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

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

ABOVE BOARD

A QUARTERLY NEWSLETTER PUBLISHED BY THE
OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
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This edition highlights the new Open Government Initiative, the Bill 29 Review Committee, information on dealing with sections 27 & 28 of the *Access to Information and Protection of Privacy Act (ATIPPA)*, and a recent ruling involving solicitor-client privilege and legal billings. It also offers a summary of OIPC Reports related to the ss. 27/28 *ATIPPA* discussion and Data Privacy Day, as well as our regular features, including an updated Resource List, which includes the new Open Government Initiative web links.

Reports: A-2013-008/009/012

Each of these Commissioner’s Reports involve section 27 of the *ATIPPA*, the mandatory exception protecting against disclosure of information harmful to the business interests of a third party. Section 27 received a significant amendment as a result of Bill 29, so these Reports should serve as guidance to public bodies for how the Commissioner’s Office interprets the new language in the provision. Formerly a three part test, currently section 27 only requires that public bodies prove that one part applies to the information in order to withhold it.

In Reports A-2013-008 (Government Purchasing Agency) and A-2013-009 (Memorial University), Applicants were denied access to requested records, in whole or in part, because the Public Bodies were of the view that disclosure of the records would be contrary to section 27(1)(c). In each case, prior to issuing a decision to the Applicants, the Public Bodies had informed the third parties of the request for information as per section 28 of the *ATIPPA*, and in each case the Third Party advised the Public Body that they objected to the release of the information to the Applicants.

In Report A-2013-012 (Eastern Health), the Public Body determined it would release the requested information, but notified two affected Third Parties, both of whom filed requests with the OIPC to have the information redacted on the basis of section 27(1)(c). Whether argued by the Public Body or a Third Party, the burden of proof (section 64) resides clearly with the entity invoking section 27. In all three cases the

Commissioner found that neither the Public Bodies in the first two Reports, nor the Third Parties in the latter Report had met the burden of proving that section 27 should apply, and therefore the recommendation was for the information in question in all instances to be released.

Eastern Health and the Government Purchasing Agency agreed to follow the Commissioner’s recommendations. The Third Parties did not appeal the decision of the Public Bodies to follow our recommendations, and as a result both matters were concluded. In the case of Report A-2013-009, Memorial University agreed to follow the Commissioner’s recommendations, however Corporate Express Canada (the Third Party, doing business as Staples) has filed an appeal with the Supreme Court Trial Division. The Commissioner has filed as an intervenor, as has Dicks and Company, the access to information Applicant



The issue to be decided will ultimately involve a judicial interpretation of section 27 as it now exists. This will be an important decision for our Office, as well as for all public bodies, because it will likely result in a ruling that will determine how section 27 is interpreted going forward. No matter what the outcome, we will also have to see whether any of the parties proceed to take the matter to a higher court, should they be dissatisfied with the ruling at the Trial Division. How this case is decided may ultimately inform the review of the *ATIPPA* as well, in terms of where third party business interests stand in the overall scheme of the Act.

ATIPPA Sections 27/28 Review

Reports A-2013-008, A-2013-009 and A-2013-012 marked the first Commissioners reports on the new incarnation of section 27 since the *Bill 29* amendments to the *ATIPPA*. Given the recent similar experiences with the use of section 27, the OIPC would like to highlight some useful things for ATIPP Coordinators to keep in mind when reviewing records they believe to fall within this exception.

1. Whether a Public Body or a Third Party believes that section 27 might be applicable, and therefore information ought to be withheld, the entity holding that belief and making that claim bears the burden of proving its application under section 64;
2. To satisfy the burden of proof set out in section 64, the Commissioner has held that detailed and convincing evidence is required in order to prove there is a reasonable expectation that the harm section 27 aims to protect against will occur if the information is not withheld;
3. The Commissioner has further elaborated in recent Reports A-2013-008, A-2013-009 and A-2013-012, to note that detailed and convincing evidence would be evidence that a) establishes a reasonable expectation of probable harm (beyond merely possible or speculative); b) shows a clear cause and effect relationship between the disclosure and the alleged harm; c) demonstrates the probable harm to be more than trivial or inconsequential; and d) hold the likelihood of harm to be genuine and conceivable;
4. Given these comments, if a Public Body or Third Party intends to successfully invoke section 27, the entity taking on that burden must be able to present evidence meeting this standard;
5. Where a Public Body receives a request for information and believes that section 27 might be applicable and notifies the Third Party of that request (under section 28), if the Third Party does not want the information released it should be able to present convincing argument to the Public Body to this effect;
6. If such convincing evidence is not available, then the Public Body should not invoke a claim of section 27;
7. Instead, the Public Body ought to notify the Third Party that it intends to release the information
8. It then falls to the Third Party to submit a Request for Review objecting to the release to the OIPC;
9. Such a Request for Review prohibits the release of the information by the Public Body until the Review has been completed and transfers the burden of proof to the Third Party;
10. The Third Party is in the best position to make the argument and provide the required detailed and convincing evidence, particularly if the Public Body does not have the necessary evidence to support a claim of section 27.

Bill 29* Committee/Statutory Review of *ATIPPA



At the beginning of 2014, it was announced that a statutory review of the *ATIPPA* (including the *Bill 29* amendments to the *Act*) would be moved forward from its scheduled occurrence next year. As part of this plan, a committee was to be assembled to review the *Bill 29* changes that broadened classes of information the government can withhold from disclosure, as well as the overall state of the province's *ATIPPA*. The *Bill 29* Review Committee panel was announced this month, and will be chaired by Clyde Wells, who served as Liberal premier from 1989 to 1996 and Chief Justice of the Newfoundland and Labrador Supreme Court of Appeal from 1999 to 2009. Other panelists are Jennifer Stoddart, who served as the Privacy Commissioner of Canada from 2003 to 2013, and journalist Doug Letto, who retired as senior producer of the CBC's *Here & Now* in late 2013.

Public Engagement Minister Steve Kent has said of the review, "Every single line of our access to information and protection of privacy legislation is up for review, and we anticipate that the review committee will do a very thorough analysis of each and every line." The premier has set no deadline for the completion of the committee's report, but has indicated that he hopes it can be done relatively quickly, dependent upon the work at hand.

The OIPC is encouraged by the government's commitment and actions and looks forward to a best-in-class access to information law, which we hope to see as a result of this review of the *ATIPPA*.

Open Government Initiative

On March 20th, the Premier of Newfoundland and Labrador, Tom Marshall, and Steve Kent, the Minister Responsible for the Office of Public Engagement, announced a government initiative focused on providing more access to information and data, while also offering expanded opportunities for input into government decision-making and policy development.

The initiative is part of the worldwide project, Open Government Partnership, which aims to secure concrete commitments from governments, making them more open, accountable, and responsive to people – with the ultimate goal of improving the quality of government programs, services and decisions.



This province’s Open Government Initiative is built upon four key pillars:

1. [Open Information](#) — The proactive release of government information;
2. [Open Data](#) — The release of government data, with an open licence (free of charge for anyone to use/reuse for any purpose);
3. [Dialogue](#) — Seeking input and feedback on programs, services and matters of public policy through a range of public engagement activities; and
4. [Collaboration](#) — Working with partners, organizations and communities to achieve shared goals through the sharing of knowledge and resources to address issues, build consensus and identify potential solutions.

The OIPC is encouraged by the Government of Newfoundland and Labrador’s Open Government Initiative. Commissioner Ed Ring released a statement in support of the initiative, saying:

“I was very pleased today to note government’s commitment in the Speech from the Throne to proceed with its Open Government Initiative. This policy initiative represents a bold move towards the best, most progressive thinking in the world today on how governments should operate, by engaging citizens to a greater extent than ever before in the decisions that affect them. The only way this initiative can succeed in a meaningful way is through enhanced disclosure of information on a proactive basis...”

The OIPC is committed to providing whatever advice and encouragement it can to government as it works towards fulfilling its Open Government Initiative goals, due to be completed by late fall 2014.

In the coming weeks, a process of public engagement seeking input and suggestions on open government initiatives is expected to be undertaken. We encourage all public body Access & Privacy Coordinators to share your ideas, insights and expertise in this process in an effort to best develop Newfoundland and Labrador’s first Open Government Action Plan.



We also remind you to be cognizant that the initiative will help you, as employees of the public service, to better engage with residents and assist in the delivery of innovative government policies and programs that address the needs of all Newfoundlanders and Labradorians.

For more information, check out: Open.gov.nl.ca

OIPC in Court



Court Decision on Records of Legal Billing and Solicitor-Client Privilege

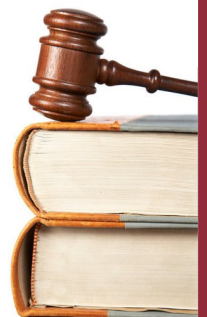
On Christmas Eve, 2013, Chief Justice David Orsborn of the Supreme Court Trial Division issued a decision on an appeal by Commissioner Ed Ring – *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 NLTD(G) 185. This appeal was in relation to a decision by the College of the North Atlantic to refuse an access to information request on the basis of a claim of section 21 (solicitor-client privilege).

As a result of amendments to the *ATIPPA* in Bill 29, the Commissioner can no longer review a refusal of access on the basis of a claim of section 21. The options available to a person who has been denied access on that basis are to appeal the matter directly to the Trial Division on their own behalf, or to ask the Commissioner to appeal the matter. In this case, the individual who was refused access asked that the Commissioner appeal the refusal. This is the first instance of the Commissioner going forward with such an appeal subsequent to the Bill 29 *ATIPPA* amendments.

The Applicant had sought access to invoices for legal services rendered to the College in connection with litigation he was engaged in with the College. The College had previously provided redacted copies of such invoices when requested by the Applicant, usually revealing the total amount of the invoice while withholding detailed information. In this case, however, the request was refused in its entirety. In his ruling, Chief Justice Orsborn confirmed the procedure which must be followed in the conduct of such Appeals. The College provided the unredacted records to the Court in a sealed envelope, to be reviewed by the Judge alone, and the parties were to make representations as to the existence and extent of the application of the solicitor-client privilege exception over the records.

At one point in the proceedings, the College requested that it be able to make further submissions to the Court in private and in the absence of the other parties. Furthermore, the College requested that Chief Justice Orsborn provide, in advance of hearing such representations, an assurance that any arguments it might present in private not form part of the public record or appear in any order or written decision, and should any parties become aware of the argument that they be subject to a confidentiality order. The College asserted that these measures were necessary to ensure that Counsel for the College would be able to present its full case, further asserting that Counsel for the College risked breaching a rule of court if it presented its argument in open court. The specific rule of court was not identified. Chief Justice Orsborn denied the College's request. One factor in his decision was that the request to present a submission in private concerned the College's ability to make a specific argument, rather than the protection of privileged information. Chief Justice Orsborn went on in paragraph 17 to emphasize the importance of the open court process, especially in light of the fact that the only review available in this case was to the Court, rather than through the Commissioner.

Chief Justice Orsborn then proceeded to rule on the matter before him, which was the denial of access to records on the basis of a section 21 claim. He described the records as invoices sent to the College from a law firm, containing "dates, initials, time spent, description of services, hourly rates, total fees by lawyers and details of disbursements." He reviewed the case law surrounding solicitor-client privilege in Canada, noting the application of solicitor-client privilege to lawyer's bills in particular, in which he relied on jurisprudence to conclude that lawyer's bills are presumptively privileged, allowing that the presumption may be rebutted. He further concluded while the Applicant (requester) may be in a position to ensure that evidence of context is put before the court, it is the Judge reviewing the matter who must decide whether the presumption is rebutted. In this case, the requester was not even a party to the Appeal, so any evidence of the context was put forward by the Commissioner and the College.



OIPC in Court continued...

In considering the matter as a whole, Chief Justice Orsborn commented that context is a crucial factor in determining the existence and extent to which solicitor-client privilege may apply to a record:

[33] [...] Accordingly, information considered privileged at one time may not necessarily be so considered at a different time and in different circumstances. This is particularly the case when the information is administrative or peripheral information such as information related to fees and billings.

Chief Justice Orsborn then reviewed and considered the facts and circumstances surrounding this particular access request, in which the records pertain to an ongoing legal matter which has not yet been to trial. He determined that “it is at least possible that an assiduous inquirer could infer from the level and timing of expenditures whether CONA has instructed its solicitor to expend efforts in resolving the matter before trial, or alternatively, if on the eve of the trial, in preparing for trial.” He continued in this vein with his analysis, finally concluding that in the context of this particular matter, “the presumption of solicitor-client privilege over the legal invoices for legal services received [...] has not been rebutted.” His finding, therefore was that the records were subject to solicitor-client privilege, and the appeal was dismissed.

Despite this conclusion, Chief Justice Orsborn emphasized that “this determination is based only on the context and circumstances existing at the time of the request and at the time of the appeal. Should that context and circumstances change, the decision on rebuttal of presumption may be different.”



OIPC Events and Activities

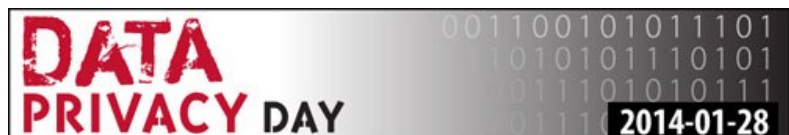


Data Privacy Day (DPD) 2014
January 28, 2014

Data Privacy Day (DPD), celebrating the impact technology is having on privacy rights and underlining the importance of valuing and protecting personal information, was marked on January 28th, 2014. All public body Access & Privacy Coordinators should have received a package with promotional material as part of our office’s educational role. The hope is that these materials, which offer tips and information for protecting personal data in various settings, will be displayed in areas where there is both internal and external/general public traffic.

We will also be launching a poster contest in the spring that highlights the themes of DPD and is aimed at school children and promoting the concept of privacy rights and what that means to them. Winning entries will be used in future promotional materials for our office. Stayed tuned for more information.

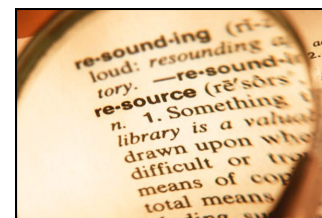
For more information on all of the above, please visit:
<http://oipc.nl.ca/events.htm>



Resource List



- <http://www.atipp.gov.nl.ca/info/schedule.html> (ATIPPA, Regulations and Fee Schedule)
- <http://www.atipp.gov.nl.ca/> (ATIPP Office)
- http://www.atipp.gov.nl.ca/publications/ATIPP_Policy_and_Procedures_Manual.pdf (Access to Information Policy & Procedures Manual)
- <http://www.atipp.gov.nl.ca/info/Protection-of-Privacy-Policy-and-Procedures-Manual.pdf> (Privacy Policy & Procedures Manual)
- <http://www.oipc.nl.ca/accessreports.htm> (OIPC Commissioner's Reports on Access to Information)
- <http://www.oipc.nl.ca/privacyreports.htm> (OIPC Commissioner's Reports on Privacy)
- <http://twitter.com/#!/OIPCNL> (OIPC Twitter)
- http://www.priv.gc.ca/information/pub/gd_em_201305_e.asp (Privacy Emergency Kit)
- <http://www.open.gov.nl.ca> (Open Government Initiative)
- <http://open.gov.nl.ca/information> (Open Information)
- <http://opendata.gov.nl.ca> (Open Data)
- <http://open.gov.nl.ca/dialogue> (Dialogue)
- <http://open.gov.nl.ca/collaboration> (Collaboration)



Access & Privacy News

Two leaders in access and privacy have recently moved on from their positions:

Dulcie McCallum, Review Officer (Commissioner) for Nova Scotia's Freedom of Information and Protection of Privacy Act since 2007 has decided to step down after receiving word from the government that she would not be reappointed.

Gary Dickson, who served as Saskatchewan's Information and Privacy Commissioner since 2003, retired at the end of January. Special thanks go to Gary Dickson for visiting this province at the invitation of Commissioner Ring in the run-up to proclamation of Newfoundland and Labrador's *Personal Health Information Act (PHIA)*. Gary took the time to travel here and share his extensive knowledge and experience on the subject of the protection of personal health information with a wide range of stakeholders in this province.

Best Wishes to Dulcie and Gary in the Future!

Kudos to Ali Askary, Director of Information Management and Protection and the Department of Child, Youth and Family Services for being high achievers in *ATIPPA* compliance. Mr. Askary had approached the Commissioner's Office to seek approval for a time extension while dealing with a challenging access to information request. Even though we approved a time extension of two weeks in relation to part of the request, Mr. Askary was ultimately able to get the entire response to the applicant by the original due date, without using the extended time period we had approved. Good work!

