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"The manner in which public bodies respond to our involvement is a key factor in how the public measures the true commitment of the government and its agencies to the principles and spirit of the legislation."

*OIPC Annual Report  
2009-2010*

# ABOVE BOARD

A QUARTERLY NEWSLETTER PUBLISHED BY THE  
OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER  
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This third edition of our newsletter marks our first time expanding readership to incorporate all public bodies. For those new readers, this newsletter aims to educate and inform about issues involving privacy and access to information, and about your roles and responsibilities in relation to the **Access to Information and Protection of Privacy Act (ATIPPA)**. The idea for this newsletter was born out of the response we received from our **ATIPPA Public Bodies Survey**, and the first two editions were targeted only at municipalities. From this edition forward our intent is to include content useful to all public bodies, and where appropriate, direct certain content at specific public body sectors. This third edition offers summaries of two recent OIPC Reports and Right to Know Week, with the bulk devoted to the background and summary of the recent Newfoundland and Labrador Court of Appeal decision regarding the Commissioner's authority to review claims of solicitor-client privilege. Our fourth edition will be published in January 2012.



## Summary of OIPC Reports

**Report A-2011-013** - The Applicant made two applications to the Town of St. George's, one for access to records related to revenue, costs, jobs and land involved in the proposed regional landfill site and the other for tender documents for the same project. The Town claimed no responsive records existed for either request. The Commissioner determined the Applicant had established a reasonable basis for concluding that records may exist that were responsive to his access requests. The Commissioner subsequently determined that the Town had failed in its duty to assist the Applicant by failing to conduct reasonable searches for the records. "Reasonable search" was defined as one conducted "by knowledgeable staff in locations where the records might reasonably be located." The Town had argued that these records were not in their custody or control because the project was administered by a regional board. The Commissioner considered several factors, including whether the subject matter was within the Town's mandate, and whether the record was being held by an officer or employee in relation to his/her duties, and determined that the Town may indeed have had custody or control of responsive records. The Commissioner recommended the Town conduct the proper searches and release any records

found to this Office and the Applicant in accordance with the ATIPPA.

**Report A-2011-014** - The Applicant made an application to the Town of St. George's for access to records related to a specific item of the Town's 2009 audited financial statement. The Town extended the time to respond under section 16 of the ATIPPA and then failed to respond within this extended period. The Town is considered to have refused access to the records as per section 11 of the Act. When asked to explain this deemed refusal, the Town stated it would have to re-engage its accountant to find the responsive records. The Commissioner determined the Town had failed in its duty to assist the Applicant by extending the time frame to respond without just cause and by failing to conduct a reasonable search for the records. The extension of time was also found to be related to a decision by the Town (noted in their Council meeting minutes) to refuse to deal with "nuisance" access requests. The Commissioner noted that there was "no provision in the ATIPPA to allow such a course of action." The Commissioner recommended the Town conduct a proper search and release any records found to the Applicant and to this Office in accordance with the ATIPPA.

## Recent Court of Appeal Decision

On October 26th, 2011, the Newfoundland and Labrador Court of Appeal (NLCA) released an important decision which confirms the authority of the Commissioner's Office to review records where a public body has denied access to an applicant based on solicitor-client privilege (section 21). Below is a summary of the background of the case, along with an excerpt from the NLCA verdict and the reaction and position of the OIPC in relation to this recent development.



### Case History:

In January of 2009 the Department of Justice refused access to records requested by an access to information applicant, claiming that the records were subject to solicitor-client privilege. The applicant requested that the Commissioner review the decision to deny access to the records. The Commissioner commenced his investigation, but the Department of Justice refused to comply with a request by the Commissioner to allow him to review records which the Department of Justice had refused to provide to the applicant. The Commissioner maintained that he required access to the records in order to carry out his mandate under the ATIPPA. The Attorney General for Newfoundland and Labrador responded in March of 2009 by seeking a declaration from the Court that the Commissioner was not entitled to review records of a public body where there has been a claim of solicitor-client privilege.

In February of 2010 Justice Valerie Marshall of the Supreme Court Trial Division rendered her decision in which she declared that section 52 of the ATIPPA does not oblige the Department of Justice to produce records claimed as solicitor-client privileged to the Commissioner for review.

This left Commissioner Ed Ring as the only Commissioner of an access to information statute in Canada with no ability to review such records. Commissioner Ring indicated at that time that "Without that ability, the accountability and transparency promised by the ATIPPA must be considered inferior to that which is enjoyed by Canadians in other jurisdictions. I believe that solicitor-client privilege is a principle which can be balanced with the twin pillars of transparency and accountability, as all three are essential underpinnings of our democracy."

The Commissioner appealed the decision of Justice Marshall to the Court of Appeal, resulting in that Court's decision of October 26<sup>th</sup>, 2011.

### Summary of the NLCA findings:

The NLCA in its decision, overturned the previous decision of the lower court. In explaining its decision to overturn the Marshall decision, the NLCA, at paragraph 54, illustrated the problem that would occur if the Commissioner was unable to review such records:

*"It would be too easy to have documents declared to be subject to solicitor-client privilege to delay resolution of a matter and to deter a ... citizen from pressing a claim for access to documents in court."*

## Recent Court of Appeal Decision (cont'd)...

### Reaction of the OIPC

“The Court of Appeal decision makes it clear that public bodies are required to produce any records to my Office which I consider relevant to an investigation, including records which a public body claims are protected by solicitor-client privilege,” said Commissioner Ring. He commented that “this decision by the Court of Appeal upholds a key element of any modern democratic society, which is an effective access to information law. Such a law can only be effective if the Commissioner appointed to oversee the law can exercise all the powers necessary to do that job. As the Court stated in this decision, ‘a right of access to records is meaningless without a means of enforcing this right.’”

Commissioner Ring went on to say that “prior to Justice Marshall’s ruling, we had conducted many reviews of access to information decisions where there had been a claim of solicitor-client privilege. In every case, we reviewed the relevant records and **either issued recommendations to the public body, or in most cases resolved the matter informally to the satisfaction of both parties.** Since Justice Marshall’s ruling we have been unable to access the relevant records in order to conduct reviews involving claims of solicitor-client privilege. As a result we have accumulated a number of files involving such claims. We now intend to access those records and get to work on those files.”



### Right to Know Week 2011 Recap

RTK Week 2011 was successful again this year, with presentations, information fairs, meetings, and networking events held province-wide. It was also the launch of the RTK Week 2011 Essay Competition, which is co-sponsored by the OIPC, Memorial University, the College of the North Atlantic, and Cox & Palmer. The deadline for essay submissions is **December 31st, 2011**, so if you know any secondary or post-secondary students who might be interested in a chance to take home a \$500 first prize, please tell them to check out our website at the links below for full competition information:

<http://www.oipc.nl.ca/events.htm>

<http://www.oipc.nl.ca/pdf/RighttoKnowWeekEssayCompetition2011.pdf>



## Resource List

<http://www.justice.gov.nl.ca/just/info/schedule.html> (ATIPPA, Regulations and Fee Schedule)

<http://www.justice.gov.nl.ca/just/departement/branches/division/atipp.html> (ATIPP Office)

[http://www.justice.gov.nl.ca/just/info/access\\_policy\\_and\\_procedures\\_manual.pdf](http://www.justice.gov.nl.ca/just/info/access_policy_and_procedures_manual.pdf) (Access Policy & Procedures Manual)

[http://www.justice.gov.nl.ca/just/info/privacy\\_policy\\_and\\_procedures\\_manual.pdf](http://www.justice.gov.nl.ca/just/info/privacy_policy_and_procedures_manual.pdf) (Privacy Policy & Procedures Manual)

[http://www.justice.gov.nl.ca/just/atipp\\_training/index.html](http://www.justice.gov.nl.ca/just/atipp_training/index.html) (ATIPP Training)

<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)

## Access & Privacy News

Congratulations to Rosemary Thorne, Coordinator, Information Access & Privacy Office, Memorial University of Newfoundland for being selected as a nominee for this year's **Grace-Pepin Access to Information Award**. The Grace-Pepin Award was established by the Office of the Information Commissioner of Canada in collaboration with its provincial and territorial counterparts in an effort to recognize exceptional contributions to the promotion and support of the principles of transparency, accountability, and the public's right to access information held by public institutions. It takes its name in memory of John Grace and Marcel Pepin, two public figures

who contributed significantly to the development and promotion of access to information principles in Canada.

This year's winner of the Grace-Pepin Access to Information Award was the Information Access and Protection of Privacy (IAPP) Certificate Program, Faculty of Extension, University of Alberta.

For more information on the award and how to submit nominees for 2012, please visit:

[http://www.righttoknow.ca/en/content/grace\\_pepin\\_award-prix.asp](http://www.righttoknow.ca/en/content/grace_pepin_award-prix.asp)

## Council Corner

New section devoted to Municipalities!

Issue: "Tabling" Information at Town Council meetings

Practice: Sections 39 and 40 of the ATIPPA allow a public body to disclose personal information where doing so is necessary for performing its statutory duties or for operating a legally authorized program of the public body. Thus, in some situations, severing of personal information will be unnecessary (i.e. the issuance of building permits and such may, for various reasons, necessitate the disclosure of some personal information). However, even in these circumstances, a public body still must only disclose **the minimum amount of personal information necessary to achieve its purpose, in accordance with section 39(2)**.



*Warmest Wishes for a Very Safe and Happy Holiday Season and a Prosperous 2012 from the Commissioner and Staff of the OIPC*