have confidence in the access to information system? Without sufficient evidence that the exception has been appropriately claimed, OIPC will be unable to ensure that it is not abused and misapplied to documents that are not legal advice.

Commissioner Harvey stated that the decision results in a return to Bill 29, a situation where there is a gap at the core of OIPC's critical oversight function of the access to information system. There was a consensus in 2015 when *ATIPPA, 2015* was passed that this was unacceptable. Now, as then, a legislative fix is required to ensure continued transparency and oversight within public bodies. This is why in a September 19, 2023 [news release](#) Commissioner Harvey called on



government to restore OIPC's authority to review solicitor and client records with a simple legislative amendment. As we are waiting on Minister Hogan to introduce amendments to *ATIPPA, 2015*, Commissioner Harvey noted:

The timing couldn't be better. Minister Hogan now has an opportunity to put *ATIPPA, 2015* back on track by making sure that it contains the necessary clear, explicit, and unequivocal language to allow the OIPC to resume this important part of our mandate. Doing so will ensure that Newfoundland and Labrador remains a leader in Canada and in the world in providing its citizens with the level of transparency and accountability for which we have become known.

Under *ATIPPA, 2015*, public bodies must meet the burden of proof when claiming an exception to access and this is still true for section 30. The Court of Appeal decision did not say that public bodies should not or must not provide records to the Commissioner for review when there is a claim of solicitor and client privilege at issue. Rather, the Court said that the Commissioner cannot require a public body to do so. Public bodies can still provide records where there has been a claim of solicitor and client privilege to OIPC for review during an access complaint and public bodies may find this the easiest and most straightforward way of satisfying the burden of proof. Furthermore, OIPC informally resolves the majority of access complaints received, and the ability to review such records during a complaint will aid in efforts to resolve the complaint informally, as complainants are able to rely on OIPC to verify the exceptions. *ATIPPA, 2015* has built-in protection for these types of records already as section 100 of *ATIPPA, 2015* specifically states: "[t]he solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner."

Should public bodies decide not to provide records for which they have made a claim of solicitor and client privilege to OIPC for review during a complaint, it is still the public body's responsibility to meet the burden of proof for establishing that section 30 applies. Other ways a public body may be able to meet that burden is through providing OIPC with an affidavit. An affidavit can take different forms; however, it should always contain sufficient detail explaining how the records meet the section 30 exception and be sworn by someone familiar with the records and the elements of solicitor and client privilege.

OIPC will work with public bodies to help ensure an affidavit contains sufficient information to enable OIPC to review the claim of section 30. However, reviewing the records directly is the most straightforward and direct way of assessing an exception to access.

### *ATIPPA, 2015* Privacy Breach Statistics July 1 - September 30, 2023

During the third quarter of 2023 (July 1 – September 30, 2023), OIPC received 48 privacy breach reports from 26 public bodies under *ATIPPA, 2015*. This is an increase from the 39 breaches reported during the previous quarter. Similar to last quarter, email breaches continued to be the most common types of breaches, accounting 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	
Central Zone (NL Health Services)	2
City of St. John's	2
College of the North Atlantic	2
Department of Children, Seniors and Social Development	3
Department of Digital Government and Service NL	5
Department of Education	1
Department of Fisheries, Forestry and Agriculture	1
Department of Health and Community Services	1
Department of Immigration, Population Growth and Skills	1
Department of Industry, Energy and Technology	1
Department of Justice and Public Safety	4
Eastern Zone (NL Health Services)	1
Executive Council	1
Legal Aid NL	1
Memorial University	2
Newfoundland and Labrador English School District	5
Newfoundland and Labrador Housing Corporation	1
NL Hydro	3
Office of the Chief Information Officer	1
Public Service Commission	1
Town of Arnolds Cove	1
Town of Burnt Islands	1
Town of Port au Port East	1
Treasury Board Secretariat	3
Western Zone (NL Health Services)	2
Workplace NL	1

