ANNUAL REPORT

OFFICE of the INFORMATION and PRIVACY COMMISSIONER

NEWFOUNDLAND & LABRADOR
2007 - 2008 ANNUAL REPORT
(April 1, 2007 – March 31, 2008)

By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it. Furthermore, the legislation places the burden squarely on the head of a public body that any information that is withheld is done so appropriately and in accordance with the legislation.

NL OIPC Report 2005-002

COMMISSIONER'S MESSAGE

February 17, 2009

The Honourable Roger Fitzgerald
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 Section 59 of the *Access to Information and Protection of Privacy Act*. This Report covers the period from April 1, 2007 to March 31, 2008.

Edward P. Ring
Information and Privacy Commissioner

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FOREWORD

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 records relating to the operations of public bodies in the Province, ranging from general records on administration and practices as well as information on legislation and even government policies. The basic objective is to make government open and transparent, and in doing so to make government officials and politicians more accountable to the people of the Province.

Over the past three decades, all jurisdictions in Canada have introduced 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. But certainly in this Province, such cases are more and more the exception. The rule and spirit of "giving the public a right of access to records" is increasingly the norm.

The *ATIPPA*, like legislation in all other Canadian jurisdictions, established the Information and Privacy 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, through the Speaker of the House, to the Legislature. The Commissioner is independent of the government in order to ensure impartiality.

Our Office 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. 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 citizens are prepared to accept that there may be instances of delays by public bodies, and 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. The manner in which public bodies respond to our involvement is a key factor in how the public will measure the true commitment of the government and its agencies to the principles and spirit of the legislation.

On the privacy side, it was noted in our 2006-2007 Annual Report that Newfoundland and Labrador remained the sole provincial jurisdiction lacking legislative requirements for public bodies to appropriately protect the personal information in their custody. Even though the access provisions of the *ATIPPA* have been in force since January 17, 2005, government chose to delay the proclamation of the privacy provisions (Part IV) in order to allow public bodies to prepare for the impact that these provisions may have on their operations. It is therefore with great satisfaction that I note here the proclamation on January 16, 2008 of Part IV of the *ATIPPA* which contains provisions 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.

Pending Personal Health Information Legislation

I wish to take this opportunity to comment on government's plan to enact legislation which is specifically aimed at the protection of personal health information, to be called the *Personal Health Information Act,* or *PHIA*. Personal health information is indeed often the most sensitive form of personal information. Even though the *ATIPPA* also protects personal health information as it does with other types of personal information, the *ATIPPA* only applies to public bodies, whereas the intention with *PHIA* is that it will pertain to personal health information held by both public sector and private sector custodians. Therefore, the scope of *PHIA* is much broader than the *ATIPPA*, and consequently this Office will be tasked with a much broader mandate than we currently

maintain as the oversight body for the *ATIPPA*, because we will also serve as the oversight mechanism for *PHIA*. Whereas there are approximately 470 public bodies designated under the *ATIPPA* who are subject to the oversight of this Office, there could be thousands of private and public sector custodians of personal health information whose compliance with the *PHIA* will be overseen by this Office. I am confident that the House of Assembly will appreciate the massive undertaking this likely will be, and that appropriate resources will be allocated to this Office in order to allow my staff to carry out this very important mandate.

During the past year, this Office has been consulted by the Department of Health and Community Services on the development of that legislation, and we believe those consultations have been fruitful and productive. We applaud government for taking that initiative, and we look forward to the passage of that legislation in the 2008-2009 fiscal year by the House of Assembly, and its eventual proclamation into law.

ACCESSING INFORMATION

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

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

- 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.

- 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 our website www.oipc.gov.nl.ca.

- 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).

- 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 may also be imposed.

- If access to the record is provided, then the process is completed. If access is denied, or other action has been implemented which you dispute, you may request a review by the Information and Privacy Commissioner, or an appeal may be made to the Supreme Court Trial Division.

How to File a Request for Review with the Information and Privacy Commissioner

- Submit a Request for Review form to our Office. The form and the contact information are available on our website www.oipc.gov.nl.ca.

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

- If informal settlement is unsuccessful, the Information and Privacy Commissioner will 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.

- 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.

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

WITHHOLDING INFORMATION

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 except certain of those 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. The recourse for applicants in such cases is to the Office of the Information and Privacy Commissioner. Their complaints range from:

- being denied the requested 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;
- other problems related to the *ATIPPA*.

While the Commissioner's investigations provide him access to any records in the custody or control of public bodies, he does not have the power to order a complaint to be settled in a particular way. He and his investigators rely on persuasion to solve 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 were listed in last year's Report but warrant repeating.

Mandatory Exceptions

- *Cabinet confidences* – where the release of information would reveal the substance of deliberations of Cabinet.

- *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. Advice is considered to be a suggested course of action and not a progress or status report.

- *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.

Unsupportable refusals to release information and delays in responding to requests for access are particularly frustrating to applicants as well as to this Office. This being said, it is of significant comfort to acknowledge that there is a sustained effort under way by government through the ATIPP Office in the Department of Justice 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.

It is noted here that public bodies often express resentment that they too often receive requests for information that they would call repetitive, trivial or even vexatious. They argue that knowing how much a minister or a CEO spends on hotel bills and meals doesn't do anything to promote good public policy, or that requesting copies of thousands of e-mails leading up to a dismissal of an employee does nothing to further the mandate or efficiency of an agency or municipality. Whether these assertions are correct 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*. The legislation does not provide for or allow this Office to pick and choose whether an access request is important, useful or frivolous. Referring back to the above examples, politicians who appreciate that their expenses may become public, might be a little more conscious of thrift when traveling, while public bodies preparing to dismiss an employee may be a little more sensitive and professional in their human resources practices.

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.

THE ROLE OF THE COMMISSIONER

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, they may ask the Commissioner to review the decision, act or failure to act relating to the request. The Commissioner and his 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 done 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.

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

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 for this Office translates into public access to information, and the required level of privacy and therefore into success for citizens.

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 provisions of the *ATIPPA*.

This Office is committed to working cooperatively with all parties. We will respect opposing points of view in all our investigations but will 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.

ACTIVITIES AND STATISTICS

2007 - 2008 Statistics

During the year ended March 31, 2008, this Office received 89 Requests for Review under section 43 of the *ATIPPA*, 13 complaints under section 44 of the *ATIPPA* and 6 privacy investigations under Part IV of the *ATIPPA*. In addition, there were 27 Requests for Review and 2 Complaints carried over from the previous year. This reflected increases of 21% for Requests for Review, 40% for Complaints and a 100% increase for privacy investigations as the privacy provisions of the *ATIPPA* were only proclaimed on January 16, 2008.

Of the Requests for Review, 45 were resolved through informal resolution and 18 resulted in a Commissioner's Report. The remainder were either closed or carried over to the 2008 - 2009 fiscal year. In addition to Requests for Review, this Office received 94 access to information related inquiries during the 2007 - 2008 year. Of the 15 complaints received under section 44, relating either to the fees being charged or to extensions of time by public bodies, 7 were investigated and concluded by this Office and the remainder were carried over to the 2008 - 2009 fiscal year.

Of the 131 Requests for Review and complaints dealt with in the 2007 - 2008 year:

- 109 (or 83%) were initiated by individuals
- 11 (or 8%) were initiated by businesses
- 5 (or 4%) were initiated by the media
- 3 (or 2%) were initiated by a political party
- 1 (or 1%) was initiated by another public body
- 1 (or 1%) was initiated by an interest group
- 1 (or 1%) was initiated by a legal firm

Thirty-nine percent of the cases were related to educational bodies. Thirty-one percent of all cases were related to provincial government departments. Twenty percent of the cases were related to local government bodies. Five percent of the cases were related to agencies of the Crown. Four percent of the cases were related to health care bodies and two percent of the cases were related to the Legislative Assembly.

A number of significant privacy breach investigations that came on the heels of the privacy provisions proclamation in January 2008 involved the Workplace Health Safety and Compensation Commission, the Public Health Laboratory and Eastern School

District. Investigations were initiated in this fiscal year but were carried over to fiscal year 2008 - 2009 and will be reported upon in the 2008 - 2009 Annual Report.

For more information on the statistics for the year 2007 - 2008 see the Figures and Tables on pages 35 to 43.

OIPC Website

Our website, (www.oipc.gov.nl.ca), continues to be a valuable resource for members of the public and public bodies. In addition to information and resources available on this website, we have now added a Table of Concordance. The purpose of this Table of Concordance is to provide an index of references in Commissioner's Reports to specific sections of the *ATIPPA*. This allows for quick and easy searching of particular topics that the Commissioner has discussed in one or more of our Reports.

Education and Awareness

Providing information on access and privacy to the public and to interested groups continues to be an important mandate of this Office. We welcome invitations to speak to groups, organizations and public bodies throughout the province. The following is a list of presentations and awareness activities conducted by this Office during fiscal year 2007 - 2008:

- January 11, 2007 – Camouflage Software Inc. Briefing
- January 30, 2007 – CBC Cross Talk
- April 19, 2007 – NLAMA Convention, St. John's
- April 25, 2007 – Newfoundland-Labrador Human Rights Association, St. John's
- May 1, 2007 – Assistant Directors of Education, St. John's
- May 1, 2007 – Placentia Town Council, Placentia
- May 31, 2007 – Newfoundland and Labrador Access and Privacy Workshop 2007, St. John's
- June 4, 2007 – Atlantic Canada Access and Privacy Workshop 2007, Halifax
- June 14, 2007 – Access and Privacy Conference 2007 – Edmonton
- September 19, 2007 - North East Avalon Joint Council, Petty Harbour
- October 16-19, 2007 – ADR Workshop
- November 29, 2007 – 5th International Conference of Information Commissioners, New Zealand
- January 15, 2008 – Memorial University Business Class, St. John's
- February 12, 2008 – Pan Canadian Privacy Forum, Ottawa
- February 13 - 14, 2008 - Investigators Conference, Ottawa

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 and public bodies. 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 and privacy matters. As an example, this Office continued to work with various stakeholders in the development of proposed personal health information legislation for the Province. In addition to providing input on specific provisions, this Office participated in consultation sessions on the proposed legislation during this reporting period.

Staffing

As is evident from this year's statistics, the demand for the services of this Office has substantially increased from last year. This has obviously had a significant effect on our operations. In response, we hired a third permanent Investigator in December 2007 and a temporary Investigator in January 2008, bringing our staff complement to five full-time positions and one temporary position, in addition to the part-time Commissioner. Late in the fiscal year, December 2007, a full time Commissioner was appointed. While all staff members work diligently and tirelessly to meet the challenges of this increased demand, it is obvious that our workload is quite high and will continue to be high well into the future. Individuals and organizations are now more familiar with this Office and with the *ATIPPA* 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, even with the additional staff, has been challenged to cope with the demands placed on it due to the significant workload resulting from the privacy breach investigations that were required to be conducted shortly after proclamation of the privacy provisions of the *Act*. The backlog of access requests/reviews has grown since the last reporting period. In addition, it is anticipated that personal health information legislation will be introduced during the next session of the House of Assembly. As with the *ATIPPA*, this Office will be the review mechanism for this new legislation. Both of these initiatives will undoubtedly create even more demand on this Office and, as such, additional staffing increases will be necessary. We will monitor these developments closely and we anticipate Government's support in seeking these increases as appropriate.

PRIVACY

As mentioned earlier in this report, the privacy provisions of the *ATIPPA* (Part IV) were proclaimed on January 16, 2008.

Part IV of the *ATIPPA* governs the collection, use and disclosure of personal information by public bodies in the Province. Personal information is defined in section 2 of the legislation as recorded information about an identifiable individual. This type of legislation is intended to protect the privacy of citizens by prohibiting the unauthorized collection, use and disclosure of personal information by public bodies and by giving individuals a specific right of access to their own personal information. The *ATIPPA* was passed by the Legislature in 2002, and proclaimed into force on January 17, 2005, with the exception of Part IV. At that time, Government chose to delay proclamation of the privacy provisions in order to allow public bodies to prepare for the impact that these provisions may have on their operations.

As with previous years, we continue to receive numerous privacy related inquiries and complaints (a total of 195 during the period of this report), many of which are legitimate concerns about the manner in which personal information is collected, used or shared.

With the proclamation of the privacy provisions of the *ATIPPA*, this Office opened four privacy complaint investigations in the first few months of 2008. The results of these investigations will be reported on in the next annual report.

Again, I must state that this Office is very pleased that the privacy provisions are now proclaimed into force which establishes the appropriate statutory controls and requirements with respect to privacy protection, and also provides the citizens of Newfoundland and Labrador with the oversight and protection of this Office, as envisioned and approved by the legislation.

REPORT SUMMARIES

As indicated in our previous Annual Report, 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, 71% 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.

The following are summaries of selected Reports issued during the period of this Annual Report:

Report 2007-014 – College of the North Atlantic

On 5 October 2006 the College of the North Atlantic (the "College") received an access request for all records (including attachments) sent to or received by eight named individuals that referenced the Applicant or his spouse for the time period April 1, 2005 to October 4, 2006. The Applicant had included a letter of consent from his spouse with his access request.

The College responded to the Applicant's request on 16 October 2006 informing him that it was relying on sections 8(2) and 10(1) of the *ATIPPA* to refuse his request due to the significant numbers of responsive or potentially responsive records that had been located. Section 8(2) states that a request must provide sufficient details about the information requested so that an employee familiar with the records of a public body can identify the record containing the information. Section 10(1)(b) states that

where a record is in electronic form, the head of a public body shall produce the record for the applicant where producing it would not interfere unreasonably with the operations of the public body. The College's position was that given the very large number of documents involved, producing the records would interfere unreasonably with the operations of the College. The College also informed the Applicant that as one of the named individuals was not a College employee, the records of this individual were outside the scope of the *ATIPPA*.

The Applicant questioned the accuracy of the high number of records reported to have been found by the College, but this number was confirmed to him on several occasions. Subsequent correspondence between the Applicant and the College led the Applicant to amend his access request to include only the records of three individuals.

In response to the amended request, a further search was undertaken by the College to look for responsive records. On 1 December 2006 the Applicant was notified that no records responsive to the amended request were located. On 11 December 2006 the Applicant filed a Request for Review with this Office, enclosing (from his own personal records) copies of several e-mails which he felt were responsive to his request, and as such should have been provided to him by the College. He stated that he felt it was quite unlikely that no records responsive to his request existed. The Applicant asked this Office to investigate the College's assertion that no responsive records existed and to also investigate whether the College had failed in its duty to assist, as required by section 9 of the *ATIPPA*.

The College later acknowledged errors in its search for the responsive records, and the search was conducted again following receipt of the Applicant's Request for Review. A significant number of records were identified as a result of that search. On 8 January 2007 the College forwarded a set of responsive records to the Applicant, withholding and severing some information based on sections 20, 21, 22, 24 and 30.

As a result of informal resolution efforts, the College agreed to provide all records to the Applicant which were proposed for release by this Office. This resulted in additional records being forwarded to the Applicant on 13 April 2007. Despite this, due to the many concerns raised by the Applicant about the process which had been followed by the College in responding to his initial request and subsequent amended request, and about how the searches were conducted, the Applicant

did not wish to accept an informal resolution, and instead requested that the Commissioner issue a Report on this particular matter.

Both parties were notified of this in a letter dated 10 May 2007, at which time they were given the opportunity to provide formal submissions. Both the College and the Applicant chose to provide submissions.

The College explained its actions as follows:

In response to the Applicant's initial access request, the College's IT group was contacted and asked to undertake the search for electronic records on 6 October. They found a total of 953 e-mails and 3,967 attachments that were responsive or potentially responsive to the Applicant's request. At that time, CNA lacked the technical means to search attachments electronically, so pending a manual search of the attachments, the College considered all the attachments potentially responsive. However, the 16 October correspondence received by the Applicant containing the College's response indicated that over 12,000 attachments were found in one College employee's e-mail archive alone. The College explained that this was an erroneous communication that arose as the result of a misunderstanding on the part of a College employee who, in giving that number, meant the total number of e-mails and attachments in his archives and not just those responsive to the Applicant's request. However, there was a further issue. At the same time as the College's Access and Privacy Coordinator was in receipt of this comment from that individual, she was also in possession of a result from the Technical Analyst who performed the search of the College's Newfoundland e-mail archives indicating that there were 641 responsive e-mails in the account of the same College employee, as well as 1,869 attachments in that individual's e-mail account falling into the time period specified in the Applicant's request. In an e-mail dated 3 November 2006, in response to the Applicant's concern that the figure of 12,000 attachments was an improbably high one, the College advised the Applicant that in addition to the 12,000 attachments, there were also 2,098 e-mails with attachments in the e-mail accounts of three other individuals named in the request. The figures for the total number of e-mails directly referencing the Applicant were not provided at that point. These three, plus the one who was mistakenly determined to have 12,000 attachments in the requested time frame, were the four individuals (out of eight names requested by the Applicant) who the College believed at that point to be in possession of e-mail records responsive to the Applicant's request.

In response to the amended request submitted by the Applicant, College IT staff were again contacted to confirm the numbers presented in October. This time, the College was advised that that there were no results, because the archives in Newfoundland for those three people were created on 5 March 2004, which would contain no e-mails later than that date, and therefore no e-mails responsive to the Applicant's request. IT staff, however, also informed the College that the e-mail addresses of two of the three named individuals were "e-mail address redirects," which would mean that an e-mail sent to either of them would be redirected to their Qatar mailboxes, and would not be saved on the College's Newfoundland server.

The College noted that there was a problem in obtaining a response from the College's Qatar campus to the Applicant's amended request. The College said that the Qatar campus closed at the end of November due to the Asian Games taking place at that time in Qatar, "and most administrative staff and faculty had left Doha on pre-arranged holidays." The College says that on 1 December 2006, after receiving no response from the Qatar campus "and finding it unlikely that the College would receive any response before the deadline of December 6th, the College responded to the request and reported that no records were found."

Upon receipt of the Applicant's Request for Review from this Office, and in order to respond to the issues raised by it, the College contacted its IT group once again to request a fuller description of the search undertaken and to inquire about the set up of the e-mail mailboxes, and if no records were found where the Applicant indicated such records should be, why they were not found.

On 20 December 2006 the former Wide Area Network Administrator at the Qatar campus responded to the request "with a link to an archive containing 1,600 e-mails which required a full line by line review prior to release to the Applicant." According to the College's submission, this person was only able to explain to the College at the time that he thought the information had already been provided to CNA's Coordinator at CNA HQ in Stephenville.

The College maintained that its search was reasonable and that reasonableness, not perfection, is the standard when conducting a search for records. The College stated that it was prompt in its responses to the Applicant and in assisting the Applicant amend his request in order to have it succeed. While the

College acknowledged its errors, it relied on several other Commissioners' decisions to argue that the mere fact that responsive records were only found after several searches did not mean that it failed in its duty to assist. The College also stated that the Applicant contributed to the problem associated with this matter due to his delay in submitting an amended access request. The College felt that the Applicant, as a sophisticated user of the *ATIPPA*, should have been able to respond more quickly.

The Applicant, in his submission, addressed several concerns. The first was his belief that the College was attempting to keep the records of one particular individual from him by alleging that as this individual was not an employee of the College, and therefore this person's records were outside the scope of the *ATIPPA*. The Applicant was aware of the individual's non-employee status, but had asked for records that were in the custody and control of the College. The Applicant also indicated that he felt the College's reliance on section 8 was unnecessary and an attempt to delay his request. (Reliance on this section was eventually abandoned by the College.) The Applicant also took issue with the College's reliance on section 10, and their repeated confirmations of the high number of records involved, in response to his repeated inquiries regarding the correctness of this number. The Applicant alleged that the College's responses were not a mistake but a deliberate attempt to "…stop the process and frustrate my right of access under the *ATIPPA*." The Applicant alleged the College had engaged in a pattern of "delay, denial and misleading of the applicant."

The Commissioner acknowledged that failure to locate records is not automatically cause for a determination that a public body has failed in its duty to assist. Such a determination can only be made on a fact-specific basis. In this case, the College had already done numerous searches of this nature, and there were only two possible locations for records, one being a server and archives in Newfoundland and the other being a server and archives at the College's location in Qatar. In the first instance, an extremely inaccurate figure (12,000 e-mails with attachments) was provided to the Applicant. No evidence was presented that the College examined the vast discrepancy between the figure erroneously provided by the individual whose e-mail account contained over 12,000 e-mails with attachments and the much smaller figure provided by IT for that person's account, which was limited to the time frame specified in the Applicant's request. The Commissioner was also concerned that the College had

stated to the Applicant in a letter dated 8 December 2006, in response to his repeated questioning of the 12,000 figure, that the 12,000 figure had previously been double checked and confirmed as correct. The College reiterated this statement in its formal submission to this Office, saying essentially that it was only after checking for a third time that the figure was determined to be incorrect - the first time being the initial misunderstanding, the second presumably being when it was supposedly double-checked at the Applicant's request, and the third upon inquiry by this Office after the Request for Review had been filed. Upon further investigation by this Office in an attempt to learn more about why the second check on the figure failed to reveal the error, the College has been unable to provide any evidence of a second check on the figure, and it appears likely that this never occurred. The Commissioner expressed concern that this assertion was made to the Applicant, and repeated in the College's formal submission to this Office.

The Commissioner also examined the College's actions with respect to the amended request. Due to ongoing issues involving the Applicant and the College which meant that the Applicant already had possession of some records responsive to this amended request, the Applicant was reasonably certain that this result could not be correct. Thus, the College's letter assuring the Applicant that the search results had been double checked in both this province and Qatar was not an accurate statement to the Applicant, and in fact was quite misleading. As noted above, the College said that no response was received from its operation in Qatar by 1 December 2006, and it was deemed unlikely that a response would be received by the deadline of 6 December 2006. In relation to both errors, the one with the original request and the one involving the amended request, the Applicant was unable to satisfactorily address his concerns without proceeding to a Request for Review. It was only during the Review process that the College was able to recognize these errors and deal with them.

With respect to the issue of the records of the person who was not a College employee, the Commissioner agreed with the Applicant that the employment status of the individual is only one aspect of determining custody or control. In this case, the named individual was working for the State of Qatar, which participates with the College in overseeing the overall operation of the College in Qatar. Even though the individual has been assigned and used College-Qatar e-mail addresses, the College explained that this was solely for the

convenience of allowing the individual to participate in e-mail discussion groups with others who have e-mail addresses on the College's Global Address List, whereby a single e-mail sent to the e-mail group is copied to the entire list. The College explained that e-mails sent or copied to this person are then redirected to a non-college e-mail address on a server belonging to the State of Qatar's College of Technology, and no copy of these e-mails remains on College servers. The Applicant stated that he does not expect access to any e-mails which are not within the control or custody of the College. The Commissioner accepted that the e-mail account and archives of this individual were not within the control or custody of the College, and were therefore outside of the scope of the *ATIPPA*.

The Commissioner stated that the Applicant faced considerable frustration resulting from the College's handling of his request for information. The College's errors were significant and repeated, ranging from an initial response indicating that there were far more responsive records than was actually the case, and later indicating that there were no responsive records when there were. The Commissioner distinguished this case from those relied on by the College due to three factors: the significant magnitude of the errors, the College's familiarity with the steps which must be undertaken in order to search for records of this nature, and the fact that the locations which had to be searched were very much finite, so the College was or should have been familiar with where such records were stored and how to search for them.

Further, the Commissioner also found that any delay on the part of the Applicant in filing an amended request could not have had any bearing on the types of errors that occurred during the College's internal search processes. The Applicant could equally say that the College was also very experienced with the *ATIPPA*, and such errors should not be occurring with a public body having this level of experience.

The Commissioner stated that the College must ensure that when a request is passed on to its IT divisions in this province and in Qatar that procedures are clear, accountabilities are well known and well defined, and appropriate training is in place so that the people undertaking searches are qualified to do so and understand the importance of doing so correctly and with due diligence. Further, the College had not reviewed its own actions carefully enough to know with certainty what it had and had not done to remedy a significant error. In looking

at this situation, a mistake was made in relation to the original finding of 12,000 potentially responsive records, but the College failed to take reasonable steps to confirm this figure when good reasons to do so were presented by the Applicant. Telling both the Applicant and this Office that those figures had at one point been checked and confirmed further compounded the error.

The Commissioner concluded that the College had failed to respond within a reasonable standard of accuracy to the Applicant's request and amended request, given the College's experience with such requests and the expertise at its disposal, and the fact that both the original and amended request were not particularly out of the ordinary in terms of other requests which the College has dealt with.

The Commissioner issued the following recommendations:

1. That the College make every reasonable effort to assist an applicant in making an access to information request and to respond without delay to an applicant, in an open, accurate and complete manner, as required by section 9 of the *ATIPPA*;

2. That the College take more care to ensure the accuracy of its statements to applicants and to the Commissioner's Office; and

3. That the College ensure that persons involved in conducting electronic records searches for the purpose of responding to access to information requests receive adequate training in such matters.

The College accepted the Commissioner's recommendations.

Report 2007-015 – Memorial University of Newfoundland

The Applicant, Dr. Ranee K.L. Panjabi, applied to Memorial University of Newfoundland for access to the names, titles and designations of all persons who had seen, had access to or been provided with an uncensored version of the Katz Report. The Katz Report is the result of an investigation launched by Memorial in January 2006 into the employment experience of a former assistant professor at Memorial. The Report was received by Memorial in August 2006. (Detailed information on the Katz Report is available on Memorial's website at www.mun.ca.)

While it is not normally the practice of this Office to identify applicants, Dr. Panjabi, who currently holds the rank of Full Professor of History at Memorial University, asked that she be named as the Applicant in this case. Dr. Panjabi also requested the dates on which access to the Katz Report was provided and the name of the administrator responsible for granting such access.

Memorial denied access to the entire record, which was, essentially, a list of names, claiming that the information was personal information and should not be released under authority of sections 30(1), which provides that public bodies must not disclose personal information to an applicant. Through negotiations with this Office, Memorial eventually released the majority of the record, but continued to refuse to disclose the names of four individuals.

The Commissioner concluded that the four names did constitute personal information, but further concluded that the four individuals in question, like most of the others on the list, were employees or members of the University. Section 30(2)(f) of the *ATIPPA* provides that the prohibition in section 30(1) does not apply where the information is about a third party's "position, functions or remuneration as an officer, employee or member of a public body" and the Commissioner found that the individuals in question had received copies of the Katz Report in accordance with their work-related duties. As such, Memorial could not refuse to disclose their names.

Several months into the review process, Memorial also attempted to claim that these four names were being withheld under authority of section 21 (solicitor-client privilege). With respect to this claim, the Commissioner concluded that in view of the policy of this Office requiring public bodies to notify the Applicant and the Commissioner of all exceptions that are being claimed, within 14 days of being notified of the Request for Review, Memorial had claimed this exception much too late in the process and, therefore, could not rely on it to withhold information.

Notwithstanding this conclusion, the Commissioner provided a detailed discussion of solicitor-client privilege, and determined that even if he had accepted the late exception, the names of the four individuals would not be considered as information subject to the privilege. Solicitor-client privilege is intended to protect the confidentiality of communications between a solicitor and a client for the purpose of seeking or providing legal advice. The

Commissioner found that in the case at hand, the information in question does not even constitute a communication, let alone a confidential communication between a solicitor and a client in the context of seeking legal advice. The information is merely a list of names, and in no way meets any of the criteria endorsed by the Supreme Court of Canada in the cases in which it has considered this issue. The Commissioner therefore recommended that the remaining four names be disclosed to the Applicant.

The Commissioner also raised a number of concerns with respect to the manner in which Memorial responded to the Applicant and to the Commissioner's Office. He held that the attempt to claim solicitor-client privilege four months after the Applicant's initial request, in view of the clear policy of this Office, displayed a lack of support for the rights of the Applicant and a lack of regard for due process. The Commissioner further concluded that Memorial's attempted reliance on section 21 of the *ATIPPA* on the facts of this case was due either to a lack of an appropriate level of knowledge of the *Act* and the law, or to an intention to avoid providing access to the information requested, for unacceptable reasons. The Commissioner further found that Memorial provided inaccurate and incomplete records both to the Applicant and to this Office, and observed that if that had been done intentionally, it would constitute obstruction and an attempt to mislead, an offense under section 72 of the *ATIPPA*. The Commissioner concluded that Memorial had failed to honour its duty to assist the Applicant under section 9 of the *Act,* and further concluded:

> *Based on all of the above, it is evident that Memorial is showing a troubling attitude toward the access to information process and lacks the commitment necessary to achieve the intent and the spirit of the ATIPPA. I cannot say whether this is due to a lack of knowledge and understanding of the legislation and due process, or a concerted effort to ensure that Dr. Panjabi does not get access to information she is likely entitled to.*

On October 26, 2007 Memorial wrote advising that it accepted the Commissioner's recommendation to disclose the remaining information. However, the University took exception to some of the above findings, in particular, to what it regarded as the Commissioner imputing negative motivations to Memorial, which it described as inappropriate, unfounded and counterproductive.

Report 2007-017 – Department of Natural Resources

This Request for Review arose from an access request to the Department of Natural Resources for information with respect to "Inspector reports and/or audits of all provincially licensed abattoirs completed between 2005 and the present date, including any cabinet briefings or cabinet reports on provincially licensed abattoirs…". The Request for Review was filed in September of 2007 by a Third Party who opposed the decision of the Department of Natural Resources to release records pertaining to it. The Department initially believed that the information requested would reveal business interests of several Third Parties and thus set about notifying them, in accordance with section 28 of the *ATIPPA*. Under section 28, third parties are given the opportunity to either consent to disclosure or make a case as to why the information should not be disclosed. No representations were received from the Third Parties and upon further review of the records, the Department determined that the information requested did not fall within section 27, thus it would be released. The Department informed the Third Parties of this determination and also informed them of their right to appeal to this Office. In response, a Third Party filed a Request for Review with this Office. Informal resolution efforts were not successful, and the Commissioner invited the Department and the Third Party to forward written representations to this Office.

The Department, in its submission, stated that the conditions of section 27 were not met, as the information requested was not "supplied" by the Third Party, nor was it provided in confidence or with an expectation of confidence as the information was gathered by government inspectors during legislatively mandated inspections. Thus, the Department's position was that it did not have grounds upon which to withhold the information requested.

The Third Party did not make a formal submission, but did provide some written comments at the time it submitted its Request for Review. The Third Party stated that the information supplied to government representatives was "strictly private" and confidential" and only provided upon the understanding that it would remain so. The Third Party also stated that should this information be released, in the future there would be no effort made to provide any information to the government representatives. The Third Party argued further that release of the information would

cause substantial financial loss to some operators and farmers.

The Applicant, in his submission, stated that his request has already resulted in the release of similar records, which revealed "serious public health and safety issues", thus release of the records is a "…fundamental issue of public health safety…". With respect to section 27 of the *ATIPPA,* the Applicant stated that the disclosure would not reveal commercial, financial, labour relations, scientific or technical information and further, this information was not supplied implicitly or explicitly in confidence. While the Applicant conceded some ground on the notion of harm contemplated by section 27, he argued that "the safety of the general public should outweigh any financial concerns that may exist for an individual business owner…"

In assessing the appropriateness of the application of section 27 to withhold the requested information, the Commissioner noted the mandatory nature of the exception and also reiterated that all three parts of section 27 must be met in order for it to apply. Namely, the information must reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party; it must have been supplied to the government authority in confidence, either implicitly or explicitly; and there must be a reasonable expectation that the disclosure of the information would cause one of the injuries listed in section 27. The Commissioner also noted that in this case, the Third Party bore the burden of proving that the Applicant had no right of access to the records requested, as set out in section 64(2).

The Commissioner found that that none of the information revealed commercial, financial, labour relations, or scientific information of the Third Party, nor did it reveal trade secrets of the Third Party. The records primarily contained the observations and analysis of government employees, rather than information which revealed something proprietary or particular about the processes used by the Third Party. However, some of the record was found to disclose technical information of the Third Party. To this extent, the Commissioner found that the first part of the test has been met, but only in relation to a small proportion of the information in the records which describe the operation and maintenance of the Third Party's process and equipment.

Part two of the three part harms test requires, in order to meet its threshold, that the information must have been supplied to the government authority in confidence, either

implicitly or explicitly. The Commissioner referred to *Canada Packers v. Canada (Minister of Agriculture)* 1988 CarswellNat 667 wherein the Federal Court of Appeal, in considering similar records, found that none of the information had been supplied by the appellant as the records were judgments made by government inspectors on what they themselves had observed. The Commissioner concluded that the information was not "supplied" within the meaning of the *ATIPPA*.

The Commissioner then went on to address whether the information was confidential in nature. He noted that no evidence was presented to support this position and that furthermore, in order to consider whether there may be an implicit understanding of confidentiality, we must consider "… the content of the information, its purposes and the purposes and conditions under which it was prepared and communicated." The information at issue was primarily composed of the observations and analysis of government employees in relation to legislatively mandated inspections. The Commissioner found that the primary purpose of the legislation under which the inspections were carried out was to ensure that a reasonable standard of food safety is established to protect public health. There is no reference in that legislation to any inspections or subsequent analysis being considered confidential information. Inspection and testing through legislative mandate by government and other public bodies of all manner of products for public use and consumption is an important part of the role of government in regulating and ensuring the safety of such products. The Commissioner found that there was no explicit or implicit basis upon which to find there was an expectation of confidentiality in relation to the responsive records. Therefore, the second part of the test had not been met.

Despite the fact the second part of the test had not been met and therefore section 27 could not be applied, the Commissioner did consider part three of the test, as it had been addressed by the Third Party. In order to meet this part of the test, the Third Party would have needed to present evidence of a reasonable expectation of probable harm, specifically in reference to one of the harms outlined in section 27(1)(c). Although the Third Party stated in writing at the time of filing his Request for Review that the disclosure of the information would harm the industry as a whole, he made no specific arguments with regard to the operation of his own business, nor how the release of these particular records would harm his own

particular business interests. Were any arguments or evidence presented by the Third Party, they would have had to be relevant to how the release of information might harm his own operation. Comments about harm to the industry as a whole were not relevant to this particular Review. All of the other operators in the Third Party's industry had either consented to disclosure or not proceeded with formal objections to this Office regarding the release of similar information. The Commissioner noted that there had already been media coverage regarding this disclosure, so any impacts on the industry as a whole, whatever their degree, had already been felt, and the release of this last set of records was unlikely to alter that effect.

The Third Party did, however, provide comments in relation to the harm described in section 27(1)(c)(ii), which applies to the disclosure of information which could reasonably be expected to result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied. However, the Commissioner observed that under the legislation that mandates these inspections; cooperation is not voluntary, which means that an operator will not be allowed to carry on as a commercial enterprise if it refuses to cooperate with the inspection process. Therefore, this was not an issue and the threshold of part three of the three part harms test could not be met by the Third Party.

The Commissioner concluded that having failed to meet the threshold necessary to satisfy parts two and three of the test, and only meeting the threshold for part one in a small proportion of the records, the Third Party has not discharged its burden of proof, and the records should be released to the Applicant. The Commissioner found that the Department's previous decision to release the responsive records was in compliance with section 27 of the *ATIPPA*, and recommended that the Department release the records to the Applicant. The Department accepted the Commissioner's recommendations and the records were released.

Report 2007-018 – Town of Portugal Cove-St. Philip's

In February 2007 the Applicant applied for access to records, including committee minutes, notes made by councilors or staff, correspondence, Town policies and procedures, by-laws and other materials, relating to an application he had made to the Town of Portugal Cove-St. Philip's for a

building permit. The Town disclosed some of the requested records, but denied access to the agendas for two privileged meetings of a committee of Council, relying on the exception to disclosure set out in section 19(1)(c) of the *ATIPPA*, which permits a municipality to refuse to disclose information that would reveal the substance of deliberations of a "privileged" (i.e. private) meeting.

The Commissioner concluded, after a review of the record, that disclosing the information in the agendas would not reveal the substance of the deliberations of the meetings. He observed that the phrase "substance of deliberations" would include such things as what was said by individuals at the meeting, the opinions expressed, how individuals at the meeting voted, and the arguments given in favour of or against taking a particular action. In order to refuse to disclose information on the basis of section 19(1)(c), a public body must prove that it is likely that the disclosure of the information would permit the reader to draw accurate inferences about the substance of deliberations that took place in the meeting.

In this case, the agendas simply listed the matters that were proposed to be discussed during the meetings, and, by themselves, could not lead to accurate inferences about what was actually said or decided at those meetings. Indeed, what happened at one of those meetings was that although the Applicant's matter was on the agenda, it was not in fact discussed because of a lack of time. The Commissioner concluded that therefore the Town was not entitled to refuse disclosure, and he recommended release of the two agendas.

The Commissioner also described a troubling aspect of the investigation, during which the Town had initially declared that there were no e-mails responsive to the request, but after prompting by the investigator found relevant e-mails, not once but twice. The Commissioner concluded that the Town, by not conducting a complete and accurate search for the responsive records, had failed to fulfil its duty to assist the Applicant as mandated by section 9 of the *ATIPPA*.

In addition, the Commissioner ruled that the Town had improperly destroyed records that were subject to the *ATIPPA*. These were notes that had been made by a councillor at a committee meeting dealing with the Applicant's matter, and which that councillor had shredded. The Commissioner determined that the notes in question did not fall into the category of "transitory records," nor were

they the personal records of the councillor, but in fact were the only official record of what had taken place at the committee meeting. Thus they were "active" records within the meaning of the Town's Records Retention Policy, because the Applicant's application was still active, and ought not to have been destroyed. The Commissioner recommended that the Town improve its procedures for searching for responsive records and update its Records Retention Policy in relation to notes taken at meetings by councillors and staff.

Following the release of the Commissioner's Report, the Town of Portugal Cove-St. Phillips advised the Commissioner and the Applicant that the Town did not agree with the Commissioner's recommendations to provide the agendas to the Applicant, and would not do so. The Applicant subsequently appealed the decision of the Town to the Supreme Court, asking that the Court order the Town to follow the recommendation of the Commissioner. The Commissioner has intervened in the appeal pursuant to section 61(2) of the *ATIPPA*. The matter is currently before the Court.

Report A-2008-002 – Public Service Secretariat

On 22 January 2007 an Applicant applied to the Public Service Secretariat (the "Secretariat") for access to records relating to his two grievances filed against his former employer. The requested records were in the custody of the Secretariat because a Staff Relations Specialist with the Secretariat was representing the Applicant's former employer at an arbitration hearing dealing with the grievances.

The Secretariat disclosed some of the information contained in the 354 pages of the responsive record but denied access to certain information on the basis of a number of the exceptions set out in the *ATIPPA*. The Commissioner discussed each of the exceptions claimed by the Secretariat.

The Secretariat claimed the exception set out in section 20, which allows a public body to refuse access to information that constitutes policy advice or recommendations developed by or for a public body or a minister. The Commissioner confirmed his previous finding that the use of the phrase "advice or recommendations" in section 20 allows a public body to deny access to information which contains a suggested course of action but does not allow a public body to refuse

access to factual information, regardless of where this factual information is found within the record. The Commissioner also determined that the advice and recommendations exception in section 20 does not apply to draft documents simply because they are drafts and a public body can only withhold those parts of a draft document which actually contain advice or recommendations. As a result, the Commissioner found that some of the information for which the section 20 exception was claimed could be withheld but recommended the release of other information which did not meet the test set out by the Commissioner.

The Secretariat also relied on the exception in section 21(a), which allows a public body to refuse disclosure of information that is subject to solicitor and client privilege. In reliance on this exception, the Secretariat claimed both solicitor and client privilege and litigation privilege. The position of the Secretariat was that the entire responsive record, having been sent to the Staff Relations Specialist for the purpose of preparing for the arbitration hearing, was subject to litigation privilege because the documents were either created or gathered for the dominant purpose of preparing for litigation. In discussing section 21(a), the Commissioner determined that this section provides a protection against the disclosure of documents subject to either legal advice privilege or litigation privilege. The Commissioner set out the criteria that must be met in order for information to be subject to legal advice privilege. In relation to litigation privilege, the Commissioner found that it applies only to those documents created for the dominant purpose of pending or apprehended litigation; it does not apply to documents gathered or copied for the purpose of litigation.

In relation to the Secretariat's claim under section 21(a), the Commissioner found that some of the information for which the Secretariat had denied access on the basis of legal advice privilege was properly withheld from the Applicant. In addition, the Commissioner determined that not all the responsive record was subject to litigation privilege, as was claimed by the Secretariat. The only documents which were excepted from disclosure on the basis of litigation privilege were those which were created for the dominant purpose of preparing for the arbitration, not those which were gathered or copied for that purpose.

The Commissioner also discussed the Secretariat's reliance on section 22, which provides an exception to disclosure for

information the disclosure of which could be harmful to law enforcement. The Secretariat relied on paragraph (h) of section 22(1), which allows a public body to refuse access to information where its disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication. In relation to this paragraph, the Commissioner determined that the disclosure of information in the responsive record to the Applicant could not reasonably be expected to deprive the Applicant of an impartial adjudication in a hearing before the arbitrator. In addition, the Commissioner found that the Applicant's former employer, who is the only other party to the arbitration, is not a "person" within the meaning of paragraph (h) of section 22(1) and, therefore, could not be deprived of an impartial adjudication in accordance with that paragraph. The Secretariat also relied on paragraph (p) of section 22(1), which allows a public body to refuse access to information where its disclosure could reasonably be expected to harm the conduct of existing or imminent legal proceedings. In relation to this paragraph, the Commissioner found that the arbitration hearing between the Applicant and his former employer was a legal proceeding within the meaning of paragraph (p). However, the Commissioner determined that there was not convincing evidence to prove that the release of any of the information to the Applicant could harm the conduct of the arbitration process. The Commissioner stated that it was not inappropriate or improper for the Applicant to have access to records in the custody of the Secretariat even though the Applicant and the Secretariat are involved in the arbitration process. As such, the Commissioner concluded that the Secretariat could not rely on paragraphs (h) or (p) of section 22(1) to deny access to any of the information in the responsive record.

The Secretariat in addition denied access to certain information on the basis of section 24, which allows a refusal of access where the disclosure of the information could be harmful to the financial or economic interests of a public body. The Commissioner stated that there was no indication from the Secretariat as to what specific harm to its financial or economic interests could result from the disclosure of the information in question. Therefore, the Commissioner found that the Secretariat had not met the burden imposed on it by section 64(1) of the *ATIPPA* to prove that by the operation of section 24(1) the Applicant had no right of access to information in the responsive record. For that reason, the Commissioner concluded that the Secretariat could not rely

on section 24(1) to deny access to any of the information in the responsive record.

The Commissioner dealt with the reliance by the Secretariat on the exception set out in section 27(1), which allows a public body to refuse access where the disclosure could be harmful to the business interests of a third party. The Secretariat relied on subparagraph (ii) of section 27(1)(a), which provides that the labour relations information of a third party is the type of information that if disclosed could be harmful to the business interests of a third party. The Commissioner confirmed the three part test that must be met before a public body is entitled to rely on section 27(1) to deny access to information and determined that the test had not been met in this case. The Commissioner stated that the Applicant's former employer, whose labour relations information was at issue, was not a third party within the meaning of section 2(t) of the *ATIPPA*. Therefore, the labour relations information at issue did not belong to a third party and, therefore, subparagraph (ii) of section 27(1)(a) was not applicable in the circumstances. As a result, the Secretariat could not rely on section 27(1) to deny access to any of the information in the responsive record.

The Secretariat also denied access on the basis of section 30(1), which contains a mandatory exception dealing with personal information. The Commissioner determined that some of the information in the responsive record constituted the personal information of a third party and should not be disclosed to the Applicant.

In conclusion, the Commissioner recommended release of some of the information to which the Secretariat had denied access.

The Secretariat made a decision not to follow the recommendation of the Commissioner. The Commissioner, with the consent of the Applicant, has appealed the decision of the Secretariat to the Supreme Court of Newfoundland and Labrador, Trial Division. The appeal is currently before the Court.

CONCLUSION

2007-2008 has been a busy and gratifying year, filled with challenges and success. This year has seen another phase in both the evolution of the Office resources and capability, along with a significant increase in its workload requirements. The additional work associated with the proclamation into force of Part IV of the *ATIPPA* (the privacy provisions) in January 2008 has further compounded and to some extent frustrated the Office's ability to meet certain legislated timeframes. That being said, I am proud of the quality and calibre of the Office of the Information and Privacy Commissioner 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 struggle to preserve and promote their rights of access to information and protection of privacy.

STATISTICS

Figure 1: Access and Privacy Requests/Complaints Received

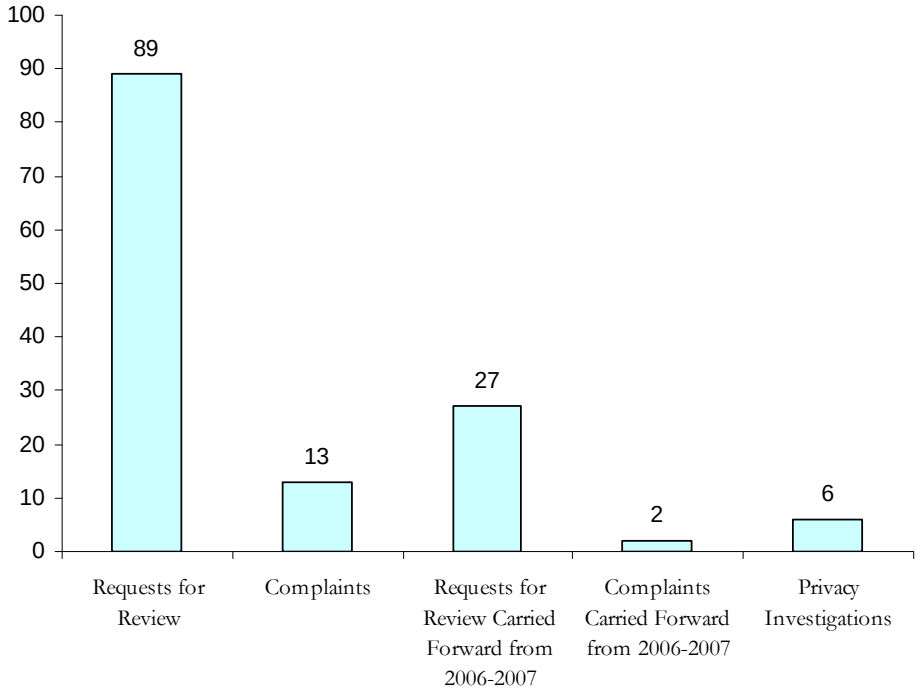
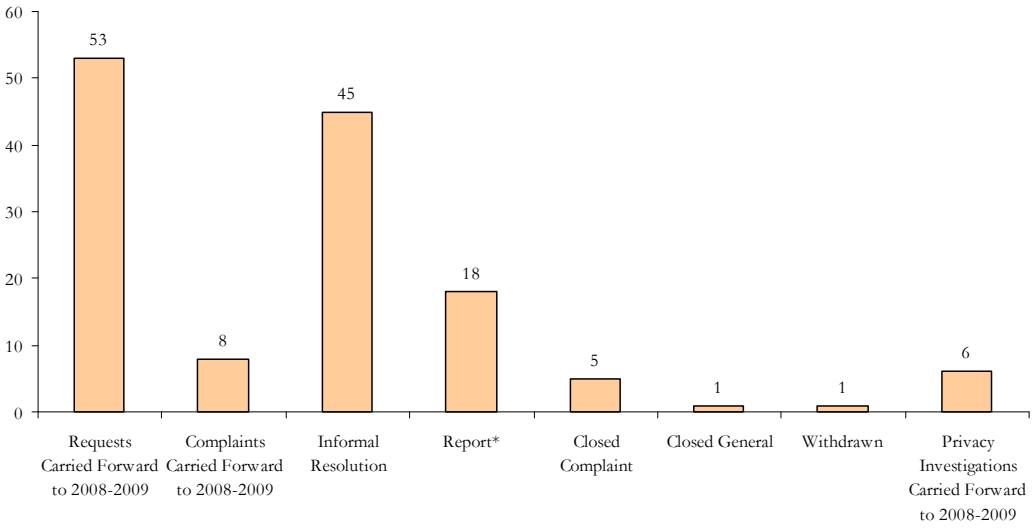


Figure 2: Outcome of Requests for Reviews/Complaints Received



*Ongoing Appeals – Reports 2007-018 and A-2008-002

Figure 3: Requests for Reviews/Complaints by Applicant Group

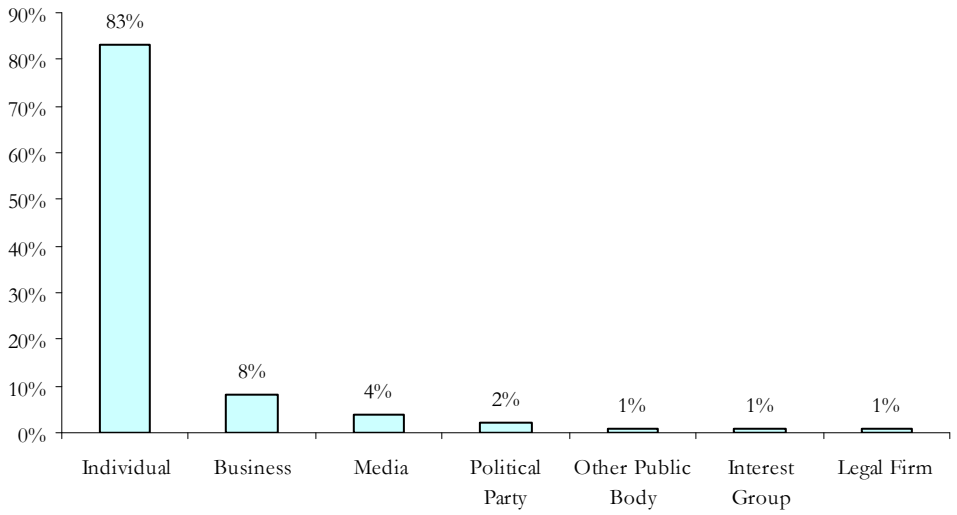


Table 1: Requests for Reviews/Complaints by Applicant Group

Public Body	*Number of Reviews*	*Percentage*
Individual	109	83%
Business	11	8%
Media	5	4%
Political Party	3	2%
Other Public Body	1	1%
Interest Group	1	1%
Legal Firm	1	1%

Figure 4: Requests for Review/Complaints by Information Requested

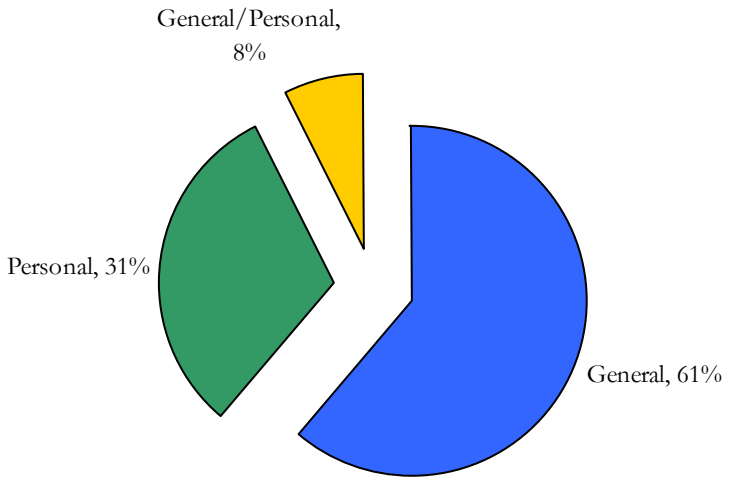


Table 2: Requests for Review/Complaints by Information Requested

General	*Personal*	*General/Personal*
80	41	10
61%	31%	8%

Figure 5: Requests for Review – Resolutions

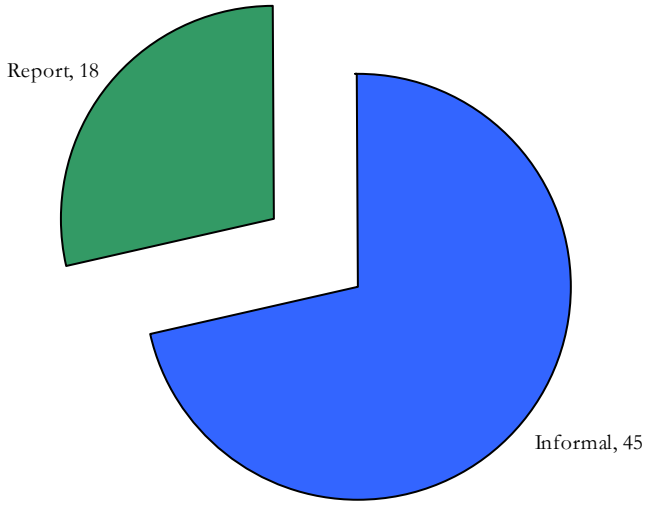


Table 3: Requests for Review – Resolutions

Informal	*Report*
45	18
71%	29%

Figure 6: Conclusions of Commissioner

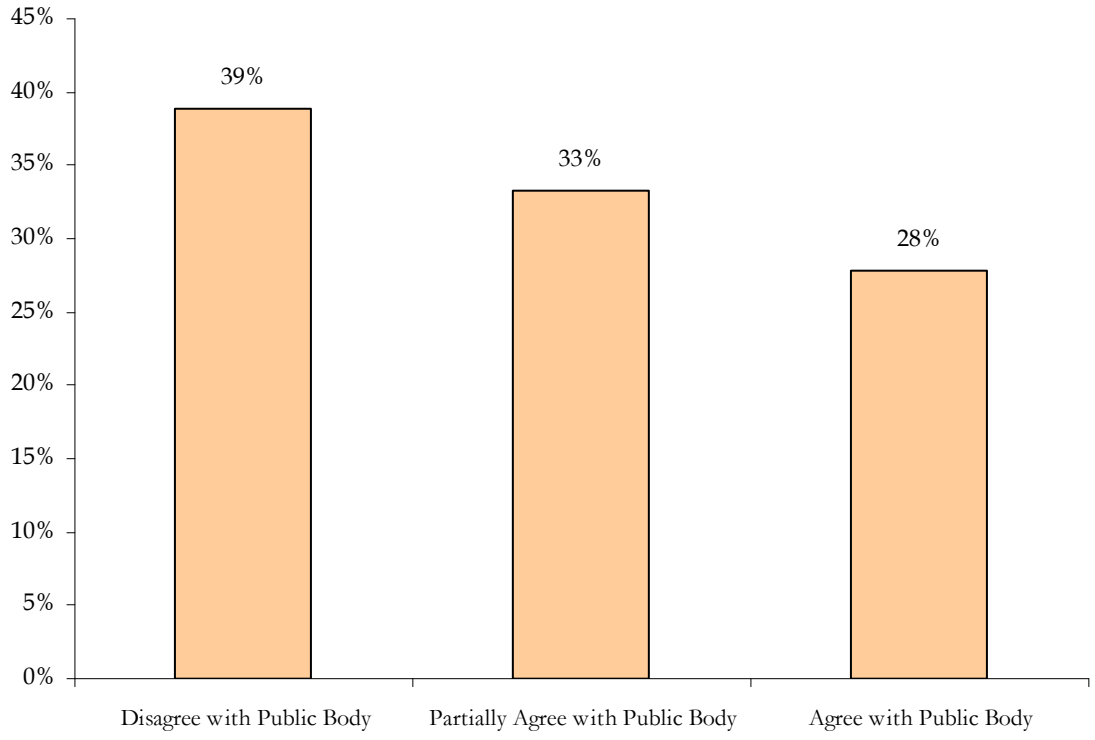


Table 4: Conclusions of Commissioner

Disagree with Public	*Partially Agree with Public Body*	*Agree with Public Body*
7	6	5
39%	33%	28%

Figure 7: Public Body Response to Commissioner's Reports

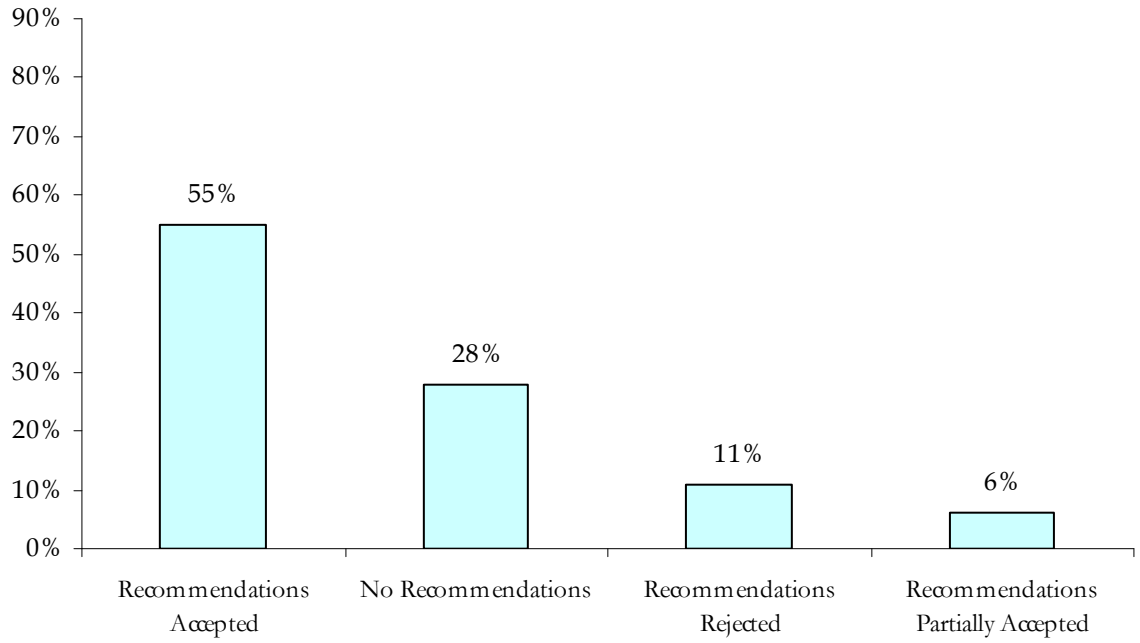


Table 5: Public Body Response to Commissioner's Reports

Recommendations Accepted	*No Recommendations*	*Recommendations Rejected*	*Recommendations Partially Accepted*
10	5	2	1
55%	28%	11%	6%

Figure 8: Public Body Covered by Requests for Review/Complaints

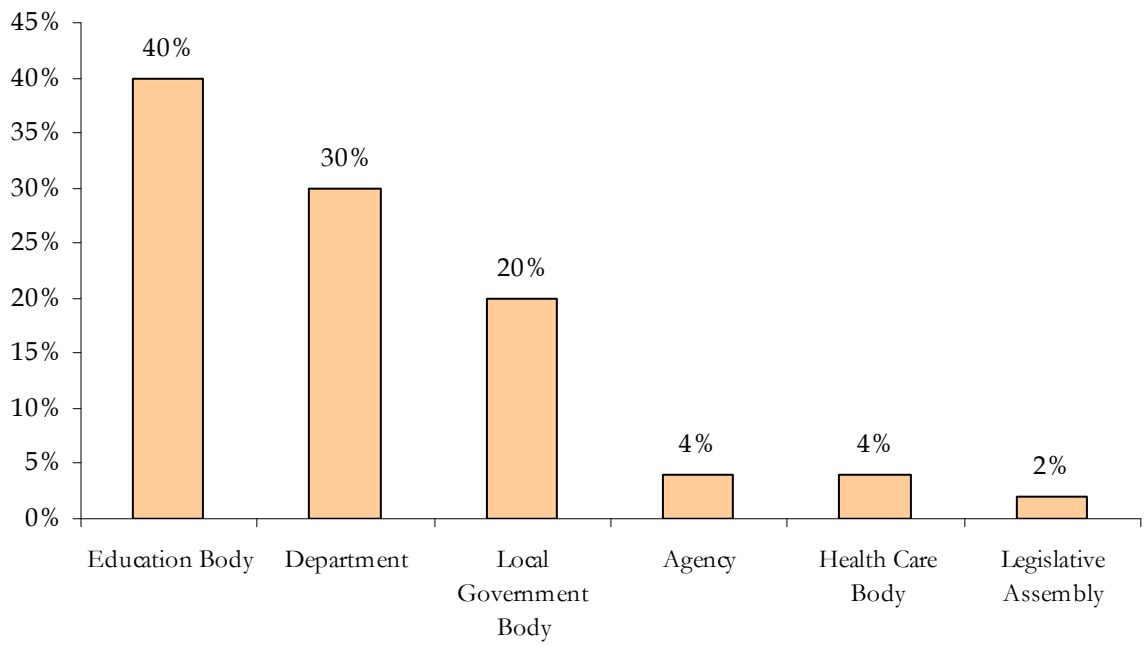


Table 6: Public Body Covered by Requests for Review/Complaints

Education Body	Department	Local Government Body	Agency	Health Care Body	Legislative Assembly
51	40	26	6	5	3
40%	30%	20%	4%	4%	2%

Figure 9: Requests for Review/Complaints By Issue*

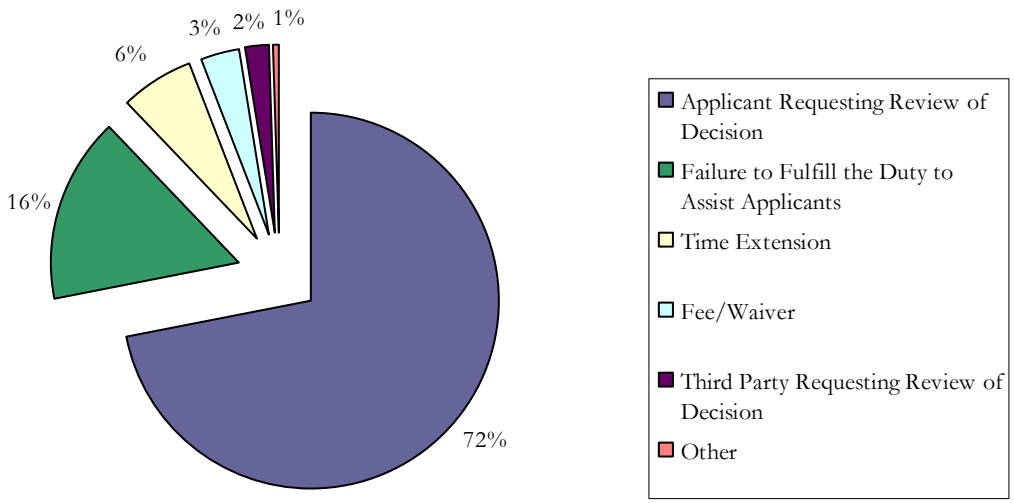


Table 7: Requests for Review/Complaints By Issue*

Applicant Requesting Review of Decision	Failure to Fulfill the Duty to Assist	Time Extension	Fee/Waiver	Third Party Requesting Review of Decision	Other
113	25	10	5	3	1
72%	16%	6%	3%	2%	1%

*A Request for Review/Complaint often relates to several issues.

Figure 10: Inquiries

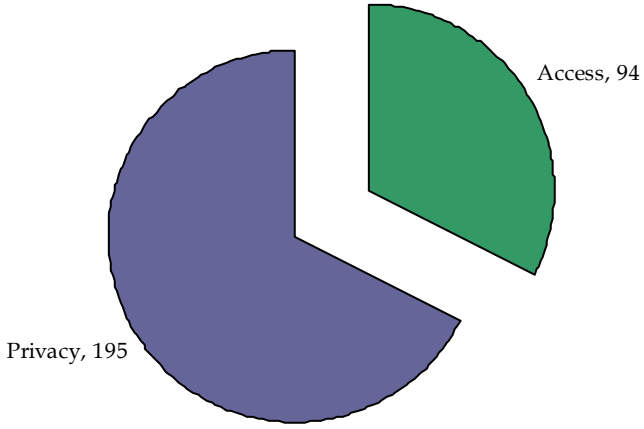
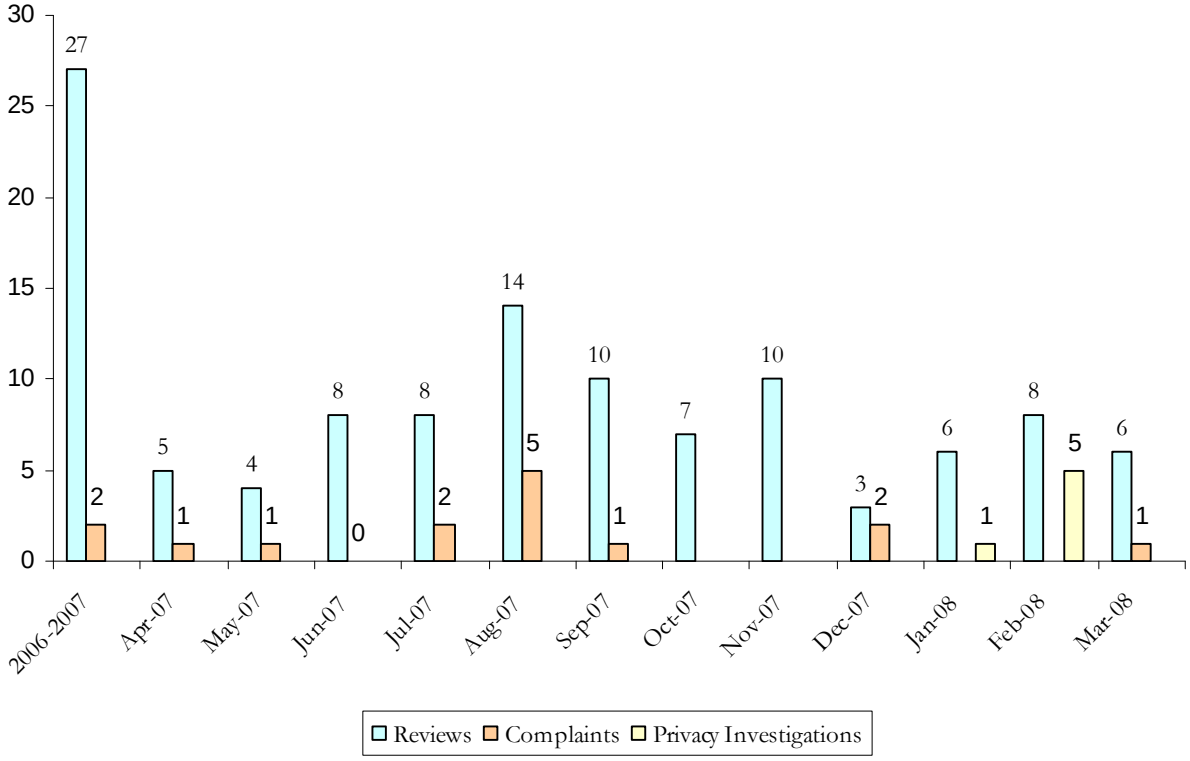


Figure 11: Requests for Review/Complaints Received (Monthly)



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