2013 ANNUAL REPORT 2014

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

PROMOTING ACCESS & PROTECTING PRIVACY

FINDING THE BALANCE

Access

"… the overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry."

Justice Laforest, Supreme Court of Canada,
Dagg v. Canada

Privacy

This Court has recognized that the value of privacy is fundamental to the notions of dignity and autonomy of the person […] Equally, privacy in relation to personal information and, in particular, the ability to control the purpose and manner of its disclosure, is necessary to ensure the dignity and integrity of the individual. […] We also recognize that it is often important that privacy interests be respected at the point of disclosure if they are to be protected at all, as they often cannot be vindicated after the intrusion has already occurred […]

R. v. Osolin, [1993] 4 S.C.R. 595
L'Heureux-Dubé J. (Dissenting)

PHIA

"I say, Mr. Speaker, this piece of legislation is intended to be a comprehensive piece of legislation to protect the integrity of your personal health information, protect the privacy and the sensitivity of the information through laying out, in a step-by-step mechanism, the whole process of storing and releasing and how personal health information gets used. It has been constructed on the basis of a wide consultation process. I say, Mr. Speaker, it reflects the principles as outlined in both the federal legislation that currently exists, as well as provincial legislation that currently exists with respect to this."

Hon. Ross Wiseman, Minister of Health and Community Services
House of Assembly Hansard, May 26, 2008

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

February 9, 2015

The Honourable Wade Verge
Speaker
House of Assembly
Newfoundland and Labrador

I am pleased to submit to you the Annual Report for the Office of the Information and Privacy Commissioner in accordance with the provisions of section 59 of the *Access to Information and Protection of Privacy Act* and section 82 of the *Personal Health Information Act*. This Report covers the period from April 1, 2013 to March 31, 2014.

Edward P. Ring
Information and Privacy Commissioner

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Commissioner's Message

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.

Under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), Newfoundlanders and Labradorians are given legal rights to access government information with limited exceptions. Access to information refers to the public's right to access records relating to the operations of public bodies in the Province, including general administrative records, financial records, permits, policies, etc. The *ATIPPA* also gives individuals a right of access to their own personal information which is held by a public body. The basic objective is to make government open and transparent, and in doing so to make government officials, politicians, government departments, agencies and municipalities more accountable to the people of the Province.

Over the past three decades, all jurisdictions in Canada have passed legislation relating to the public's right to access information and to their right to have their personal privacy protected.

These legislative initiatives represent an evolution from a time when governments in general consistently demonstrated stubborn resistance to providing open access to records. This concept has changed. Today, access to information is a clearly understood right which the public has demanded and which governments have supported through legislation and action. No doubt there are still instances when unnecessary delays and unsubstantiated refusals to release information are encountered by the public, which is why it is important that the Office of the Information and Privacy Commissioner (OIPC) exists as an independent body to review decisions made by public bodies about access to information requests.

On January 16, 2008 Part IV of the Act was proclaimed into force. Part IV contains the privacy provisions of the ATIPPA, governing the collection, use and disclosure of personal information by public bodies. These provisions also give individuals a specific right to request the correction of errors involving their own personal information.

The *ATIPPA*, like legislation in all other Canadian jurisdictions, established the Information and Privacy Commissioner (the "Commissioner") as an Officer of the House of Assembly, with a mandate to provide an independent and impartial review of decisions and practices of public bodies concerning access to information and privacy issues. The Commissioner is appointed under section 42.1 of the *ATIPPA* and reports to the House of Assembly through the Speaker. The Commissioner is independent of the government in order to ensure impartiality.

The Office of the Information and Privacy Commissioner (the "OIPC") has been given wide investigative powers, including those provided under the *Public Inquiries Act*, and has full and complete access to all records in the custody or control of public bodies in relation to matters which the Commissioner is empowered to review. The government amended the *ATIPPA* through Bill 29 to remove the Commissioner's authority to review a refusal of access to information based on a claim of solicitor and client privilege (section 21) and a claim that a record is an official cabinet record (section 18(2)(a)). The Commissioner therefore has no right to conduct a review into such a refusal nor to demand that such records be produced in the course of a review. The applicant, however, retains the right to ask the Supreme Court Trial Division to review a decision to refuse access on the basis of either of those two provisions, or the applicant may ask the Commissioner to initiate such an appeal.

Aside from those provisions, if the Commissioner considers it relevant to an investigation, he may require any record, including personal information, which is in the custody or control of a public body to be produced for his examination. This authority provides the citizens of the Province with the confidence that their rights are being respected and that the decisions of public bodies are held to a high standard of openness and accountability. While most citizens are prepared to accept that there may be instances of delays by public bodies, and that there may also be mistakes and misunderstandings, they also expect that such problems will be rectified with the help of this Office when they occur. One area which currently requires clarification is regarding situations where a public body asserts, by citing section 5, that certain records responsive to an access to information request are outside the scope of the *ATIPPA*.*

* The Commissioner's jurisdiction to review records where there is a claim of section 5 has been considered three times at the Supreme Court Trial Division. In the first decision Mr. Justice Fowler determined that the Commissioner did not have jurisdiction where a claim of section 5 was made by a public body: Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner), 2010 NLTD 19. In the next decision, Chief Justice Orsborn determined that the matter involved essentially the same issue and the same parties, and therefore it was res judicata. He did, however, offer an obiter analysis in which he determined, for different reasons than Judge Fowler, that the Commissioner did not have jurisdiction: The Information and Privacy Commissioner v. Newfoundland and Labrador (Business), 2012 NLTD(G)28. A third decision which was rendered by Madame Justice Gillian D. Butler agreed with her colleagues that the Commissioner did not have jurisdiction: Ring v. Memorial University of Newfoundland, 2014 NLTD(G) 32. That case also involves an interpretation of language within section 5 pertaining to research information, and it will be the subject of an appeal to the Court of Appeal.

The Personal Health Information Act *(PHIA)*

Health Information a Private Matter

On April 1, 2011 the *Personal Health Information Act (PHIA)* was proclaimed into force. Newfoundland and Labrador's *PHIA* is a law which establishes rules regarding how your personal health information is to be handled. *PHIA* governs information held by custodians of your personal health information, whether in the public sector or the private sector. Most personal health information is considered to be in the control or custody of a custodian and is therefore covered by *PHIA*.

Major Custodians

- Eastern Health, Central Health, Labrador-Grenfell Health and Western Health; Newfoundland and Labrador Centre for Health Information.
- Regulated health professionals in private practice, such as doctors, dentists, pharmacists, physiotherapists, chiropractors and registered massage therapists.
- Faculty of Medicine and the Schools of Nursing, Pharmacy, and Human Kinetics and Recreation at Memorial University.

The purposes of *PHIA* are accomplished by:

1. establishing rules for the collection, use and disclosure of personal health information to protect the confidentiality of the information as well as to protect individual privacy;
2. giving the public a right of access to personal health information about themselves;
3. giving the public a right to require correction or amendment of that information;
4. establishing measures to ensure accountability by custodians and to safeguard the security and integrity of personal health information;
5. providing for independent review of decisions and resolution of complaints respecting personal health information; and
6. establishing measures to promote compliance with *PHIA* by custodians.

PHIA recognizes that you expect your health information to remain confidential and that it should only be collected, used or disclosed for purposes related to your care and treatment. However, *PHIA* also acknowledges that personal health information is sometimes needed to manage the health care system, for health research and for other similar purposes. Furthermore, law enforcement officials, health officials and others may also have a legitimate need to access personal health information, under limited and specific circumstances.

If you wish to access your personal health information, or if you have an inquiry about how your personal health information is being collected, used or disclosed, you may contact your health care provider. For more information about *PHIA*, visit the *PHIA* web page of the Department of Health and Community Services at www.health.gov.nl.ca/health/*PHIA*.

The Commissioner's Office investigates privacy breach complaints and other complaints about how personal health information has been improperly collected, used, disclosed or otherwise mishandled by a custodian. The Commissioner also investigates complaints on the basis that a custodian has refused to provide a copy of an individual's personal health information to the individual, or refused to correct an error in an individual's personal health information record.

If you believe on reasonable grounds that a custodian has contravened or is about to contravene a provision of the *PHIA* in relation to your own personal health information or that of another individual, you may file a complaint with the Commissioner.

If you wish to file a complaint with the Commissioner, we ask that you use the forms which are available from our Office or our web site at www.oipc.nl.ca/forms.htm.

Complaints may be mailed, dropped off, or sent by fax or e-mail. Those sent by e-mail must contain a scanned copy of a signed and dated complaint form, otherwise they will not be accepted.

Upon receipt of a complaint, the Commissioner will attempt to resolve the matter informally. If this is not successful, a formal review may be conducted. There is no cost to file a complaint with the OIPC.

PHIA balances your right to privacy with the legitimate needs of persons and organizations providing health care services to collect, use and disclose such information.

Accessing Information

ATIPPA

It should not be a difficult process for individuals to exercise their right of access to records in the custody or control of a government department or other public body covered by the *ATIPPA*. Many people are seeking records containing information which may be handled without a formal request under the access legislation. This is referred to as routine disclosure and I am pleased to report that more and more information requests are being dealt with in this timely and efficient manner. Where the records are not of a routine nature, the public has a legislated right of access under the *ATIPPA*. The process is outlined below.

How to Make an Access to Information Request?

STEP 1

Determine which public body has custody or control of the record.

STEP 2

Contact the public body, preferably the Access and Privacy Coordinator, to see if the record exists and whether it can be obtained without going through the process of a formal request. A list of Access and Privacy Coordinators and their contact information can be found at the ATIPP Office Website.

STEP 3

To formally apply for access to a record under the *Act*, a person must complete an application in the prescribed form, providing enough detail to enable the identification of the record. Application forms are available from the public body or from the ATIPP Office Website.

STEP 4

Enclose a cheque or money order for the $5.00 application fee payable to the public body to which the request is submitted (or, if a government department, payable to the Newfoundland Exchequer).

STEP 5

Within 30 days, the public body is required to either provide access, transfer the request, extend the response time up to a further 30 days or deny access. Additional fees will likely also be imposed for providing a copy of the records.

STEP 6

If access to the record is provided, then the process is completed. If access is denied or delayed unreasonably, or if you think the fee charged is inappropriate, or if you have experienced other problems with the access to information process, you (the applicant) may request a review by the Commissioner, or you may appeal directly to the Supreme Court Trial Division.

How to File a Request for Review or Investigation of Complaint?

STEP 1

Submit a Request for Review or Investigation of Complaint Form to our Office.

STEP 2

Upon receipt of a complaint or formal request for review, the Commissioner will review the circumstances and attempt to resolve the matter informally.

STEP 3

If informal resolution is unsuccessful, the Commissioner may prepare a Report and, where necessary, will make recommendations to the public body. A copy of the Report is provided to the applicant and to any third party notified during the course of our investigation, and the Report is also posted on our website.

STEP 4

Within 15 days after the Report is received, the public body must decide whether or not to follow the recommendations, and the public body must inform the applicant and the Commissioner of this decision.

STEP 5

Within 30 days after receiving the decision of the public body, the applicant or the Commissioner may appeal the decision to the Supreme Court Trial Division.

PHIA

PHIA also grants individuals a right of access to information, but under *PHIA* this is only a right of access to the individual applicant's own personal health information. Under specific circumstances as outlined in section 7, typically where the individual is not able to exercise their own rights, the right to request access to this information (as well as other rights under *PHIA*) can be exercised by a representative of the individual. The provisions which allow a custodian to refuse access to the requested information are limited, and the situations in which these provisions would apply occur relatively infrequently. Unless one of those provisions apply, any individual who requests access to their own personal health information should expect to get it, although as with *ATIPPA*, a reasonable fee may apply. Just as with the *ATIPPA*, any individual who is refused access to their own personal health information may file a complaint with the Commissioner.

How to Make an Access Request?

STEP 1

An individual who wishes to access his or her own personal health information should make a request directly to the custodian that the individual believes has custody or control of the information.

STEP 2

The request should be in writing unless the individual has limited ability to read or write English, or has a disability or condition that makes it difficult to do so in writing.

STEP 3

The request should contain sufficient details to permit the custodian to identify and locate the record.

STEP 4

A custodian must respond to a request without delay, and in any event, within 60 days of receiving the request. That deadline can be extended for a maximum of an additional 30 days under specific circumstances outlined in *PHIA*. Nothing in *PHIA* prevents a custodian from granting a request for access informally without the need for a written request.

How to File a Request for Investigation of Complaint?

STEP 1

If you have submitted a request to a custodian for access to your personal health information and you are not satisfied with the response, you may ask the Commissioner to review the matter by filing a complaint.

STEP 2

If you wish to file a complaint with the Commissioner, we ask that you use the forms which are available from our Office or our web site at www.oipc.nl.ca/forms.htm.

Withholding Information

ATIPPA

While the *ATIPPA* provides the public with access to government records, such access is not absolute. The *Act* also contains provisions which allow public bodies to withhold certain records from disclosure. The decision to withhold records by governments and their agencies frequently results in disagreements and disputes between applicants and the respective public bodies. Although applicants are empowered to appeal directly to the Supreme Court Trial Division, the most common route for applicants in such cases is to the OIPC.

Complaints Range From

- being denied the requested records;
- being told there are no responsive records;
- being requested to pay too much for the requested records;
- being told by the public body that an extension of more than 30 days is necessary;
- not being assisted in an open, accurate and complete manner by the public body; and
- other problems related to the *ATIPPA* process.

The Commissioner does not have the power to order that a complaint be settled in a particular way. He and his staff rely on negotiation to resolve most disputes, with his impartial and independent status being a strong incentive for public bodies to abide by the legislation and provide applicants with the full measure of their rights under the *Act*. As mentioned, there are specific but limited exceptions to disclosure under the *ATIPPA*. These are outlined below:

Mandatory Exceptions

- *Cabinet confidences* - the head of a public body shall refuse to disclose to an applicant a Cabinet record including: (a) an official Cabinet record; (b) a discontinued Cabinet record; and (c) a supporting Cabinet record.
- *Personal information* - recorded information about an identifiable individual, including name, address or telephone number, race, colour, religious or political beliefs, age, or marital status.

- *Harmful to business interests of a third party* - includes commercial, financial, labour relations, scientific or technical information and trade secrets.
- *House of Assembly service and statutory office records* - protects parliamentary privilege, advice and recommendations to the House of Assembly, and records connected with the investigatory functions of a statutory office.

Discretionary Exceptions

- *Local public body confidences* - includes a draft of a resolution, by-law, private bill or other legal instrument, provided they were not considered in a public meeting.
- *Policy advice or recommendations* - includes advice or recommendations developed by or for a public body or minister.
- *Legal advice* - includes information that is subject to solicitor-client privilege and legal opinions by a law officer of the Crown.
- *Harmful to law enforcement* - includes investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed.
- *Harmful to intergovernmental relations* - includes federal, local, and foreign governments or organizations.
- *Harmful to financial or economic interests of a public body* - includes trade secrets, or information belonging to a public body that may have monetary value, and administrative plans/negotiations not yet implemented.
- *Harmful to individual or public safety* - includes information that could harm the mental or physical well-being of an individual.
- *Confidential evaluations* – protects from disclosure evaluative or opinion material, provided explicitly or implicitly in confidence, which was compiled for specific purposes outlined in the exception.
- *Information from a workplace investigation* – limits the amount of information available to applicants regarding a workplace investigation, but specifies that certain information about the investigation must be made available to specific parties as defined in the exception.
- *Disclosure harmful to conservation* – allows information about conservation to be withheld if disclosure could reasonably be expected to damage or interfere with conservation as outlined in the exception.
- *Disclosure harmful to labour relations interests of public body as employer* – allows certain labour relations information to be withheld in the circumstances outlined in the exception.

Unsupported refusals to release information and delays in responding to requests for access are particularly frustrating to applicants as well as to this Office. That being said, it is of significant comfort to acknowledge that there is a sustained effort under way by government through the ATIPP Office to train public bodies in their obligations under the *ATIPPA*, especially as it relates to the timeframes for notification and action. The government's *ATIPPA* Policy and Procedures Manual is an integral part of the ongoing training program. This Office has and will continue to work with government in this effort.

Since the *ATIPPA* first became law, public bodies have often expressed resentment that they sometimes receive requests for information that they would call frivolous or vexatious. Whether these concerns have been justified or not, the fact is that in the grand scheme of things, requests for records which may seem petty to some, may be a serious issue for certain citizens whose right to make a request is protected by the *ATIPPA*. Since this Office was established in 2005, there have been very few cases involving access requests which could have been considered frivolous or vexatious, for example. That being said, those few we have seen were indeed problematic for the public bodies involved, and there was no remedy under the law as it existed prior to Bill 29 to refuse such requests. Since the Bill 29 amendments, the *ATIPPA* provides an opportunity for public bodies to disregard a request if the circumstances set out in section 43.1(1) apply:

> 43.1 (1) The head of a public body may disregard one or more requests under subsection 8(1) or 35(1) where:
>
> (a) because of their repetitive or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to the abuse of the right to make those requests;
>
> (b) one or more of the requests is frivolous or vexatious; or
>
> (c) one or more of the requests is made in bad faith or is trivial.
>
> (2) Where the head of a public body so requests, the commissioner may authorize the head of a public body to disregard a request where, notwithstanding paragraph (1)(a), that the request is not systematic or repetitive if, in the opinion of the commissioner, the request is excessively broad.

As set out above, section 43.1(2) provides for an additional circumstance where an applicant's request may be disregarded, but only with the authorization of the Commissioner. When the Bill 29 amendments became law, we were concerned at first that we might see many public bodies attempt to disregard requests on the basis of one of the provisions in section 43.1. On the contrary, we have only seen a couple of inquiries of this nature. It could be that public bodies are aware that there is substantial case law on the meaning of these provisions in similar legislation in other Canadian jurisdictions, and that there is

a high threshold to make a case that an applicant's request may be disregarded. Furthermore, knowing that our Office is here to review any applicant's claim that their request has been unjustly disregarded would no doubt serve as a deterrent to any such move by a public body which was not well founded.

The bottom line is that it is inevitable that the public's recourse to access laws will likely grow. Whether they are policy, financial, economic, political or personal, issues are becoming more and more complex and the public is becoming more questioning. The right to demand access to such information, even if it seems trivial or unimportant to all but the requester, is still paramount in that process.

PHIA

PHIA contains very limited provisions allowing a custodian to refuse access to a record of an applicant's personal health information. As with *ATIPPA*, the basis for a decision to refuse access to a record may be either mandatory or discretionary, as described in section 58 of *PHIA*.

Mandatory Exceptions

The mandatory exceptions occur under the following circumstances, where:

- another *Act*, an *Act* of Canada or a court order prohibits disclosure to the individual of the record or the information contained in the record in the circumstances;
- granting access would reveal personal health information about an individual who has not consented to disclosure;
- the information was created or compiled for the purpose of:
  - a committee referred to in subsection 8.1(2) of the *Evidence Act*;
  - review by a standards or quality assurance committee established to study or evaluate health care practice; or
  - a body with statutory responsibility for the discipline of health care professionals or for the quality or standards of professional services provided by health care professionals.

Discretionary Exceptions

The discretionary exceptions to the right of access under *PHIA* are set out in section 58, subsections 2 and 3. One example is section 58(2)(d)(i) which says that a custodian may refuse access to a record of personal health information where "granting access could reasonably be expected to result in a serious risk of harm to the mental or physical health or safety of the individual who is the subject of the information or another individual."

The Role of the Commissioner

The key tenet of our role is to keep the lines of communication with applicants, public bodies and affected third parties open, positive, and productive.

In accordance with the provisions of the *ATIPPA*, when a person makes a request for access to a record and is not satisfied with the resulting action or lack thereof by the public body, he or she may ask the Commissioner to review the decision, act or failure to act relating to the request. The Commissioner and this Office therefore have the key role of being charged by law with protecting and upholding access to information and protection of privacy rights under the *ATIPPA*.

This responsibility is specific and clear, and this Office takes it seriously. However, there are often questions concerning how we see our role, and how we do our job. It has been mentioned earlier that the Office is independent and impartial. There are occasions when the Commissioner has sided with applicants and other occasions when the Commissioner supports the positions taken by public bodies. In every case, having conducted our research carefully and properly, all conflicting issues are appropriately balanced, the law and common sense are applied and considered, and the requirements of the legislation are always met. Applicants, public bodies and third parties must understand that this Office has varied responsibilities, often requiring us to decide between many conflicting claims and statutory interpretations.

As noted, this Office does not have enforcement or order power. We do not see this as a weakness, rather it is a strength. Order power may be seen as a big stick which could promote an adversarial relationship between this Office and public bodies. We promote and utilize negotiation, persuasion and mediation of disputes and have experienced success with this approach. Good working relationships with government bodies are an important factor and have been the key to this Office's success to date.

Success can be measured by the number of satisfied parties involved in the process, by fewer complaints, and by more and more information being released by public bodies without having to engage the appeal provisions of the *ATIPPA*. We are equally committed to ensuring that information that should not be released is indeed protected.

This Office is committed to working cooperatively with all parties. We respect opposing points of view in all our investigations but pursue our investigation of the facts vigorously.

We are always available to discuss requests for review and related exceptions to the fullest extent at all levels without compromising or hindering our ability to investigate thoroughly. We emphasize discussion, negotiation and cooperation. Where appropriate, we are clear in stating which action we feel is necessary to remedy disagreements. In that regard, we will continue to make every effort to be consistent in our settlement negotiations, in our recommendations and in our overall approach.

In accordance with the provisions of the *PHIA*, the Commissioner has broad authority to oversee this important law. The Commissioner may exercise his powers and duties under *PHIA* by:

1. reviewing a complaint regarding a custodian's refusal of a request for access to or correction of personal health information;
2. reviewing a complaint regarding a custodian's contravention or potential contravention of the *Act* or regulations with respect to personal health information;
3. making recommendations to ensure compliance with the *Act*;
4. informing the public about the *Act*;
5. receiving comments from the public about matters concerning the confidentiality of personal health information or access to that information;
6. commenting on the implications for access to or confidentiality of personal health information of proposed legislative schemes or programs or practices of custodians;
7. commenting on the implications for the confidentiality of personal health information of using or disclosing personal health information for record linkage, or using information technology in the collection, storage, use or transfer of personal health information; and
8. consulting with any person with experience or expertise in any matter related to the purposes of this *Act*.

Outreach and Statistics

Education and Awareness

The reporting period from April 1, 2013 - March 31, 2014 has once again presented the Office with many opportunities to engage with the public and professional organizations along with opportunities for staff to attend workshops and conferences in order to remain current with emerging trends and developments in Access, Privacy and Health Information. A number of meetings and consultations were held with public bodies under *ATIPPA* as well as with a number of large and smaller custodians under *PHIA*. Additionally, a number of meetings were held between OIPC officials and officials from a number of governing bodies and associations representing many of the major custodian groups under *PHIA*. A significant number of briefings and presentations were delivered to schools throughout the Province.

Data Privacy Day

Data Privacy Day (DPD) is recognized by privacy professionals, corporations, government officials, academics and students around the world. It aims to highlight the impact that technology is having on our privacy rights and underline the importance of valuing and protecting personal information.

The 6th International DPD was celebrated on January 28 with events held in major centers across Canada in an effort to raise awareness and generate discussion about data privacy and access rights and responsibilities. In Newfoundland and Labrador, the OIPC participated in a Privacy After Hours event for privacy professionals and conducted an educational campaign distributing promotional materials to all public body ATIPP Coordinators. We also provided online content and tips in concert with Stay Safe Online.org.

Privacy Awareness Week

Privacy Awareness Week (PAW) is an event to highlight and promote awareness about privacy rights and responsibilities in the community. This year's PAW took place from April 28 to May 4, 2013.

The OIPC focused awareness efforts on five distinct areas of concern, one for each day of the work week: Youth, Mobile Devices, Surveillance, Health, and Online Privacy. For each day/topic the OIPC posted facts, tips, videos, quizzes, and links to information addressing each area of concern on both the OIPC website (www.oipc.nl.ca), and the OIPC Twitter account (www.twitter.com/OIPCNL), as well as to all government employees through the Public Service Network (PSN), and all ATIPP Coordinators via e-mail. This

information was meant to make people more aware of the various concerns associated with these specific privacy areas, as well as to open a dialogue about these issues and offer tips and advice on how to better secure your personal information.

Right to Know (RTK) Week 2013

For the eighth year, the OIPC joined with other information and privacy commissioner and ombud offices from across the country in celebrating national Right to Know (RTK) Week from September 23 to 28, 2013, and international Right to Know Day on September 28, 2013.

Right to Know seeks to raise awareness of individual's right to access government information, while promoting freedom of information as essential to both democracy and good governance. The OIPC highlighted RTK through online and media informational campaigns, as well as posts on RTK facts and principles sent out through the PSN and to ATIPP Coordinators.

Twitter

The OIPC joined Twitter in January 2012, as part of our broader communications practices, and the OIPC has continued to grow our followers since then, using the social media site to communicate clearly and quickly to the public, who are interested in access to information and protection of privacy issues.

The OIPC's Twitter account is www.twitter.com/OIPCNL. Through it, the OIPC links to news releases, reports, speeches, presentations and other publicly available OIPC material; relevant information produced and published elsewhere; interesting facts, quotes, videos or observations related to access and privacy; as well as topical questions related to access and privacy meant to provoke discussion.

Consultation/Advice

This Office continues to receive numerous inquiries and requests for advice and consultation. In response, our staff routinely provides guidance to individuals, organizations, public bodies and custodians.

We consider this to be an important aspect of our overall mandate and we encourage individuals and organizations to continue seeking our input on access, privacy, and personal health information matters. There may be times when we are unable to advise on a specific situation if it appears that the matter could subsequently be brought to the OIPC for investigation or review, however if that is the case we can still offer information about the applicable legislation and the complaint or review processes.

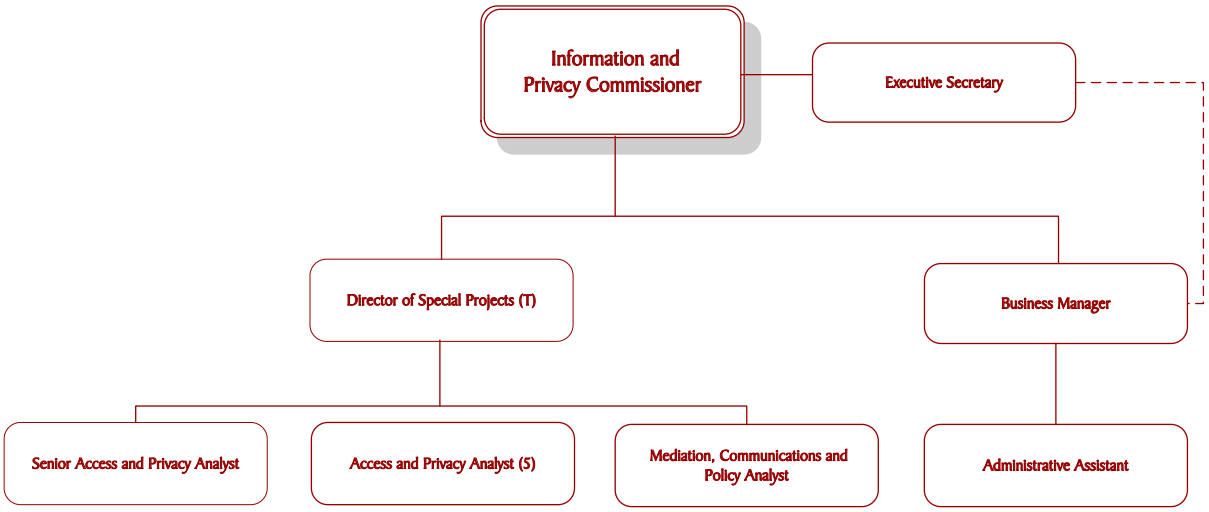
OIPC Website

Our website, www.oipc.nl.ca, continues to be a useful tool for members of the public, public bodies and custodians. There are a number of valuable resources there, with updates and additions planned in the coming year.

Among the information and resources available on this website, you will find Tables of Concordance for *ATIPPA* and *PHIA* access and privacy review decisions, which allows anyone to choose a section of the *ATIPPA* or *PHIA* and be quickly presented with links to all of the Commissioner's Reports which are relevant to that section.

Staffing

The Office has a total of 12 staff including: the Commissioner; Director of Special Projects (Temporary); Senior Access and Privacy Analyst; five Access and Privacy Analysts; Mediation, Communications and Policy Analyst; Business Manager; Executive Secretary, and an Administrative Assistant.



While all staff members work diligently to meet the challenges of increased workload demands, our work volume is quite high and will continue to be high for the foreseeable future. This situation is in part due to the fulfillment of our role to educate the public, and the demands of numerous consultations and inquiries. An OIPC representative also makes a significant contribution to the ongoing work of the Canada Health Infoway Privacy Forum, which is a national body engaged in funding and setting pan-Canadian standards for the development of an interoperable electronic health record. We also participate in the Health Information Privacy Advisory Committee led by the Department of Health and Community Services.

Individuals and organizations are now more familiar with this Office and with the *ATIPPA* and *PHIA* and, as a result, are exercising their rights under the legislation more often. We are encouraged by this. I should also note that our Office has been challenged to cope with the demands placed on it due to the significant workload resulting from privacy breach investigations.

2013-2014 Statistics

Statistical breakdown for this reporting period can be found on our website www.oipc.nl.ca. Highlights are provided below.

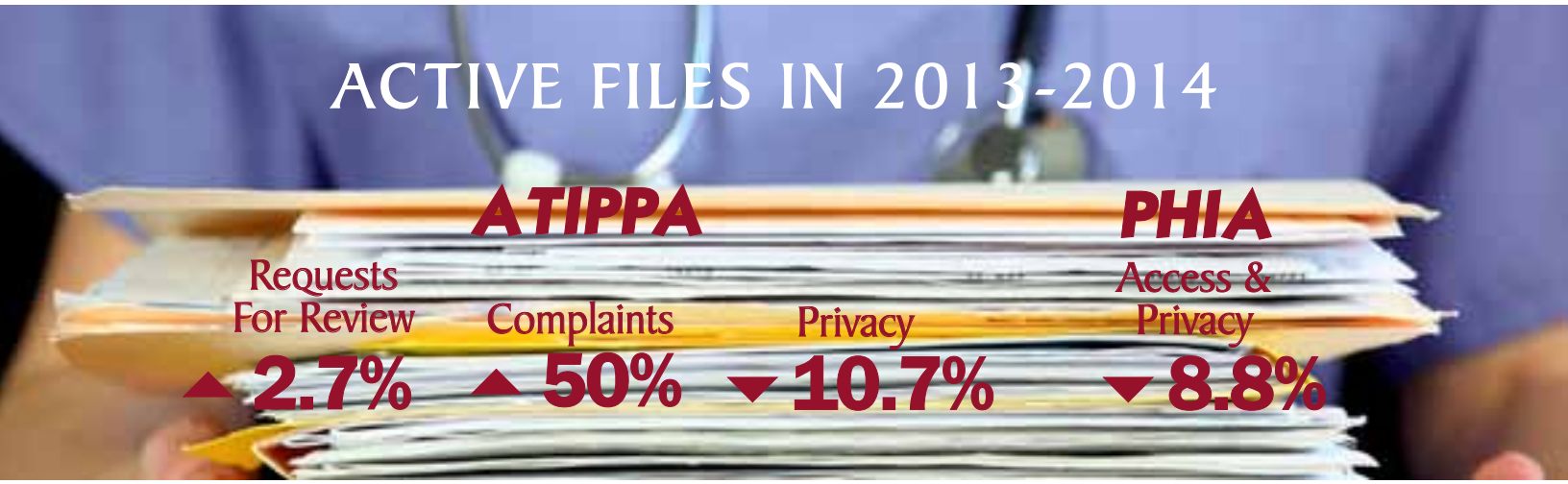
Requests

Of the **557** Requests received by Public Bodies **61** were submitted to OIPC for review.

ATIPPA

Of the **113** active Requests for Review, **22** were resolved through informal resolution and **29** resulted in a Commissioner's Report. The remainder was either resolved by other means or carried over to the 2014-2015 fiscal year. Of the **12** complaints received under section 44, relating either to the fees being charged or to extensions of time by public bodies, **8** were investigated and concluded by this Office and the remaining files were carried over to the 2014-2015 year.

Of the **39** active privacy investigations, **23** were closed and **16** were carried over to the 2014-2015 year. Closed privacy investigations include those which may have been resolved through Informal Resolution or No Jurisdiction/Declined to Investigate.



PHIA

This Office received **1** access/correction complaint and **6** privacy complaints under section 66 of *PHIA*. In addition, there were **2** access/correction complaints and **53** privacy complaints carried over from the previous year for a total of **62** active access/correction and privacy complaints for the 2013-2014 fiscal year.

Of the **3** access/correction complaints, **2** were closed, and **1** was carried over to the 2014-2015 fiscal year. Of the **59** privacy complaints received, **10** were closed and **49** were carried over to the 2014-2015 fiscal year.

Inquiries

Of the inquiries received **507** involved the *ATIPPA* and **244** involved *PHIA*.

Privacy

ATIPPA

The OIPC will react to all formal privacy breach complaints and will conduct an investigation as appropriate. It should be noted that the OIPC reserves the right to initiate an investigation into privacy breach matters when it appears to be in the public interest to do so, without a formal complaint from a complainant. The Office may also conduct a privacy investigation at the request of the head of a public body or his or her representative.

The OIPC is not bound by statute to issue reports on its privacy investigations, although we have done so in some cases because it is something we consider to be a valuable part of our tool-kit as an oversight body. Our Office has developed internal criteria, such as whether a conclusion would set a legal precedent, or whether a report might have significant educational value, to help decide whether a report should be issued in any particular case. There have been many cases in which we have opted instead to write a letter to the public body and complainant, following the investigation of a privacy complaint, outlining the results, either agreeing with the public body or making recommendations for changes. We have tried to be careful, however, not to place ourselves in a situation where we are issuing a public report every time we have found that a public body has made an error, but only sending a private letter to the parties when we find that there has been no breach, or that the public body has done something correct. In other words, we want to present to the public through our reports not only the failures of compliance, but the successes as well.

It should be re-emphasized that it is access issues, rather than privacy issues, which have constituted the bulk of our work in the past year. A lot of credit for the fact that privacy issues have not been as numerous as might have been expected, goes to the ATIPP Office and to the Office of the Chief Information Officer, for being proactive on privacy, for concentrating on privacy impact assessments, for responding quickly to gaps in policies and procedures when they are identified, and for cooperating fully with our Office. Privacy is all about prevention, and sometimes the preventive work goes unrecognized. I want to take this opportunity to recognize the good work that is being done here in Newfoundland and Labrador.

Part IV of the ATIPPA was proclaimed on January 16, 2008. Part IV contains provisions governing the collection, use and disclosure of personal information by public bodies in Newfoundland and Labrador. These are the rules that public bodies must follow in order to protect the privacy of all citizens.

In contrast to the access to information provisions of the *ATIPPA*, there is no requirement to issue a report resulting from a complaint about a breach of the privacy provisions. If a privacy complaint is not resolved informally, the Commissioner must decide in the context of his role in overseeing the *ATIPPA* whether to publish a report or to allow the file to be concluded through a letter of findings and recommendations from the investigating OIPC Analyst to the public body and complainant. To this end, the OIPC has developed some guidelines to help the Commissioner in this decision. No individual factor is to be determinative, as these considerations are only advisory in nature. Ultimately, the decision of how to conclude a privacy breach complaint is one which requires the consideration of all relevant factors at the discretion of the Commissioner, including some which may be relevant only to the particular case under consideration.

Factors to be Considered Include:

- **Educative value for the public:** are there issues in the Privacy Complaint which are of broad public interest and should be discussed in a published Report in order to help educate the public about the applicable privacy considerations?
- **Educative value for Public Bodies:** are there issues in the complaint which, if addressed in a Report, would be of value or of interest to other public bodies as they incorporate privacy considerations into their policies and procedures?
- **Precedent:** are there issues in the Privacy Complaint which would give rise to the consideration of significant legal issues from a privacy standpoint such that there would be value in highlighting them in a Report?
- **Recommendations:** are there one or more recommendations to the Public Body as a result of the Privacy Complaint?
- **Significance:** is the Privacy Complaint a trivial matter or one where the allegation of a privacy breach is minor in nature, or one involving unique circumstances that would affect only a small number of people?
- **Complainant Agreement:** has the Complainant agreed that:
  - upon investigation, his or her complaint is unfounded and therefore accepts that no formal report or other action by the OIPC is required or expected; or
  - upon investigation, the Public Body has agreed to take steps acceptable to the Complainant to resolve the complaint so that no formal report or other action by the OIPC is required or expected?

PHIA

PHIA is part of a new generation of privacy laws which are being developed in jurisdictions across Canada. Now, all of the personal health information held by private sector custodians, from dentists to pharmacists, to doctors in private practice, to ambulance services, and many more, is governed by *PHIA*. The other major effect of *PHIA* is that all of the personal health information held by public sector custodians (including Eastern Health, Western Health, Labrador Grenfell, and Central Health) now falls under *PHIA* rather than *ATIPPA*.

In the time leading up to the proclamation of *PHIA*, this Office was involved in extensive discussions and committee work with the Department of Health and Community Services and many other stakeholders to ensure that all of the ingredients were in place to help custodians comply with *PHIA*. That work has continued since the proclamation of *PHIA*. We continue to meet with the professional colleges, boards and associations representing the many registered health professionals in the Province in order to educate these organizations about the new law which now applies to their members. Each time we issue a Report under *PHIA*, we send a copy by e-mail to all of these boards and associations. We have had the opportunity to address issues of mutual concern cooperatively with the Pharmacy Board and College of Physicians and Surgeons, and we continue to provide presentations about *PHIA* and the role of the OIPC at the request of boards and associations at Annual General Meetings and professional development sessions.

Since *PHIA* proclamation, we have developed an excellent rapport with some of the largest custodians of personal health information, namely the four Regional Health Authorities, listed above. *PHIA* requires that they notify the Commissioner's Office in the event of a "material" or serious breach as defined in the *PHIA* regulations. Our experience has been that while these custodians have been notifying us of material

PHIA was proclaimed into law on April 1, 2011. This was an important step in the evolution of personal health information privacy law within our Province.

breaches, they have also been informing us of less serious breaches on occasion, and also engaging our expertise to discuss policy development, breach response, and to consult with us on the decision of whether and how to notify individuals who have been affected by a breach. We believe this process is working well so far, and we look forward to continued cooperation with these custodians.

We are also engaged with the Regional Health Authorities in other ways. In addition to our regular interactions relating to breach notification, we also look for their cooperation in the event of a complaint which requires investigation. Usually in such cases, there has been a breach or alleged breach of *PHIA*, and an individual has filed a complaint with the OIPC asking that we investigate. Our experience to date is that the Regional Health Authorities have been cooperative and helpful during our investigations, and are fully engaged in trying to improve their policies and procedures in order to prevent future breaches and to meet the expectations set out by *PHIA*.

We also continue to work with the Department of Health and Community Services as issues arise. One important venue for this cooperation is through our membership on the Health Information Privacy Advisory Committee (HIPAC) of the Department of Health and Community Services, the goal of which, as stated in the Terms of Reference, is to be:

> *… a forum for collaboration between and among provincial stakeholders from both the public and private sectors to facilitate compliance with privacy and access requirements arising from the Personal Health Information Act. The Committee will enable subject-matter experts from different areas of operational responsibility within the health and community services sector to develop and share resources and knowledge related to privacy and access.*

Membership of the HIPAC is made up of the largest custodians as well as organizations which represent some of the larger health professions. To date, the HIPAC has proven to be a useful opportunity to discuss issues and concerns faced by custodians in achieving compliance with *PHIA*. The OIPC continues to be mindful of its unique role in this regard, and will abstain from discussions when necessary to ensure that its role as an oversight body is not compromised.

Access Investigation Summaries

As previously indicated, the majority of Requests for Review received at this Office continue to be resolved through informal resolution. Of the Requests completed within the period of this Annual Report, 31 were resolved through the informal resolution process. In these cases, we write the applicant and the public body, as well as any applicable third party, confirming that a resolution has been achieved and advising all parties that the file is closed or will be closed within a specified time period. Where informal resolution is successful, no Commissioner's Report is issued.

In the event that our attempt at an informal resolution is not successful, the file will be referred to a formal investigation. The results of this investigation, including a detailed description of our findings, are then set out in a Commissioner's Report. The Report will either contain recommendations to the public body to release records and/or to act in a manner consistent with the provisions of the *Act*, or will support the position and actions of the public body. All Commissioner's Reports are public and are available on our website at www.oipc.nl.ca.

The following are summaries of selected investigation files.

Report A-2013-008 – Government Purchasing Agency

The Applicant requested from the Government Purchasing Agency a copy of a successful bid submitted by a third party business in response to a particular tender for office supplies. The Government Purchasing Agency severed some information under sections 27(1)(c) (harm to the business interests of a third party) and 30 (personal information). The Applicant took no issue with the application of section 30 and it was not an issue for this Report.

This was the first Report issued with respect to the "new" section 27 (since the amendments contained in Bill 29 became law). Previously, section 27 contained a 3 part test, all three parts of which had to be met in order for section 27 to apply. The old version of section 27 also required the harm to the competitive position and the interference with the negotiating position to be significant in order for the exception to apply. The changes in the wording of section 27 now means that section can be applied

to withhold information when only one of 27(1) (a), (b), or (c) are applicable. Further, the harm or the interference no longer needs to be "significant". However, the amended section 27 still uses the words "disclosure of which could reasonably be expected to", which, as more fully set out below, requires a specific standard of proof.

Given that one of the main purposes of the *ATIPPA* is to promote accountability by, among other things, giving individuals a right of access to records in the custody or control of a public body subject to limited and specified exceptions, it was the Commissioner's opinion that the standard of proof under the amended section 27 still requires detailed and convincing evidence to establish a reasonable expectation of probable harm. This is the same standard that existed under the old section 27.

This standard has been widely applied by information and privacy commissioners across the country, and has been set out in numerous reports from this Office as well. The Commissioner then re-examined some case law, Reports from our Office, and other information sources with respect to the burden of proof and the type of evidence that would be necessary to meet this burden.

The Commissioner determined that the evidence must establish a reasonable expectation of probable harm, which requires a risk of harm that is beyond merely possible or speculative. In addition, when considering the level of harm required (given the removal of the word "significant" from section 27) the Commissioner found that the test to be applied when considering harm under section 27 is as follows: (a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged; (b) the harm caused by the disclosure must be more than trivial or inconsequential; and (c) the likelihood of harm must be genuine and conceivable.

Further, the Commissioner offered the following comments to public bodies when dealing with information to which section 27 may apply:

> *When a public body receives a request for information and believes that section 27 might be applicable and notifies the third party of the request, if the third party does not want the information released, it should be able to present a convincing argument to the public body. Because it bears the burden of proof under section 64, the public body needs information and evidence on which to base its claim of section 27. If such convincing evidence is not provided, then the public body should not claim section 27, and instead notify the third party that it intends to release the information. Then, if the third party still objects to the release of the information, the third party can submit a Request for Review*

to this Office objecting to the decision of the public body to release the information. Until such review is concluded, the public body cannot release the information, and the burden of proof is then transferred to the third party, who, in reality, is in the best position to make the argument and provide the required detailed and convincing evidence.

The Commissioner further stated that despite the significant change to section 27, the principle of accountability is one of the main underpinnings of all access to information legislation. In addition to the foregoing case law surrounding the required standard of evidence, his analysis of the applicability of section 27 was heavily influenced by these principles. He was reluctant to interpret 27 so narrowly as to shield from disclosure all business dealings a public body has with a third party, as this would completely undermine one of the main purposes of the *ATIPPA*. The changes to the section may mean that more information can be withheld than was previously the case, but it does not change the nature or the quality of evidence required to prove that harm would result from disclosure.

Furthermore, given the importance of the principle of accountability, it is also the Commissioner's opinion that heightened competition should not be interpreted as harm. Heightened competition ensures that public bodies are making the best possible use of public resources; this is not possible if bid details are protected from disclosure by section 27 in the absence of detailed and convincing evidence. Knowing the bid details of the successful bid does not ensure that a competitor will be successful in the next tender. Many factors go into the determination of a bid. Admittedly, having pricing information is useful, as knowing what the successful competitor bid in the past is a good starting point, in that it provides knowledge of the "ballpark" one must be in to be competitive. However, according to the evidence before the Commissioner, pricing is influenced by several factors, which may vary from company to company. Further, these factors are not static and can change from year to year.

With respect to section 27, given the standard of evidence required to show harm as established by case law, the Commissioner found that the burden of proof under section 64(1) had not been met by the Public Body as the submission was brief and only outlined in very general terms the harm that might occur if the record was disclosed. The evidence was neither detailed nor convincing. Therefore, the Commissioner recommended that the information be released.

Report A-2013-009 – Memorial University

The Applicant requested records from Memorial University pertaining to Memorial University Tender TFS-009-11, specifically 2 lists of items (one list for contract items and one list for non-contract items) purchased from a Third Party for the period from July 1, 2011 to June 30, 2012 to include the product

number, item description, quantity purchased, unit of measure, price charged, and total extended value per item. Memorial denied access to the information on the basis of section 27(1)(c) (business interests of a third party).

Despite bearing the burden of proof as set out in section 64(1), Memorial made no formal submission to this Office. The Third Party did file a submission with this Office as part of the formal investigation process.

Again, the Commissioner commented on two of the underlying purposes of access to information legislation – accountability and transparency. The Commissioner stated that because public bodies are spending public funds, the public should be able to know how those funds are being spent.

> *The public should be able to "check up on" a public body to ensure public funds are spent in a fiscally responsible manner. This is how public bodies are made accountable. If the information is available and someone asks for it and finds something questionable, then the leadership of the public body has to account for that. If the information is not available, there is no transparency and there is also no accountability for the spending. Publication of the overall bid amount is fine, and does go some way in ensuring accountability and transparency (by ensuring that the lowest bid is the winning bid) but if the actual prices that are being paid by the public body are not in line with prices set out in a bid then there is a problem – one which may never come to light if the actual purchases of a public body are shielded from disclosure by section 27.*
>
> *…*
>
> *Last, but certainly not least, we cannot lose sight of the purpose of the ATIPPA in general and the purpose of section 27 in particular. The accountability of public bodies is one of the core purposes of the ATIPPA. Section 27, which recognizes the need, in some cases, to protect certain third party information, must balance the notion of accountability with the principle that third parties should not be harmed. Section 27 should not be interpreted in such a way that it acts as a shield against competitive bidding, nor should it be used by a third party to maintain an unfair advantage over other bidders. I interpret "harm to competitive position" to mean actions or harm which would place other bidders at an unfair competitive advantage, not actions that would level the playing field. In my mind, disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process which is transparent to the public and supports the accountability function that underlies the purpose of the ATIPPA. Contracts with public bodies require greater transparency than those with private sector entities, this is simply a "cost of doing business" with public sector entities.*

Asking a public body to disclose how much it pays for the goods and services purchased from a third party simply fulfills the accountability purpose of the ATIPPA. Prior to Bill 29, this type of information was available and it should still be available post Bill 29. Asking a third party to disclose, for example, how much it pays to obtain the goods they sell, how they decide what price(s) to bid or how it produces or manufacture its products would be unfair. These are some types of third party information that I believe section 27 is intended to protect, not the prices paid by a public body to procure goods and services.

The Commissioner found that the burden of proof under section 64(1) had not been met by Memorial and the submission filed by the Third Party also failed to establish that the requested information must be withheld under section 27(1)(c). Therefore, he found that section 27(1)(c) was not applicable to the requested information, and it should be released to the Applicant.

The Commissioner commented that if Memorial was not prepared to make the argument that section 27(1)(c) was applicable or did not have the necessary evidence to make the argument, its decision should have been to release the information and notify the Third Party of this decision. Then, if the Third Party objected to disclosure, it could have submitted a request for review to this Office and the burden of proving the exception applies would have shifted to the Third Party under section 64(2).

Report A-2013-012 - Eastern Health

Eastern Health received an access to information request for the successful bidder vendor name and successful bidder price (net & extended) on bids submitted over a period of six months for oxygen equipment and supplies. Eastern Health decided to grant access to the records, but first had to notify two affected Third Parties, on the basis of its assessment that the information might affect their business interests if released.

Both Third Parties filed Requests for Review, stating that section 27 (business interests of a third party) applied to the information and that the records should not be released. In this particular type of bidding context, it became apparent during the informal resolution process that the loss of one or two contracts would not significantly impact a company's bottom line, and could possibly even be made up the next month. Further, the contracts containing the information responsive to this request are only a part of each Third Party's business. Contracts with private individuals or businesses did not factor into the review. The Commissioner also noted that up until June 25, 2012, it was common practice for Eastern

Health to reveal the successful bidder and the amount of the bid for oxygen equipment and supplies, and that other health authorities in the Province continue to do so. This information was presented to both Third Parties but no formal submission was made by either.

The Commissioner found that neither third party had met the burden of proof as there must be detailed and convincing evidence to establish a reasonable expectation of probable harm. Further, if harm to the third parties was a reasonable likelihood, given the recent past practice in Eastern Health and the current practice of revealing bids in other jurisdictions where the parties do business, it should have been fairly easy for the third parties to show how the release of the information in the past and in these other jurisdictions currently has harmed them and how it would continue to do so in the future. In the absence of any formal submission presenting any evidence at all, it was very clear that the required standard had not been met.

The Commissioner found that given the lack of evidence presented, he was in agreement with Eastern Health that the information should be released to the Applicant.

Report A-2013-015 - College of the North Atlantic

The Applicant requested, from the College of the North Atlantic, approved budget documents for the years 2008, 2009, 2010, 2011, 2012 from CNA-Qatar. The College declined to provide the records, claiming sections 23(1) (a) and (b) (disclosure harmful to intergovernmental relations) and section 24(1) (a), (b) and (g) (disclosure harmful to the financial or economic interests of a public body) of the *ATIPPA*.

Because the matter could not be resolved informally, the file was referred to formal investigation. Section 64(1) of the *ATIPPA* places the burden squarely on the public body to prove that an exception applies to requested records. The College, however, declined to provide any written submission in support of its refusal to provide the records.

Section 23 of the *ATIPPA* requires the public body to show that there is a reasonable expectation of probable harm to a specific intergovernmental relationship, and that the information in question was "received in confidence". Section 24 likewise applies to disclosures that might reasonably be expected to cause harm to various financial or economic interests of the public body, and similarly requires detailed and convincing evidence to show why the exception applies.

This was one of several cases in which the Commissioner found that a public body, by not providing any formal submission in support of its position, had not met the burden of proof under section 64(1).

This is a concern for a couple of reasons. First, in the absence of detailed and convincing evidence, this Office cannot speculate about how exceptions might hypothetically apply. The result is that we sometimes have no choice but to recommend that records be disclosed, because the burden of proof has not been discharged. In addition, a refusal to provide submissions is clearly a failure to engage with the statutory process, and it therefore calls into question the effectiveness of the law that we must oversee and uphold.

Report A-2014-003 - Department of Finance

This case highlights the importance of responding to access requests within the prescribed time periods under the *ATIPPA*.

The Applicant made nine access to information requests to the Department of Finance (the "Department") on August 6, 2012 covering a wide range of topics. The Department contacted the Applicant to seek clarification regarding the nine access requests and the result was that some of the access requests were combined due to similarity of topics. The nine original access requests were decreased to seven access requests.

Section 11 of the *ATIPPA* requires a response within 30 days or an extended period. The Department responded to all access requests outside the 30 day period and in some instances this delay could have been avoided had the Department used the provisions of the *ATIPPA* properly.

The Department took longer than 30 days to respond, and advised the Applicant that one access request needed to be transferred to another public body, while another required the Department to give written notice to a third party. The Applicant was advised that there were no responsive records for another access request. All of these actions should have been completed within the 30 day time period unless the time limit was extended, in accordance with the time extension provisions in the *ATIPPA*, which it was not. The Applicant did not receive a response on the remainder of the access requests until four to six months after the initial access requests were submitted.

In relation to the access request that needed to be transferred to another public body and the access request where third party notification was needed, the Department would have been justified in relying on section 11(1)(b) and (c) of the *ATIPPA* in order to extend the time for a final response. However, the Department did not notify the Applicant of these circumstances until almost 60 days later. Based on section 11(2) of the *ATIPPA* once the initial 30 days has passed if there is no extension of time or response from the public body then the head of the public body is considered to have refused access to the records.

Regarding the remainder of the access requests, the Department did not extend the 30 day time limit under section 16 of the *ATIPPA* which provides for an extension when there are a large number of records to be searched or where notice is given to a third party under section 28 of the *ATIPPA*. In this case the Department could have also considered section 16(2) which provides for an extension of time with the Commissioner's approval where multiple concurrent requests have been made by the same applicant. The Department had many time extension options available, however, it was the Department's opinion that its ongoing communication with the Applicant was evidence of its active engagement in the response process and it therefore believed that the absence of the final responses within the 30 day time frame was not intended to indicate that the Department was refusing access to the information.

The Commissioner concluded in this case that the Department breached sections 9 (duty to assist) and 11 (time limit) of the *ATIPPA*. The time it took the Department to respond to the Applicant's access requests was not reasonable. The Applicant received a total of 252 pages of records and was denied access completely in relation to certain requests. The Commissioner felt that a thorough response could have been issued in far less than the four to six months it took the Department to complete this task. The Commissioner found that the Department failed to "respond without delay to an applicant in an open, accurate and complete manner" and therefore failed to fulfill the duty to assist imposed on it by section 9 of the *ATIPPA*.

With regard to the time limits, a "do-your-best deadline" is not what section 11 of the *ATIPPA* says. A public body must respond within the 30 day time period or an extended period. The Department did not respond within the 30 day period nor did the Department extend the time period as provided for under the *ATIPPA* which they could have justifiably done with certain requests. A time period of four to six months to provide the Applicant with 252 pages of records is completely unreasonable and a clear violation of section 11 of the *ATIPPA*.

The Commissioner recommended that the Department be mindful of the statutory duties imposed on it by sections 9 and 11 of the *ATIPPA*, review section 16 of the *ATIPPA* and use the tools available to it under the *ATIPPA*, when necessary, to prevent deemed refusals, and review and assess its policies and procedure for handling access to information requests for the purpose of ensuring that it complies with section 9 and 11 of the *ATIPPA*.

Report A-2014-004 – Department of Advanced Education and Skills

On October 3, 2012, the Applicant requested from the Department of Advanced Education and Skills copies of all funding proposals submitted to the Department from any organization in a particular community and for details of any approved funding.

The Department's response to the access request was due on November 2, 2012. The Department received approval from this Office, pursuant to section 16(2), to extend the time for responding to the access request for an additional 20 days to November 22, 2012.

The Department responded to the Applicant's access request by letter dated January 25, 2013. The Applicant received the Department's response on February 1, 2013.

In a Request for Review dated January 29, 2013 and received in this Office on February 1, 2013, the Applicant asked for a review of this matter. Specifically, the Applicant requested an explanation as to why the access request was not responded to within the legislated time lines.

As part of the formal investigation process, the Department made a submission addressing the duty to assistant applicants as set out in section 9 and the time limit for responding to an access request as provided for in section 11.

In relation to the duty to assist, the Department stated:

> *Section 9: Duty to Assist: The Department made every effort to ensure information was provided to the Applicant. The applicant requested records that totaled over 400 pages, and information that was not readily available. This information had to be created through various data capturing programs and OCIO assistance. The Department did not charge the Applicant for the request and it was not the intention of the Department to deny access to these records.*

The Department commented in relation to the time lines in section 11 as follows:

> *Section 11: Time Limit for response: This request had a large number of records, records that needed to be created and at the time, the applicant had submitted three requests within a short time frame: two on October 3rd, and one on October 19th, 2012. The Department aims to meet all deadlines, but due to increased internal review processing time (due to large volumes of records), the department was late in responding.*

The Department also stated in its submission:

> *The Department has engaged in further training of their staff for processing ATIPPA requests. This training is meant to increase employee knowledge regarding processing and aims to decrease the number of late requests.*

In finding that there had been a deemed refusal to respond to the access request, the Commissioner stated:

> *It is clear that section 11(2) is applicable here. The Department failed "to respond within the 30 day period or an extended period". This Office extended the time for responding to November 22, 2012 but the Department did not send its response until January 25, 2013, with the Applicant receiving the response on February 1, 2013. It may be that if the Department had made a further application to this Office for an extension of time then such an extension might have been considered. No such application was made. The result is that the Department is "considered to have refused access to the record" in accordance with section 11(2) of the ATIPPA.*
>
> *The Department stated in its submission that "it was not the intention of the Department to deny access to these records." However, section 11(2) applies regardless of the intention of the public body involved. Once there has been a failure to respond within the prescribed time period, the public body is considered to have refused access. In other words, there is a deemed refusal to provide access to the requested records.*

After discussing the components of the duty to assist as determined by this Office and the obligations of that duty as set out in the Access to Information Policy and Procedures Manual of the ATIPP Office, the Commissioner concluded that the Department had not complied with the duty to assist:

> *In the present case, there is no indication that when it found itself in a deemed refusal situation the Department took "whatever actions are available" or that such measures began as soon as it was "apparent that the extended time frame cannot be met." For example, the Department did not assign additional staff as soon as possible to help process the request. Nor did it contact this Office to ask for another extension of time to respond to the request.*
>
> *In short, the Department has not met the burden of showing that what it did was reasonable in the circumstances. As such, I find that the Department has failed to fulfill the duty to assist imposed on it by section 9 of the ATIPPA.*

The Commissioner recommended that the Department be mindful of its obligations under section 9 and section 11 and take measures to ensure compliance with these sections in order to improve its access to information process.

The Department concurred with the Commissioner's recommendations and outlined the measures it had already taken and would continue to take to improve its responses to access requests.

Court Proceedings

The following are summaries of several of the proceedings in the Supreme Court of Newfoundland and Labrador, Court of Appeal and Trial Division in which this Office has been involved during the period of this Annual Report.

2012 01G 6594 – Office of the Information and Privacy Commissioner v. Department of Environment and Conservation, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding is an appeal by the Commissioner under section 60(1.1) of the *ATIPPA*, which allows the Commissioner to appeal a decision of a public body refusing to disclose a record on the basis of solicitor and client privilege under section 21.

It was necessary to proceed with this matter by way of an appeal to the Trial Division because amendments to the *ATIPPA* in Bill 29 removed the Commissioner's power to do a review of a public body's decision to deny access on the basis of the solicitor and client exception to disclosure. The only remedy now for an access to information applicant who has been refused access on the basis of a claim of solicitor and client privilege is for the applicant to appeal the decision of the public body directly to the Trial Division under section 60(1.1) or request the Commissioner to launch such an appeal.

In this case, after being denied access to the requested records on the basis of solicitor and client privilege under section 21, the Applicant requested this Office to file an appeal of the decision of the Department of Environment and Conservation to refuse access.

This Office filed a Notice of Appeal on December 21, 2012 appealing the decision of the Department dated October 26, 2012 in which it refused to provide the requested records based on a claim of solicitor and client privilege under section 21 of the *ATIPPA*.

At present, the Factums have been filed by the parties and a date for a hearing will be set shortly.

2012 01G 4352 – Office of the Information and Privacy Commissioner v. Memorial University, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding is an appeal by the Commissioner under section 61(1) of the *ATIPPA*, which allows the Commissioner to appeal a decision of a public body refusing to follow the recommendations in a Commissioner's Report.

This matter has its origins in an access request to Memorial University by an Applicant seeking records pertaining to an observational study of MS patients. Memorial denied access to all of the records in reliance on section 5(h) which exempts from the *ATIPPA* a record containing "research information of an employee of a post-secondary educational institution".

The Applicant filed a Request for Review resulting in Report A-2012-009 in which the Commissioner recommended release of some of the information which Memorial had claimed was exempted by section 5(h). Memorial University declined to follow the Commissioner's recommendation and expressed the view that the Commissioner should not have sought access to the records nor completed a report because the responsive records were prima facie exempted research information and by doing so the Commissioner exceeded his jurisdiction.

Pursuant to section 61(1) of the *ATIPPA*, the Commissioner filed an appeal in relation to Memorial's decision not to follow his recommendations in Report A-2012-009.

The Appeal was heard by Madam Justice Gillian D. Butler who delivered her written decision in the matter on March 24, 2014. In that decision, Justice Butler discussed two previous cases involving section 5 of the *ATIPPA* and stated as follows:

> *[33] I accept that both Fowler, J. and Orsborn, C.J. held that:*
>
> - *the authority of the Commissioner is found in and only in the legislation;*
> - *the legislature of this Province chose to remove the categories of records enumerated in section 5 of Part I from the operation of the Act altogether; and*
> - *unlike records that are exempted under Part III of the ATIPPA, the Commissioner therefore has no ability to compel production of records enumerated in section 5 of Part I.*

Justice Butler set out her conclusion as follows:

> *[64] The Commissioner has no jurisdiction over section 5 records. He cannot compel their production for review to verify a claim under section 5. He cannot review them and cannot make a recommendation to a public body on their release. Based on the current wording of the ATIPPA, when a claim to section 5 records is made, the Commissioner's only recourse is to request that this court conduct a judicial review of the records and the public body's claim that the records are outside the ambit of the Act. This judicial review is distinct from the appeal provisions of Part III of the ATIPPA.*

The Commissioner is giving serious consideration to appealing the decision of Madam Justice Butler.

2012 01G 5928 – Office of the Information and Privacy Commissioner v. College of the North Atlantic, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding is an appeal by this Office under section 60(1.1) of the *ATIPPA*, which allows the Commissioner to appeal a decision of a public body who refuses to disclose a record on the basis of solicitor and client privilege under section 21.

It was necessary to proceed with this matter by way of an appeal to the Trial Division because amendments to the *ATIPPA* in Bill 29 removed the Commissioner's power to do a review of a public body's decision to deny access on the basis of the solicitor and client privilege exception to disclosure.

In this case, after being denied access to copies of invoices from law firms submitted to the College of the North Atlantic (the College), the Applicant requested the Commissioner to file an appeal of the decision of the College to refuse access.

The Commissioner filed a Notice of Appeal on November 22, 2012 appealing the decision of the College dated October 25, 2012 in which the College refused to provide the legal invoices based on a claim of solicitor and client privilege under section 21 of the *ATIPPA*. In light of the issues involved, the Law Society of Newfoundland and Labrador was granted leave to appear as an Intervenor.

The dates of the hearing for this matter were June 5, 2013 and September 12, 2013. Chief Justice David B. Orsborn delivered his written decision on December 24, 2013.

Chief Justice Orsborn noted that the procedure followed was that set out in previous appeals involving claims of solicitor and client privilege. The College provided the unredacted records in question to the court in a sealed envelope to be viewed only by the presiding judge. The parties made submissions directed primarily to the existence and extent of the claimed solicitor-client privilege and whether or not

there could be any degree of redaction which would allow non-privileged information to be disclosed. Chief Justice Orsborn indicated that he reviewed in detail the records in question and in determining that the records were subject to solicitor and client privilege he stated:

> *[39] I do not consider that this appeal should fall to be decided on the issue of onus. Pursuant to s. 64 of ATIPPA, the burden is on CONA to establish that [the Applicant] has no right of access to the requested records. In my view that burden is satisfied by establishing, as it has done here, that the requested records are presumptively privileged and thus protected from disclosure. It may then be argued that the onus of rebutting the presumption rests on the requestor. However, the legislation and the procedure adopted for judicial assessment of a refusal to provide records said to be solicitor-client privileged suggests that the court simply make its own objective assessment without regard to onus. This is what I have done in this case. But having said that, one would expect that the applicant would ensure that all relevant evidence of context is put before the court.*
>
> *. . .*
>
> *[45] In the context of [this] application, the presumption of solicitor-client privilege over the legal invoices for legal services received by CONA for matters relating to [the Applicant] has not been rebutted. The information remains subject to solicitor-client privilege. I would point out, however, 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 the presumption may be different.*

Having found that the records were subject to solicitor and client privilege, the Chief Justice went on to consider whether the College had properly exercised its discretion in refusing access to the records under section 21 of the *ATIPPA*. In deciding that there had been a proper exercise of discretion, the Chief Justice stated:

> *[49] Thus, based on the approach in Pomerleau, the court would consider whether CONA's discretion was exercised in good faith and for a reason rationally connected to the purpose for the granting of the discretion. In my view, the issue of an improper exercise of discretion is one which calls for the onus of proof to be on the person asserting the improper exercise. In this case, there is no evidence at all that CONA exercised its discretion improperly. Further, given the nature of the privilege, the circumstances would, in my view, have to be exceptional in order to support a finding that a discretion to refuse to disclose information subject to solicitor-client privilege had been improperly exercised. . . .*

The Chief Justice determined that because the records in question were subject to solicitor and client privilege and the presumption had not been rebutted the appeal must be dismissed.

2013 01G 3476 – Corporate Express Canada Inc., trading as Staples Advantage Canada v. Memorial University; OIPC as Intervenor, Dicks and Company Limited as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding is an appeal by a third party under section 60(1) of the *ATIPPA*, which allows a third party who has been notified under section 28 of the *ATIPPA* to appeal a decision of a public body to follow a Commissioner's recommendation to release information to an applicant.

This matter began with an access request to Memorial University by Dicks and Company Limited ("Dicks") seeking access to records relating to a tender for the provision of office supplies to Memorial University. After receiving the access request, Memorial University, pursuant to section 28 of the *ATIPPA*, notified Corporate Express Canada Inc. ("Corporate Express") that an access request had been made for access to a record containing information the disclosure of which may affect the business interests of Corporate Express. Corporate Express responded to this notification by correspondence setting out the reasons why it objected to the release of the requested information. Subsequently, Memorial advised Dicks that it was denying access to the requested information on the basis of section 27 (disclosure harmful to the business interests of a third party).

Dicks filed a Request for Review with the Commissioner resulting in the release on June 4, 2013 of Report A-2013-009 in which the Commissioner recommended that Memorial release the information withheld under section 27. On June 17, 2013, Memorial advised the Commissioner that it accepted the Commissioner's recommendation to disclose the information.

Pursuant to section 60(1) of the *ATIPPA*, Corporate Express, as a third party, filed an appeal in relation to Memorial's decision to follow the recommendation in Report A-2013-009. Pursuant to section 61(2), the Commissioner became an Intervenor in the appeal. Dicks was granted Intervenor status by the court.

The hearing for the appeal has been scheduled for June 17-19, 2014 in the Supreme Court of Newfoundland and Labrador, Trial Division in St. John's.

2013 04G 0007 – Peter McBreairty v. College of the North Atlantic; OIPC as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding is an appeal by an access to information applicant under section 60(1) of the *ATIPPA*, which allows an applicant to appeal a decision of a public body refusing to follow the recommendations in a Commissioner's Report.

This matter began with an access request to the College of the North Atlantic by an Applicant seeking records relating to the Vacation Leave Payout of a named individual. The College denied access to some of the information in the responsive records on the basis of section 30 (disclosure of personal information).

The Applicant filed a Request for Review resulting in Report A-2012-011 in which the Commissioner recommended release of some of the information which the College had claimed was excepted by section 30. The College declined to follow the Commissioner's recommendation and stated that the information recommended for release was the personal information of an individual who was not employed by the College of the North Atlantic (CNA) but was an employee of College of the North Atlantic-Qatar (CNA-Q). According to the College, CNA-Q is a distinct legal entity from CNA. The College drew a distinction between "locally hired employees" who are employees of CNA-Q recruited locally from Doha, Qatar and "Canadian hires" who are employees deployed to work at CNA-Q that are employees of CNA. The College indicated that it would not follow the Commissioner's recommendation to release the information because it related to "locally-hired employees of CNA-Q".

Pursuant to section 60(1) of the *ATIPPA*, the Applicant filed an appeal in relation to the College's decision not to follow the recommendations in Report A-2012-011. Given the important issues raised by the College's position regarding "local hires" and the legal status of CNA-Q, the Commissioner became an Intervenor in the appeal proceeding.

The hearing for the appeal has been scheduled for May 26-27, 2014 in the Supreme Court of Newfoundland and Labrador, Trial Division in Corner Brook.

2014 01G 0775 – Scarlet Hann v. Department of Health and Community Services; OIPC as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding is an appeal by an access to information applicant under section 60(1) of the *ATIPPA*, which allows an applicant to appeal a decision of a public body not to follow a Commissioner's recommendation to release information to the applicant.

This matter began with an access request to the Department of Health and Community Services by an applicant seeking records relating to a certain position within the Department and decisions made in relation to that position. The Department denied access to all responsive records based on the exceptions set out in section 18 (cabinet confidences) and section 20 (policy advice or recommendations).

The Applicant filed a Request for Review resulting in the release on January 14, 2014 of Report A-2014-001 in which the Commissioner determined that section 18 and section 20 had been appropriately relied on by the Department to sever information in the responsive records. However, the Commissioner

determined that section 7(2) of the *ATIPPA* was applicable. It was reasonable to sever the excepted information from the records, therefore, the applicant had a right to the remainder of the record. Therefore, the Commissioner recommended the release of the information not excepted from disclosure by section 18 or section 20.

The Department declined to follow the Commissioner's recommendation by indicating that all the information recommended for release was subject to the exception set out in section 18. The Department indicated that it was prohibited from disclosing any portion of a record subject to section 18. Furthermore, the Department indicated that to disclose the information recommended for release would constitute a contravention of the *ATIPPA*.

Pursuant to section 60(1) of the *ATIPPA*, the Applicant filed an appeal in relation to the Department's decision not to follow the Commissioner's recommendation in Report A-2014-001. Pursuant to section 61(2), the Commissioner became an Intervenor in the appeal.

No date has been set for the hearing of the appeal.

Follow-Up

From time to time, the OIPC designates certain files for follow-up, particularly those which may require a longer period of time before recommendations can be implemented.

In May 2013 this Office received a privacy complaint from an employee regarding the video camera surveillance system at the St. John's City Lockup. The Department of Justice responded to this complaint by noting that one of the primary responsibilities of the Adult Corrections Branch is to maintain safe and secure correctional facilities for inmates, staff and members of the public. They noted that the Lockup operates in an environment requiring enhanced security measures as most inmates detained there are fresh arrests and are often under the influence, have not undergone any security/classification assessment and some express suicidal ideations.

The Department also noted that signage is in place to notify people that they are being recorded. In an effort to balance privacy with security the Department has limited access to the recordings to two senior employees, and the retention period of the recordings is limited to 30 days.

In a letter dated November 27, 2013, the OIPC responded to the complaint. The position of this Office was that, given the nature of the workplace and the measures that have been taken to minimize the intrusion on the privacy of staff, the use of video camera surveillance did not contravene the *ATIPPA*, and that section 32, in particular, allows for the collection of personal information that "relates directly to and is necessary for an operating program or activity of the public body".

This Office stated that there was a rational basis for these security measures, and they were directly related to and necessary for the safe operation of the Lockup in accordance with section 32 of the *ATIPPA*. However, we did recommend the Department adopt comprehensive policies and procedures (to be reviewed and updated as necessary) to direct its practices in relation to the surveillance system. We advised the Department that these policies and procedures should be in writing and include the following:

- the rationale and purpose of the system;
- provide system guidelines that include: the location and field of vision of equipment, list of authorized personnel to operate the system, when surveillance will be in effect, and whether and when recordings will be made;
- develop policies and procedures specific to providing notice of use of surveillance, providing access, use, disclosure, security, retention and destruction of records;
- outline responsibilities of all service providers (employees and contractors) to review and comply with policy and statute in performing their duties and functions related to the operation of the video surveillance system;
- clarify consequences of breach of contract or policy.

Unfortunately, the Department has still not implemented these policies and procedures. Upgrading of the surveillance system has been the focus of the Department since this Office's recommendations and they have only recently received the required approvals and financial support to implement this upgrade. We are advised by the Department that the development of policies and procedures will now begin as the upgrades are now approved. It is the intention of the Department to discuss a draft of these policies with this Office before finalizing them. We look forward to assisting the Department as they try to balance privacy concerns with operational requirements and we will report on the Department's progress in this regard in a future Annual Report.

Conclusion

2013-2014 has been a challenging year. This year has seen another phase in the evolution and capability of the Office along with a significant increase in its workload requirements associated with both Access and Privacy and Personal Health Information. I am proud of the quality and calibre of the OIPC staff and I continue to be impressed with the dedication, hard work and positive attitude of all staff. We will continue to strive in the coming year to improve the services provided to the citizens of Newfoundland and Labrador, and to achieve greater progress in the ongoing mandate to preserve and promote their rights of access to information and protection of privacy.

Significant time, effort and research has been invested by the Office as a result of the comprehensive legislative amendments resulting from Bill 29. A number of the amendments have broadened the scope and interpretation of particular sections of the Act requiring a steep learning curve as the Office conducts the appropriate level of analysis of decisions by other Commissioners across the country dealing with similar issues, as well as decisions from the courts. Compared to previous years, our Office has been required to refer matters to the courts with greater frequency, primarily due to the legislative changes brought about by Bill 29, however, other matters, unrelated to these changes also required judical review. In particular, the removal of the Commissioner's authority to review claims of section 21 (solicitor and client privilege) by public bodies has resulted in the referral of cases to the Supreme Court to ensure that section 21 is being appropriately claimed. The *ATIPPA* is still relatively young but as we move forward and encounter challenges, clarity in interpretation will continue to be achieved.

Although the *ATIPPA* legislative review process will be reported on, in detail, in our Annual Report for the period April 1, 2014 - March 31, 2015, it should be recognized that the OIPC had undertaken a significant amount of work between the period of January to March 2014 in preparation for its presentations to the Review Committee. Several full day sessions were conducted with the entire staff in order to develop the best approach to the review. As a result, all analysts were assigned various sections of the *ATIPPA* for review and research and to subsequently present their findings and recommendations for consideration. This work will ultimately result in a very comprehensive OIPC submission to the Review Committee.

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