OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Submission of the Information and Privacy Commissioner to the Access to Information and Protection of Privacy Review Committee

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Introduction

Although it is trite to say that we live in an information age, in order to begin consideration of this subject matter, we must first turn our minds to what is meant by that phrase. Privacy makes the local, national and international news on a regular basis. Controversy about amendments to an access to information law can sweep across the political landscape like gale force winds. The biggest corporations in the world deal in information rather than manufacturing. The electronic tools at our disposal have completely transformed our relationship to information, and each other. Privacy and access to information are at the forefront of public discourse, and they are transforming people's expectations of democracy. This is arguably the defining public policy discussion of our time.

As Canadians, we like to think of ourselves as world leaders, and we take particular pride in our strong democratic traditions and institutions. We live in a world which is in a constant state of change and, we hope, progress. Although we can point to our Charter of Rights and Freedoms as the stable framework which guides us as our country evolves, it is up to the citizens and leaders of each generation to determine how to move forward within that framework. As we go forward, it is important to have objective evidence of how we are doing. On one important measure of progress, objective evidence shows that we in Canada, and in this Province, need to do more.

Canada is lucky to be home to one of the most well respected non-governmental organizations in the world with expertise in the area of access to information laws. The Centre for Law and Democracy has compared and ranked access to information laws from around the world. Its finding is that Canada is decidedly in the middle of the pack, and that the Bill 29 amendments to the *ATIPPA* amounted to a clear step backward for Newfoundland and Labrador within the Canadian context. We need to step forward once again and become leaders in Canada. By taking this step forward, we can help Canada move forward too.

Open, transparent and accountable government in today's world requires courage. On the one hand, governments must pay the cost of criticism when an occasional misstep becomes public through access to information, but on the other hand, the potential rewards of demonstrable transparency and accountability are boundless, not just for governments, but for all citizens.

Newfoundlanders and Labradorians have different expectations today of what it means to participate in the democratic process. The "general public" is not an amorphous mass. The internet has put tools in the hands of individuals to become their own lobby group and their own publisher – to make statements and foster debate among their Twitter followers, blog readers and Facebook friends. People seem to find it much easier to participate with the click of a button rather than going on the air on an open line radio program or writing a letter to the editor. The idea that simply casting a vote every four years is the beginning and end of democracy is less and less accepted. There is an increasing desire to hold elected officials accountable, and a perception of excessive secrecy obliterates any vestiges of trust in those officials.

The digital age allows citizens to become active in public affairs in a way that has never before been part of the Canadian political system. If there is a demand from the public for policy or legislative change, the process doesn't begin with coordinating meetings and licking stamps. It

happens over the internet in seconds, and it can "go viral" in hours. Now that people have the tools to speak out and voice opinions, governments must listen and respond to this growing movement by ensuring that people are able to access the information they need in order to be fully informed about the issues that concern them.

In 2014, we received a strong and unambiguous message from this government that they were listening. The Open Government initiative, when brought to full fruition, is precisely the kind of approach to democratic engagement that progressive governments the world over are beginning to offer to citizens. After the dramatic misstep of Bill 29, both in process and in substance, it seems that government realized its mistake, and they are now taking tangible steps to increase transparency and accountability through efforts like the Open Government initiative, as well as this *ATIPPA* review process.

We've seen what can happen when goings-on behind closed doors are shrouded in unnecessary secrecy. The House of Assembly spending scandal resulted in criminal convictions for elected and non-elected officials and it seriously damaged public trust in our most important democratic institution. Fortunately, the reforms which followed that scandal brought greater transparency to the affairs of our legislature and our elected officials, including ensuring that the House of Assembly and its statutory offices became subject to the *ATIPPA*. As former U.S. Supreme Court Justice Louis Brandeis famously stated, "sunlight is said to be the best of disinfectants." The Report by Chief Justice Derek Green which ultimately led to those reforms was entitled "Rebuilding Confidence" and one of its key themes was the necessity of bringing transparency and accountability to the House, because "transparency and accountability are the building blocks of public confidence" (p. 30). To a large extent, in today's democracy, access to information and open government are all about rebuilding and maintaining confidence in our political system. As Chief Justice Green said in his Report:

> *Transparency is the foundation on which the accountability of public officials is built; it implies openness and a willingness to accept public scrutiny. (p. 3)*
>
> www.gov.nl.ca/publicat/greenreport/execsummary.pdf

Transparency and accountability are now a permanent part of our political lexicon. A truly well informed electorate is a precondition of an engaged electorate. Between elections, citizens can participate in every way except in the House of Assembly, and through elections, they choose the Members of that House. To get the best government, we must first ensure that we have the best electorate – one that is informed and engaged. This can only be accomplished through a modern access to information statute that reflects the desires and aspirations of citizens in a modern democracy. Whether it is in the cut and thrust of debate within the House of Assembly, on the airwaves, in the newspaper, on social media, in coffee shops, or in chance meetings at the supermarket checkout or over the backyard fence – the lifeblood of democracy is pumping most strongly through the body politic when the actions of our public institutions are subject to scrutiny, discussion and debate.

This is an exciting time to operate in the world of access and privacy. 9-11 was a defining moment in terms of the tradeoff between privacy and security for all governments. Internationally, we have Wikileaks and Edward Snowden, and the debate about where the

balance should be struck between privacy and security is well under way. Nationally, we have 20th century access and privacy laws which are lagging behind in a 21st century world. Cameras and electronic devices monitor our every move, and federal laws seem to allow governments and law enforcement greater and greater access to our on-line communications with little in the way of checks and balances.

At the same time, an international process is underway which is helping to transform how governments relate to citizens. Canada is one of 63 governments around the world who have come together to form the Open Government Partnership. In some cases, these governments have a poor track record of openness and accountability and they have a long way to go. Others are leaders. All of them share a desire to improve. From the Open Government Partnership web site:

> *The Open Government Partnership is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. In the spirit of multi-stakeholder collaboration, OGP is overseen by a Steering Committee including representatives of governments and civil society organizations."*
>
> www.opengovpartnership.org

Given this international political, cultural and technological background, let us now consider where we have come from over the past 9 years since the *ATIPPA* first came into force. It is clear that a law can only do so much – there must be "buy-in" from senior leadership within public bodies and within government for things to work as they should. A cultural shift must take place within government, both at the elected level and in the bureaucracy, before access to information and protection of privacy become the standard, accepted way of doing things. This is one of the issues which concerned Mr. Cummings at the time of the last *ATIPPA* review, having made the following statement in his Report:

> *It is clear to me that government departments are having much greater difficulty dealing with access requests … It is evident that some departments have adopted a secretive attitude, while others are open with their information as a matter of course.*
>
> *It is not the purpose of the Act to make things easier for civil servants. Government departments must remember that providing information to the public under the ATIPPA is just as much a part of their responsibilities as the many other things they are called upon to do. Some civil servants have not accepted this fact and regard access requests as a secondary responsibility. Public bodies must be prepared to accept the administration of access to information and protection of privacy legislation as a part of their normal business.*

Interestingly, one major result of the public discourse and debate about Bill 29 is a noticeable cultural shift within government and the bureaucracy in favour of access to information. Even though the letter of the law as found in Bill 29, in some critical aspects, has had a negative

impact on access to information in this Province, the backlash created by the debate surrounding the amendments has seemed to inspire government towards doing the best it can within the current legal framework. There has been some progress towards building the culture of openness which Mr. Cummings seemed to feel was lacking, but that progress is like a green shoot which, unless nurtured, will wither again. The Open Government initiative, along with the decision to move the ATIPP Office to the Office of Public Engagement, have been positive steps. The decision by Premier Marshall to initiate this review of the *ATIPPA* two years earlier than required by law is a very positive development. It is clear that the tone and message delivered from the top is a major factor in ensuring that access to information works as it should.

While there were some good aspects to Bill 29, regrettably some parts of it simply catered to the fears and perceived problems of the first few years of working with the *ATIPPA*, pulling back the law to match the muted enthusiasm of some public bodies. Some people in government were not ready for the *ATIPPA* when it arrived in 2005, they were not ready to change how things were done, and they were looking for ways to resist that change. Unfortunately, some of this was reflected in Bill 29. The reality is that in light of the evolution that has occurred in technology, in society and in politics, governments can no longer afford to be out of step with the public on these important issues.

Although what follows in this submission is quite detailed at times, it boils down to two key themes:

1) some of the exceptions to the right of access allow government to withhold more information than necessary – these provisions should be changed;

2) the Commissioner needs to be given the necessary powers and authority to oversee the law effectively in order to ensure that citizens can enjoy the full measure of their access and privacy rights.

Ultimately it must be remembered that the discourse about the *ATIPPA* is about rights – the privacy rights of citizens whose information is held by public bodies, and the public's right of access to information, which is necessary for the health of a modern democratic society. Rights are not limitless, however, and it must also be recognized that some information must be protected from disclosure in order to ensure that government can function properly for the public good.

This discussion is very much of this moment in history given the political, social and technological context. Furthermore, it is one that is taking place not just in this Province, but nationally and internationally. In fact, together with my colleagues, the Information and Privacy Commissioners from across Canada, in 2013 I signed a joint resolution asking our respective governments to bring our access to information and protection of privacy laws into the modern era: www.priv.gc.ca/media/nr-c/2013/res_131009_e.asp . Many of the items in that resolution are also found in the recommendations of this submission.

I will leave it to former Supreme Court of Canada Justice Laforest to remind us again what access to information is all about:

> … [T]he 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*

This submission is divided into five parts. Part A contains specific, substantial recommendations for amendment to the *ATIPPA*. Part B is entitled "Restoring the Commissioner's Jurisdiction and Powers," and it focuses on challenges we have faced in effectively overseeing the access to information provisions of the *ATIPPA*. Part C contains a number of proposals for amendment to the *ATIPPA* with the goal of ensuring that there is appropriate and meaningful privacy oversight. Part D contains other recommendations of a more general nature, some of which would not necessarily require amendment to the *ATIPPA*, while Part E contains a table with some brief additional recommendations for amendments which do not require detailed explanation.

This review submission is largely the result of a collective effort on the part of staff in my Office, and I wish to acknowledge their expertise and experience in making the most of this important task. I believe it is a very thorough and insightful commentary on the *ATIPPA*, which I fully endorse.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador

Summary of Key Recommendations

This is not an exhaustive list of all recommendations in this submission, nor does it include most of the items listed in the table in Part E. For more detailed recommendations and in some cases proposed legislative language please refer to the recommendations at the end of each section of this document.

1. Broaden the definition of "public body" to include a corporation or entity owned by or created by or for a public body or group of public bodies.

2. Replace section 18 (cabinet confidences) with a version that restores the substance of deliberations test, so that it is more similar to the one that existed prior to Bill 29.

3. Replace section 20 (policy advice or recommendations) with the version that existed prior to Bill 29. Repeal section 7(4), (5) and (6).

4. Amend section 22.2 (information from a workplace investigation) for greater clarity.

5. Replace section 27 (business interests of a third party) with the version of section 27 which existed prior to Bill 29.

6. Amend section 30 (personal information) to ensure transparency regarding the remuneration of public officials.

7. Amend section 30 (personal information) to clarify the law on disclosure of information about deceased individuals.

8. Amend section 31 (public interest disclosure) to broaden the circumstances under which a disclosure of information in the public interest must be made despite any other provision of the *ATIPPA*, and clarify the procedures for doing so.

9. Consider whether or not changes should be made to section 43.1 (power of a public body to disregard requests) and clarify the appeal provision if section 43.1 is to remain otherwise unchanged.

10. Amend various provisions of section 46 (informal resolution).

11. Amend section 63 (disposition of appeal) to clarify the full range of options open to judges when disposing of an appeal.

12. Amend section 72 (offence) to: broaden the circumstances under which a charge may be laid; to increase the time frame within which a charge must be laid; and to increase the maximum fine.

13. Amend the *ATIPPA* to restore and clarify the Commissioner's authority and jurisdiction to conduct a review of any public body decision to deny access to an applicant, including a decision to deny access based on sections 5 (application), 18 (cabinet confidences) and 21 (solicitor-client privilege).

14. Amend the *ATIPPA* to ensure that the Commissioner has adequate jurisdiction and authority to protect the privacy of citizens whose information is held by public bodies by giving the Commissioner the power to issue a report which would trigger an option for the Commissioner to seek an order at the Trial Division compelling a public body to comply with the privacy provisions of *ATIPPA*.

15. Amend the *ATIPPA* to require that public bodies conduct privacy impact assessments for all new enactments, projects, programs or activities, and that these assessments be provided to the Minister responsible for the *ATIPPA* for approval.

16. Amend the *ATIPPA* to require that all privacy impact assessments relating to disclosures under section 39(1)(u) must be provided to the Commissioner for review and comment.

17. Amend the *ATIPPA* to require that government must consult with the Commissioner at least 30 days before first reading of any new legislation that could affect access or privacy.

18. Amend the *ATIPPA* to require that public bodies notify individuals whose information has been the subject of a privacy breach.

19. Amend the *ATIPPA* to require that public bodies report privacy breaches to the Commissioner.

20. Amend the *ATIPPA* to provide the Commissioner with the authority to audit the performance of public bodies regarding any aspect of *ATIPPA* compliance.

21. Amend the *ATIPPA* to provide the Commissioner with the explicit authority to commence an investigation of any suspected violation of the *ATIPPA* whether or not a complaint has been received.

22. Amend the *ATIPPA* or establish new legislation requiring that records be created to document all decisions of government, including the decision-making process.

23. Implement the Directory of Information described in section 69.

24. Amend the fee schedule to ensure that applicants are not charged for time spent considering whether or not any exceptions to the right of access apply.

25. Amend the *ATIPPA* so that the Commissioner can conduct a review and issue a report which would trigger an option for the applicant or the Commissioner to appeal a fee for access to information to the Trial Division.

26. Review all of the provisions from other laws which are listed in the *ATIPPA* Regulations as taking precedence over the *ATIPPA* to ensure that each one is necessary.

27. Amend the *ATIPPA* requiring that the Commissioner be consulted prior to any other laws being added to the regulations for the purpose of giving them precedence over the *ATIPPA.*

28. The *ATIPPA* Review Committee is asked to recommend that the Commissioner be consulted on the language of any draft bill to amend the *ATIPPA* in order to allow the Commissioner to provide advice as to workability and procedural soundness of the draft provisions from the oversight perspective.

29. Consider legislation protecting the privacy of private sector employees who do not currently enjoy legislated privacy rights.

30. Amend the *ATIPPA* to make the term of office of the Information and Privacy Commissioners a six year term.

Recommendations for Specific Amendments to the ATIPPA

Section 2(p) - Expanding the Definition to Include More Public Bodies

How should the *ATIPPA* deal with entities created by or for a public body or group of public bodies? Separate entities are sometimes created by local public bodies (often municipalities) to carry out public policy objectives and provide public services, usually using public funds to do so. Currently, those entities do not fall within the scope of the *ATIPPA*. Some are created directly by a single municipality, while others may involve an organization of which several municipalities are jointly members. Such entities should be subject to the *ATIPPA* in order to maintain an appropriate level of accountability. This recommendation is clearly supported by one of the core purposes of the *ATIPPA*, which is to establish an access to information regime to facilitate accountability. Government can take a solid step forward towards ensuring greater accountability and transparency in this Province by simply requiring that such entities are defined as public bodies subject to the *ATIPPA*.

Currently, under the *ATIPPA*, it is clear that an entity created by or operated by "the Crown" is, in most cases, deemed to be a public body by definition. Specifically, the definition of "public body" in section 2(p) provides that the following categories of entities are public bodies subject to the *ATIPPA*:

> *2(p) "public body" means*
>
> […]
>
> *(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown;*
>
> *(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister*
>
> […]

This provision does not capture entities created by municipalities and certain other local public bodies, and therefore entities that they own, create or operate are not deemed to be public bodies. The term "local public body" is defined in section 2(k) of the *ATIPPA*, and it includes municipalities and educational bodies such as Memorial University.

For illustrative purposes let us consider "A Tale of Two Cities." It would not be at all surprising to find two neighbouring incorporated municipalities which run their affairs in two different ways. The first municipality chooses to operate its own recreational facilities and to promote economic development in and around the town using town staff. The second municipality establishes a corporation to operate its recreational facilities, and another corporation to promote economic development in the municipality. In the first municipality, all of its activities related to

recreational facilities and economic development are subject to the *ATIPPA*. Any personal information in its control or custody regarding those activities must be protected accordingly, and citizens have a right of access to records, subject to limited and specific exceptions as set out in the *ATIPPA*. However, many records associated with the same activities in the second municipality, which are carried out by separate corporations created by the municipality, may not be subject to the *ATIPPA*, because at present such corporations would not be covered by the *ATIPPA*. From the point of view of transparency and accountability, there is a double standard at play, one which we believe is unfair and no longer meets public expectations in a democratic society.

Although we made the same recommendation to Mr. Cummings in the previous *ATIPPA* review, and he agreed with our recommendation, government chose not to amend the *ATIPPA* accordingly through Bill 29. Subsequent to Bill 29 becoming law, we then pursued other discussions with government aimed at seeking the inclusion of additional public bodies using the Minister's authority under section 2(j)(v). Unfortunately this did not occur, and frankly it would have been a much more difficult and cumbersome process. The fairest approach, which we once again recommend, is to designate these additional public bodies by amending the definition.

The experience in British Columbia is instructive. BC's *Freedom of Information and Protection of Privacy Act* (*FIPPA*) has had a provision for some time, in Schedule 1 of that *Act*, which stipulates that the definition of the term "public body" includes:

> *(n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of which are appointed or chosen by or under the authority of that body,*

Our understanding is that this provision has functioned well in that jurisdiction, and has helped to clarify situations involving public bodies which have established other entities or corporations. For example, it can be difficult at times to determine issues of control or custody of records when often the same individuals work for the public body and the new entity, and they have been involved in creating records and doing work for both. Very few cases have come to the BC OIPC in relation to the extended definition of public bodies.

Different approaches to this issue may be seen in legislation across the country. Alberta specifically designates gas utilities and entities that own generating units, transmission facilities or electrical distribution systems as local public bodies. New Brunswick and Quebec both have a provision which designates the following category of entities as a local public body:

> *"any body whose board of directors includes at least one elected municipal officer sitting on the board in that capacity and for which a municipality or a metropolitan community adopts or approves the budget or contributes more than half the financing."*

Even if government implements the proposed expanded definition of public body as we have recommended, the ability to add additional public bodies by regulation could still be an asset in

instances where government wished to utilize that power to designate specific entities which closely but not precisely fit the definition. These could be added using the power referenced in section 2(p) to designate a public body under the regulations in section 73(m).

If this recommendation is to be considered by government, some study should be undertaken to ensure that any entity created pursuant to section 219 of the *Municipalities Act* is subject to the *ATIPPA*:

> *219. A council may enter into an agreement with the government of the province, a regional service board or municipal service delivery corporation or another municipality, agency or person for the joint construction, ownership, maintenance and operation of a facility or service that the council is permitted to construct, own, maintain and operate under this Act.*

From time to time we continue to encounter examples where citizens have unsuccessfully sought information about the operations of a particular entity operating in their community which to all outward appearances looks like it should be a public body, only to learn that it is not. The rationale for our recommendation in respect of this issue is the same rationale for the *ATIPPA* itself – to create a mechanism to ensure accountability and transparency for public bodies. If corporations or entities are owned by or created by or for public bodies in order to perform services for or do work on behalf of public bodies, these corporations or entities should be accountable not only to the public body, but to the public at large.

For the foregoing reasons, we therefore propose the following addition to the definition of public body:

> *2(p)(v.1) a corporation or entity owned by or created by or for a public body or group of public bodies, and* […]

Recommendation	Amend section 2(p) of the *ATIPPA* to broaden the definition of public body to include a corporation or entity owned by or created by or for a public body or group of public bodies. The purpose of this amendment would be to make public bodies which own or have created these entities more accountable to the public in accordance with the purpose of the *ATIPPA* in section 3(1).

Current Language	Proposed Language
[no current language]	2(p)(v1) a corporation or entity owned by or created by or for a public body or group of public bodies, and […]

Section 18 - Cabinet Confidences

The issue with section 18 as it now stands is that Bill 29 changed it from a provision which was intended to protect cabinet confidences to one which defines a broad range of records as cabinet records and assigns protection from disclosure to all of those records categorically. (Issues regarding the Bill 29 amendments to section 18 which partially removed the Commissioner's role and provide an unprecedented role for the Clerk of the Executive Council are dealt with in greater detail in the section of this submission dealing with the Commissioner's jurisdiction.)

In the previous *ATIPPA* review, our submission focused on the differing judicial interpretations of the phrase "substance of deliberations," which is typically at the core of cabinet confidences exceptions to the right of access in Canadian jurisdictions. In his analysis, Review Commissioner Cummings also discussed the differing interpretations of this phrase.

Section 18 has not yet been interpreted by a court in our Province – neither before nor after Bill 29. Prior to Bill 29, this Office reviewed interpretations by courts in different jurisdictions across Canada, and determined that the interpretation and test offered by *O'Connor v. Nova Scotia,* 2001 NSCA 132 (CanLII), is the most appropriate (see our Reports 2005-004, A-2008-008, and A-2008-010). Saunders, J.A. of the Nova Scotia Court of Appeal characterized the test in this way:

> *Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption ...*

A competing interpretation of "substance of deliberations" is set out in a ruling of the BC Court of Appeal in *Aquasource Ltd. v. British Columbia*, 1998 CanLII 6444. Order F14-11, 2014 BCIPC No.13 (CanLII) from the British Columbia Office of the Information and Privacy Commissioner is the most recent consideration of their cabinet confidences provision, and it contains a succinct review of some of the key interpretations of that provision. It was our understanding that government favoured the *Aquasource* interpretation, however as noted, the issue was never before the courts in this Province.

In our analysis of this provision as it existed prior to Bill 29, we determined that the exception for cabinet confidences is not meant to be simply a list of categories of records which must not be disclosed. The "substance of deliberations" test must be met in order to refuse disclosure. We reiterate that position now, and note that the first paragraph of the proposed revision to section 18 below is meant to clarify that it is only information which would meet the "substance of deliberations" test that should be withheld, regardless of the type of records involved.

It is interesting to note that although Mr. Cummings recommended that the listing of types of records found in the *Management of Information Act* be incorporated into the exception, he was also clear that the substance of deliberation test should remain in place. He also noted: "… I have not found any interpretation of provincial [access to information] legislation that necessarily

excludes all cabinet information or entire cabinet documents or records from disclosure and avoids severance."

Despite Mr. Cummings' recommendation, the Bill 29 amendment expanded the cabinet confidences provision to a degree of breadth unprecedented in Canada. The list of cabinet records was expanded to match the *Management of Information Act* as per his recommendation, but the substance of deliberations test was omitted entirely, and the language of the exception changed from withholding information within a record to withholding an entire record. As a result, one interpretation might be that all of the listed records are protected from disclosure on a categorical basis.

Additionally, in the case of a category entitled "Official Cabinet Records," the Clerk of Executive Council's certificate is all that is required to confirm the mandatory exception to disclosure, and the Commissioner is now explicitly excluded from reviewing such a decision. While there is the possibility of an appeal to the Supreme Court, Trial Division, such an appeal would likely have little practical effect beyond confirming the existence and clarity of the Clerk's certificate, because subsection 18(4) says that the Clerk's certificate "is conclusive of the question."

Mr. Cummings did not propose any particular language to resolve the differing interpretations of "substance of deliberations," although he was clear that the words should remain part of the provision. We note, however, that while Nova Scotia is not only operating with the *O'Connor* decision on substance of deliberations, it also has a much narrower version of the exception than some other jurisdictions. Furthermore, the exception in Nova Scotia's law is discretionary rather than mandatory. Given that section 3(c) of the *ATIPPA* says that exceptions should be limited and specific, we believe that this exception, as with the others, should be approached from the perspective that the exception should be crafted to allow or require to be withheld only the information which must be withheld in order to ensure, as Mr. Cummings suggested, that "our system of government functions in an effective and timely way." The approach should not be to extend the language of the exception far beyond what is necessary, as this would certainly be contrary to the purpose of the *Act*.

The current version of section 18 results in a huge volume of "background" information being included in the cabinet confidences exception, whether or not it ever played a role in the cabinet process. This is certainly overbroad, particularly considering the mandatory nature of section 18. It is important to note that if we were to revert to a cabinet exception which is more typical of others found in Canada, it does not mean that all background information will automatically be released upon request. Any of the other exceptions in the *ATIPPA* could still apply to the information. For example, any advice or recommendations which form part of the Cabinet process would of course be protected by section 20, which is a discretionary exception.

We believe that this legislative review is an opportunity to clarify the term "substance of deliberations," and to do so in favour of the interpretation which supports the right of access to information as envisioned in the *O'Connor* decision. This could be accomplished through some additional clarity in a new subsection 18(1), as set out below, which would make it clear that the

exception is meant to apply only to information within the record which would, if disclosed, reveal the substance of deliberations of cabinet.

Also noteworthy is that subsection 18(8) provides for a time frame, beyond which section 18 no longer applies. It should be noted that other exceptions may still apply beyond this time frame, such as personal information (section 30) or third party business information (section 27). As it stands, once a record has been in existence for 20 years, section 18 cannot be relied upon to withhold it. Each jurisdiction in Canada has such an expiry period, some longer, some shorter in duration. However, the most common time period found in similar provisions is 15 years. This shorter time period should be given consideration.

While section 18 is a mandatory exception to disclosure, some jurisdictions in Canada empower Cabinet to consent to the disclosure of records which would otherwise be protected by their equivalent exception. This is an approach which government may wish to consider in order to allow for disclosure of information which would not cause significant harm while at the same time broadening the potential for greater transparency.

As a footnote to this analysis, it is worth noting that, unlike every other provincial jurisdiction in Canada, government's official view is that a record containing information which must be withheld on the basis of section 18 must be withheld in its entirety, (despite section 7(2) which mandates severing), even if some of the information in the record would not reveal information as described in section 18. Section 4.5.1 of government's Access to Information Policy and Procedures Manual (August, 2013 version) makes it clear that no line-by-line review of a record is necessary when there is a claim of section 18, because the record must be withheld in its entirety. When Bill 29 amended section 18, it should be noted, there was no complementary amendment to section 7(2) to state that information to which the exception does not apply must also be withheld. Such a position regarding the protection of cabinet confidences goes beyond the purpose of the exception. The approach as represented by the current version of section 18 does not meet the basic standard for a cabinet confidences exception within the context of modern Canadian access to information law.

Recommendations	1. This provision is intended to protect the long-held parliamentary principle of cabinet confidentiality. Government is urged to take a more balanced view of this exception so as to recognize the public right of access to information while ensuring the protection of information required for cabinet to deliberate without fear that the differing views expressed at the Cabinet table will be revealed. 2. Amend the time frame in section 18 from 20 to 15 years.

Current Language	Proposed Language
18(1) In this section (a) “cabinet record" means (i) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet, (ii) draft legislation or regulations submitted or prepared for submission to the Cabinet, (iii) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet, (iv) a discussion paper, policy analysis, proposal, advice or briefing material, including all factual and background material prepared for the Cabinet, (v) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet, (vi) a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy, (vii) a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet, (viii) a record created during the process of developing or preparing a submission for the Cabinet, or (ix) that portion of a record which contains information about the contents of a record within a class of information referred to in subparagraphs (i) to (viii);	18(1) The head of a public body shall refuse to disclose information from any of the following categories of records if the disclosure would reveal the substance of deliberations of Cabinet, including, (a) an agenda, minute or other record of the deliberations or decisions of Cabinet, (b) a record containing policy options or recommendations submitted, or prepared for submission, to Cabinet, (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to Cabinet for their consideration in making decisions, before those decisions are made and implemented, (d) a record used for or reflecting consultation among ministers on matters relating to the making of government decisions or the formulation of government policy, (e) a record prepared to brief a minister in relation to matters that are before or are proposed to be brought before Cabinet, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy, and (f) draft legislation or regulations.

Current Language	Proposed Language
(b) "discontinued cabinet record" means a cabinet record referred to in paragraph (a) the original intent of which was to inform the Cabinet process, but which is neither a supporting Cabinet record nor an official Cabinet record; (c) "official cabinet record" means a cabinet record referred to in paragraph (a) which has been prepared for and considered in a meeting of the Cabinet; and (d) "supporting cabinet record" means a Cabinet record referred to in paragraph (a) which informs the Cabinet process, but which is not an official cabinet record. (2) 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. (3) The commissioner may review the refusal of a Cabinet record by the head of a public body under subsection (2) except where the decision relates to a Cabinet record which has been certified as an official Cabinet record by the Clerk of the Executive Council or his or her delegate. (4) Where a question arises as to whether a Cabinet record is an official Cabinet record, the certificate of the Clerk of Executive Council or his or her delegate stating that the record is an official Cabinet record is conclusive of the question.	(2) Subsection (1) does not apply to (a) information in a record that has been in existence for 15 years or more, (b) information in a record of a decision made by Cabinet on an appeal under an Act, (c) information in a record the purpose of which is to present background facts to Cabinet for consideration in making a decision if (i) the decision has been made public, (ii) the decision has been implemented, or (iii) 5 years or more have passed since the decision was made or considered. (3) The head of a public body shall not refuse to give access to a record based on subsection 1 where the Cabinet for which, or in respect of which, the record has been prepared consents to access being given.

Current Language	Proposed Language
(5) The delegate of the Clerk of the Executive Council referred to in subsections (3) and (4) shall be limited to the Deputy Clerk of the Executive Council and the Secretary of the Treasury Board. (6) An applicant may appeal a decision of the head of a public body respecting Cabinet records referred to subsection (2), except an official Cabinet record, to the commissioner or the Trial Division under section 43. (7) An applicant may appeal a decision of the head of a public body respecting a Cabinet record which is an official Cabinet record directly to the Trial Division. (8) This section does not apply to (a) information in a record that has been in existence for 20 years or more; or (b) information in a record of a decision made by the Cabinet on an appeal under an Act.	

Section 20 - Policy Advice or Recommendations and Section 7(4), (5) and (6)

Section 20

Subsection 20(1) currently reads:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;*
>
> *(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on it for more than 3 years;*
>
> *(c) consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister; or*

(d) draft legislation or regulations.

Prior to the amendment set out in Bill 29 subsection 20(1) read:

> *20(1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice or recommendations developed by or for a public body or a minister;*
>
> *or*
>
> *(b) draft legislation or regulations.*

As can be seen, Bill 29 added to section 20(1)(a) the words "proposals" "analyses" and "policy options". In addition, it added section 20(1)(b) and section 20(1)(c) to include a provision regarding a formal research or audit report and "consultations or deliberations".

All Canadian access to information statutes have a subsection comparable to section 20(1) of the *ATIPPA*. The use of terms such as "proposals", "analyses", "policy options" and "consultations or deliberations" is common in several other jurisdictions, with three provinces (British Columbia, Ontario and Nova Scotia) using the pre-Bill 29 language of "advice or recommendations".

The Commissioner discussed the purpose of section 20 in Report A-2008-006 by stating:

> *[18] It can be seen that section 20 is a discretionary provision that allows a public body to refuse to disclose a record when it falls into the category of "advice or recommendations developed by or for a public body…." The meaning and intent of this section has been discussed on a number of occasions, both in reports from this Office and in reports of Information and Privacy Commissioners from other jurisdictions where similar provisions exist. In Report 2006-013, my predecessor adopted the explanation of the purpose of section 20 found in the ATIPPA Policy and Procedures Manual, produced by the Access to Information and Protection of Privacy Office of the Department of Justice. The Manual states, at section 4.2.3, that:*
>
> *Section 20 is intended to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny, while allowing information to be released which would not cause real harm.*

The Commissioner has interpreted "advice or recommendations" in Report A-2009-007 as follows:

> *[14]Having reviewed the discussions of the phrase "advice or recommendations" in my predecessor's Report 2005-005, in the Ontario Court of Appeal decision in*

Cropley, and in the Federal Court of Appeal decision in 3430901 Canada Inc. v. Canada (Minister of Industry), I have reached the following conclusions on the meaning of the phrase "advice or recommendations" found in section 20(1)(a):

1. The statement by my predecessor in Report 2005-005 that "the use of the terms 'advice' and 'recommendations' . . . is meant to allow public bodies to protect a suggested course of action" does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than "a suggested course of action."

2. The term "advice or recommendations" must be understood in light of the context and purpose of the ATIPPA. Section 3(1) provides that one of the purposes of the ATIPPA is to give "the public a right of access to records" with "limited exceptions to the right of access."

3. The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.

4. Neither "advice" nor "recommendations" encompasses factual material.

It is the submission of this Office that the exception to disclosure in section 20 as it existed prior to Bill 29 did accomplish the goal of allowing "full and frank discussion of policy issues" without the deliberative process of government being subjected to "excessive scrutiny." Report A-2009-007 clearly sets out how this could be accomplished by giving an appropriate interpretation to the phrase "advice or recommendations". This interpretation of the provision as it was before the Bill 29 amendments has been relied on by the Supreme Court of Newfoundland and Labrador, Trial Division, in *McBreairty* v. *College of the North Atlantic* and *OIPC*, 2010 NLTD 28 (CanLII). Attaching the proper meaning to the phrase "advice or recommendations" would allow for the removal of terms such as "proposals", "analyses", "policy options" and "consultations or deliberations" from section 20, and a reversion back to the prior wording of the provision.

A recent decision from the Supreme Court of Canada deals with the interpretation of the phrase "advice or recommendations" as found in section 13(1) of Ontario's *Freedom of Information and Privacy Act*, R.S.O. 1990, c. F.31. The decision in *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) takes the same approach to the terms "advice" and "recommendations" that this Office took in Report A-2009-007. The Supreme Court at paragraph 24 of that decision agreed with the approach taken by the Federal Court of Appeal in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 (CanLII), which is one of the decisions relied on in Report 2009-007. The Supreme Court's decision addressed the purpose of access to information laws, as well as the purpose of this particular provision, and made a determination intended to strike the

appropriate balance between the right of access and the ability for government to function effectively.

The Supreme Court of Canada in *John Doe v. Ontario (Finance)* has determined that protection of policy options from disclosure is accomplished through the terms "advice" and "recommendations" as found in 20(1)(a) as it existed prior to Bill 29. Policy options are defined by the Supreme Court of Canada in the above-noted case as follows:

> *[26] Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.*

The Supreme Court also explored the purpose of the advice and recommendations exception:

> *[46] Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.*

It is important to emphasize that this ruling by the Supreme Court is in relation to the Ontario section 13, which is a close equivalent to section 20 of the *ATIPPA* as it existed prior to Bill 29. The additional language added by Bill 29 is, in our view, unnecessary to accomplish the purpose of the exception as outlined by the Supreme Court in paragraphs 41 to 46. The additional language added in Bill 29 may result in more information being withheld than is necessary to strike the balance referenced in the above-noted decision of the Supreme Court.

It appears, based on Mr. Cummings' commentary on this provision, that there were fears that government could not function effectively with section 20 as it was, and that decisions were being made, or might be made, to cease producing briefing notes out of fear that the advice and recommendations they contain would be released. It is our view that a statute such as the *ATIPPA* should not be amended based on misunderstandings and misperceptions. If senior officials require legal advice in interpreting the statute, such legal advice is readily available. There is no record of public bodies being forced to release briefing notes through the courts under *ATIPPA.* A certain amount of education of senior officials and advisors may be required to ensure that they understand and have confidence in how such a provision is intended to operate.

It seems reasonable that there is little or no real risk in returning to the former version of section 20, given that other provinces which have that version of section 20, namely Ontario, British Columbia, and Nova Scotia, have been operating with such a provision for many years to no apparent ill effect. Furthermore, we submit that our interpretation of that former version of the provision is consistent with the one that has now been applied by the Supreme Court of Canada in its recent decision. Finally, the Supreme Court of Canada appears satisfied that such a

provision strikes the appropriate balance necessary to achieve the objects of the legislation while ensuring the ability of government to function as it should.

Besides adding additional language to section 20(1)(a) and (c), Bill 29 also added 20(1)(b). This amendment to section 20 has the potential to clash with section 20(2)(f) in cases where a report has been commissioned but the findings are not to the liking of the public body which commissioned it. As long as the head of the public body is of the opinion that the report is "incomplete", section 20(1)(b) allows the report to be withheld for up to three years. This could carry on indefinitely if token additions or alterations are made from time to time, thus ensuring that the three year time period does not elapse. This provision should be removed because it relies on the "opinion of the head" rather than any objective evidence or analysis as to the completeness of the report. A provision equivalent to this is found in section 22(1)(h) of Prince Edward Island's legislation, and Alberta's 24(1)(h), but nowhere else in Canada. We believe that it goes beyond what is necessary for section 20 to accomplish, and in fact it could be misused. If the Commissioner determines based on objective evidence that such a report is a final report, we would recommend that it be released based on section 20(2)(f), subject to any other exceptions which may apply. If objective evidence exists to indicate that it is not final, a claim of section 20 could be considered on its merits, but the "blanket" approach of section 20(1)(b) is unnecessary and overbroad.

On the basis of the foregoing analysis, we are of the view that the Bill 29 amendments to section 20 are unnecessary, as the purpose of the exception can be adequately met using section 20 as it existed prior to Bill 29.

Section 7(4), (5) and (6)

A provision related to section 20 was added by amendment to the *ATIPPA* through Bill 29:

> *7 (4) The right of access does not extend*
>
> *(a) to a record created solely for the purpose of briefing a member of the Executive Council with respect to assuming responsibility for a department, secretariat or agency; or*
>
> *(b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the House of Assembly.*
>
> *(5) Paragraph (4)(a) does not apply to a record described in that paragraph if 5 years or more have elapsed since the member of the Executive Council was appointed as the minister responsible for the department, secretariat or agency.*
>
> *(6) Paragraph (4)(b) does not apply to a record described in that paragraph if 5 years or more has elapsed since the beginning of the sitting with respect to which the record was prepared.*

Similar provisions can be found in the legislation of Alberta and Yukon, but it is not a common feature of access to information statutes in Canada. In his analysis of section 20 during the last *ATIPPA* review, Mr. Cummings noted the existence of section 6(4) of Alberta's law, which is essentially the same provision. Mr. Cummings noted concerns that there could be a "chilling effect" on the process of government due to section 20 as it was prior to Bill 29, and he specifically referenced media stories that Ministers were receiving verbal instead of written briefings out of concern that some information in a briefing note might be obtained through an access to information request. Mr. Cummings noted that he encountered "widespread uncertainty" among senior government officials over what could be protected by section 20 and what could not. Mr. Cummings reflected on his own experience in senior government positions, and he was of the view that the practice of verbal rather than written briefings could harm the conduct of government business. On that basis, he recommended an expansion of section 20 to ensure that written briefings could continue in confidence. Notably, he also considered and rejected the recommendation from some senior government officials that all ministerial briefing materials be exempt from disclosure.

Once again, it is of great concern that a decision appears to have been made to amend this statute based on "uncertainty" on the part of senior government officials as to its correct interpretation, particularly when there is a growing body of case law on the subject. The fear that section 20 as it existed prior to Bill 29 would force disclosures which could harm the deliberative process should be the focus of education and training for senior officials and their advisors rather than the type of legislative amendment found in 7(4). The practice of providing written briefings to Ministers should not be hindered, and we are of the view that section 20, as it existed prior to Bill 29, would not in fact hinder such a practice. That provision was already sufficient to ensure that the key elements of such briefings could be protected from disclosure.

As noted above, the governments of British Columbia, Ontario and Nova Scotia appear to be able to operate effectively with the protection afforded by a version of section 20 as it existed prior to Bill 29. Exceptions to access should only be incorporated within the *ATIPPA* if they are necessary. If the post-Bill 29 version of the exception has not been considered necessary in those three provinces, is it necessary here? Our recommendation is clear on that subject.

Most other jurisdictions also operate without a version of section 7(4),(5) and (6). Mr. Cummings, with a long career at senior levels of government, did not believe that section 7(4), (5) and (6) was necessary to ensure the integrity of the Ministerial briefing process. We therefore recommend that it be removed from the *ATIPPA*.

On a final note, we are concerned by the location of section 7(4), (5) and (6) in Part I of the *ATIPPA*. If it was meant to be an exception to the right of access, it should have been included in Part III with the other exceptions. We are left to wonder whether there was an intention that a decision to refuse access on the basis of section 7(4) should not be subject to appeal or review by the Commissioner, which we believe would be contrary to the purpose of the *ATIPPA* in section 3(1)(e).

Recommendation	Section 20(1) should be amended to read as it read prior to Bill 29. An additional option would be to add clear definitions of the terms "advice" and "recommendations" in section 2 of the Act based on the Supreme Court of Canada decision noted above. Section 7(4), (5) and (6) should be removed from the *ATIPPA*.

Current Language	Proposed Language
Policy advice or recommendations 20(1) The head of a public body may refuse to disclose to an applicant information that would reveal (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister; (b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on it for more than 3 years; (c) consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister; or (d) draft legislation or regulations.	Policy advice or recommendations 20(1) The head of a public body may refuse to disclose to an applicant information that would reveal (a) advice or recommendations developed by or for a public body or minister; or (b) draft legislation or regulations.

Section 22.2 - Information from a Workplace Investigation

New Brunswick's *Right to Information and Protection of Privacy Act* is the only one in Canada that has a similar provision to section 22.2. New Brunswick's provision is as follows:

> *20(1) The head of a public body shall refuse to disclose information to an applicant that would reveal*
>
> *(a) the substance of records made by an investigator providing advice or recommendations of the investigator in relation to a harassment investigation or a personnel investigation,*

(b) the substance of other records relating to the harassment investigation or the personnel investigation, or

(c) the substance of records made pursuant to a university's academic or non-academic by-laws or regulations with respect to conduct or discipline of a student.

(2) The head of a public body may disclose to the applicant who is a party to the harassment investigation or personnel investigation the information referred to in paragraphs (1)(b) and (c) by allowing the applicant to examine the records, but the head may refuse to provide the applicant copies of the record.

The meaning of "substance of records" is unclear and has not been interpreted in any other jurisdiction in Canada. This causes great difficulty for public bodies when trying to interpret its meaning so as to determine its applicability to records. Reading section 22.2, it is clear that witnesses involved in a workplace investigation are only entitled to information that relates to their own statements. As one would expect, applicants who are not a party to the workplace investigation get no information that would reveal the "substance of records".

The problem arises when a party to such an investigation requests information. The section contains no prohibition against disclosure to a party to an investigation, and affirms that a party has a definite right to information that reveals the "substance of records". The question is how much information does this entail? Does this mean all the information collected or made during an investigation, or something else? One of the principles of legislative interpretation tells us that all sections of a statute have a particular meaning or purpose. In order to give specific meaning and purpose to section 22.2, we presume it was included to grant parties to an investigation a broader right of access than what would otherwise be available under the legislation (for example, if one were just to consider section 30 when deciding what information can be released). Otherwise, there would be no need for such a section.

It is therefore our recommendation that section 22.2 be amended to remove the phrase "substance of records" and more clearly state exactly what information parties to an investigation are entitled to or not entitled to.

Recommendation	Amend section 22.2 to remove the phrase "substance of records" and clarify what information must be provided to a party to a workplace investigation. Remove the reference in 22.2(2) to an applicant other than a party to the investigation. If an individual who is not a party to the investigation requests records relating to an investigation, section 30 and/or other exceptions will likely apply.

Current Language	Proposed Language
22.2(1) For the purpose of this section (a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended; (b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and (c) "workplace investigation" means an investigation related to (i) the conduct of an employee in the workplace, (ii) harassment, or (iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public which may give rise to progressive discipline or corrective action by the public body employer. (2) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of records collected or made during a workplace investigation.	22.2(1) For the purpose of this section (a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended; (b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and (c) "workplace investigation" means an investigation related to (i) the conduct of an employee in the workplace, (ii) harassment, or (iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public which may give rise to progressive discipline or corrective action by the public body employer. **(2) The head of a public body shall disclose to an applicant who is a party to a workplace investigation all relevant information created or gathered for the purpose of a workplace investigation.**

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2). (4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.	(3) Notwithstanding subsection (2), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.

Section 27 - Business Interests of a Third Party

Subsequent to the Bill 29 amendments to the *ATIPPA*, this Office has issued several reports with respect to the interpretation of section 27 as it relates to bid or tender information. Most claims of section 27 revolve around the issue of harm to the competitive position of the third party or significant financial loss or gain to a third party.

The legislation in five Canadian jurisdictions employs a three-part test when determining whether this section is applicable, such that (a) information must be of a particular type, (b) it must be supplied in confidence and (c) disclosure of it could reasonably be expected to have one of several enumerated outcomes. All three parts of the test must be met in order for the exception to apply. As a mandatory exception to the right of access, the public body is required to refuse access if the exception applies. If one part of the test is not met, then the section is not applicable. This was also the state of the legislation in this Province prior to the amendments in Bill 29.

In the Report of Mr. Cummings, he noted that several public bodies had expressed concerns that the interpretation of section 27 adopted by this Office set an unreasonably high standard which public bodies and third parties were unable to achieve to protect disclosure of third party information. We feel it necessary to emphasize that the positions adopted by this Office in our Reports have always been based firmly on the available jurisprudence from those jurisdictions which have similar or identically worded provisions. Rarely did a public body (or third party) come forward with any alternative jurisprudence to challenge any legislative interpretations put forward in our Reports.

The key fact is that we found it to be relatively rare for a party asserting a claim of section 27 to present the necessary evidence and argument to discharge its burden of proof, on the balance of

probabilities, that the claimed exception applied to the information being withheld. Quite often, the effort expended appeared to be minimal. Sometimes we would receive a few paragraphs of unsupported assertions, and nothing more, as the formal position of the public body or third party. In fact, we took the opportunity on a number of occasions in Commissioner's Reports to plead with public bodies and third parties to put the appropriate amount of effort into discharging their burden of proof. For example, in Report A-2011-007 we agreed that the information could be withheld because the third party had taken the time to provide us with sufficient evidence and argument to support its position, in contrast to an earlier Report we had issued in which the burden of proof had not been discharged in relation to a very similar access request. Over and over in our Reports (not just in relation to section 27), we were frustrated by the lack of effort expended, primarily by public bodies but sometimes by third parties, in supporting their case. (Note that the burden of proof is usually on the public body in access reviews, however this burden switches to the third party on an appeal or review of a public body's decision to give an applicant access to information relating to the third party. The third party must prove that an applicant has no right of access.)

Despite this frustration on our part, as well as the concerns expressed to Mr. Cummings, it is a fact that prior to Bill 29, no section 27 cases were ever brought to court, either by this Office or by an applicant or third party. As this Office only has the power to recommend, no third party information ever got released that was not voluntarily released by the public body. Any perception that section 27 as it was prior to Bill 29 was somehow harming third parties is therefore a misperception. Given that five other Canadian jurisdictions have carried on business with third parties while using the same three-part harms test which we had prior to Bill 29, we see no reason why we cannot return to that provision, which in our view strikes the most appropriate balance and represents the "gold standard" for the third party business exception in Canada.

Rather than a three-part test, our current provision now requires that only one of the three parts be met in order to withhold information from an applicant. New Brunswick, Manitoba, Saskatchewan and the Northwest Territories are the jurisdictions which share our current "post-Bill 29" version of the provision. However, it is interesting to note that these jurisdictions (with the exception of the Northwest Territories) also have a provision that provides for disclosure of information that would otherwise fall under this section if the public interest in disclosure for purposes such as improved competition, or circumstances in which government regulation of undesirable trade practices outweighs the private interest of the third party. In fact, the legislation in Saskatchewan does not even specify what the purpose of the public interest has to be. If any public interest outweighs any financial loss or gain, prejudice to the competitive position or interference with contractual negotiations, a head may give access to that information. The weakness of this provision, however, is that the application of these additional factors is purely at the discretion of heads of public bodies, and does not fulfill the accountability purpose of the *Act* as well as a return to the three-part test as it existed prior to Bill 29. We believe that the three-

part test as it was prior to Bill 29 reflects the public interest better than a discretionary consideration with no objective test.

As a result of the amendment which gave us our current provision, this Province and the Northwest Territories clearly have the broadest protection for business interests of third parties anywhere in Canada. In our experience, most requests that fall under this section have been in relation to information of third parties who have been awarded contracts to supply goods or services to a public body. Applicants are trying to gain access to information about how much money public bodies are paying to purchase various good and services. The principle of accountability is one of the main underpinnings of all access to information legislation. Transparency with respect to expenditure of public funds is one of the most fundamental means to ensure government accountability. While there is a legitimate need to protect business interests of a third party, section 27 should not routinely shield from disclosure the prices paid by public bodies for goods and services, as this would completely undermine one of the main purposes of the *ATIPPA*. Our experience is that the current version of section 27 is being used by public bodies and third parties to do just that.

British Columbia, Alberta, Ontario, Nova Scotia, and Prince Edward Island have been able to operate with the pre-Bill 29 three-part test for decades. One would expect there to have been an outcry in these jurisdictions if third parties were refusing to do business with government, and the operations of government were being harmed because of this provision. No such outcry is apparent, and it is our submission that section 27 should revert back to a three-part test, which allows for the greatest amount of access while protecting third parties from harm to their business interests.

Some consideration should also be given to reducing the 50 year expiry period for the application of this provision in subsection 27(3). To put it in perspective, an applicant requesting information in 2014 could be refused access to records relating to third parties engaged in the completion of the Trans-Canada Highway across Newfoundland in 1965 (“Finish the Drive in ‘65”). It is quite possible that many of the companies which were engaged in or which bid on that work are no longer in existence, but most importantly it is difficult to see how disclosure of information that old could in any way harm or affect a business operating today. Consider also that this is a mandatory exception, which means that information that qualifies for protection on the basis of section 27 is required to be withheld by a public body for 50 years, with no possibility of the exercise of discretion, yet on the first day after 50 years, it must all be released upon request by an applicant (unless another exception applies). It may also be possible to amend this provision such that after the records reach a certain age, there is a provision for the exercise of discretion on the part of the public body. Even if the possibility of discretion were to be introduced, 50 years appears to be too long.

Recommendation	Section 27 should revert back to the pre-Bill 29 three-part test most commonly used by other Canadian jurisdictions.

Current Language	Proposed Language
27 (1) The head of a public body shall refuse to disclose to an applicant information that would reveal (a) trade secrets of a third party; (b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to (i) harm the competitive position of a third party or interfere with the negotiating position of the third party, (ii) 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, (iii) result in significant financial loss or gain to any person or organization, or (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to	**27 (1) The head of a public body shall refuse to disclose to an applicant information** **(a) that would reveal** **(i) trade secrets of a third party; or** **(ii) commercial, financial, labour relations, scientific or technical information of a third party;** **(b) that is supplied, implicitly or explicitly, in confidence; and** **(c) the disclosure of which could reasonably be expected to** **(i) harm significantly the competitive position of a third party or interfere significantly with the negotiating position of the third party,** (ii) 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, (iii) result in significant financial loss or gain to any person or organization, or (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a

Current Language	Proposed Language
resolve or inquire into a labour relations dispute.	labour relations dispute.
(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.	(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.
(3) Subsections (1) and (2) do not apply where	(3) Subsections (1) and (2) do not apply where
(a) the third party consents to the disclosure; or	(a) the third party consents to the disclosure; or
(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.	(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Section 30 - Disclosure of Personal Information

One of the most significant amendments in Bill 29 saw the adoption of a greatly improved personal information exception through the introduction of a harms test. The previous version was difficult to work with because it was an "all or nothing" inflexible provision, sometimes leading to absurd results. Greater flexibility was required to achieve the appropriate balance and reflect the nuances of personal information. The current version of section 30, while much more detailed, and in some respects more challenging to implement, will generally provide a more just result for the applicant as well as for individuals whose personal information is the subject of an access request.

That being said, section 30 can be improved upon in the following respects.

Remuneration Versus Salary Range

Although we were not aware of any concerns of this nature, Mr. Cummings in his Report indicated that, on the basis of comments from "several government employees", he was

recommending that the provision which allows for the disclosure of the remuneration amount of public employees be changed to "salary range" only. For most public employees, salary range would likely be sufficient to ensure the accountability of government. However, the more senior the employee, the more likely that forms of remuneration other than salary range could enter the picture. The extent of bonuses earned, severance pay, or any similar benefit could be significant, and it is at those senior levels with higher profile appointments and greater public interest where the necessary accountability mechanism is missing when only the employee's salary range can be disclosed as a matter of course. Prior to Bill 29, the *ATIPPA* was clear in that information about the remuneration of public employees could not be withheld as personal information. It is possible to interpret section 30 through the consideration of factors under 30(5) such that remuneration beyond salary range could be released, however it is not certain that public bodies would adopt such an approach. Section 30 should be amended to restore this accountability mechanism.

It should also be noted that while six jurisdictions use the term "salary range", those that use that term also include the term "benefit" or "discretionary benefit," which is broader than simply "salary range" on its own. Some consideration may also be given to defining "remuneration" as "including but not limited to salary, bonuses, and any other benefits provided to the employee."

Personal Information of the Deceased

Currently, 30(2)(m) provides that a disclosure is not an unreasonable invasion of a third party's personal privacy where the personal information is about an individual who has been dead for 20 years or more. In all of the circumstances enumerated in section 30(2), the public body cannot withhold the personal information because those categories of information have been deemed to be "not an unreasonable invasion" of privacy. While it is acknowledged that the privacy interests of the deceased are generally considered to decrease over time, we do not consider it appropriate to legislate a firm cutoff date, after which the privacy rights of the deceased are completely extinguished. The disclosure of personal information of the deceased raises issues of personal dignity for the deceased as well as surviving family members. Would we want sensitive personal information about us released after we are gone? The answer may vary depending on the particular information, and the concerns may fade as the years pass, but a more nuanced approach might allow for greater sensitivity. Section 30(2)(m) provides no opportunity to consider those issues once 20 years has passed.

Section 39(1)(v), which was added through Bill 29, allows for disclosure of personal information to a surviving spouse or relative where the disclosure is not an unreasonable invasion of the deceased's privacy. Section 30(2)(d) provides that any disclosure which is authorized by an Act or regulation of the province or Canada is not an unreasonable invasion of privacy. This ensures that an applicant who is a surviving spouse or relative can access appropriate personal information of the deceased.

Under section 30(2)(m), however, the applicant need not be a relative or surviving spouse of the deceased, nor have any connection whatsoever. As long as 20 years have passed, it would appear that any and all personal information of the deceased is fully available upon request. We do not believe this is appropriate to circumstances where the dignity of the deceased, as well as perhaps

surviving family members, could be impacted through disclosure of personal information. The provision that is required is one which protects the personal information of the deceased, with decreasing protection over time, in conjunction with other relevant factors such as those found in 30(5). This could be accomplished through the removal of 30(2)(m) combined with an amendment to section 30(5) ensuring that the privacy interests of the deceased become one of the relevant circumstances to be considered by a public body when determining whether the personal information of a deceased individual should be released to an applicant.

Alberta, Manitoba, New Brunswick and PEI all have similar provisions to the one currently in place in this Province, however the cut-off for applicability of the provision ranges from a low of 10 years to a high of 25. Section 22(2)(i) of British Columbia's law, however, has a different provision which we believe would allow for the release of information about the deceased while ensuring that consideration of the sensitivity of the information as time passes is the key factor.

Recommendations	1. Section 30(2)(f) should be amended to replace the term "salary range" with the term "remuneration" which was in place prior to Bill 29. 2. Section 30(2)(m) should be deleted and in its place we propose an addition to section 30(5) which would require public bodies to consider disclosure of the personal information of deceased to an applicant where the length of time that has elapsed since death would allow the head of the public body to determine that disclosure is not an unreasonable invasion of privacy.

Current Language	Proposed Language
30(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where (f) the information is about a third party's position, functions or **salary range** as an officer, employee or member of a public body or as a member of a minister's staff; […] (m) the personal information is about an individual who has been dead for 20 years or more	30(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where (f) the information is about a third party's position, functions or **remuneration** as an officer, employee or member of a public body or as a member of a minister's staff; […] [delete 30(2)(m) and add 30(5)(j)] **(j) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an**

	unreasonable invasion of the deceased person's personal privacy

Section 31 - Information Shall be Disclosed if in the Public Interest

Section 31 creates a positive obligation on public bodies to disclose information to certain parties about a risk of significant harm if it is of a certain type and in the public interest to do so. Several jurisdictions have a version of this provision. It is a provision which tends to gain little attention or notice, but could be crucial in certain circumstances.

Section 31 of the *ATIPPA* limits the disclosure to circumstances of a "risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest." Similar wording is found in provisions in the comparable legislation of other jurisdictions; however Alberta and PEI offer important additional language. In those jurisdictions, the provision creates an obligation to disclose any information which is "for any other reason, clearly in the public interest."

If government is inclined to consider an amendment to section 31, the Commissioner would recommend that an approach similar to that found in PEI and Alberta be considered, as this would allow the current provision of section 31(1) to remain, but be supplemented by language which broadens the obligation to disclose information in the public interest.

The Commissioner is also of the view that section 31 should require that the Commissioner be notified by a public body who intends to rely on section 31 to disclose information, as is the case in Alberta and PEI. Furthermore, the language in section 31 should be amended to make the disclosure include "to any person" and "of the person" as in Alberta and PEI. One final suggestion is in relation to subsection 31(4). There may be instances where there is no known address, or there may not be time to notify individuals in an emergency situation. We therefore suggest that an alternative to a mailed notice be considered for such instances.

Recommendation	Section 31 should be amended to broaden the circumstances under which a disclosure of information in the public interest must be made despite any other provision of the ATIPPA, and the procedures for doing so should be clarified.

Current Language	Proposed Language
31(1) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of	31(1) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of

Current Language	Proposed Language
people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest. (2) Subsection (1) applies notwithstanding a provision of this Act. (3) Before disclosing information under subsection (1), the head of a public body shall, where practicable, notify a third party to whom the information relates. (4) Where it is not practicable to comply with subsection (3), the head of the public body shall mail a notice of disclosure in the form set by the minister responsible for this Act to the last known address of the third party.	people, **to any person**, or to an applicant: **(a) information about a risk of significant harm to the environment or to the health or safety of the public or a group of people or a person, the disclosure of which is clearly in the public interest, or** **(b) information the disclosure of which is, for any other reason, clearly in the public interest.** (2) Subsection (1) applies notwithstanding a provision of this *Act*. (3) Before disclosing information under subsection (1), the head of a public body shall **notify the commissioner, and where practicable,** a third party to whom the information relates. (4) Where it is not practicable to comply with subsection (3), the head of the public body shall (a) **mail a notice of disclosure in the form set by the minister responsible for this Act to the last known address of the third party, or** (b) **if it is not practicable to mail a notice of disclosure and the disclosure relates to information held in a database or relates to a particular group of individuals, the public body may issue a public advisory indicating that the disclosure will occur and publicizing the name of a contact person at the public body who can answer questions about the disclosure.**

Section 43.1 - Power of a Public Body to Disregard Requests

Section 43.1(1) enumerates the circumstances under which the head of a public body may disregard a request for access. Section 43.1(2) provides for a circumstance where the head of a public body may request that the Commissioner authorize such a decision. Section 43.1(3) provides a mechanism whereby any decision to disregard a request for access may be appealed.

This is a section which was added by Bill 29. We support the principle that there may be requests for access to information filed under the *ATIPPA* which are not and should not be treated as legitimate requests. Such requests, in our experience, are extremely rare. The language in section 43.1 has resulted in fears from some quarters that public bodies may use this provision to disregard legitimate requests as a way of avoiding the accountability purpose of the *ATIPPA*. This has not been our experience thus far. That being said, there may be some value in reconsidering the composition and orientation of section 43.1 to ensure that there is greater public confidence in the operation of this provision and of the statute as a whole.

It should be noted that six Canadian jurisdictions have provisions within their comparable statutes which provide for limited circumstances under which a request for access may be disregarded, but there is some variation in the models. In British Columbia, Alberta, Quebec, PEI and New Brunswick, public bodies must seek the Commissioner's authorization to disregard a request. Only in Manitoba is the discretion to make such a decision solely in the hands of a public body, which is then reviewable by the Ombudsman (who serves as Commissioner in Manitoba). In this Province we have a hybrid model, where section 43.1(1) gives the discretion to public bodies and 43.1(2) provides for a circumstance where public bodies must ask the Commissioner to authorize such a determination.

Use of section 43.1 has been exceedingly rare. We have only received one request under section 43.1(2), for example, and in that instance the applicant was quick to withdraw his request upon being contacted by this Office to seek any representations he may have on the matter before the Commissioner would issue a decision. Nevertheless, if there is a level of discomfort among the general public and other users of the *ATIPPA* with the heads of public bodies wielding the authority to disregard a request under section 43.1(1), the Committee may wish to recommend that only the Commissioner be given the authority to allow a public body to disregard a request when asked by the head of a public body. The main concern with this approach is that if the applicant disagrees with the decision, the Commissioner, having authorized it, could not be available to review the decision, and the applicant would then have to consider the time and expense involved in going to the Trial Division.

Finally, we note that there is a flaw with subsection 43.1(3), which provides for an appeal of a decision made under 43.1(1) or (2). It indicates that in either case, the individual may appeal to the Commissioner or the Trial Division. This provision should be amended to make it clear that if the Commissioner authorizes the head of a public body to disregard a request using the authority granted in 43.1(2), the applicant should have no right of appeal to the Commissioner, but only to the Trial Division. If the applicant wishes to appeal a decision under section 43.1(1), then of course both options for appeal should be open to the applicant. Any recommendation in

relation to this issue will need to be considered in light of whether other substantial amendments are made to section 43.1.

Recommendations	1. It is proposed that some consideration be given as to whether the decision to disregard a request should lie with the head of a public body, or whether all such decisions should be made only as authorized by the Commissioner. 2. It is recommended that the language in 43.1(3)(c) be amended to clarify the appeal procedure presuming that section 43.1 is not amended in a substantial way such as to render the issue moot.

Current Language	Proposed Language
43.1 (3) The head of a public body who refuses to give access to a record under this section shall notify the person who made the request, and that notice shall contain the following information: (a) that the request is refused because the head of the public body is of the opinion that the request falls under subsection (1) and of the reasons for the refusal; (b) that the request is refused because the commissioner has authorized the head of a public body to disregard a request under subsection (2) and of the reasons for the refusal; and (c) that the person who made the request may appeal to the commissioner or the Trial Division under section 43.	43.1 (3) The head of a public body who refuses to give access to a record under this section shall notify the person who made the request, and that notice shall contain the following information: (a) that the request is refused because the head of the public body is of the opinion that the request falls under subsection (1) and of the reasons for the refusal; (b) that the request is refused because the commissioner has authorized the head of a public body to disregard a request under subsection (2) and of the reasons for the refusal; and (c) that the person who made the request may appeal to the commissioner or the Trial Division under section 43 **in the case of a refusal under subsection 43.1(1) or to the Trial Division in the case of a refusal under subsection 43.1(2).**

Section 46 - Informal Resolution

Section 46 deals with informal resolution of a request for review. Subsection 46(1) provides that the Commissioner may take the steps he considers appropriate to informally resolve a request for review to the satisfaction of the parties involved and in a manner consistent with the *Act*. Subsection 46(2) provides that where the Commissioner is unable to informally resolve a request for review within 60 days, the Commissioner is required to review the decision, act or failure to act of the public body and to complete a report under section 48 (contingent on whether the Commissioner determines that any of the provisions in 46(3) apply).

In our submission to Mr. Cummings during the last *ATIPPA* review, this Office explained the challenges involved in completing the informal resolution process during the 30-day period that was set out in the previous version of subsection 46(2). We pointed out that the laws in other Canadian jurisdictions authorize the use of an informal resolution or mediation process prior to a review or inquiry being conducted by the commissioner, and most do not set time constraints within which this process must be completed. Nova Scotia and New Brunswick are exceptions, setting time limits of 30 and 45 days, respectively.

This Office recommended that section 46(2) be amended to eliminate the reference to a 30-day time restriction for the information resolution process. Mr. Cummings agreed and proposed that the Commissioner be provided with the discretion to determine the length of time for the informal resolution process in all cases. Bill 29 amended subsection 46(2) to increase the informal resolution period from 30 days to 60 days.

Approximately three-quarters of our Reviews are resolved informally, and it is typically the preferred outcome for all parties, primarily because of the timely result. However, informal resolution can be a long process in itself. Sometimes a large volume of records is involved, and there can be an extended back and forth process to ensure that the *ATIPPA* is applied correctly, which can include negotiating the release of additional records. Sometimes public bodies simply need additional time to undertake tasks necessary to advance the informal resolution process, which can involve additional searches for records, reconsidering the application of exceptions, and in some cases reconsidering the exercise of discretion for discretionary exceptions. Sometimes applicants themselves request that the process be extended to accommodate their own professional or personal obligations.

Informal resolution requires the active involvement of all parties. Our approach has been that as long as there continues to be a reasonable prospect of progress in the informal resolution process and we continue to have the support of the applicant and public body, we believe that the informal resolution process should proceed. Even when the entire matter is not resolved informally, it is helpful in preparation for the formal Review, and ultimately the Commissioner's Report, to clear the decks of any matters that can be resolved informally so that the Review and Report can focus only on any intractable, outstanding issues. We therefore recommend that the time limit for informal resolution be removed, which would be consistent with our position that the Commissioner's staff should continue informal resolution efforts as long as there is progress towards resolution and the parties agree to continue the process.

Another issue with section 46 is how the Bill 29 amendment used the terms "complaint" and "review." It is clear from a reading of sections 43 and 44 that the terms complaint and review

apply to different situations and have different meanings. A complaint under section 44, as it currently exists, relates to a time extension, a fee, or an alleged violation of Part IV of the *ATIPPA*. Currently, the decision of whether to accept for investigation a complaint regarding these matters is a discretionary one on the part of the Commissioner, as is clear from the language of section 44(1).

In contrast, a review under section 43 refers to a decision, act or failure to act of a public body in relation to a request for access or correction. Prior to Bill 29, the Commissioner was required to proceed with a review each time a request for review was received. Section 46(2) was amended, and section 46(3) and (4) were added by Bill 29, which gave the Commissioner some discretion to decide not to conduct a review, which we think was an important and positive amendment. Unfortunately, the provision appears to have been imported without the necessary adaptation from the *Personal Health Information Act*, where the term "complaint" applies to all matters. The term "complaint" as it appears in this provision does not accurately reflect the difference between the use of the terms "complaint" and "review" as they appear in sections 43 and 44. The Commissioner already has the necessary discretion under 44, so the term "complaint" in 46(3)(a) to (d) needs to be changed to reflect the fact that this provision is meant to refer only to requests for review under section 43. This could be done in a variety of ways, but we have suggested one approach below.

A related amendment to section 46 from Bill 29 was also necessary and important, but perhaps could have been better executed. Section 46(4) provides for an appeal if the Commissioner decides not to conduct a review based on one of the provisions in 46(3). We are left to assume that it must be an appeal of the public body's original decision to deny access, rather than an appeal of the Commissioner's refusal to conduct a review, but the language is not as clear as it should be in that regard. From our perspective, an appeal of the Commissioner's decision might move the matter six months to a year down the road before being heard and a decision rendered by the court, and even if it were successful for the applicant it would only place the applicant back at square one of the process. In the same period of time, a court could review the public body's original decision to deny access and issue a decision of greater value to the applicant. This would be a much more productive way for the applicant to spend time and money going to court. We have therefore recommended that it be clarified that the appeal in section 46(4) is an appeal of the decision of the public body to deny access or correction.

Some further fallout from Bill 29 which needs to be addressed is the fact that while section 46(4) refers applicants to section 60 to launch an appeal, the provisions of section 60 are not well suited to this endeavor, and they were not amended to allow for an appeal flowing from 46(4). One immediate issue is the 30-day time limit set out in section 60(1). Under section 45(1) applicants have 60 days (or longer at the discretion of the Commissioner) to request that the Commissioner conduct a review of a public body's decision. It is therefore very unlikely that a decision of the Commissioner under 46(3) would be received within 30 days of receiving a decision of the public body, which is the time limit for an appeal under section 60(1).

Recommendations	1. It is recommended that subsection 46(2) be amended to remove the 60-day time period. This would reflect a more realistic approach to the informal resolution process.

	2. It is recommended that subsection 46(3) be amended to remove the reference to "complaint" and make it clear that the provision is meant to refer to requests for review under section 43. 3. It is recommended that 46(4) be amended to clarify that the decision to be appealed is the decision of the public body to refuse a request for access or correction, rather than the Commissioner's decision to refuse to conduct a review. 4. Furthermore, an amendment is required to section 60 regarding the time limit for an appeal, because the 30-day time period in section 60(1) would likely be past by the time the Commissioner were to issue a notice under 46(4).

Current Language	Proposed Language
46 (2) Where the commissioner is unable to informally resolve a request for review **within 60 days of the request**, the commissioner shall review the decision, act or failure to act of the head of the public body, where he or she is satisfied that there are reasonable grounds to do so, and complete a report under section 48. (3) The commissioner may decide not to conduct a review where he or she is satisfied that (a) the head of a public body has responded adequately to the complaint; (b) the complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this Act; (c) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date when the complaint was filed is such that a review under	**46 (2) Where the commissioner is unable to informally resolve a request for review, the commissioner shall review the decision, act or failure to act of the head of the public body, where he or she is satisfied that there are reasonable grounds to do so, and complete a report under section 48.** (3) The commissioner may decide not to conduct a review where he or she is satisfied that (a) the head of a public body has responded adequately **to the matter which was brought before the commissioner in the request for review;** **(b) the subject matter of the request for review** has been or could be more appropriately dealt with by a procedure or proceeding other than a review under this Act; (c) the length of time that has elapsed between the date when the subject matter of the **request for review**

Current Language	Proposed Language
this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or (d) the complaint is trivial, frivolous, vexatious or is made in bad faith. (4) Where the commissioner decides not to conduct a review, he or she shall give notice of that decision, together with reasons, to the person who made the complaint and advise the person of his or her right to appeal the decision to the court under section 60 and of the time limit for appeal. **[no equivalent provision to the proposed 60(2.2)]**	**arose and the date when the request for review was filed** is such that a review under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or **(d) the request for review** is trivial, frivolous, vexatious or is made in bad faith. (4) Where the commissioner decides not to conduct a review, he or she shall give notice of that decision, together with reasons, to the person who made the request for review and advise the person of his or her right to appeal the decision **of the public body** to the court under section 60 and of the time limit for appeal. **60(2.2) An appeal may also be commenced by an applicant under this section in accordance with subsection 46(4) within 30 days of receiving a decision of the Commissioner not to conduct a review.**

Section 63 - Disposition of Appeal

Section 63 of the *ATIPPA* provides as follows:

> *63(1) On hearing an appeal the Trial Division may*
>
> *(a) where it determines that the head of the public body is authorized or required to refuse access to a record under Part II or III, dismiss the appeal; or*
>
> *(b) where it determines that the head is not authorized or required to refuse access to all or part of a record under Part II or III,*
>
> *(i) order the head of the public body to give the applicant access to all or part of the record, and*

(ii) make an order that the court considers appropriate.

(2) Where the Trial Division finds that a record or part of a record falls within an exception to access under Part II or III, the court shall not order the head to give the applicant access to that record or part of it, regardless of whether the exception requires or merely authorizes the head to refuse access.

Part III of the *ATIPPA* contains a number of mandatory as well as discretionary exceptions to the right of access. The approach to be taken in relation to discretionary exceptions was discussed in *Pomerleau Inc. v. Smart*, 2011 NLTD(G) 105 (CanLII), where Thompson, J. of the Supreme Court of Newfoundland and Labrador, Trial Division stated at paragraphs 4 and 5 as follows:

> *[4] I note in Dagg v. Canada (Minister of Finance) 1997 Carswell, NAT 867; 148 DLR 435, SCC, that the Supreme Court of Canada confirmed at paragraph 114 the approach to be taken with respect to discretionary exemptions under the Act. Cory, J., writing for the majority, stated:*
>
> *In Kelly v. Canada (Solicitor General), (1992), 53 F.T.R. 147 (Fed. T.D.), Strayer J. discussed the general approach to be taken with respect to discretionary exemptions under the Privacy Act. He stated, at p. 149:*
>
> > *It will be seen that these exemptions require two decisions by the head of an institution: first, a factual determination as to whether the material comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.*
> >
> > *The first type of factual decision is one which, I believe, the court can review and in respect of which it can substitute its own conclusions. This is subject to the need, I believe, for a measure of deference to the decisions of those whose institutional responsibilities put them in a better position to judge the matter.* […]
> >
> > *The second type of decision is purely discretionary. In my view in reviewing such a decision the court should not attempt to exercise the discretion de novo but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted.*
>
> *In my view, this is the correct approach to reviewing the exercise of discretion under s. 8(2)(m)(i) of the Privacy Act.*

> *[5] In my view, while the court must respect the difference* [sic] *afforded to administrative decisions, the court must also be in a position to reasonably assess, from the response:*
>
> *(a whether the absent material comes within the description of material subject to withholding, and;*
>
> *(b) whether, in the circumstances, the discretion appears to have been exercised in good faith, and for a reason or reasons rationally connected to the purpose for which the discretion to withhold is permitted.*

In *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 NLTD (G) 185 (CanLII), Chief Justice Orsborn of the Supreme Court of Newfoundland and Labrador, Trial Division quoted the above passage of Thompson, J. in *Pomerleau* and 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. . . .*
>
> *[50] However, there is an additional issue in this case relating to any review of CONA's discretion. I repeat subsec. 63(2) of ATIPPA:*
>
> *63(2) Where the Trial Division finds that a record or part of a record falls within an exception to access under Part II or III, the court shall not order the head to give the applicant access to that record or part of it, regardless of whether the exception requires or merely authorizes the head to refuse access.*
>
> *[51] Section 21 provides that information that is subject to solicitor-client privilege is an exception to access and that the head of the public body is authorized to refuse access. Section 21 is included in Part II of ATIPPA. Accordingly, I read subsec. 63(2) as precluding the Court from ordering access to information considered to be subject to solicitor-client privilege even though the public body may, in its discretion, release such information. However, I repeat, that if it were within the jurisdiction of the Court to review the exercise of the discretion of the public body, there is no evidence in this case that would suggest to me that in the existing context and circumstances, CONA's discretion was improperly exercised.*

This Office interprets the decisions of Chief Justice Orsborn and Mr Justice Thompson as concluding that on an appeal filed under section 60 the court is required to find, in the case of a discretionary exception, whether the information in question falls within the claimed exception to disclosure and whether the public body has properly exercised its discretion. However, if a court determines that certain information is covered by an exception to disclosure but that a public body has not properly exercised its discretion in regard to whether the information will be released, then the court is prevented from ordering release of that information by section 63(2).

We are of the view that if a court makes a determination that a public body has not properly exercised its discretion, that court should have the explicit authority to order a public body to reconsider its exercise of decision, in response to which the public body should either make a new decision or confirm its existing decision. If the public body makes a new decision in its exercise of discretion it may result in additional information being released to the applicant. If the public body reconsiders the exercise of discretion but in the end confirms its existing decision, there will be no change. In neither case would the court make an order contrary to 63(2).

We are of the view that there is nothing in the *ATIPPA* which necessarily precludes the court from making such an order, however neither does the *ATIPPA* specifically provide for such an option. It appears from Chief Justice Orsborn's decision that he may not have considered the possibility of making such an order, or alternatively, he may have believed that it was not within his authority to do so. We believe there is ample support within administrative law jurisprudence to support the option of referring a discretionary decision back to the decision-making body when there is insufficient evidence that the discretion was "exercised in good faith, and for a reason or reasons rationally connected to the purpose for which the discretion to withhold is permitted" as Thompson J. stated in relation to *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC).

Recommendation	It is recommended that section 63 be amended by adding subsection 63(3) which would give the Trial Division the authority to order a public body to reconsider its decision to refuse access to information using a proper exercise of discretion.

Current Language	Proposed Language
[no current provision]	**63(3) Where the Trial Division determines that the head of the public body is authorized to refuse access to a record under Part II or III but determines that the head of the public body has not properly exercised its discretion in its decision to refuse access to the record, the Trial Division may order the public body to reconsider its decision using a proper exercise of discretion.**

Section 72 - Offence

The offence provision in public sector access and privacy statutes across Canada has rarely if ever been used. Although there have been instances where individuals in this Province have come to our Office and suggested to us that an offence may have been committed, or where we ourselves have considered the application of section 72 on our own accord, we have never contacted the Attorney General to request or recommend such action. This has often been due to the fact that we simply did not believe that the circumstances would warrant such action. On the other hand, there have been situations where the language of the offence provision itself has barred any serious consideration of contacting the Attorney General, despite circumstances which could be considered serious and otherwise appropriate for such a step.

It is important to have a practical, workable offence provision in order to ensure that there are means to deal with serious acts which can harm rights granted under the legislation. In an age of electronic information, the potential for vast amounts of personal information to be collected and the ways it can be combined with other information are increasing at an astounding rate. The privacy provisions of the *ATIPPA* reflect an understanding between the public, whose personal information is collected, used and disclosed, and the public bodies who collect, use and disclose it. In many cases, these collections, uses, and disclosures can legally occur without the consent of the individual, and even where there is consent, the public has no choice but to trust that the public body will deal with their information in a responsible and secure manner, in accordance with the *ATIPPA*.

Elsewhere in this submission we have proposed that the Commissioner be given better tools to oversee compliance with the privacy provisions by public bodies. In addition, we also need tools to deal with the "rogue employee" who chooses to violate privacy laws, despite policies and procedures and appropriate security measures being in place. Sometimes a breach of this nature can be targeted at the personal information of a particular individual, while other times it can be broad and more cumulative in nature, affecting many individuals.

It is far from certain that appropriate measures will be taken against such an employee by the employer, because labour arbitrators have in many cases ordered suspensions to be reduced and terminations to be reversed when it comes to privacy transgressions. Furthermore, if an employee happens to be eligible to retire at the time the breach is discovered, there may be few if any options available for meaningful discipline. Another consideration is that the victim or victims may never learn whether the employee who committed the breach was disciplined, due, ironically, to the privacy protections afforded to the employee in the *ATIPPA*. Victims of breaches in such circumstances often assume that the public body is protecting the employee from punishment, and come away feeling that the employee's privacy rights are more important than theirs.

It is unfair to place the burden on affected individuals to pursue legal recourse, at the cost of their own time and money, against employees of public bodies who have violated their privacy in some significant way. In the very limited circumstances where prosecution of an offence is warranted in relation to the actions of rogue employees, it provides comfort to the general public that flagrant violations of the law do not go unpunished.

It is in the interest of all public bodies to support a meaningful offence provision, so that they can make it clear to the public that the responsibility for the breach, in certain cases, is on the individual who committed the act because that individual acted contrary to all of the preventative measures which the public body had in place. The public body is then in a better position to continue to receive the cooperation and good will of citizens who are asked to provide their personal information for legitimate purposes, because the public body is seen to be cooperating in a process which will bring the rogue employee to justice. This helps to ensure and maintain continued public confidence in the information handling practices of the public body.

If it is accepted that a workable, practical offence provision is an essential element in a statute such as the *ATIPPA*, we must then look to see what elements such a provision should contain. As it happens, this Office has some experience in laying charges under the offence provision of the *Personal Health Information Act* (*PHIA*), having had occasion to do so twice. Section 88 of *PHIA* sets out the offences and penalties under that *Act*. Section 88(1), is similar in many respects to section 72 of *ATIPPA*. The main difference is that in section 88(1)(a), the offence relates to a person who "obtains or attempts to obtain another individual's personal health information," whereas in *ATIPPA* section 72(a) comes into play when a person "discloses information contrary to Part IV."

That distinction is significant when we look at the breadth of coverage of the offence provisions. For example, we have encountered an incident whereby an employee of a public body, on his own initiative and without the knowledge or consent of his employer, accessed a database and obtained information about an individual in the database for personal reasons. This occurrence had potentially serious implications, and when discovered, was greatly alarming to the individual whose information was obtained. The individual who obtained the information did not disclose the information outside of the public body, nor did he do anything which would trigger any of the other offence provisions currently in force. Nevertheless, it was an incident which, broadly speaking, we believe may have triggered a decision to prosecute had the enabling language been present in the statute. For this reason, we have looked across the country at other offence provisions, and we now propose additional language which would enable prosecution of a broader range of offences, in order to ensure that this particular tool is available if necessary for situations such as the one described.

The basic characteristic of the shift of information storage from a paper medium to an electronic one is that vast amounts of information can be accessed quickly and efficiently, thus improving service delivery for public bodies. The privacy risk is that this also makes it easier for employees of public bodies to access and use this information for personal reasons beyond program delivery. The tools available to mitigate this are very useful, but cannot eliminate the risk. For example, staff education is the number one tool, with the goal of creating a culture of respect for privacy. Also, access to data can be limited where possible to those individuals who need access to do their jobs, and audit technology and processes can be used to detect some, but not all, inappropriate accesses. Despite these and other tools, it is possible for employees to gain access beyond what is required to do their jobs, and the magnitude and scope of that access is now much greater than it ever was in a paper-based world. While the benefits of electronic records are undoubtedly significant, the risks to privacy are also greatly increased.

Section 38 of *ATIPPA* makes it clear that personal information can only be used for certain purposes and only to the extent necessary for those purposes. As it stands now, however, the offence provision of *ATIPPA* would only apply to an employee who actually disclosed personal information contrary to the *ATIPPA*. If the employee were to browse databases of personal information in order to learn information about others for personal gain or out of malice, or for whatever reason, the current offence provision cannot be used to hold those individuals accountable. This should not be allowed to continue.

In contrast, the *PHIA* offence provision can be used against individuals who choose to browse databases of personal health information for their own purposes. Sometimes they may do so with the clear purpose of achieving some personal gain or advantage, but not necessarily. Either way, once they learn that information, about a neighbor, co-worker, friend, relative or complete stranger, the capacity is there to use that information for some purpose in the future, and the confidentiality with which that information was being maintained by the public body has been forever broken. While we believe a similar provision would be an important addition to *ATIPPA*, we do not believe the "falsely representing" language in section 88 of *PHIA* is necessary or useful, and it appears to be unique language in Canadian personal health information legislation.

The range of fines across the country varies somewhat, however to add to the deterrent value of this provision, we believe that increasing the maximum fine to $10,000 is worthy of consideration. $10,000 is the maximum under *PHIA*, and the trend in newer and recently amended privacy laws across Canada is towards larger fines. We believe that the higher maximum provides the courts with greater flexibility to ensure that serious offences can be dealt with appropriately.

Something we have learned through our experience in using the offence section of *PHIA* is that the statutory time limit for laying a charge is crucial. Neither *PHIA* nor *ATIPPA* have specific language addressing this, and therefore both *Acts* fall under the *Provincial Offences Act* when it comes to the time limit within which a charge must be laid subsequent to the date of occurrence of the offence. It should be noted that a characteristic of privacy breaches is that they are often not detected for some time after they have occurred. The individual committing the breach may be engaged in a pattern of behavior that is only detected through audit or through the suspicion of one or more victims of a breach a year or more after some of the breaches occurred. It has been our experience that the basis for laying a charge is not necessarily a single incident, although that could occur. Individuals who are willing to snoop in the personal information of others may do so repeatedly, and it can be important for the purposes of trial and sentencing to ensure that all incidents are part of the charge.

Furthermore, we must factor in practical matters. If an individual suspects that their information has been subject to a privacy breach, they often first bring it to the attention of the public body, who will likely conduct an internal investigation. It may be some time subsequent to that before the individual brings a complaint to the Commissioner. An investigation would begin, but depending on a number of factors, it could be a period of months before it is determined that there exists a basis to charge an individual with an offence. To begin with, it could easily be a year before the person even suspects the breach, and the remaining processes could easily take several months or more before a charge can be laid. It is therefore necessary to ensure that

sufficient time is allowed for these events to occur in order to allow for prosecution of an offence.

A recently proposed amendment to Ontario's *Personal Health Information Protection Act* (*PHIPA*) makes *PHIPA* exempt from that province's *Provincial Offences Act*, which would effectively remove any statutory time limit for the laying of a charge subsequent to the offence occurring. Additionally, public sector privacy legislation in Alberta and New Brunswick prescribes a statutory time limit on the commencement of prosecutions at two years. The only difference between the two is the commencement of the time period. In Alberta the time limit begins from the date of the commission of the offence. In New Brunswick the time limit begins from the date of discovery. Based on our experience with *PHIA* prosecutions in court, we recommend the inclusion of a two year limitation period commencing on the date of discovery, especially in light of reasonably anticipated difficulties associated with discovering privacy breaches.

Since we have undertaken the *PHIA* prosecutions, the health authorities have informed us that employees are certainly aware of the prosecutions and there is now another significant element of deterrence at play. Prosecutions have become another tool in the toolbox of the staff education component. We believe an improved offence section can similarly assist public bodies as they work to educate their staff on the importance of privacy and the repercussions of knowingly acting contrary to privacy laws.

In an age when privacy is in the news every day and there are so many concerns about the security of electronic records, we believe that these practical improvements to the offence provision of *ATIPPA* will help to ensure continued confidence in the work of public bodies who must collect, use and disclose the personal information of citizens to deliver programs and services. Furthermore, we believe that our recommended approach is very much in line with public expectations regarding accountability for the protection of that information. An improved offence provision directed at the "rogue employee" is one small but important part of an improved privacy oversight regime which we are recommending for *ATIPPA*.

Recommendation	It is recommended that the language of the offence provision be broadened to ensure that the scope of potential offence proceedings more accurately reflects the full scope of the privacy provisions of the *Act*. Further recommended amendments would see an increased maximum fine of $10,000 and a time limit for laying of charges of two years from discovery of the breach.

Current Language	Proposed Language
72 A person who wilfully (a) discloses personal information contrary to Part IV; (b) makes a false statement to, or	72 (1) Every person who wilfully collects, uses or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable, on summary conviction, to a fine

Current Language	Proposed Language
misleads or attempts to mislead the commissioner or another person performing duties or exercising powers under this Act; (c) obstructs the commissioner or another person performing duties or exercising powers under this Act; or (d) destroys a record or erases information in a record that is subject to this Act with the intent to evade a request for access to records, is guilty of an offence and liable, on summary conviction, to a fine of not more than $5,000 or to imprisonment for a term not exceeding 6 months, or to both.	of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both. (2) Every person who wilfully (a) attempts to gain or gains access to personal information in contravention of this Act; (b) makes a false statement to, or misleads or attempts to mislead, the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act; (c) obstructs the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act; (d) destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records; or (e) alters, falsifies or conceals any record, or directs another person to do so, with the intent to evade a request for access to the record, is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both. (3) No prosecution for an offence under this Act shall be commenced after 2 years from the date of the discovery of the alleged offence.

Restoring the Commissioner's Jurisdiction and Powers

Introduction

The following discussion relates to different sections of the *ATIPPA*, but fundamentally it is about the same issue. In its first few years of operation, the Commissioner's Office conducted reviews involving three sections of the *ATIPPA* which have since been removed from our jurisdiction and authority through a combination of court decisions and amendments to the *ATIPPA*. The three sections of the *ATIPPA* to be discussed are 5, 18(2)(a) and 21. As anyone knows who understands the function of this Office, our role is fundamental to the protection of rights granted to citizens under the *ATIPPA*. One of the purposes of the *ATIPPA* is to make public bodies more accountable, as found in section 3 of the *Act*, and the review of decisions by the Commissioner is the primary mechanism by which that accountability is ensured. Once you remove the Commissioner from part of the equation, there is a reduction in accountability. Having lost the ability to conduct reviews when access to information requests are refused on the basis of one of these provisions, the Newfoundland and Labrador Office of the Information and Privacy Commissioner has become arguably the weakest access to information oversight body in Canada. This should be of great concern to anyone who believes in the importance of access to information.

We are not aware of any incidents which may have led to the decision by government to pursue this whittling away of the Commissioner's jurisdiction. We know of no rationale as to why the government chose to work through the courts and the legislature to ensure that the Commissioner's oversight role was removed in relation to these provisions. As stated by Justice Fowler in his decision *Newfoundland and Labrador (Attorney General)* v. *Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 19 (CanLII) on February 3rd, 2010, "It must be remembered that the Commissioner under no circumstances can release information or order the head of a public body to release information." There has never been an allegation or a hint of any sort that the Commissioner's Office has acted inappropriately or disclosed any information contrary to the *ATIPPA*. The Commissioner's Office maintains very high security measures protecting all of the information it receives from public bodies and other parties. In the first years of the Office's operation, we conducted reviews involving every category of information in the control or custody of a public body, including sections 5, 18 and 21, without incident or issue. We see no reason why this should have changed.

The OIPC was disappointed that the government chose to initiate this process, because it has had a significant negative effect on the ability of this Office to do its job, which is to ensure compliance with the *ATIPPA* and to protect the rights granted thereunder. Justice Fowler, who decided the initial case regarding our jurisdiction to review claims of section 5 went so far as to say that the situation was a "conundrum" because of the effect that the decision he felt he was forced to make would have on oversight of the *ATIPPA*. He proposed that the legislature was the most appropriate forum to address the issue. Having been given the opportunity to resolve the conundrum of Justice Fowler through Bill 29, government's decision to do nothing to address that issue demonstrated that it was satisfied to carry on with the reduced role of the Commissioner regarding section 5. There have been two subsequent decisions at the Trial

Division on this issue, and now a pending case before the Court of Appeal. These court decisions are referenced below.

Another challenge we were aware of in the lead up to the last legislative review was to our jurisdiction to review claims of solicitor-client privilege. A court challenge by the Department of Justice to our authority to conduct such reviews resulted in a decision at the Trial Division which determined that the *ATIPPA* did not contain the necessary language to allow the Commissioner to review such claims. The Court of Appeal overturned that decision, however, ruling that the *ATIPPA* (as it existed prior to Bill 29) did indeed give this Office the power to review such claims (2011 NLCA 69 (CanLII)). Unfortunately, only a few months after the Court of Appeal decision, Bill 29 negated that important ruling. Of the 14 jurisdictions in Canada with access to information legislation, only in this Province and New Brunswick does the Information and Privacy Commissioner not have the power to review claims of solicitor-client privilege.

It is important to recognize that such claims are just that - claims. During the period between the government's initial challenge to our jurisdiction on this matter, and the date of the decision by the Court of Appeal, we had no choice but to hold 14 files in abeyance. These were cases where access to information applicants had requested that we review claims of solicitor-client privilege over some portion of requested records, but we had no way to review those claims. In most of those instances, the letter to the applicant denying access was signed by a senior person within that public body, such as a Deputy Minister or a lawyer. In the period after the Court of Appeal ruling, and prior to the passage of Bill 29, we received the responsive records for the files held in abeyance, including the file which had been the subject of the court action. It was a shock and a disappointment to us to find that in the majority of those 15 files, over half of the claims of solicitor-client privilege were groundless. The majority of these files were resolved informally through discussions between Analysts with this Office and the representatives of the public bodies which had made the claims. One which was not resolved informally resulted in a Report into the very matter which had triggered the government's challenge to our right to conduct such a review. The entire saga is outlined in Report A-2013-004, which is recommended reading for the Committee.

The Court of Appeal clearly sent the message that the Commissioner's ability to conduct a review involving any information request denial by a public body, including solicitor-client privilege, was absolutely necessary for the objects of the *ATIPPA* to be achieved. We are of the view that the principles underlying the Court's commentary on that issue are equally applicable to the section 5 issue. We also strongly believe that to achieve the purpose of the *ATIPPA* as set out in section 3(e), the Commissioner must have the ability to review all information request denials, including a claim that information is a cabinet confidence covered by section 18. Section 18 is the third provision of the *ATIPPA* which was removed from the Commissioner's jurisdiction, although in that case it was a partial removal.

Prior to Bill 29, this Office reviewed a number of files involving claims of section 18, and issued several reports. Just to reiterate, at no time during or after our review process do we provide any records or information to applicants who request that we review an information request denial. No cabinet records, or records which were claimed to be cabinet records, were ever disclosed to

any outside party, nor was government ever forced to release such records through the review process.

Despite the fact that our review process has not harmed or impaired the government's ability to protect cabinet confidences, once again, through Bill 29, the independent oversight role of the Commissioner was weakened by removing the jurisdiction to review claims of this important category of information described in section 18. Outside of this Province, only the federal government and New Brunswick place the review of a claim of cabinet confidences outside of the Commissioner's jurisdiction.

It was emphasized by the 2001 Freedom of Information Review Committee that the courts are not effective as a first or primary level of oversight of access to information legislation. The time and expense are too great a deterrent to the applicant, especially when, as is so often the case, access delayed is access denied, since many access to information requests are time-sensitive. If the public, the media and opposition politicians wish to hold leaders and public institutions to account, their efforts can be thwarted by a law which places the only recourse of appeal with the courts.

Jurisdiction to Review Claims of Solicitor-Client Privilege (Section 21)

As noted above, the best description of how this Office lost, regained, and lost once again the ability to review claims of solicitor-client privilege is found in Report A-2013-004. The best summary of reasons why the Commissioner must have the jurisdiction and authority to review claims of solicitor-client privilege is found in the decision of Justice Harrington at the Court of Appeal. Some key passages are included below (note: DOJ refers to Department of Justice):

> *[56] The Commissioner's role is designed to be a timely and inexpensive method of testing whether the DOJ has a legitimate claim to withhold particular information. The balancing safeguard regarding the integrity of an information withholding claim is that the opinion of the Commissioner is not binding. However, morale* [sic] *suasion will play a key part in the enforcement of the Commissioner's opinion regardless of whether the matter is referred to a judge for a final determination.*
>
> *[57] This analysis is supported by an examination of the purpose of ATIPPA which must begin by examining the statement of purpose set out in section 3. (See para. 15, supra). The applications judge correctly pointed to the fact that subsection 3(1)(e) provides a mechanism of independent review which is particularly relevant to this case. Subsection 3(1)(a), however, is also relevant because a right of access to records is meaningless without a means of enforcing this right. As will be seen from an examination of the legislative history below, one of the aims of ATIPPA is to provide a timely and cost effective means of securing access to requested records.*
>
> *[58] ATIPPA's predecessor was the Freedom of Information Act, RSNL 1990, c. F-25, which was similar in concept to legislation in other provinces which*

provided for the right of citizens to seek access and make demands for copies of records of personal information in records and documents maintained by government officials, departments and agencies. Where requests for such records were denied, the sole recourse of citizens making such requests was to the Court. The Court would be the sole arbitrator of a request for certain records should access be denied on the basis of, inter alia, solicitor-client privilege. In the course of performing that function, the court was entitled to examine the records in dispute to determine whether in fact solicitor-client privilege applied. In 2002, the Freedom of Information Act was repealed and replaced by ATIPPA.

[59] ATIPPA was debated and enacted by the provincial legislature following the receipt of a report titled Striking the Balance: The Right to Know & the Right to Privacy, vol. 1 (St. John's: July 2001) prepared by the Freedom of Information Review Committee established by the provincial legislature. One of the primary issues addressed in the report of the review committee was the relatively low number of requests made by members of the public. The committee expressed the view that the cost of any citizen taking a denied access request to the court was both time consuming and expensive and that an alternate method should be considered. At p. XV of the report, it states:

> At present, the only option for a person who disagrees with a freedom of information decision is to launch an appeal to the Trial Division of the Newfoundland Supreme Court. Problems associated with using this process – particularly the costs and the length of time required – were frequently raised during the public consultations.
>
> …
>
> The Committee believes that the Newfoundland and Labrador legislation should provide an alternative to the courts, and recommends the establishment of the office of Information and Privacy Commissioner, with the authority to investigate and mediate complaints, and to make recommendations. In addition, the Commissioner should have the discretion to take a denied request to court at public expense.

[60] At p. 37, it states:

> To function effectively, the Information and Privacy Commissioner must have certain special powers and authority. The Commissioner must have the power to investigate requests for review and complaints under the Act, and these powers should be specified in the legislation. <u>To conduct an effective investigation, the Information and Privacy Commissioner must be able to examine the information in question to determine if disclosure has been appropriately denied, or if personal privacy is threatened. Without such power, the Commissioner will be unable to make well-informed and considered decisions.</u>
>
> <u>This power of review should operate notwithstanding any law or privilege that may be claimed for the information in question , such as</u>

> Cabinet confidences. The Commissioner should be able to examine any requested record within a reasonable period of time, so that the time limits can be met.
>
> **Recommendation**:
>
> **37. That the Information and Privacy Commissioner have investigative powers and the right to examine, during an investigation, any record that is the subject of a review request or complaint.**
>
> [underlining and bold in originals]

[61] In response to this recommendation, section 42 of ATIPPA provides that the office of the Commissioner is established and filled by the Lieutenant Governor-in-Council on the resolution of the House of Assembly. The Commissioner is an officer of the House of Assembly and by virtue of subsection 52(1): "has the powers, privileges and immunities that are conferred on a Commissioner under the Public Inquiries Act" [S.N.L. 2006, c. P-38.1].

[62] The Commissioner's role is to facilitate the effort of a requestor to seek access to information including records maintained by government departments and agencies and is effectively an ombudsman or liaison between the citizen and government in attempting to resolve the request by mediation or otherwise if documents or information known to be existing are being withheld in whole or in part for various reasons including a claim of solicitor-client privilege.

[…]

[78] Having found that section 52 of ATIPPA authorizes the Commissioner to compel the production of responsive records subject to solicitor-client privilege, the Court must go on to determine whether the routine production of such records is absolutely necessary. The purpose of the legislation, described above, is to provide for an independent review officer which can undertake a timely and affordable first level review of all information request denials. This access to justice rationale mandates that the Commissioner's routine exercise of his authority to review solicitor-client privileged materials is absolutely necessary. The purpose of ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor-client privilege is claimed and was forced to resort to applications to court to compel production.

The Court of Appeal ruling, in our view, has made it quite clear that the Commissioner had the authority, prior to Bill 29, to review claims of solicitor-client privilege in the course of a review of an information request denial. Furthermore, the decision supports the principle that ALL information request denials by public bodies should be reviewable by the Commissioner, and indeed must be reviewable in order for the law to attain its objects.

One of the significant flaws of Bill 29 was the decision to craft what perhaps appeared to the drafters to be a middle ground, allowing the Commissioner to appeal to the Trial Division a claim of section 18 or 21 on behalf of an applicant who has been refused access to information on one of those grounds. It fails in both theory and execution.

In terms of theory, applicants already had the little-used option of going to court directly to appeal any denial of access to information, including denials based on sections 18 and 21. The other option which was included through Bill 29 of having the Commissioner go to court on the applicant's behalf is also fraught with difficulty. The Commissioner is placed in a difficult role in such instances. Even though we cannot view the information that was withheld from the applicant, we must decide whether or not to launch an appeal on the applicant's behalf if the applicant requests us to do so. In contrast to the applicant, we have no vested interest in getting access to the records. As the oversight body for the *ATIPPA*, we want to ensure that the *Act* is adhered to, so we are not in a position to approach the matter in the same partisan way that an applicant would. On the other hand, if we do not advance the strongest arguments that we can think of in favour of disclosure, we have arguably failed the applicant. Meanwhile of course we are accumulating tens of thousands of dollars in legal bills to be paid out of the public purse as well as court time and related resources in having the Court fulfill a role which we had carried out for several years without complaint or incident.

In terms of execution, the time limits for such an appeal outlined in section 60(1.1) betray a fundamental misunderstanding of how the process works. For one, the Commissioner does not "receive the decision" of a public body. We only get involved when we receive a request for review from an applicant. Under section 45, we can accept a request for review within 60 days of the applicant receiving the decision of the public body in response to his or her access request or "a longer period that may be allowed by the commissioner." It is difficult to ascertain the legislature's intent with the time frame in 60(1.1). If we were contacted by an applicant with a request that we bring an information request denial to court on his behalf under section 60(1.1), would it matter how long ago the public body's decision had been in the hands of the applicant prior to coming to the Commissioner? According to 60(1.1), as long as the Commissioner filed an appeal with the Trial Division within 30 days of "receiving it" from the applicant (because we do not receive decisions from the public body), presumably the appeal would be within the time limit, regardless of how much time passed between the public body's decision and the applicant's request that we take this appeal forward. It is difficult to guess whether this was the intention.

Another difficulty arises at the end of the process if the Commissioner goes to court to seek a review of a claim of solicitor-client privilege at the request of an applicant. If the Court upholds the public body's decision, the choice of whether or not to appeal the matter to the Court of Appeal is in the Commissioner's hands, leaving the applicant completely without recourse if we choose not to appeal. The entire procedure fails to adequately ensure the rights of applicants and it arguably places the Commissioner in a conflict as both participant and oversight body.

Ultimately, we believe that in order for the *ATIPPA* to achieve its purpose as set out in section 3, the powers and jurisdiction of the Commissioner must be commensurate with that role. We should be able to fulfil our role, as it was envisioned by the Freedom of Information Review

Committee, as it is provided for in section 3 as one of the purposes of the *ATIPPA*, and as confirmed by the Court of Appeal.

Jurisdiction to Review Claims that a Record is a Cabinet Confidence (Section 18)

A full analysis of the scope of section 18 as amended by Bill 29 is outlined elsewhere in this submission. This particular section will focus on oversight of decisions made by public bodies based on section 18, however a short reprise of the effect of the amendment may be in order first.

Bill 29 removed the version of section 18 which was in place from 2005 until 2011, and replaced it with a version of the provision which may be one of the broadest and most protective of the widest range of information in the world. It is certainly the most comprehensive in Canada, allowing a greater range of information to be protected under this provision than in any other jurisdiction. The Bill 29 amendment to section 18 is based on the *Management of Information Act*, a provincial statute that governs how records are to be maintained and organized. For records management purposes, it makes a great deal of sense to broadly include all information related to the operation of Cabinet in particular categories. From an access to information perspective, however, it entirely loses the point of having a statute whose purpose, as stated in section 3, is to ensure that exceptions are both limited and specific in nature. Section 18 as it now stands is arguably quite specific, but it is anything but limited. It abandons the "substance of deliberations" test in favour of a records management or categorical approach which no longer simply protects true cabinet confidences, but also puts out of reach a vast swath of information far beyond that which was intended by the original provision.

One of the notable features of the post-Bill 29 version of section 18 is the unique role of the Clerk. Section 18(3) and (4) gives the Clerk a final decision-making role – the Clerk's certificate stating that a record is an official cabinet record is "conclusive of the question." The Clerk is given tremendous authority to make such a determination, and his or her role in this access to information provision is unprecedented in any jurisdiction of which we are aware. "Official cabinet record" is a term defined in section 18(1)(c), and it can refer to a broad range of records referenced in section 18(1)(a) "which has been prepared for and considered in a meeting of the Cabinet." According to section 18(1)(a), this could include factual or background material which has been "prepared for the Cabinet." Although we have not yet issued a report interpreting this provision, one might conclude that such information could include pre-existing factual and background information which has been packaged together or compiled in a new way. Even if it is presented as an appendix to a document considered by Cabinet, it appears that the Clerk could consider such information to be an official cabinet record. There is no opportunity to determine whether the release of such information might reveal the substance of deliberations of Cabinet, because it can be categorized in a wholesale manner and withheld on the basis of the Clerk's certificate. Arguably, based on the fact that the Clerk's certificate is "conclusive of the question," there is no real possibility of appeal.

This brings us to the review process for section 18. According to section 18(5) and (6) (as well as sections 43(1) and 52(2)) the Commissioner is barred from reviewing a claim of cabinet confidences under section 18(2)(b). As a result of amendments through Bill 29, the only appeal is to the Trial Division. As with solicitor-client privilege, such an appeal may be launched by the

applicant or by the Commissioner, presumably at the applicant's request. It is quite possible, however, that such a review by the Trial Division could prove to be a very narrow exercise, once again based on the provision that the Clerk's certificate is "conclusive of the question." It is quite possible that the burden of proof of a claim of section 18(2)(b) might be discharged simply by presenting the Clerk's certificate to the judge, as long as the certificate was sufficiently specific in referring to the withheld records.

As noted above, only the New Brunswick and the federal Commissioners are prevented from reviewing claims that a record is subject to the cabinet confidences exception. We believe that section 18 should be replaced in its entirety with a provision which is more in keeping with the Canadian context, and which is more focused on protecting only that information which, if released, would reveal the substance of deliberations of cabinet. Such an amendment would necessarily remove the provision restricting the Commissioner from reviewing certain records of this nature, and it would also eliminate the Clerk's statutory role.

Jurisdiction to Review Claims that a Record is not Subject to the ATIPPA Based on Section 5(1)

Section 5(1) was applied or commented on in several OIPC Reports prior to any question arising as to our jurisdiction to do so (see Reports A-2005-007; A-2006-004; A-2007-003; A-2008-013). In most of these cases section 5 has been discussed with reference to this Office's jurisdiction. For example, in Report 2006-004, the Commissioner concludes, "I have no other choice, therefore, but to conclude that I do not have jurisdiction as it relates to these specific records." The section itself states:

> *(1) This Act applies to all records in the custody of or under the control of a public body but does not apply to*
> *(...)*

The provision goes on to list a number of different categories of records, such as political party or caucus records, certain archival records, etc. For access to information purposes, this simply means that neither the provisions for disclosure of records to an applicant, nor those provisions providing for exceptions to disclosure, operate on those records. However, it is important to note that section 5(1) says nothing about the jurisdiction of the Commissioner. It should also be noted that records falling into one of the categories of section 5 are also not subject to the privacy protections set out in Part IV of the *ATIPPA.*

The core purposes of the *ATIPPA* are set out in section 3, including making public bodies more accountable to the public, by giving the public a right of access to records, and by providing for an independent review of decisions made by public bodies under the *Act.* The function of the Commissioner is one of the core purposes of the *Act.*

The jurisdiction of the Commissioner derives from section 3 and from the appointment provisions (section 42) and explicitly from the particular powers granted to the Commissioner under various sections, including sections 43 to 49 and 51 to 63. It is important to note that the statutory jurisdiction of the Commissioner is not a jurisdiction over records. It is, rather, a

jurisdiction under section 43 to conduct reviews of decisions, acts or failures to act of heads of public bodies respecting requests for access to records or correction of personal information.

Prior to Bill 29, the powers and duties of the Commissioner as set out in the *Act* (particularly sections 52 and 53) were not explicitly limited or restricted to particular kinds of records. Section 52 (production of documents) and section 53 (right of entry) were not stated to relate only to "documents to which the Act applies." On the contrary, section 52 explicitly stated that the Commissioner "may require any record in the custody or under the control of a public body," without exception. Section 53 similarly gave the Commissioner the power to examine and make copies of "a record in the custody of the public body." Prior to Bill 29, the only restrictions expressed by the *Act* on records subject to sections 52 or 53 were (1) that the record be in the custody and control of a public body, and (2) that the Commissioner considers it relevant to an investigation.

Section 52(1) still provides that, independently of the other powers set out in sections 52 and 53, the Commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act.* Those powers are extensive, particularly in the matters of compelling evidence and requiring the production of records that relate in any way to the subject of the inquiry. There is nothing in the *Public Inquiries Act* that limits those powers or excludes certain kinds of records from their application.

In all four of the cases referenced above in which Reports were issued involving section 5, the entire responsive record was in fact produced to our Office by the public body, and was examined to determine whether the record, or any part of it, belonged to one of the categories of records covered by section 5(1). (In one further case, our Office agreed to review an outgoing e-mail to determine whether it was a caucus record, and since it was, agreed that we did not need to examine the replies to conclude that they were necessarily also caucus records.)

In some cases the Commissioner agreed that the record was covered by section 5(1). In other cases, he found that it was not. What is important is that the Commissioner, as the independent Officer who has been given the statutory duty to review decisions of public bodies, must be able to review a refusal to give access to records based on a claim that requested records fall into one of the categories listed in section 5. The 2011 Court of Appeal decision, with reference to claims of solicitor-client privilege, clearly explained that:

> *[65] Taken together, these sources help inform the background and purpose of the legislation, which is, inter alia, to provide for an independent review officer, as an alternative to the courts, who can undertake a timely and affordable first level review of all information request denials. A central aspect of this review is the ability to examine all documents, regardless of whether any form of privilege attaches to them. The legislative history clearly establishes an intent to eliminate any possible objections that might be raised to the delivery of documents to the Commissioner in the discharge of his statutory mandate.*

Furthermore, even public bodies acting with the utmost good faith often differ in the interpretation of the *Act*. The purpose of independent review by the Commissioner is to provide

for objectivity and consistency in interpretation, by applying previous decisions of this Office as well as decisions of other jurisdictions, in a review process characterized by the receipt of submissions from all parties and the application of accumulated expertise. The review function carried out by the Commissioner is a quasi-judicial function in all respects except that the Commissioner makes recommendations, not orders, at the conclusion of an investigation.

The issue relating to the Commissioner's jurisdiction and powers relating to section 5 was first subject to a court proceeding in the case *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)* (cited above) which was decided by Justice Fowler of the Supreme Court of Newfoundland and Labrador, Trial Division on February 3, 2010. The matter arose out of access to information requests made by two journalists to the Royal Newfoundland Constabulary (the "RNC") and the Department of Justice (the "Department") for records relating to an Ontario Provincial Police report prepared by that police department in relation to its investigation of a senior officer of the RNC. The investigation led to the commencement of a prosecution of the senior officer. The RNC and the Department both denied the applicants' access to the records. Pursuant to section 43 of the *ATIPPA,* both journalists asked this Office to review the decisions of the RNC and the Department to deny access to the requested records. Under the authority of section 52 of the *ATIPPA* this Office made repeated requests to the RNC and the Department for the records responsive to the access requests in order to conduct a review of the decision to deny access, but both public bodies refused to provide those records. They claimed that paragraph (k) of subsection 5(1) of the *ATIPPA* was applicable to the records, and that the Commissioner did not have a right to demand production of records or review a decision in relation to a claim of section 5. Subsection 5(1) provides as follows:

> *5(1) This Act applies to all records in the custody of or under the control of a public body but does not apply to*
>
> . . .
>
> (*k*) *a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed*

In our efforts to obtain the responsive records, this Office indicated to both the RNC and the Department that we were prepared to commence a court proceeding to enforce our right under section 52 of the *ATIPPA* to production of any record considered by the Commissioner to be relevant to an investigation. As a result, the Attorney General of Newfoundland and Labrador brought a pre-emptive application in the Supreme Court of Newfoundland and Labrador, Trial Division seeking a declaration with respect to the applicability of section 5 of the *ATIPPA*. The Commissioner was named as Respondent in the Attorney General's application.

Justice Fowler summarized the position put forth by Counsel for the Commissioner (respondent) on the hearing of the application as follows:

> *[21] Counsel for the Respondent stresses that under section 3 of the Act, the Office of the Commissioner is an independent review mechanism for achieving the purpose of the Act; that is, to make public bodies more accountable to the public and to protect personal privacy. Further, in order to achieve those purposes the*

Commissioner must be permitted to exercise his own jurisdiction to decide whether or not a specific request for information falls within an exemption or not. The question reduces as to who has the power to decide whether an item falls within an exempted class or not? Counsel for the Respondent argues that it can only be the independent commissioner and not the government or head of a public body since to confine this to the government or head of a public body offers no assurance of independence or accountability in that the government or head of a public body is deciding for itself when its own information is to be withheld from public access. It is argued that this is the very purpose for which the ATIPPA was intended to overcome.

. . .

[23] Counsel for the Respondent therefore argues that section 52(2) of the Newfoundland and Labrador Act authorizes the Commissioner to demand that any record held by a public body be produced for his determination as to whether or not it falls within an exemption under section 5(1) or Part III of the Act.

. . .

[25] Counsel for the Respondent argues further that if the Applicant's position is accepted it then renders the Act meaningless since the government, or the head of the public body could determine for itself what it wishes to disclose or not, without review by the independent review process as stated in the Act. This, she argues, would revert back to the process whereby any refusal of access would have to find its way through the court process and by implication the ATIPPA fails in its purpose.

. . .

[27] It is the position of the Respondent therefore that the independent review of any record including those under section 5 and in particular section 5(k) of the Act be subject to the independent review by the Commissioner not for disclosure purposes but to verify that these records are indeed subject to Part I, section 5 or Part III exclusions under the Act. This, it is argued, is fundamental to guaranteeing access to information and protection of personal information.

The issue to be decided in the application was stated by Justice Fowler as follows:

[44] This brings into perspective the real issue or question to be decided. If the Commissioner, as the Applicant argues, has no jurisdiction to inquire into the section 5(1) records then how is this determined? How can the Commissioner determine his own jurisdictional boundaries without having the power to examine a section 5(1) record to determine for himself whether or not the record properly falls under section 5(1) over which the Act and jurisdiction don't apply.

> [*45] This is indeed a conundrum and raises the question, does the commissioner simply accept the opinion of the head of a public body that the information being requested does not fall under the authority of the Act. If that were the case, the argument could be made that it could be seen to erode the confidence of the public in the Act by an appearance or perception that the process is not independent, transparent or accountable. For example, it could be argued that the head of a public body could intentionally withhold information from review by the Commissioner by simply stating that it falls under section 5(1) for which the Act does not apply. The question then becomes, how can the Commissioner look behind that to verify the claim and determine his own jurisdiction?*

Justice Fowler discussed further what he called the "conundrum" created by the current wording in the *ATIPPA*:

> *[47] I accept that in the instant case there are difficulties in determining how the Commissioner can gain access to certain information deemed to be outside the Act as defined by section 5(1). However, as the Act is presently configured, it would require a legislative amendment to rectify this unfortunate circumstance. . . . I am satisfied that for the ATIPPA to achieve its full purpose or objects, the Commissioner should be able to determine his own jurisdiction. This would not require complex measures to safeguard those special areas where access is off limits. However, it is not for this court to rewrite any provision of the Act. . . .*

The finding of Justice Fowler on the Attorney General's application was that the Commissioner, as presently empowered by the *ATIPPA*, does not have the authority to determine as a preliminary jurisdictional issue whether or not records alleged to be covered by section 5(1)(k) are outside the jurisdiction of the Commissioner.

In his concluding paragraph, Justice Fowler proposed a remedy for the problem he identified with respect to the *ATIPPA*:

> *[56] The legislature of this province is the author of this Act and if a solution is required it is for that branch of government to create it. It is not within the authority of the court to rewrite any section of the Act. . . .*

This Office is in complete agreement with Justice Fowler when he stated that "for the *ATIPPA* to achieve its full purpose or objects, the Commissioner should be able to determine his own jurisdiction" and "[h]ow can the Commissioner determine his own jurisdictional boundaries without having the power to examine a section 5(1) record to determine for himself whether or not the record properly falls under section 5(1)*".* These comments by Justice Fowler address the fundamental question of whether a public body should have the ability to deny access to the Commissioner based on an unproven claim of Section 5. Simply stated, should a public body that is subject to the *Act*, be able to tell the Commissioner charged with oversight that the records in question are not within his or her jurisdiction?

This Office also agrees with Justice Fowler that any shortcomings in the *ATIPPA* which prevent the Commissioner from being able to determine his own jurisdiction with respect to section 5(1) records should be remedied by the Legislature of this Province.

As a postscript to that case, it is interesting to note that Mr. Justice Fowler appeared particularly concerned by the fact that judge's notes are one of the categories set out in section 5, and he could not reconcile how the Commissioner should have the ability to conduct such a review involving judge's notes. Despite the fact that it was not directly relevant to the case at hand, he referenced this concern several times, in paragraphs 42, 47, 48, 50 and 54, and it appeared to play a significant role in his decision.

On a closer reading of the *ATIPPA*, however, it is difficult to imagine how judge's notes as referenced in 5(1)(a) would ever arise in the course of a review in any case, because section 2(p)(vii) makes it clear that the Trial Division, the Court of Appeal and the Provincial Court are not public bodies subject to the *ATIPPA*. The Commissioner's jurisdiction is over public bodies, not records. Section 43 gives the Commissioner the jurisdiction and authority to conduct a review of a decision of a public body in relation to an access request. There are no circumstances where a review could occur involving records in the control or custody of an entity which is not a public body, especially an entity which has been explicitly excluded from the statute such as the courts. The inclusion, then, of section 5(1)(a) might be a case of providing a double level of assurance to the courts, such that not only are the courts not public bodies, but there is also no right of access to such records even if the records were somehow located in the custody or control of a public body.

Subsequent to the decision of Justice Fowler, it was decided that an appeal would not be filed, as the Office was also involved in a court matter relating to the Commissioner's authority to review claims of solicitor-client privilege, and we were very much focused on that issue at the time. However, at a later date the Commissioner attempted to revisit the issue of his jurisdiction over decisions of public bodies involving section 5. This resulted in the decision of Chief Justice Orsborn, who determined the matter was *res judicata* on the basis that the same issue had been decided between essentially the same parties (*The Information and Privacy Commissioner v. Newfoundland and Labrador (Business)*, 2012 NLTD(G) 28 (CanLII)). In his decision, however, he offered an *obiter* commentary on the issue in which he agreed with Judge Fowler's findings, although for different reasons, and proposed that some sort of judicial review appeared to be possible, although he was not specific on the point.

The matter did not end there however. The Commissioner issued Report A-2012-009 which further revisited the issue due to a unique set of facts. In that Report, the Commissioner recommended that Memorial University disclose some information which it had claimed was covered by section 5(1)(h). When Memorial refused to follow the Commissioner's recommendations, the Commissioner brought the matter to court as an appeal under section 60. In *Ring v. Memorial University of Newfoundland*, 2014 NLTD(G) 32 (CanLII), Madam Justice Butler, considering among other things the decision of Justice Fowler and the *obiter* comments of Chief Justice Orsborn, concurred with her colleagues that the Commissioner does not have the jurisdiction or authority to carry out a review of a claim of section 5, however she offered to bring the parties before her to adjudicate the application of section 5 to the responsive records

involved in the case. Memorial University took the position that the Commissioner did not have the authority under his statute to bring an application for judicial review, and declined the offer. The decision of Madame Justice Butler regarding the Commissioner's jurisdiction and authority has been appealed by the Commissioner to the Court of Appeal.

Section 52 of the *ATIPPA* deals with the production of records to the Commissioner by public bodies. The Commissioners in other provinces and territories have been granted similar powers as those set out in section 52. For example, Alberta's *Freedom of Information and Protection of Privacy Act* contains the following provision in subsection 56(2):

> *(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.*
>
> [Emphasis added]

This provision from Alberta appears to have been enacted in order to make clear that the Commissioner has the power to demand production of records where the records required by the Commissioner have been exempted from the application of the act by a provision similar to section 5 of the *ATIPPA*. The proposed amendment below is meant to have the same effect. The "conundrum" identified by Mr. Justice Fowler in his decision must be resolved in order for the Commissioner to provide effective oversight of the *ATIPPA*.

Recommendations	1. Amend section 18 as proposed elsewhere in this submission, removing any restriction on the type of information or records which can be reviewed by the Commissioner in examining a claim of section 18. 2. Amend section 43(1) by reverting to the version which was in place prior to Bill 29, thus restoring the Commissioner's ability to review a refusal of access to information based on a claim of section 18 or 21. 3. Amend subsection 52(2) and 52(3) to clarify that the Commissioner has the authority to compel the production of any record the Commissioner considers relevant to an investigation, including those listed in subsection 5(1), which may be reviewed by the Commissioner for the purpose of determining whether or not the Commissioner has jurisdiction over those records. 4. Amend 52(2) and 52(3) to remove the references to solicitor-client privilege under section 21 and official cabinet confidence under section 18 to restore the Commissioner's ability to review such claims as it existed prior to Bill 29. The addition of the words "this or" will ensure clarity regarding the Commissioner's ability to review decisions of public bodies in relation to section 5.

	5. Amend 52(4) and 52(5) to ensure that the Commissioner can review claims of solicitor-client privilege. 6. Amend section 53 to remove the reference to solicitor-client privilege. It is recommended that the *ATIPPA* revert to section 53 as it was prior to Bill 29, except with the addition of the words "this or" which will ensure clarity regarding the Commissioner's ability to review decisions of public bodies in relation to section 5. 7. Amend section 60 by removing 60(1.1) which was added by Bill 29 in tandem with the removal of the Commissioner's authority to conduct reviews of claims of solicitor-client privilege and cabinet confidences. 8. Consider adding the words "or the Commissioner" to 60(1.2). 9. Amend section 60(4) in order to ensure that an applicant is notified of an appeal by a third party of a public body's decision to give the applicant access to a record. The third party would likely not know the identity of the applicant.

Current Language	Proposed Language
52 (1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*. (2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner except any record which contains information that is solicitor and client privileged or which is an official cabinet record under section 18.	52 (1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*. (2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the Commissioner, **including any record described in paragraphs 5(1)(a) to (m) of this Act**, and may examine information in a record, including personal information.

Current Language	Proposed Language
(3) The commissioner may examine information in a record that he or she may require under subsection 2, including personal information. (4) The head of a public body shall produce to the commissioner within 14 days a record or copy of a record required under this section, notwithstanding (a) another Act or regulation; or (b) a privilege under the law of evidence, except a privilege referred to in subsection (5). (5) Subsection (4) does not apply to records which are solicitor and client privileged.	(3) The head of a public body shall produce to the commissioner within 14 days a record or copy of a record required under this section, notwithstanding **this or** another Act or regulations or a privilege under the law of evidence**, or that the record is described in paragraphs 5(1) (a) to (m) of this Act.** (4) Where it is not practicable to make a copy of a record required under this section, the head of a public body may require the commissioner to examine the original at its site.
53 Notwithstanding another Act or regulation or any privilege under the law of evidence **except solicitor and client privilege**, in exercising powers and performing duties under this Act the commissioner has the right (a) to enter an office of a public body and examine and make copies of a record in the custody of the public body; and (b) to converse in private with an officer or employee of the public body.	53 Notwithstanding **this or** another Act or regulation or any privilege under the law of evidence, in exercising powers and performing duties under this Act the commissioner has the right (a) to enter an office of a public body and examine and make copies of a record in the custody of the public body; and (b) to converse in private with an officer or employee of the public body.
60 (1) Within 30 days after receiving a decision of the head of a public body under section 50, an applicant or a third party may appeal that decision to the Trial Division.	60 (1) Within 30 days after receiving a decision of the head of a public body under section 50, an applicant or a third party may appeal that decision to the Trial Division.

Current Language	Proposed Language
(1.1) Where an applicant or the commissioner wishes to appeal a decision of the head of a public body who refuses to disclose **(a) a record which is an official Cabinet record under section 18; or** **(b) a record on the basis of solicitor and client privilege under section 21,** **that appeal shall be made directly to the Trial Division within 30 days after the applicant or the commissioner received the decision.**	
(1.2) The solicitor and client privilege of the records in dispute shall not be affected by the disclosure to the Trial Division.	(1.2) The solicitor and client privilege of the records in dispute shall not be affected by the disclosure to the Trial Division **or the Commissioner**.
(2) An appeal may also be commenced by an applicant under this section in accordance with subsection 43 (3).	(2) An appeal may also be commenced by an applicant under this section in accordance with subsection 43 (3).
(2.1) An appeal may also be commenced by an applicant under this section in accordance with subsection 43.1(3).	(2.1) An appeal may also be commenced by an applicant under this section in accordance with subsection 43.1(3).
(3) Where a person appeals a decision of the head of a public body, the notice of appeal shall name the head of the public body involved as the respondent.	(3) Where a person appeals a decision of the head of a public body, the notice of appeal shall name the head of the public body involved as the respondent.
(4) The head of a public body who has refused access to a record or part of it shall, on receipt of a notice of appeal by an applicant, give written notice of the appeal to a third party who (a) was notified of the request for access under section 28 ; or	**(4)(a) The head of a public body who has refused access to a record or part of it shall, on receipt of a notice of appeal by an applicant, give written notice of the appeal to a third party who** **(i) was notified of the request for access under section 28 ; or**

Current Language	Proposed Language
(b) would have been notified under section 28 if the head had intended to give access to the record or part of the record.	**(ii) would have been notified under section 28 if the head had intended to give access to the record or part of the record.**
	(b) The head of a public body who has decided to give access to a record or part of it to an applicant shall, on receipt of a notice of appeal of that decision by a third party, give written notice of the appeal to the applicant.
(5) A copy of the notice of appeal shall be served by the appellant on the commissioner and the minister responsible for this Act.	(5) A copy of the notice of appeal shall be served by the appellant on the commissioner and the minister responsible for this Act.
(6) The minister responsible for this Act may become a party to an appeal under this section by filing a notice to that effect with the Trial Division.	(6) The minister responsible for this Act may become a party to an appeal under this section by filing a notice to that effect with the Trial Division.
(7) The record for the appeal shall be prepared by the head of the public body named as the respondent in the appeal.	(7) The record for the appeal shall be prepared by the head of the public body named as the respondent in the appeal.
(8) The practice and procedure under the Rules of the Supreme Court, 1986 relating to appeals apply to an appeal made under this section unless they are inconsistent with this Act.	(8) The practice and procedure under the Rules of the Supreme Court, 1986 relating to appeals apply to an appeal made under this section unless they are inconsistent with this Act.

Ensuring that the Commissioner has Adequate Means to Protect Personal Privacy

Giving the Commissioner the Power to Conduct Privacy Reviews and Take Privacy Complaints to the Trial Division

In our submission during the previous review of the *ATIPPA*, we addressed the fact that prior to Bill 29, there were no explicit provisions in the *ATIPPA* granting the Commissioner the power to investigate a privacy complaint. Even though explicit authority was lacking, we were of the view that the language of section 51 implied that this authority was present, because section 51(a) includes within the Commissioner's mandate the ability to "make recommendations to ensure compliance with this Act and the regulations." We interpreted that provision as enabling the Commissioner to undertake any necessary activities, including an investigation, in order to fulfill the mandate of making recommendations to ensure compliance with the *ATIPPA*. Prior to Bill 29, this Office commenced several privacy investigations. Although we usually received cooperation from public bodies, this was not always the case. Our Report P-2011-002 explores how this played out in one particular investigation.

With Bill 29, section 44 of the *ATIPPA* was amended by adding section 44(2) as follows:

> *44(2) The commissioner may investigate and attempt to resolve complaints by an individual who believes on reasonable grounds that his or her personal information has been collected, used or disclosed by a public body in contravention of Part IV.*

While this provision was helpful in eliminating resistance to privacy investigations such as described in Report P-2011-002, there are certain limitations and drawbacks with this approach that we wish to bring to the attention of the Review Committee, along with some proposed remedies.

You will note that the Commissioner's power of review as described in section 43 is the ultimate mechanism in the *ATIPPA* for oversight within his jurisdiction. This power to review a decision, act or failure to act is solely in relation to the decision of the head of a public body that relates to a request for access to information, or a request for correction of personal information. The importance of the review process is that it triggers all of the provisions of Part V of the *ATIPPA* which refer to the process of a "review" such as sections 45, 47, and 48, and others. Importantly, it also triggers section 49, which is the issuance of a Commissioner's Report, containing recommendations, and the subsequent requirement by the public body that it respond to the Report within 15 days. It is that response, by the public body, which then opens the avenue for an appeal to the Trial Division under section 60, either by the Commissioner or by the complainant, if the individual or the Commissioner are not satisfied with the public body's response to the Report. None of this can occur in relation to a privacy complaint initiated through section 44(2) involving the provisions found in Part IV, commonly known as the privacy provisions.

In fact, section 44(2) is silent on what, if anything, can be done with a privacy complaint beyond investigating and attempting to resolve it. If resolution is not possible, and even more importantly, if the Commissioner believes that there are issues of ongoing non-compliance with Part IV, the *ATIPPA* provides no clear tools for oversight, either by the Commissioner or by the courts. Essentially, compliance with Part IV is voluntary, for all intents and purposes. We could issue a report with recommendations, relying again on section 51(a), or include comments about the issue in our Annual Report, but in reality there is no mechanism at the disposal of the Commissioner to "ensure compliance with the Act" as stated in section 51(a). Any report we might issue would not be a report that could trigger the possibility of an appeal to the courts, because it would not be a "review" as contemplated by section 43.

The "investigate and attempt to resolve" limitation incorrectly assumes that privacy breaches are always single inadvertent events that can be "resolved." While many breaches fall into this category, some do not. The gap we currently see is that there is no legally enforceable way to require a public body to cease a collection, use or disclosure that is contrary to the *ATIPPA*. While we may investigate a privacy breach and attempt to resolve a complaint about it, we lack the ability to prevent future breaches from occurring by issuing an order or asking a court to order certain activities that are contrary to Part IV to cease. The kinds of breaches referred to here are not the "rogue employee" breaches referenced in our discussion about the offence provision. A breach in this context is one in which there is a new or ongoing program or policy of a public body which we believe to be in contravention of the *ATIPPA*, and the public body is either of the view that it is not in contravention of the *ATIPPA*, or it has decided to proceed despite concerns that it may be in contravention.

Some may point to the recent class actions that are being explored in relation to privacy breaches as a means to deal with this situation. It should be noted that none of those cases involves breaches of the *ATIPPA*. It must also be remembered that the purposes of a class action lawsuit and the circumstances which might lead one to be initiated may be different from those which would be considered by the Commissioner. A class action is primarily focused on seeking compensation for a past wrong, while the Commissioner's oversight role is primarily meant to ensure current and future compliance with the *Act* by public bodies. The Commissioner should not be left to hope that a class action might be launched by someone, and that its outcome might have the effect of ensuring future compliance with the *Act* that he has been appointed to oversee. It is simply not good enough to rely on individuals being sufficiently aggrieved to spend the time and money to take a breach of Part IV to court, whether as part of a class action or other civil proceeding.

While Commissioners in some Canadian jurisdictions find themselves in the same situation, Commissioners in other jurisdictions can order public bodies to cease a collection, use or disclosure of personal information. Should a public body disagree with such an order, it could be appealed to the courts by the public body through an application for judicial review. Although many of the examples which follow are of jurisdictions where the Commissioner has order power, the case being put forth here is not an argument for order power. Rather, what we think would work best in this jurisdiction at this time is a process similar to the one we have under the access provisions. This would allow the Commissioner to issue a report with the same status as one flowing from an access to information review. A response would be required from the public

body which is the subject of the report, and most importantly, the Commissioner would have the option to bring the matter to the Trial Division, if necessary, to seek an order requiring the public body to comply with the privacy provisions of the *ATIPPA*. This approach would allow the Commissioner to maintain the flexibility of the ombuds model of oversight while ensuring that compliance with the *Act* can be compelled by a court if necessary. In laying out the case for this approach, however, it is important to examine the tools that are available to Commissioners in other jurisdictions, some of whom have statutes providing them with order power.

In Alberta, section 53(1)(b) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) empowers the Commissioner to issue an order flowing from an "own motion" investigation even if no complaint has been received. This is important because sometimes privacy compliance issues arise which are systemic in nature and it is not reasonable to expect individual citizens to file a complaint. Issues may also be urgent in nature, and there may not be time to wait for a complaint, or alternatively there could be a breach in which it is difficult to notify affected individuals. Therefore it is important that the Commissioner be able to launch an "own motion" privacy investigation leading to a Report with recommendations, and the Commissioner should be able to bring the matter to the Trial Division to seek an order of compliance if the public body fails to comply with the Commissioner's recommendations.

Furthermore, section 65(3) of Alberta's *FIPPA* allows the Commissioner to conduct a review of a privacy complaint involving the collection, use or disclosure of personal information, and that review has the same status as a review of a decision relating to access or correction. In the case of Alberta, the Commissioner has order power over these areas, rather than simply the power to recommend, as we have in this Province. Most importantly, however, is the fact that there is an ability to "ensure compliance" with the law in Alberta.

Prince Edward Island's Commissioner has powers similar to the Alberta Commissioner. In PEI, a privacy complaint has the same status as complaints about access and correction. All three matters can be the subject of a review and report by the Commissioner, and the Commissioner can issue an order under section 66(3) of PEI's *FIPPA* respecting, among other things, the collection, use and disclosure of personal information by a public body.

Ontario's *FIPPA* is a comparatively older statute which has not been reviewed regularly, but section 59 of that law gives the Commissioner various powers and duties, including the power to order that a collection of personal information by a public body cease, and that any records of personal information already collected be destroyed.

Manitoba's legislation is overseen by the Ombudsman. In that province, privacy complaints to the Ombudsman can be made through the same process as a complaint about access or correction, and the Ombudsman can issue a Report under section 66(1). If the Ombudsman's recommendations are not followed or are not implemented in a timely manner, the Ombudsman can refer the matter to an adjudicator under section 66.1(3) for a review. The adjudicator is empowered to issue an order under 66.8(3), including an order that a public body "… cease or modify a specific practice of collecting, using or disclosing personal information in contravention of Part 3."

In 2004, the BC Commissioner made a submission during the legislative review process of their *FIPPA* legislation in which it was recommended that the *Act* be amended to combine the complaint process and the review and inquiry process into a unitary process for the Commissioner to investigate, review, mediate, inquire into and make orders about complaints respecting decisions under the *Act* or other allegations of non-compliance with the *Act*. Section 58(3) of British Columbia's *FIPPA* now provides the Commissioner with the ability to order compliance by a public body of the full gamut of issues, in addition to those provided for in 58(2):

> *58(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:*
>
> *(a) Confirm that a duty imposed under this Act has been performed or require that a duty imposed under this Act be performed;*
>
> *(b) Confirm or reduce the extension of a time limit under section 10(1);*
>
> *(c) Confirm excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;*
>
> *(d) Confirm a decision not to correct personal information or specify how personal information is to be corrected;*
>
> *(e) Require a public body or service provider to stop collecting, using or disclosing personal information in contravention of this Act, or confirm a decision of a public body or service provider to collect, use or disclose personal information;*
>
> *(f) Require the head of a public body to destroy personal information collected in contravention of this Act.*

A similar regime to the one in British Columbia is also found in section 72 of Alberta's *FIPPA*. Whether the Commissioner's powers under *ATIPPA* remain in the realm of recommendation, or if a decision was made to give the Commissioner order power, it is our submission that in order to ensure that there is meaningful protection of the privacy rights of citizens under the *ATIPPA* that strong oversight, whether directly by this Office, or by giving the Commissioner a means to bring matters before the courts, must be a necessary feature of an amended *ATIPPA*.

Other Means of Ensuring Sufficient Privacy Oversight

Privacy oversight should not be a one-dimensional, after the fact, complaint-driven process. If the goal is to prevent breaches from occurring in the first place, and to ensure that public bodies are in compliance with the *ATIPPA*, a more proactive, forward-thinking approach is needed. Other Commissioners have the jurisdiction and authority to engage with public bodies to ensure that privacy considerations are present when policies, programs and legislation are being developed. This then becomes a preventative focus, where the Commissioner works

collaboratively, providing feedback as programs, policies and legislation are being developed. We currently have the jurisdiction to engage with public bodies in this way through section 51(d) and (e), but as there is no requirement for public bodies to seek our comment, the provisions have not been used frequently.

To assess the need for this approach, one must first consider the fact that we have hundreds of public bodies. Some are large and sophisticated, with advanced technical and legal advice at hand, while others are small, including many municipalities, with little expertise in those areas. All public bodies collect, use and disclose personal information, and almost all have electronic, networked, internet enabled tools at their disposal. At any given time, these public bodies are at various stages of developing new policies, programs, bylaws, regulations and legislation. Quite often, these initiatives involve the collection, use or disclosure of personal information. They also involve the sharing of personal information between and among public bodies. Furthermore, the evolution of technology is constantly opening up new avenues for public bodies to achieve their goals. It sometimes allows public bodies to attain new goals that they had not even considered before. The challenge is that this technology is not always developed or used with privacy in mind, and it is not always assessed against compliance with *ATIPPA* in a meaningful way, if at all.

The following are four additional ways we believe that the privacy oversight regime should be improved so as to ensure that the Commissioner can adequately protect the privacy rights and interests of Newfoundlanders and Labradorians:

Privacy Impact Assessments

The Privacy Impact Assessment (PIA) is a well-recognized self-assessment tool that public bodies can use to help determine whether planned programs or policies will be compliant with *ATIPPA*. The PIA can identify privacy risks, thus allowing consideration of different ways that those risks can be mitigated through changes to the proposed program or policy. Sometimes a Threat and Risk Assessment may also be required to assess information security issues, and that is a determination which can be made through the completion of a PIA. This has long been a standard part of the privacy compliance tool kit of governments and businesses nationally and internationally. While such assessments may be conducted internally by some public bodies, there is no legal requirement to do so. We are in no way involved in this process, and we are not consulted on the outcomes of these assessments. As the privacy oversight office, we have no means of becoming aware of these processes, and even if we were aware, no means of requiring any actions to be taken to ensure compliance with the *ATIPPA*. While our Commissioner is not unique in facing this oversight deficit, there are alternative approaches from some other jurisdictions to consider which would ensure that there is sufficient oversight.

For example, in British Columbia there is a requirement that public bodies conduct a privacy impact assessment (PIA) on all new enactments, systems, projects, programs or activities. The PIA must be completed during the development stage, and must meet the approval of the Minister responsible for the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). Furthermore, all PIAs that relate to a "common or integrated program or activity or a data-linking initiative" must be provided to the Commissioner for the Commissioner's review and

comment. These provisions can be found in section 69 of BC's *FIPPA*. The need for such a process in this jurisdiction is underscored by the fact that Bill 29 introduced section 39(1)(u), an amendment which means that if two or more public bodies decide to implement a common or integrated program or service, they are entitled to disclose personal information to one another for that purpose.

While there are no doubt many advantages to implementing such a program or service, it is necessary to ensure that privacy laws are being adhered to in that process. In one case investigated by our Office, employees in one public body were given access to the database of another public body, but the disclosing public body had failed to put any parameters around the disclosure or use of that information. They also failed to ensure that access was limited to those who had a legitimate need, and had failed to put any kind of information sharing agreement in place with the receiving public body. In that case, an employee misused his access to the database for personal purposes. A "catch-all" provision such as 39(1)(u) should be subject to an appropriate level of oversight to ensure that such personal information sharing occurs only when necessary.

A requirement for the Commissioner to comment on all PIAs may be unnecessary at this time, however public bodies should be required to conduct them and to provide them to the Minister for approval before "going live" with the particular project or policy. The PIA can demonstrate that public bodies have done due diligence and considered privacy impacts before implementing new programs or policies. It can also be quite useful if a privacy audit were to be conducted by the Commissioner (as recommended below), and it would be helpful in the case of a privacy breach investigation, whether conducted internally or by the Commissioner.

Consulting with the Commissioner on Proposed Legislative Schemes

We believe that there is significant value in putting into law a requirement that government consult with the Commissioner on all proposed legislation which may affect access to information or protection of privacy. The option currently exists in section 51(d) for the Commissioner to comment on proposed legislative schemes, however there is no requirement that such comment be invited, nor any time frame to give the Commissioner sufficient opportunity to research the issue and present comments which could add value to the process. At the federal jurisdiction, it is not uncommon to see the Privacy Commissioner invited to appear before a committee of the House of Commons to discuss the potential privacy impacts of a particular bill before the House, which allows legislators to be aware of such concerns, if any. In recent months, we have been invited to provide comment to government on certain draft bills which may have privacy implications, however, this is a recent development, and there is no requirement in the *ATIPPA* that this practice be continued by this or successive governments.

Breach Reporting and Notification

It is fast becoming a standard feature of privacy laws throughout the world, as well as in Canada, to mandate that entities which have control or custody of personal information must notify individuals whose personal information has been collected, used or disclosed contrary to law, and to report breaches to the appropriate privacy oversight body. In Canada, these features have

found their way into newer private sector privacy laws as well as personal health information laws, including *PHIA* in this Province.

The value of notifying affected individuals is manifold. It allows such individuals to take appropriate action in response to the breach, including cancelling credit cards, contacting credit rating agencies, contacting authorities regarding measures to mitigate risks of identity theft, being prepared for social and emotional impacts from the fact that their personal information may be in the wrong hands, allowing them to have discussions with officials at the public body about how the breach occurred, exactly what information was disclosed, and what measures have been put in place to contain the breach and prevent it from reoccurring. Affected individuals who know about a breach may also consider filing a complaint with the Commissioner or consulting a lawyer about a breach. Furthermore, some individuals who have been affected by a breach may choose to go to the media with the information as a means of making public bodies accountable for their errors. At a more basic level, it's their information and they should have a right to know if something has gone wrong with it.

The value of public bodies being required to report a breach to the Commissioner is also significant. At a very basic level, it allows the Commissioner to be aware of the kinds of issues that are arising in the scope of his or her oversight authority. Otherwise, the Commissioner is essentially in the dark as to how well public bodies are protecting the personal information of citizens, which is another fundamental flaw in the oversight regime of the *ATIPPA*. While some public bodies have voluntarily reported significant breaches to this Office, such reporting is not required by law, and it tells us nothing about the state of overall privacy compliance. We are unable to spot trends or systemic issues, and therefore are unable to recommend steps to help prevent further breaches in the future.

To address this shortcoming in the *ATIPPA*, we recommend that provisions be drafted which accomplish standards for notification and reporting similar to that which appears in *PHIA*. Section 15 of *PHIA* essentially requires that custodians notify affected individuals of all breaches as described in 15(3) unless the custodian "reasonably believes" that the breach will not result in an adverse effect as described in 15(7). These criteria were of course crafted to deal with the effects of breaches which are more typical of personal health information, so if government intended to proceed with such an amendment we would welcome a dialogue on the appropriate threshold of notification. Similarly, the threshold for reporting a breach to the Commissioner would have to be discussed in greater detail were such an amendment to be contemplated. In *PHIA*, it is a "material breach" which must be reported to the Commissioner, and the *PHIA Regulations* provide some criteria for assessing such a breach. Once again, this language has been crafted to deal with breaches of personal health information, and would have to be considered within the *ATIPPA* context.

Audit by the Commissioner

Another tool which should be brought to bear is to give the Commissioner the power to conduct audits of a public body's compliance with the *ATIPPA*, at the discretion of the Commissioner. Oftentimes, privacy is lost through a "death by a thousand cuts", such that each new collection, use or disclosure of personal information is small, but with the passage of time, they add up to a

significant erosion of privacy rights. In a gradual process such as this, individuals cannot be expected to notice or become sufficiently aggrieved with each incremental change in the way public bodies deals with their personal information. However, the cumulative effect over time may be a significant privacy issue, and by that time the program or practice may be deeply entrenched and the damage done. The Commissioner's Office is able to bring the necessary expertise to bear, and there must be a mechanism within the *ATIPPA* to make this expertise an effective tool for oversight of the privacy provisions. An audit provision would provide the Commissioner with the ability to ensure continued compliance with the *ATIPPA*. For examples, see sections 18 and 19 of *PIPEDA*, and section 49 of Manitoba's *FIPPA*. Section 42(b) of British Columbia's *FIPPA* allows the Commissioner to make an order based on the results of an audit of a public body's compliance with the privacy provisions of that *Act*.

Recommendations for Amendment

In this Province, we have at least some ability to ensure compliance when it comes to access or correction issues by proceeding to court under section 60, but we have no way of doing so when it comes to privacy matters falling under Part IV of the *ATIPPA*, and this must be viewed as a fundamental flaw. Just as order power is infrequently used in the jurisdictions that have it, we would anticipate that bringing a privacy matter to court to seek an order in relation to a public body's practices of collection, use or disclosure of personal information would be an exceptional circumstance. At the same time, we are of the view that having such an ability will be a powerful incentive for cooperation and dialogue with public bodies on privacy issues. If combined with the other recommendations in this section in an amendment to the *ATIPPA*, the result will be that the Commissioner would truly be in a position to ensure effective oversight of the privacy provisions of the *Act*. This would ensure greater public confidence in the activities of public bodies in relation to the personal information of citizens, which we submit would in the long run assist public bodies in carrying out their public policy goals and objectives.

Recommendations	1. The *ATIPPA* should be amended to include a provision ensuring that a complaint respecting compliance with the privacy provisions (Part IV) of the *ATIPPA* will have the same status as a Review under section 43. If a report is issued by the Commissioner respecting a privacy complaint, there must be a requirement for the public body to respond to the report. The public body should have up to one year to follow the Commissioner's recommendations, and the Commissioner should have the ability to appeal to the Trial Division the public body's decision or failure to implement its stated decision. The court must have the authority found in section 58(3)(d),(e) and (f) of British Columbia's *FIPPA* to make an order disposing of the appeal. 2. The *ATIPPA* should be amended to include a requirement that public bodies complete a Privacy Impact Assessment on all new enactments, systems, projects, programs or activities to be submitted for approval to the Minister responsible for *ATIPPA*.

	3. The *ATIPPA* should be amended to ensure that all PIAs that relate to a "common or integrated program or activity or a data-linking initiative" or any disclosure under section 39(1)(u) must be provided to the Commissioner for the Commissioner's review and comment. For reference, see section 69 of British Columbia's *FIPPA*. 4. The *ATIPPA* should be amended to require that government consult with the Commissioner at least 30 days in advance of first reading of any new legislation which could have implications for access to information or protection of privacy. 5. The *ATIPPA* should be amended to include a requirement for public bodies to notify individuals affected by a privacy breach. The threshold for notification should be determined following appropriate study and consultation. 6. The *ATIPPA* should be amended to include a requirement for public bodies to report breaches to the Commissioner. The threshold for reporting should be determined following appropriate study and consultation. 7. There should be an amendment to section 51 of the *ATIPPA* empowering the Commissioner to audit the performance of public bodies in relation to any aspect of *ATIPPA* compliance. 8. Section 51(a) of *ATIPPA* should be amended to provide explicit authority to the Commissioner to "conduct investigations to ensure compliance with any provision of this Act whether or not a complaint has been received" and a further amendment to ensure that any investigation under this provision can result in a Report issued by the Commissioner to which a public body must respond, resulting in the same options described above in recommendation 1.

Other Recommendations

Duty to Document

Among the reasons for instituting a legislated duty to document include good governance, historical legacy of government decisions, and the protection of privacy and access to information rights. Without a legislated duty to document, government can effectively avoid public scrutiny of the rationale for its actions.

-Investigation Report F13-01: Increase in "No Responsive Records" to General Access to Information Requests: Government of British Columbia. Office of the Information & Privacy Commissioner of British Columbia. March 4, 2013(www.oipc.bc.ca/report/investigation-reports.aspx)

Any attempt by government to make decisions without documentation reflecting the decision-making process is fundamentally flawed and undemocratic.

-Deleting Accountability: Records Management Practices of Political Staff: A Special Investigation Report. Information & Privacy Commissioner of Ontario. June 5, 2013. (www.ipc.on.ca/images/Findings/2013-06-05-Ministry-of-Energy.pdf)

As can be seen from the above referenced reports, some Commissioners have recently noted a disturbing trend which reflects a tendency within public bodies not to document decisions and, instead, conduct transactions orally – see also *Becoming a Leader in Access And Privacy: Submission to the 2013 Government of Alberta FOIP Act Review. Office of the Information and Privacy Commissioner of Alberta. July, 2013.* (www.oipc.ab.ca/Content_Files/Files/Publications/FOIP_Act_Review_2013_Becoming_A_Leader.pdf)

It is possible that a "duty to document" provision could be included within the *ATIPPA*, however it could also be placed within another statute, or in a stand-alone piece of legislation. However it is implemented, we believe that legislating such a requirement would help to ensure that the right of access granted under the *ATIPPA* is fully realized. Given that a primary purpose of the *ATIPPA* in section 3 is to make public bodies more accountable, it must be observed that such accountability can only be delivered through the right of access to information if a requirement is in place to ensure that appropriate records are kept.

To address this concern, Commissioners have called for the implementation of a legislated duty to document - a statutory requirement for public bodies to create records when decisions are made and implemented, inclusive of the advice, recommendations, deliberations and consultations surrounding those decisions. The attempt is not to capture each and every day-to-

day decision of government, but rather all non-trivial decisions including but not limited to decisions relating to human resources and personnel, finances, governance, and policy. In the above-referenced Report, the British Columbia Information and Privacy Commissioner recalls the recommendation of the then Information Commissioner of Canada, John Grace, who called for governments to "create records necessary to adequately document government's functions, policies, decisions, procedures, and transactions."

The creation of a duty to document does not mean that all of the documented information is necessarily disclosed. The *ATIPPA* would apply to the recorded information as it would to any other information, and the exceptions to access could be invoked by public bodies as required. Without such a requirement, there is a risk that the business of government could operate within what the Ontario Commissioner refers to as a "verbal culture" which, in turn, will lead the public to question whether verbal decision-making is being carried out to increase government efficiency, or rather to evade accountability and transparency and circumvent access to information. The effect may be the erosion of public confidence and an increase in the negative perception of government actions. It would also certainly run counter to open government initiatives.

Going hand-in-hand with this duty would be the need to implement policies and procedures internal to the public body to ensure that any such records which are created under a duty to document are maintained, protected and retained in proper fashion. This may require public bodies to ensure that there are staff responsible for ensuring that decisions and related processes are documented appropriately.

The duty to document was supported in a joint resolution of all Canadian Information and Privacy Commissioners in 2013, which called for the creation of "… a legislated duty requiring all public entities to document matters related to deliberations, actions and decisions." (www.priv.gc.ca/media/nr-c/2013/res_131009_e.asp)

To include such a provision in legislation rather than policy ensures that there is a firm commitment to follow through on this issue. Furthermore, if there were a failure to document important issues, it would allow the Commissioner to address the issue as one of compliance with the *ATIPPA*, and to make recommendations to help ensure better compliance in the future.

Recommendations	1. The creation of a legislated duty on public bodies to document (i.e. create records relating to) any non-trivial decision relating to the functions, policies, decisions, procedures and transactions relating to that public body. 2. The creation of a legislated duty on public bodies to implement policies relating to the maintenance and retention of records created under Recommendation #1.

Section 69 - Directory of Information

Section 69 of the *ATIPPA* provides for the creation and publication of a directory of information to assist people in identifying and locating records held by public bodies. The proposed directory appears to be comprehensive, covering all public bodies under the *ATIPPA*. It covers both general records in the custody of public bodies, including policy and program manuals, and records containing personal information. In particular, there are detailed requirements for personal information banks to be maintained by public bodies.

We refer to this directory as "proposed" because although the *ATIPPA* directs the Minister responsible for the *Act* to establish the directory, there apparently has been no action to do so since the *Act* came into force. This is technically not a failure to comply with the *Act*, because subsection 69(5) states that the section applies to those public bodies "listed in the regulations", and so far no such list has been created. Clearly, however, the creation of this directory was intended by the legislature to be an integral part of the access to information and protection of privacy infrastructure in the Province.

The value of such a directory is underscored by a recent statement from the Ontario Information and Privacy Commissioner:

> *Government organizations can develop information management practices that go beyond just the basic measures of reactive disclosure. When a ministry, municipality, police force, school board or other government organization sits down to identify exactly how it can make public data more easily accessible, it starts a process that we call Access by Design. This includes more than just accountable and accessible government – it embraces the concept of a more responsive and efficient government that engages in collaborative relationships with those it serves.*
>
> (Ann Cavoukian, Ph.D., *Access by Design,* April 2010)

Finally, it is noted that in 2014 our government announced its Open Government Plan, including Open Information: www.open.gov.nl.ca. Section 69 deserves close scrutiny regarding its potential to help realize the goals of the Open Government Plan as well as its ability to make the *ATIPPA* easier to use. Governments in British Columbia, Nova Scotia and Alberta have made use of their equivalent to section 69, however we have found Alberta's directory to be the most clear, succinct and user-friendly.

Recommendation	It is recommended that the publication of the directory of information pursuant to section 69 be commenced and maintained.

Fee Complaints

It is apparent from reviewing and comparing the fees charged in other jurisdictions across Canada that the fees set in this Province are certainly in line with and in some respects better

than the other jurisdictions in terms of fairness to applicants as well as presenting a minimal deterrent to those wishing to exercise the right of access to information under the *ATIPPA.*

The fee schedule set by the Minister is not strictly a part of the *ATIPPA* or the Regulations, but it is set pursuant to section 68 of the *ATIPPA.* There is one particular part of the fee schedule which we believe should be amended, and we reproduce the fee schedule in part below:

> *1.(1) An applicant who makes a request for access to a record pursuant to the Access to Information and Protection of Privacy Act must pay to the public body:*
>
> *[…]*
>
> *(b) $25.00 for each hour of person time after the first four (4) hours, rounded down to the nearest hour, for the following: locating; retrieving; providing; manually producing; and severing, which includes the review of records to determine whether or not any of the exceptions to disclosure apply, and the subsequent redaction of the records if necessary;*
>
> *[…]*

The phrase which we wish to focus on is "…which includes the review of records to determine whether or not any of the exceptions to disclosure apply…." This provision is troublesome simply because it is difficult to quantify and to assess in any meaningful way if an applicant were to file a fee complaint with this Office. The time it takes to determine whether or not any of the exceptions apply could vary widely depending on the subject records. If you take two access requests, both resulting in 100 pages of responsive records, the Access and Privacy Coordinator for the public body may have two very different experiences. One set of records might require minimal redaction (or severing of information), amounting to less than an hour of time. The other set of records might cause the Coordinator to engage legal counsel and senior executive officials to discuss potential harms and issues to be considered regarding the exercise of discretion, involving a review of case law, consultation with other public bodies, or even other jurisdictions, in the course of considering which exceptions apply.

Furthermore, the time spent reviewing the records to consider which exceptions apply could depend to a large extent on the expertise of the staff person assigned to it. An experienced ATIPP Coordinator who has been through the process and read the ATIPP Manual and several Commissioner's Reports on the sections involved would be able to go through the records much more efficiently than someone who has to look up the meaning of each exception. The applicant in each case will not necessarily know or appreciate the difference in terms of the fee, and it is not at all clear that the cost for a lengthy period of review and consideration should be borne by the applicant. Rather, it is the public body which is protecting its interests in this process, and which should arguably absorb the cost of this part of the process. It seems wrong to charge the applicant a fee for time spent determining why the applicant cannot have access to a record or part of a record.

Another factor to consider when it comes to fees is the state of the records management system of a public body. Applicants should not have to pay a high fee because a particular public body has not implemented good records management practices, resulting in a search for records taking longer than it should. In the case of a complaint, the Commissioner should have the discretion to factor that into any findings.

We also wish to recommend that a fee complaint to the Commissioner be part of the review process, rather than a complaint under section 44. This recommendation was made in the previous review to government subsequent to our submission to Mr. Cummings. The *ATIPPA* allows for the payment of a fee in order to get access to information, and section 44 empowers the Commissioner to "investigate and attempt to resolve" complaints regarding fees and time extensions. If a public body has inappropriately applied a time extension, it ultimately does not deny an applicant their right of access to records. If the public body does not respond within the time limits set out in the *ATIPPA*, it is a "deemed refusal." We consider that to be a "decision, act, or failure to act" under section 43, and we can conduct a full review and issue a Report, as we have done in the past.

However, if an unreasonable fee is assessed, this could prove to be a serious barrier to the right of access. Even if our Office recommends that the fee be reduced, the public body may not agree to do so. At that stage, given that fees and time extension complaints are dealt with separately under section 44, and are not included in the language pertaining to the Commissioner's review powers, it does not appear that there is any recourse for someone whose request has been stymied by the very real barrier of an unreasonable fee, nor is there any path to avail of the Trial Division.

One option to deal with this would be to include fee complaints under the Commissioner's review powers, which, if not resolved informally, could result in a Report with recommendations. The public body's response to the recommendations in the Report would then open the avenue of an appeal to the Trial Division, as with any other matter which has gone through the review process under section 43. Fee complaints are almost always resolved informally - this has been and will hopefully continue to be our experience. However, there are occasionally large fees involved, in the hundreds and thousands of dollars. If we determine that there has been a large and unreasonable fee imposed, it could prove to be a barrier to access for which there is no clear remedy if the public body will not compromise.

This proposal is consistent with the process followed in British Columbia. In that province, *FIPPA* grants the Commissioner the following authority regarding fees.

> *58(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:*
>
> *[…]*
>
> *(c) Confirm excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;*
>
> *[…]*

The main difference between what we propose and what is in place in British Columbia is that the Commissioner there has order power as opposed to recommendation power under *ATIPPA*. A decision by a public body about a fee is arguably already a "decision that relates to the request" under section 43, so it is possible that no amendment is required except the removal of the reference to fees in section 44. We interpret the language in section 44 as setting fees apart from other decisions relating to the request, so removing the section 44 provision might be sufficient, however it would probably be advisable to add some language in section 43 to ensure that everyone is aware that the Commissioner can conduct a Review involving a decision by a public body about a fee to be charged in relation to an access request.

Recommendations	1. Amend the *ATIPPA* to ensure that the Commissioner can conduct a review under section 43 of a fee to be charged for access to information and remove the reference to a fee complaint from section 44. 2. Remove the provision from the fee schedule allowing public bodies to charge for time spent determining whether or not any exceptions apply to a request for access to information.

ATIPPA Regulations

Twenty-four different provincial laws are listed in section 5 of the *ATIPPA* Regulations for the purpose of designating specific provisions of those Acts as taking precedence over the *ATIPPA*. Many of those provisions relate to access to information in records that are created, collected or used in accordance with each particular Act. A number of them appear to have no appeal mechanism associated with provisions which limit access to information, whether to the courts or to any other body. One exception to this is the recently enacted *Children and Youth Care and Protection Act*, which has a provision in section 75 of that *Act* for an internal review of a decision to deny access as well as an appeal to the Trial Division. Whenever it is considered necessary to designate a piece of legislation as taking precedence over the *ATIPPA*, it is recommended that basic features such as this be included to ensure that any decision to deny access is reviewable.

It should be a standard feature of any review of the *ATIPPA* that regulations designating provisions in other legislation as taking precedence over the *ATIPPA* be reviewed to ensure their continued necessity. The *ATIPPA* itself has changed, and in some cases the specific legislation and its implementation may have changed, which may affect the necessity of designating each particular law. Any time a law is designated in the *ATIPPA* Regulations for this purpose, two criteria should be met – 1) it is essential for the purpose of the particular piece of legislation that certain information described therein not be disclosed, and 2) no existing provision in the *ATIPPA* is capable of providing the necessary assurance that such protection can be relied upon. The onus should be on each public body whose legislation is listed in section 5 of the *ATIPPA* regulations to make a convincing case for their continued inclusion in the regulations during each statutory review of the *ATIPPA*. We therefore propose that consideration be given to adding a sunset provision to the *ATIPPA* to the effect that the laws listed in section 5 of the regulations will no longer take precedence over the *ATIPPA* unless they are confirmed by the Minister

responsible for the *ATIPPA* following each statutory review of the *Act* under section 74 and re-designated in the regulations as required.

Although we have conducted a preliminary review of the various provisions covered by section 5 of the *ATIPPA* regulations, we believe that we are not equipped to make recommendations to the Committee without the benefit of having heard from the public bodies involved as to their rationale for each one. The Committee may wish to invite the public bodies involved to do so. We can, however, provide a couple of examples where there could be some basis for suggesting a review. For example, section 5(1) of the *Fish Inspection Act* is deemed to take precedence over the *ATIPPA* through regulation 5(h) of the *ATIPPA*. Section 5(1) of the *Fish Inspection Act* appears to primarily address the issuance of licenses, and it is not at all clear how this provision is meant to interact with the *ATIPPA*, as no provision of the *ATIPPA* deals with this subject matter. Although one could argue that the inclusion of this provision in the *ATIPPA* Regulations is intended to imply that a request for information about the reason for a refusal of a license may not be subject to an *ATIPPA* request, there is no specific provision to this effect. In other words, there may be a purpose behind designating this particular provision, but it is not at all clear that it would accomplish the particular purpose if put to the test.

Another noteworthy provision is 5(j) which designates various provisions of the *Highway Traffic Act* as taking precedence. Some of the particular provisions of the *Highway Traffic Act* which are designated in 5(j) have been amended since these provisions were initially included in the *ATIPPA* Regulations, so it is presumed that this regulation will need to be changed to reflect that.

It is also worth noting that Commissioners from certain other jurisdictions have complained about having more laws designated as taking precedence over the provincial access law than necessary. This has not been the case in this Province. Only two laws have been added to the list since the *ATIPPA* was first proclaimed in 2005, however it should be said that these are quite significant. The *Energy Corporation Act*, as well as the *Research and Development Council Act* were later additions. The *Energy Corporation Act* is primarily known as the statute which governs the activities of Nalcor and its subsidiaries. The provisions which govern access to information under both of these statutes are more intricate than they first appear, and should be subject to detailed study to assess their continued status in the *ATIPPA* Regulations. The key question to be asked is one of necessity – can the *ATIPPA* provide the necessary protection for the information being withheld by these public bodies? Manitoba Hydro, by way of comparison, is a publicly owned hydro utility which is fully subject to the provisions of the Manitoba *Freedom of Information and Protection of Privacy Act*. There is no indication that the operations of Manitoba Hydro are being impaired in any way by being fully subject to that law. It may be the case that the scope and nature of the activities of Nalcor is sufficiently different from Manitoba Hydro to require the arrangement that we have in this Province, but there should be a process to determine whether that is indeed the case.

In conjunction with the foregoing suggestions on this subject, it is also recommended that a provision be added to section 51 of the *ATIPPA* to the effect that if government wishes to designate any additional provisions from other statutes as taking precedence over the *ATIPPA*, the Commissioner should be consulted a minimum of 30 days in advance of the date planned for such action.

Recommendations	1. The *ATIPPA* should be amended to include a sunset clause ensuring that each provision designated as taking precedence over the *ATIPPA* will automatically expire unless the necessity of such precedence is reviewed in conjunction with each statutory *ATIPPA* review and renewed. 2. The *ATIPPA* should be amended to require that the Commissioner be consulted at least 30 days in advance of a decision to designate any further provisions from other laws as taking precedence over the *ATIPPA*. 3. The provisions currently listed in section 5 of the Regulations should be reviewed to determine whether it is necessary to continue to include each one.

Review by Commissioner of Draft Amendments Including Transitional Clause

We have found the transitional clause in Bill 29 (Clause 34) to be the cause of some confusion, and it is currently one of the subjects of an ongoing court case in which this Office is an intervenor. We believe it is important to have a transitional clause which is easily understood and operates as intended.

In a similar vein, we are understandably very interested in the mechanics of the legislation. Regardless of what amendments are made, it is vital that all of the provisions work together harmoniously. Unfortunately we found several significant flaws in the simple workability of some of the Bill 29 amendments which created gaps and ambiguities.

In the case of the transitional clause as well as any amendments to the statute as a whole, we hereby request the opportunity to review the draft bill and provide advice as to its workability and procedural soundness. We believe we can provide a unique perspective in that regard, and we request that the Committee support this request in its final report to government in order that the citizens and public bodies end up with the most user-friendly and practical statute possible.

Miscellany

Privacy for Private Sector Employees

While this issue is not one that can likely be addressed in the legislative review of the *ATIPPA*, we could not overlook a longstanding gap in privacy legislation. We have received inquiries at this Office from time to time from employers as well as employees of private companies who want to know the status of privacy law in the private sector employee-employer context. Unfortunately we are obliged to advise them that their concerns do not fall within our mandate. As well, we also must regrettably inform them that there is a lack of legislated rules and

remedies in that particular environment. *PIPEDA*, the federal legislation which governs the collection, use and disclosure of personal information in most of the private sector, is aimed at the protection of consumer information, and explicitly excludes employee information (unless employees work in a federally-regulated industry). This situation seems to indicate the need for some analysis and consideration of a potential regulatory or legislative remedy. This Office would be pleased to engage in discussions and consultations with government about different options to address this concern. Although we made this offer in our submission to Mr. Cummings, we have not been advised to date of any intention on the part of government to consider this issue, so we reiterate the offer here.

Auditor General

Finally, Clause 33 of Bill 29 amended the *Auditor General Act*. We recommend that the Committee consult with the Auditor General to determine whether that particular amendment has had any negative impact on his ability to carry out his duties in a satisfactory manner.

Recommendations for Correction of Errors and Other Amendments Which do not Require Detailed Explanation

Current Language	*Proposed Language*	*Reasons for Alterations*
Conflict with other Acts 6(1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail. (2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it. (3) Subsections (1) and (2) shall come into force and subsection (4) shall be repealed 2 years after this Act comes into force. (4) The head of a public body shall: (a) refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another Act or regulation; and (b) give access and disclose information to a person, notwithstanding a	**Conflict with other Acts** 6(1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail. (2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.	Since the Act has been in force for more than 2 years, subsection (4) ought to be repealed in accordance with subsection (3). Likewise, subsection (3) would appear to serve no further purpose at this time and should also be repealed.

Current Language	*Proposed Language*	*Reasons for Alterations*
provision of this Act, where another Act or regulation provides that person with a right to access or disclosure of the information.		
Time limit for response 11(1) The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it, unless (a) the time limit for responding is extended under section 16; (b) notice is given to a third party under section 28; or (c) the request has been transferred under section 17 to another public body. (2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.	**Time limit for response** 11(1) **The head of a public body shall respond to a request in writing in the form prescribed by section 12 within 30 days after receiving it**, unless (a) the time limit for responding is extended under section 16; (b) notice is given to a third party under section 28; or (c) the request has been transferred under section 17 to another public body. (2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.	Legislation in Saskatchewan and Ontario places an obligation on the public body to respond to an applicant in writing within the statutory timeframe. In fact, access legislation in Ontario requires that the response include access to the records and, where necessary, a copy of the records. Section 7 of Nova Scotia's *Freedom of Information and Protection of Privacy Act* also contains a mandatory response provision, but it goes further to make clear the obligations placed on a public body in terms of its response. To do so it explicitly combines the intentions and purpose of sections 11 and 12 of our *Act*. Therefore it is proposed that section 11 of the *Act* be amended to make it absolutely clear that public bodies must respond to an applicant's request in the form prescribed by section 12 within the 30-day timeframe.
Transferring a request 17(2) Where a request is transferred under subsection (1), (a) the head of the public body who transferred the request shall notify the applicant of the transfer in writing as soon as possible; or	**Transferring a request** 17(2) Where a request is transferred under subsection (1), (a) the head of the public body who transferred the request shall notify the applicant of the transfer in writing as soon as possible; **and**	The "or" appears to be an error.

Current Language	*Proposed Language*	*Reasons for Alterations*
Transferring a request 17(2) Where a request is transferred under subsection (1), (b) the head of the public body to which the request is transferred shall make every reasonable effort to respond to the request within 30 days after that public body receives it unless that time limit is extended under section 16.	**Transferring a request** 17(2) Where a request is transferred under subsection (1), (b) the head of the public body to which the request is transferred shall **respond to the request within 30 days after that public body receives it unless that time limit is extended under section 16.**	The rationale for this is found in the discussion of section 11 above: **Time limit for response** 11(2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record. Neither section 11(1) nor section 17(2)(b) are consistent with section 11(2). Both 11(1) and 17(2)(b) use "reasonable effort" language, but section 11(2) makes it clear that if the 30 day period or an extended period as set out in 11(1) are not met, the head is considered to have refused access to the record. This is known as a "deemed refusal." Section 11(2) clarifies that the 30 day period is a hard deadline (with extensions allowed by section 16). If these deadlines are not met, section 11(2) makes it clear that the request is deemed to have been refused. The "reasonable effort" is not a factor in that determination, and should therefore be removed for clarity.
Disclosure harmful to law enforcement 22(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to (h) deprive a person of the right to a fair trial or impartial adjudication;	**Disclosure harmful to law enforcement** 22(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to (h) deprive **a person other than a public body** of the right to a fair trial or	This amended wording reflects the Commissioner's interpretation of this provision in Report 2006-014. If it is the government's wish that public bodies be covered by this provision, we note that "public body" is a defined term, and it should therefore be explicitly included. Otherwise, we recommend that it be explicitly

Current Language	*Proposed Language*	*Reasons for Alterations*
	impartial adjudication; **OR** (h) deprive **a person or public body** of the right to a fair trial or impartial adjudication;	excluded, for the sake of clarity.
Disclosure harmful to law enforcement 22(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to (p) harm the conduct of existing or imminent legal proceedings.	[provision recommended to remain the same]	This Office has concluded in Report 2006-014 (para. 46-50) that this provision references harm to the proceedings, not harm to the public body or any other party. If government intends this section to include harm to any of the parties to the proceedings, a revision will be required. Saskatchewan legislation, for example, specifically refers to a harm which might befall the government or government institution in the conduct of those legal proceedings. Further, this Office has adopted the definition of "legal proceedings" from Manitoba's ATIPP Manual – "any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration; any proceeding authorized or sanctioned by law, and brought or instituted for the acquiring of a right of the enforcement of a remedy." Government may wish to include such a definition in the *ATIPPA* for greater clarity.
Disclosure of House of Assembly service and statutory office records 30.1 The Speaker of the House of Assembly or the officer	**Disclosure of House of Assembly service and statutory office records** 30.1 The Speaker of the House of Assembly or the officer	There are occasions when records such as correspondence to heads of public bodies from a statutory office may contain information required to be withheld by this exception,

Current Language	*Proposed Language*	*Reasons for Alterations*
responsible for a statutory office shall refuse to disclose to an applicant information (a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly; (b) that is advice or a recommendation given to the speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission established under the *House of Assembly Accountability, Integrity and Administration Act* that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; and (c) in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records connected with the investigatory functions of the statutory office.	responsible for a statutory office **or the head of a public body** shall refuse to disclose to an applicant information (a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly; (b) that is advice or a recommendation given to the speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission established under the *House of Assembly Accountability, Integrity and Administration Act* that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; **or** (c) in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records connected with the investigatory functions of the statutory office.	particularly when a public body is under investigation by a statutory office. This is most likely to occur in the case of records referred to in 30.1(c). The phrase "or the head of a public body" clarifies that not only must the Speaker or the statutory office refuse access, but any public body receiving a request for such records must refuse access. "And" at the end of paragraph (b) could be interpreted to mean that all three paragraphs must be applicable to a record, which would render this section meaningless, because it would apply to few, if any, records. "Or" would clarify this.
Term of office 42.2(1) Unless he or she sooner resigns, dies or is removed from office, the	**Term of office** 42.2(1) Unless he or she sooner resigns, dies or is removed from office, the	Extending the term of office to six years would put the Information and Privacy Commissioner in the same term

Current Language	*Proposed Language*	*Reasons for Alterations*
commissioner shall hold office for 2 years from the date of his or her appointment, and he or she may be re-appointed for further terms of 2 years.	commissioner shall hold office for **6** years from the date of his or her appointment, and he or she may be re-appointed for a further term of **6** years.	of office already accorded to the Child Youth Advocate and Citizen Representative, and would be consistent with other Information and Privacy Commissioners elsewhere in Canada. The current 2-year term is too short a period to allow a new commissioner to become expert in both the *ATIPPA* and *PHIA*. Additionally, the term of office ought to be longer than the term of office of government so that the independence of the office is protected from any negative perception.
Privilege 55 Where a person speaks to, supplies information to or produces a record during an investigation by the commissioner under this Act, what he or she says, the information supplied and the record produced is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.	**Privilege** 55 Where a person speaks to, supplies information to or produces a record during an investigation by the commissioner under this Act, what he or she says, the information supplied and the record produced **are** privileged in the same manner as if **they** were said, supplied or produced in a proceeding in a court.	This wording rectifies a syntax error in the original legislation.
Fees 68(3) The applicant has 30 days from the day the estimate is sent to accept the estimate or modify the request in order to change the amount of the fees, after which time the applicant is considered to have abandoned the request.	**Fees** 68(3) The applicant has 30 days from the day the estimate is sent to accept the estimate or modify the request in order to change the amount of the fees, after which time the applicant is considered to have abandoned the request, **unless the commissioner has been requested to review the fee, whereby the time**	This proposed wording allows for better practical operation of the legislation. For context, please see the section in this submission on fees which proposes that fee complaints under section 44 be changed to requests for review under section 43.

Current Language	*Proposed Language*	*Reasons for Alterations*
	period is suspended until the matter is resolved or the commissioner has issued a recommendation.	
Fees 68(6) The fee charged for services under this section shall not exceed the actual cost of the services.	**Fees** 68(6) The fee charged for services under this section shall not exceed: (a) **the estimate given to the applicant under subsection (2); and** (b) **the actual cost of the services.**	This proposed wording is more in keeping with the spirit of the legislation.