OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Submission of the Information and Privacy Commissioner to Mr. John Cummings, Q.C. on the Review of the *Access to Information and Protection of Privacy Act (ATIPPA)*

June 30, 2010

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ATIPPA Review Submission

Introduction

This Office is pleased to participate in the first five-year review of the *Access to Information and Protection of Privacy Act* (*ATIPPA*). In the more than five years since four of the five parts of the *ATIPPA* came into force (the privacy provisions were not proclaimed into law until January 2008), the Office of the Information and Privacy Commissioner (OIPC) has seen its fair share of business, and more. We have been challenged by unusual fact situations which don't seem to fit into the scheme of the *ATIPPA* very well, we've been caught in the middle between applicants and public bodies who sometimes think we are siding with the other party, and we, like some public bodies, have been surprised at times by the volume of work generated by the *ATIPPA*.

In short, we have often felt ourselves to be the focus of that ancient Chinese curse, "may you live in interesting times," because our work is almost always interesting and challenging. We feel that we are at the fulcrum of a fine balance, not only between access and privacy in the world of personal information, but also within the access sphere itself – between the right of people to access information, and the right of the government (or public body) to withhold that information in order to protect it from disclosure for valid and necessary reasons. Both elements are crucial to a healthy functioning democracy. The citizenry and various institutions of civil society need to know the essence of the issues being grappled with by their government and public institutions, while at the same time if certain information is disclosed, there could be a number of harms, such as harm to law enforcement, harm to a third party's financial interests, or simply harm to the ability of government officials to recommend and discuss policy options freely without fear that every piece of advice or recommendation will end up headlining a news story. Public officials need to be free to toss around and propose different policy ideas, and through such dialogue, good policy development is facilitated. If actual advice and recommendations could not be withheld from disclosure, the decision-making process of government would be hindered.

The *ATIPPA* has served this province quite well over the past five plus years, and in most cases has achieved the necessary balance between these competing interests. If there were no changes in the *ATIPPA*, it would still be far preferable to the previous situation with the old *Freedom of Information Act*, which was much more limited in scope and contained no provision for an oversight mechanism such as the Commissioner's Office. That left little incentive for public bodies to follow the *Act* strictly, as very few applicants had the time or resources to take matters to court directly, which was the only option at that time.

In undertaking this Review, government, through the appointment of Mr. John Cummings, Q.C., has given all of the parties affected by the *ATIPPA* an opportunity to comment on how well the *ATIPPA* has served them. As part of that process, Mr. Cummings has been given a wide-ranging mandate, but he has also been asked to pay special attention to certain issues. Some of those issues are ones which have been identified by the OIPC as well, and we have addressed them throughout this Review submission, but it was felt that some other issues warranted some comment in this Introduction.

The first issue is actually two interrelated issues. These deal with the recent court cases involving the authority of this Office to review certain types of records. The result of both cases at the lower court was to limit the power of this office to compel the production of records to this Office for review.

As anyone who understands the function of this Office within the *ATIPPA* appreciates, our role is key to the process. One of the purposes of the *ATIPPA* is to make public bodies more accountable, as found in section 3 of the Act. The OIPC is the primary mechanism by which that accountability is ensured. Once you remove the OIPC from part of the equation, there is a reduction in accountability.

The OIPC was disappointed that the government chose to initiate the process which led to these court decisions, because it has had a net negative effect on the ability of this Office to do its job. The judge in the case dealing with 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 then threw the matter back in the hands of the legislature to deal with. Given that we are in the middle of a review of the *ATIPPA*, and given the strong language of the judge, it is sincerely hoped that government will take another look at how to restore as much as possible of what was lost in these court decisions.

If we are not able to review records, even during the informal resolution stage of our process, we can all look forward to, with regret, more formal reports from this Office, and/or more time-consuming and expensive trips to the courts in order to ask judges to take on the tasks that were previously undertaken by this Office, and which I believe were done extremely well prior to government's challenge to our role. The most significant impact of these developments has been the one on our informal resolution process, which has previously resulted in the early and successful closure of about three-quarters of our files. When files are resolved informally, it means that all parties are satisfied with the result – primarily the public body and the applicant. Sometimes a third party is also involved in the process and also must be satisfied with the result, and of course the OIPC must be satisfied that the resolution is consistent with the *Act*.

If we can no longer see certain records during the informal resolution process, we are unable to give the necessary assurance to an applicant that they either **have** received all of the records to which they are entitled under the *ATIPPA*, or offer the opinion that they **have not**. This information then informs the applicant's decision as to whether he or she will be satisfied to conclude the process, or instead request that the matter move on to a formal review and Report. It is doubtful that an applicant will be satisfied with a simple affidavit from a public body which simply reaffirms its previously stated position that the records have been properly withheld. If it were that simple, the old *Freedom of Information Act* would have worked just as well as the *ATIPPA*, but it did not. Applicants have valued the independent assessment provided by this Office, and that is what has made our process work. Already, since the decision of Judge Marshall, we have had one individual from a public body bold enough to state that he claimed section 21 simply because it meant that we would not be able to review his decision. I would imagine that any other public bodies wishing to take the same approach will not be so obvious about it.

A couple of issues which are found in Mr. Cummings' written mandate involve the scope of public bodies which are covered by the *ATIPPA*. One question posed in his mandate was simply whether local public bodies should be covered by the *ATIPPA*. I cannot state and underscore more firmly that local public bodies absolutely need to be covered by the *ATIPPA*. In most cases, your local municipality, school board or regional health board is the entity which makes the decisions which have the most impact on your everyday life. These public bodies must be held to the same level of accountability as other local public bodies across Canada, where almost without exception they are governed by comprehensive access and privacy laws with similar oversight provisions. To

contemplate removing those public bodies or reducing the scope of application of the *ATIPPA* for them would be a firm step backward.

If anything, we need more accountability at the local level. As an example of this, separate entities are sometimes created by local public bodies (often municipalities) to carry out public policy objectives, 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. In order to maintain accountability for the expenditure of public funds, these entities should be subject to the *ATIPPA*.

At the other end of the spectrum is the concern that some municipalities, particularly smaller ones, may not always have the expertise to efficiently administer the *ATIPPA*. When requests for access to information are infrequent, the process is understandably not as smooth as it would otherwise be. The OIPC recognizes this, and when matters come to this Office for review involving municipalities, we try to work with them not only to resolve the matter at hand, but to educate and encourage as we go. We recognize that the lone Town Clerk is the unsung hero of the municipal sector, and these are the individuals who often must also act as Access and Privacy Coordinators under the *ATIPPA*. This Office has met on a number of occasions with staff and elected officials from various municipalities in our education work, however it is the ATIPP Office of the Department of Justice who is charged with the primary responsibility to ensure that public bodies have the necessary training. I would therefore recommend that government ensure that the necessary resources are in place, either at the ATIPP Office or elsewhere, to support municipalities in this undertaking.

Finally, a note about this document. The submission is divided into three parts. Part A sets out, in a chart format, proposed amendments which do not require detailed discussion or rationale. Some of these are minor points, others are more significant, but all should be relatively straightforward in terms of our rationale and intended result. Part B is focused on proposed amendments which require more detailed explanation and argument. Part C discusses some new proposals in support of access and privacy, and the administration of the *ATIPPA*.

Please note that there is no executive summary in this submission. As noted, Part A is simply a chart with proposed amendments embedded within, while Parts B and C contain proposed amendments at the conclusion of each topic covered. There should be very little duplication between the three parts, except where certain topics are inter-related.

Generally speaking, if we have not commented on a section or an issue related to the *ATIPPA*, one can assume that this Office is of the view that the related *ATIPPA* provisions are working well. However, there may be other issues which have been raised by the general public or public bodies during Mr. Cummings' consultations which we have not identified, and we would be pleased to be given the opportunity to discuss those with him should they materialize in the various submissions he receives. We would further request the opportunity to discuss this submission with Mr. Cummings in person at his convenience.

Finally, I wish to note that 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 think the result is a very thorough and insightful commentary on the *ATIPPA*, which I fully endorse.

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

Part A
Recommendations for Correction of Errors and Other Amendments
Which Do Not Require Detailed Explanation

Current Language	Proposed Language	Reasons for Alterations
2 (p) "public body" means (i) a department created under the *Executive Council Act* , or a branch of the executive government of the province, (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, (iv) a local public body, and (v) the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act,*	2(p**)** "public body" means (i) a department created under the *Executive Council Act* , or a branch of the executive government of the province, (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, (iv) a local public body, (v) **a corporation or entity created by or for a public body or group of public bodies, and** (vi) the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*	The inclusion of new subsection (v) will amend the loophole that exists where separate entities are created by public bodies to carry out public policy objectives, but those entities currently do not fall within the scope of the *ATIPPA*. This scenario has been noted on occasion within the municipal sector. The proposed change will bring NL in line with other jurisdictions and will ensure that transparency and accountability extends to all public body activities and undertakings.

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 provision of this Act, where another Act or regulation provides that person with a right to access or disclosure of the information.	**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
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 require that public bodies respond to an applicant's request in the form prescribed by section 12 within the 30-day timeframe.
Published material 14(1) The head of a public body may refuse to disclose a record or part of a record that (a) is published, and available for purchase by the public; or	**Published material** 14(1) The head of a public body may refuse to disclose a record or part of a record that (a) is published **and/or available to the public**; or	Some published material is free and does not need to be purchased.

Current Language	Proposed Language	Reasons for Alterations
Extension of time limit 16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where.	**Extension of time limit** 16(1) The head of a public body may extend the time for **<u>responding to a request or series of requests from the same applicant</u>** for up to an additional 30 days where.	This is more in keeping with the practical application of this section and its intended effect – ensures accountability for a series of requests.
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; **<u>and</u>**	The "or" appears to be an error.
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 **<u>respond to the request within 30 days after that public body receives it unless that time limit is extended under section 16</u>**	The rationale for this is found in section 11(b): **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)

Current Language	Proposed Language	Reasons for Alterations
		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 specific situational extensions of up to 30 days). 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.
21 The head of a public body may refuse to disclose to an applicant information (a) that is subject to solicitor and client privilege; or (b) that would disclose legal opinions provided to a public body by a law officer of the Crown.	21 The head of a public body may refuse to disclose to an applicant information (a) that is subject to solicitor and client privilege	Section 21 sets out a discretionary exception to disclosure related to solicitor-client privileged information. This Office has accepted that section 21 encompasses both branches of the privilege: litigation privilege and legal advice privilege.

Current Language	Proposed Language	Reasons for Alterations
		It is currently unclear what is meant by "law officer of the Crown" under section 21(b), and why such legal opinions as referenced in section 21(b) would not already be captured by section 21(a). Nova Scotia's and British Columbia's Freedom of Information statutes only include our equivalent to section 21(a). Section 21(b) ought to be repealed for the sake of clarity, because in our view both branches of solicitor-client privilege are already captured by section 21(a). We do not anticipate any reduction in the scope of section 21 to result.
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;	(h) deprive **a person other than a public body** of the right to a fair trial or impartial adjudication; **OR** (h) deprive **a person or public body** of the right to a fair trial or impartial adjudication;	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 excluded, for the sake of clarity.

Current Language	Proposed Language	Reasons for Alterations
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 (j) facilitate the escape from custody of a person who is under lawful detention;	**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 (j) facilitate the escape from custody of **an individual** who is under lawful detention;	This wording provides clarity to the intended meaning of the provision.
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.

Current Language	Proposed Language	Reasons for Alterations
		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." If government does not agree with this interpretation, amendment may be advisable.
Disclosure of House of Assembly service and statutory office records 30.1 The Speaker of the House of Assembly or the officer 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	**Disclosure of House of Assembly service and statutory office records** 30.1 The Speaker of the House of Assembly or the officer 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	"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.

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(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.	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.	

Current Language	Proposed Language	Reasons for Alterations
How personal information is to be collected? 33(1) A public body shall collect personal information directly from the individual the information is about unless (a) another method of collection is authorized by (i) that individual, or (ii) an Act or regulation; (b) the information may be disclosed to the public body under sections 39 to 42 ; or (c) the information is collected for the purpose of (i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary, (ii) an existing or anticipated proceeding before a court or a judicial or quasi-judicial tribunal, (iii) collecting a debt or fine or making a payment, (iv) law enforcement, or (v) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual.	**How personal information is to be collected**? 33(1) A public body shall collect personal information directly from the individual the information is about unless (a) another method of collection is authorized by (i) that individual, or (ii) an Act or regulation; (b) the information may be disclosed to the public body under sections 39 to 42 ; or (c) the information is collected for the purpose of (i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary, (ii) an existing or anticipated proceeding before a court or a judicial or quasi-judicial tribunal, (iii) collecting a debt or fine or making a payment, **or** (iv) law enforcement. **33 <u>(1)(d) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual.</u>**	This would correct what appears to be a drafting error.

Current Language	Proposed Language	Reasons for Alterations
35(6) Within 30 days after receiving a request under this section, the head of a public body shall (a) make the requested correction and notify the applicant of the correction; or (b) notify the application of the head's refusal to correct the record and the reason for the refusal, that the record has been annotated, and that the applicant may ask for a review of the refusal under Part V.	35(6) Within 30 days after receiving a request under this section, the head of a public body shall (a) make the requested correction and notify the applicant of the correction; or (b) notify the **applicant** of the head's refusal to correct the record and the reason for the refusal, that the record has been annotated, and that the applicant may ask for a review of the refusal under Part V.	This would correct what appears to be a drafting error.
Term of Office 42.2(1) Unless he or she sooner resigns, dies or is removed from office, the commissioner shall hold office for 2 years from the date of his or her appointment, and he or she may further be re-appointed for further term of 2 years.	**Term of Office** 42.2 (1) Unless he or she sooner resigns, dies or is removed from office, the commissioner shall hold office for **6** years from the date of his or her appointment, and he or she may further be re-appointed for further term of **6** years.	Extending the term of office to six years would put the Information and Privacy Commissioner in the same term 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.

Current Language	Proposed Language	Reasons for Alterations
49(2) Where the commissioner does not make a recommendation to alter the decision, act or failure to act, the report shall include a notice to the person requesting the review of the right to appeal the decision to the court under section 60 and of the time limit for an appeal.	49(2) **Whether or not the commissioner makes a recommendation** to alter the decision, act or failure to act, the report shall include a notice to the person requesting the review of the right to **appeal the decision of the public body under section 50** to the court under section 60 and of the time limit for an appeal.	The "whether or not" language reflects the reality that applicants can file an appeal under section 60 regardless of whether or not the Commissioner issues a recommendation. This change also recognizes the fact that even though the Commissioner may make a recommendation that the public body alter a decision, act or failure to act, the public body may ignore the recommendation, and therefore the applicant must be able to appeal the decision of the public body under section 60. The additional language "of the public body under section 50" makes it clear to applicants which decision must be the focus of their appeal.
50(2) Where the head of the public body does not follow the recommendation of the commissioner, the head of the public body shall, in writing, inform the persons who were sent a copy of the report of the right to appeal the decision to the Trial Division under section 60 and of the time limit for an appeal.	50(2) **Whether or not the head of the public body follows the recommendations of the commissioner**, the head of the public body shall, in writing, inform the persons who were sent a copy of the report of the right to appeal the decision to the Trial Division under section 60 and of the time limit for an appeal.	As with the above comment, this change reflects the reality that applicants can file an appeal under section 60 regardless of whether or not the public body follows the recommendations of the Commissioner. It sometimes occurs that the Commissioner issues a recommendation which is then followed by the public body, but still may not result in the desired outcome of the applicant.

Current Language	Proposed Language	Reasons for Alterations
		Therefore the applicant must be able to appeal, and the language of the *ATIPPA* must be unambiguous on this point.
52(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 another Act or regulations or a privilege under the law of evidence.	52(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 regulation, or any claim of privilege, whether under the law of evidence or otherwise, including a claim of solicitor-client privilege, or that the record is described in paragraphs 5(1)(a) to (k) of this Act.**	This language provides the clarity necessary for the Commissioner to hold public bodies accountable for decisions, acts or failures to act under the *ATIPPA*, which has been hampered by the recent decision of Judge Marshall. It also inserts the necessary language to resolve the "conundrum" outlined by Judge Fowler in his recent decision.

Current Language	Proposed Language	Reasons for Alterations
Right of Entry 53 Notwithstanding another Act or regulation or any privilege under the law of evidence, in exercising powers or 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.	**Right of Entry** 53 Notwithstanding this or another Act or regulation, **or any claim of privilege under the law of evidence, including solicitor-client privilege**, in exercising powers or 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.	This wording is consistent with the proposed wording of section 52(3) above, in terms of addressing the "conundrum" outlined by Judge Fowler. As with the amendment recommended for that section, this proposed amendment would ensure the Commissioner's ability to fulfil his mandate, which has been significantly hampered as a result of the recent decision of Judge Marshall.
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.
60(5) A copy of the notice of appeal shall be served by the appellant on the minister responsible for this Act.	60(5) A copy of the notice of appeal shall be served by the appellant **on the commissioner and the minister** responsible for this Act.	This would create agreement with section 61(2). The Commissioner has the power to intervene as a party to an appeal, which is an important provision, but there is no corresponding requirement in the *ATIPPA* that he be informed of such appeals.

Current Language	Proposed Language	Reasons for Alterations
62(2) Notwithstanding an Act or regulation to the contrary or a privilege of the law of evidence, the Trial Division may order the production of a record in the custody or under the control of a public body for examination by the court.	62(2) Notwithstanding an Act or regulation to the contrary **or a privilege of the law of evidence, including solicitor-client privilege**, the Trial Division may order the production of a record in the custody or under the control of a public body for examination by the court.	This wording is in keeping with proposed wording for sections 52 and 53.
Designation of head by local public body 66 A local public body shall, by by-law, resolution or other instrument, designate a person or group of persons as the head of the local public body for the purpose of this Act.	**Designation of head by local public body** 66 A local public body shall, by by-law, resolution or other instrument, designate a person or group of persons as the head of the local public body for the purpose of this Act, **and once designated, the local public body shall advise the minister of this designation**.	This inclusion would allow for better practical application and operation of the legislation. This information could be maintained by the Department of Justice ATIPP Office, and accessed by the public or the Commissioner as required.
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.	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 a fee complaint is made to the commissioner under section 44(6), whereby the time period is suspended until the matter is resolved or the commissioner has issued a recommendation in relation to the complaint.**	This proposed wording allows for better practical operation of the legislation by making this notion explicit.

Current Language	Proposed Language	Reasons for Alterations
68(6) The fee charged for services under this section shall not exceed the actual cost of the services.	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 intention of the legislation and the actual practice for determining the fee charged.

Part B

Recommendations Requiring Detailed Explanation and Supportive Argument

Section 2(i): Definition of "law enforcement"

As indicated in Report 2007-003 (paragraphs 97-101), it may be reasonable to interpret the definition of "law enforcement" broadly, especially if the phrase "investigations, inspections or proceedings" in clause (ii) of section 2(i) is given a broad interpretation. Commissioners and courts across the country differ as to the interpretation to be given to comparable clauses in provincial and territorial access to information legislation.

The access to information legislation in most provinces and territories contains a definition of the term "law enforcement," but there have been differing interpretations of whether a harassment investigation ought to fall under this description, particularly in a situation when such an investigation is not conducted by a body (such as a Human Rights Commission) with the statutory authority to do so. Alberta has held that law enforcement should encompass the notion of a violation of a law. Similarly, New Brunswick legislation contains a provision dealing with information relating to harassment, personnel or university investigations (s. 20(1)). It is submitted that if the term "law enforcement" included non-statutory harassment or personnel investigations then it would not have been necessary for the legislature of New Brunswick to enact this separate provision to deal with harassment and personnel investigations. Additionally, the access to information statutes in some provinces and territories state clearly that "law enforcement" relates to the enforcement of laws enacted by a province, a territory or the federal Parliament (Ex. Manitoba and Yukon).

Recommendation:	It is therefore recommended that paragraph 2(i) be amended to clarify that "law enforcement" does not include investigations conducted in relation to such matters as harassment or workplace disputes, unless it is an investigation, inspection or proceeding conducted under the authority of or for the purpose of enforcing an enactment. It should also be clarified that any penalty or sanction is being imposed pursuant to an enactment.

Current Language:	Proposed Language:
(i) "law enforcement" means (i) policing, including criminal intelligence operations, or (ii) investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed;	(i) "law enforcement" means (i) policing, including criminal intelligence operations, or (ii) investigations, inspections or proceedings **conducted under the authority of an enactment** that could lead to a penalty or sanction being imposed **under that enactment or any other enactment.**

Section 2(o): Definition of Personal Information

Currently the *ATIPPA* at section 2(o) defines personal information to include "the opinions of a person about the individual" and "the individual's personal views or opinions". This causes a conflict when the information in question is one person's opinion about another person. Under our current legislation this opinion would be the personal information of both parties.

This Office dealt with this issue in Report 2007-001. The Commissioner held that in these instances the information would be found to be the personal information of the person whom the opinion was about, and not of the person who was the source of the opinion.

Every other jurisdiction in Canada which addresses "opinions" in its definition of personal information has avoided this situation. In these other jurisdictions the "individual's personal views or opinions" are their personal information "except if they are about someone else."

A simple revision to our definition is therefore recommended in order to bring it in line with the rest of the country:

Current Language	Proposed Language
2. In this Act … "personal information" means recorded information about an identifiable individual, including … (viii) the opinions of a person about the individual, and (ix) the individual's personal views or opinions	2. In this Act … "personal information" means recorded information about an identifiable individual, including … (viii) the opinions of a person about the individual, and (ix) the individual's personal views or opinions**, except if they are about someone else;**

Section 5(1): Application

Section 5(1) has been applied or commented on in a number of Reports (see 2005-007 – IGA; 2006-004 – Executive Council, Rural Secretariat; 2007-003 – MUN; 2008-013 – MUN), and in most of these cases section 5 has been linked to the 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*
> *(…)*

and goes on to list nine different categories of records, such as political party or caucus records. In our view, all that section 5(1) does is to exclude those records from the operation of the access provisions of the Act. For access 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. For example, there is no right of access, under section 7, to records covered by section 5. However, it is important to note that section 5(1) says nothing about the jurisdiction of the Commissioner.

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 not simply administrative, but is one of the core purposes of the *Act*.

The jurisdiction of the Commissioner flows implicitly from section 3 and from the appointment clauses (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 to conduct reviews (of decisions, acts or failures to act of heads of public bodies in respect of access requests) and to investigate complaints. Among the kinds of decisions made by heads of public bodies which have been subject to review by the Commissioner are: decisions whether certain records are responsive to a request, refusals to disclose records, and decisions that certain records are covered by section 5(1).

In that regard, the powers and duties of the Commissioner as set out in the Act (particularly sections 52 and 53) are not in any way limited or restricted to particular kinds of records. Section 52 (production of documents) and section 53 (right of entry) are not stated to relate only to "documents to which the Act applies." On the contrary, section 52 explicitly states that the Commissioner "may require any record in the custody or under the control of a public body." Section 53 similarly gives the Commissioner the power to examine and make copies of "a record in the custody of the public body." The only restrictions expressed by the Act on records subject to sections 52 or 53 are (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.

In addition, Section 52(1) 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 the compelling of evidence and requiring the production of records in anyone's custody and control 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 above in which Reports were issued, the entire responsive record was in fact produced to our office by the public body, and was examined to determine whether in fact the record, or any part of it, in fact 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 determination of that threshold issue must be made by the Commissioner – the independent Office that has been given the statutory duty to carry out the review of the decision of the public body. It cannot be made by the public body itself. If it could, then it would be possible for any public body, when faced with an access request, to evade all of its responsibilities under the Act simply by claiming that the record in question was covered by section 5(1), and there would be no independent review of that decision.

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 receiving 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.

This Office was recently involved in court proceedings which resulted in a judicial interpretation of the application of section 5. (See *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)* 2010 NLTD 19 (CanLII)).

A decision in the matter was rendered by the Honourable Mr. Justice Robert A. 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 but both public bodies refused to provide those records claiming that paragraph (k) of subsection 5(1) of the *ATIPPA* was applicable to the records. 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 an 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.

Mr. 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 Mr. 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?*

Mr. 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 Mr. 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, Mr. 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 Mr. 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 Mr. Justice Fowler address the fundamental question as to 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 matter/records in question are not within his/her jurisdiction?

This Office also agrees with Mr. 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.

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. In addition, Alberta's *Freedom of Information and Protection of Privacy Act*[1] 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 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*.

Recommendation:	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 records may be reviewed by the Commissioner for the purposes of determining whether or not the Commissioner has jurisdiction over those records. The "conundrum" identified by Mr. Justice Fowler in his recent decision must be resolved. Therefore the following language amendments are proposed to deal with the problem of the Commissioner's fundamental right to examine records to determine whether they are subject to the *ATIPPA,* and also maintain the current exemption from the *ATIPPA* of, for example, the courts, political parties or constituency offices, since these institutions are still not "public bodies" under subsection 2(p) of the *Act*. (This proposed revision also applies to our recommendation regarding the Commissioner's ability to review records for which section 5 has been claimed – see separate section below on sections 21, 52 and 56).

[1] R.S.A. 2000, c. F-25.

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*. (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 and may examine information in a record, including personal information. (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 another Act or regulations or a privilege under the law of evidence. (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.	52(1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the Public Inquiries Act. (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 (k) of this Act**, and may examine information in a record, including personal information. (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 another Act or regulations or **any claim of** privilege, **whether** under the law of evidence **or otherwise, including a claim of solicitor-client privilege, or that the record is described in paragraphs 5(1)(a) to (k) 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.

Section 5(1)(c) (repealed), 30.1, and Section 55

Significant amendments to the *Access to Information and Protection of Privacy Act*, (the "*ATIPPA*") were made by section 67 of the *House of Assembly Accountability, Integrity and Administration Act,* S.N.L. 2007, c. H-10.1. Subsection 67(2) amended the definition of "public body" in paragraph 2(p) of the *ATIPPA* such that the House of Assembly and its statutory offices became public bodies under the *ATIPPA*.

In order to facilitate the inclusion of the statutory offices as public bodies it was necessary to repeal paragraph 5(1)(c) of the *ATIPPA*, which provided 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

. . .

(c) a record that is created by or for an officer of the House of Assembly in the exercise of that role

The repeal of paragraph 5(1)(c) was legislated by subsection 67(3) of the *House of Assembly Accountability, Integrity and Administration Act*.

One of the consequences of the amendment of section 2(p) which defines "public body" and the repeal of paragraph 5(1)(c) of the *ATIPPA* would be that all records in the custody of or under the control of the House of Assembly and its statutory offices would be subject to disclosure under an access request made pursuant to section 8 of the *ATIPPA*. However, a limitation on which records of the House of Assembly and its statutory offices could be disclosed was imposed by enacting section 30.1, which was added to the *ATIPPA* by subsection 67(4) of the *House of Assembly Accountability, Integrity and Administration Act.*

The end result of the amendments made by section 67 of the *House of Assembly Accountability, Integrity and Administration Act* for the Office of the Information and Privacy Commissioner is that our Office is now a public body to whom access to information requests can be made. However, in accordance with section 30.1 of the *ATIPPA*, the Commissioner as the officer responsible for the statutory office must refuse to disclose to an applicant records connected with the investigatory functions of our Office.

Nevertheless, this does not mean that records connected with our investigatory functions are not subject to being disclosed in an access to information request. This disclosure could occur when an access request is made to another public body for any records in its custody or under its control that relate to that public body's dealings with this Office on previous Requests for Review, such as e-mails and letters from this Office sent to the public body as part of the informal resolution process carried out on all Requests for Review. Section 30.1 prohibits only the Commissioner from disclosing records related to our investigatory functions; it does not prevent the head of another public body from releasing records in its custody or under its control that relate to the dealings of this Office with the public body during previous Request for Review processes.

Thus, it is clear that section 30.1 does not afford this Office the same protection with regard to our investigatory records as did the repealed provision in paragraph 5(1)(c), which exempted from the application of the *ATIPPA* any "record that is created by or for an officer of the House of Assembly in the exercise of that role".

Another provision of the *ATIPPA* that deals with disclosure of records in the custody of the Office of the Information and Privacy Commissioner is section 55 which provides as follows:

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.

Section 55 was interpreted by the Supreme Court of Newfoundland and Labrador, Trial Division in *McBreairty v. College of the North Atlantic*, 2010 NLTD 28 (CanLII). In that case, Mr. Justice Seaborn had to decide whether documents provided by the College to the Commissioner during either the informal resolution stage or the formal investigation stage are privileged from subsequent disclosure under section 55. In deciding that such documents are privileged, Mr. Justice Seaborn stated at paragraph 107:

> *[107] I am satisfied that to attain the objects of the Act, of which both the informal and formal resolution processes of the Commissioner are essential components, the correct interpretation of section 55 is that in regard records produced during either process they are privileged from production under a later request for records to the public body involved in the prior investigation by the Commissioner. To find otherwise would not only hamper the resolution processes of the Commissioner but could also result in revealing the substance of a record the public body may have successfully claimed to be exempt from disclosure, thus defeating the purpose of the Act. . . .*

In summary, the combined effects of the amendments to the *ATIPPA* enacted in section 67 of the *House of Assembly Accountability, Integrity and Administration Act* and the judicial interpretation of section 55 produces the following outcomes for our Office:

1. The Office of the Information and Privacy Commissioner as a statutory office of the House of Assembly is a public body to whom access to information requests may be made;
2. The Information and Privacy Commissioner is prohibited from releasing to an access to information applicant any records connected with the investigatory function of this Office;
3. Any record or information provided to the Information and Privacy Commissioner by a public body during either the informal resolution stage or the formal investigation stage is privileged and not subject to disclosure in an access request to that public body; and
4. Any record or information provided by the Information and Privacy Commissioner to a public body during either informal resolution or the formal investigation stage remains subject to disclosure in a subsequent access request to that public body.

The fact that any record or information provided by our Office to a public body during either the informal or formal stages of our Request for Review process is subject to disclosure in a subsequent access request to that public body has significant consequences for our Office and its mandate. Mr. Justice Seaborn pointed out in *McBreairty* that "both the informal and formal resolution processes of the Commissioner are essential components" to attaining the objects of the *ATIPPA*. It is submitted that disclosing records or information provided by this Office to a public body during either the informal or formal processes would hinder the functioning of this Office and could reveal the substance of a record for which the public body has successfully claimed an exception to disclosure.

As a result, it is necessary to amend the *ATIPPA* to fill the legislative lacuna created by the repeal of paragraph 5(1)(c) which exempted from disclosure "a record that is created by . . . an officer of the House of Assembly in the exercise of that role".

Recommendation:	Section 5 should be amended to provide that the *ATIPPA* does not apply to: *records created by [or for] the Commissioner while carrying out his or her investigatory functions, whether such records are in the custody or control of the Commissioner or in the custody or control of another public body*

Sections 10 and 16: Unreasonable Interference

Public bodies have, from time to time, presented this Office with scenarios whereby they feel that certain access to information requests have subjected their operations to unreasonable interference, however there were no suitable provisions within the *ATIPPA* upon which they could rely in making that argument to the Commissioner. When this situation has been encountered, public bodies have attempted to rely on sections 10(1)(b) and 16(1)(b) to either refuse the request or extend the time period.

Section 10(1)(b) allows a public body to refuse access to records in electronic form where producing them would "interfere unreasonably with the operations of the public body," while section 16(1)(b) allows for extension of time for an additional 30 days where "a large number of records is requested or must be searched," and responding within the original 30 days would "interfere unreasonably with the operations of the public body."

The question has been raised as to whether public bodies should be able to refuse access to requests which would interfere unreasonably with the operations of a public body when the requested records are in paper form, as opposed to electronic form, as stipulated by section 10(1)(b). Furthermore, public bodies have faced similar challenges when dealing with an applicant who presents multiple access requests during the same time period, none of which would individually interfere unreasonably with the operations of the public body, but collectively they might do so. Currently, the *ATIPPA* does not adequately address either situation.

We anticipate that public bodies will bring these questions forward during this legislative review. We therefore have studied the matter and if government chooses to address these scenarios, we offer a proposed solution which is currently in force elsewhere. Other jurisdictions have sections which allow an unlimited time extension for requests involving a large number of records, as well as multiple requests from the same applicant, but only with the Commissioner's permission. If this approach were adopted, public bodies would have no discretion to extend the time period in the multiple requests scenario, without approval being granted.

Alberta, PEI and N.S. already have sections which accomplish this (with one wording change) –

> (1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
> … (b) a large number of records are requested or must be searched and responding within the period would unreasonably interfere with the operations of the public body,
> …

> (2) The head of a public body may, with the Commissioner's permission, extend the time for responding to a request if multiple ~~concurrent~~ active requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other[2]. [Subsection (2) is in Alberta and PEI only]

Subsection (1) above is an adaptation of section 16(1) of the *ATIPPA*. If such an amendment is considered, further revision of section 16 may be necessary to ensure that sections 16(1)(a) and (c) are not captured and affected by this change.

Recommendation:	That the provisions referenced from Alberta, PEI, and NS be studied and considered by government as remedies for the scenarios described, should public bodies seek to have the *ATIPPA* amended to address these concerns.

Section 18: Cabinet Confidences

This Office has issued several reports which interpret the language in section 18. Most jurisdictions in Canada use language which includes the phrase "substance of deliberations." This provision has not yet been interpreted by a court in our province. This Office therefore 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* is the most appropriate (see our Reports 2005-004, 2008-008, and 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 …*

In other words, this exception is not 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.

Last year, government amended the *Management of Information Act (MIA)* in relation to the definition of "cabinet records." It should be clear that that definition has no bearing on how the cabinet confidences provision of the *ATIPPA* is to be interpreted. That act bears on the management of information, but it is the *ATIPPA* which bears on the public's right of access to information found in records, regardless of how the *MIA* categorizes those records.

Through our exchanges with Executive Council and other public bodies in relation to section 18, it appears government has generally not shared our interpretation of section 18, which may mean that the provision will eventually have to be interpreted by the courts in this jurisdiction. In the alternative, government may choose to amend that provision now so that its intentions are clear. If

[2] I would note that "in association with each other" is not defined.

government chooses to do so, it is our view that this provision is intended to protect the long-held parliamentary principle of cabinet confidentiality. This does not mean, however, that any record, once classified as a cabinet record, would harm or threaten that principle if released. Rather, government is urged to take a balanced view of this exception which maximizes the public right of access to information with the need for cabinet to deliberate without fear that the differing views expressed at the Cabinet table will be revealed.

Also noteworthy is that subsection 18(2) provides for a time frame, beyond which section 18 no longer applies. 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. Another similar time frame found in the *ATIPPA* is found in section 23(3), which provides an expiry period of 15 years for the application of that exception to most of the information which would fall under its scope.

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.

Recommendations:	1. If considering an amendment to section 18, note that the OIPC's view is that this provision is intended to protect the long-held parliamentary principle of cabinet confidentiality. However, Government is urged to take a balanced view of this exception so as to maximize the public right of access to information with the need 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(2) from 20 to 15 years.

Section 19: Local Public Body Confidence

Sections 19(1) and (2) of the *ATIPPA* work together such that a record may be refused under section 19(1) if it contains information of the type(s) identified in sections 19(1)(a), (b) or (c); under section 19(2), however, the information will have to be disclosed *in spite of the fact that it was considered in a privileged meeting* if the information is the subject matter of deliberations that has *also* been considered in a *public* meeting of the local public body (section 19(2)(a)), or if the information is 15 years old or more (section 19(2)(b)). (Note that with respect to section 19(2) the *Act* itself does not specify whether consideration in a public meeting must occur *before* or *after* the privileged meeting.)

The Commissioner has found that the substance of deliberations identified in section 19(1)(c) of the *ATIPPA* includes such information as "what was said by individuals at the meeting, the opinions expressed, how individuals at the meeting voted, and the arguments given in favour or against taking

a particular course of action." Again, section 19(1)(c) permits a local public body to refuse to disclose information that would reveal the "substance of deliberations" taking place in an authorized privileged meeting of the local public body. In this context, the Commissioner has found that information may be withheld under section 19(1)(c) if a privileged meeting was in fact authorized, actually held, and if its disclosure would also likely "permit the reader to draw accurate inferences about the substance of deliberations that took place in the meeting" (Report 2007-018 at paragraph 36).

On the other hand, section 19(2)(a) indicates that if the *subject matter* of deliberations is discussed in a public meeting, then any record that would reveal the substance of deliberations cannot be withheld from disclosure under section 19(1)(c). This Office has not yet defined the "subject matter of deliberations" as distinct from the "substance of deliberations" or dealt in sufficient detail with the interaction of sections 19(1)(c) and 19(2)(a). Nevertheless, there may be a problem with use of the term "subject matter" rather than "substance" of deliberations in section 19(2)(a).

Could a local public body be assured of the ability to talk about an issue in confidence during the course of a privileged meeting, if the subject matter of deliberation had already been raised in a public meeting? What if the subject matter was raised, even inadvertently, at a later public meeting – do all the details of the privileged meeting become public? The answer to these hypothetical scenarios depends on the definition of the "subject matter" of deliberations as distinct from the "substance" of deliberations.

The Ontario Information and Privacy Commissioner has addressed the interaction of provisions similar to our sections 19(1)(c) and 19(2) by determining, for example, that a local public body that considers the product of privileged deliberations in a public meeting (e.g., in the act of adopting a report debated in a privileged meeting without further discussion) cannot be said to be considering the subject matter of deliberations (Order M-385).

Recommendation:	In Newfoundland and Labrador, adopting the Ontario finding may indeed avoid the conclusion that mere mention of a report in a public meeting that was discussed in a privileged meeting must lead to disclosure of the substance of deliberations that took place in a privileged meeting. However, a simple amendment to the *ATIPPA* could resolve the matter. Therefore, it is recommended that government either clarify the phrase "subject matter of deliberations," found in section 19(2)(a) as it pertains to the possible negation of the refusal to disclose information under section 19(1)(c); or alternatively amend section 19(2)(a).

Current Language:	Proposed Language:
19(2)(a) the draft of a resolution, by-law or other legal instrument or private Bill or the subject matter of deliberations has been considered in a meeting open to the public; or	19(2)(a) the draft of a resolution, by-law or other legal instrument or private Bill or the **substance** of deliberations has been considered in a meeting open to the public; or

Section 20: Policy Advice or Recommendation

Section 20(1)(a) sets out:

> *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;*

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

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.*

The OIPC does not recommend any revisions to this section. However, we wish to note that the Commissioner's interpretation has been relied on by the Supreme Court, Trial Division, in *McBreairty* v. *College of the North Atlantic* and *OIPC* 2010 NLTD 28.

Recommendation:	Any suggested change to this section that may come from other parties should be reviewed in light of the Commissioner's interpretation, and any change should endeavor to uphold this accepted interpretation.

Section 22: Disclosure Harmful to Law Enforcement

Section 22 is a discretionary exception that allows a public body to refuse access to certain information associated with "law enforcement." In Report 2007-003, the Commissioner expressed concern about the broad language used in paragraph 22(1)(a) and in paragraph 2(i). At paragraph 91 of that Report the Commissioner stated:

> *[91] The intent of a number of provisions of section 22(1) is to prevent the release of information that may lead to some form of harm. This is evident in a number of terms used throughout the section, such as "interfere with," "harm," "prejudice," "reveal," "endanger the life," "deprive," and "adversely affect." I am concerned, however, with the language of section 22(1)(a) which uses, in addition to the terms "interfere with" and "harm," the term "disclose information about." I also note that the word "or" in this section allows this latter term to stand alone. As such, section 22(1)(a) appears on its face to permit a public body to refuse to disclose any information about any policing matter or any proceeding that may lead to a penalty or sanction, without the requirement to show some adverse affect* [sic] *that release of the information may cause. I believe such broad language, in combination with the broad definition of "law enforcement," has established an exception which is at odds with the overall intent of the legislation. With this language, I would suggest that it was not necessary to use the terms "interfere with" and "harm" in section 22(1)(a) nor, for that matter, any of the other terms referenced above. In fact, if all information about law enforcement may be withheld by a public body without the requirement to show some form of harm, all other provisions of section 22(1) would be completely redundant.*

A review of other provincial and territorial access to information statutes reveals the use of more restrictive language for sections comparable to our section 22. Elsewhere in Canada the comparable legislation allows for a denial of disclosure of information that would interfere with or harm a law enforcement matter.

Recommendation:	It is proposed that paragraph (a) of subsection 22(1) be amended by deleting the phrase "disclose information about" while continuing to allow public bodies to withhold information where the disclosure could reasonably be expected to "interfere with or harm a law enforcement matter".

Current Language:	Proposed Language:
22(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to (a) interfere with, disclose information about or harm a law enforcement matter;…	22(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to (a) **interfere with or harm a law enforcement matter;…**

Section 28: Notifying the Third Party

When a public body invokes section 27 (disclosure harmful to the business interests of a third party) the public body will normally notify the affected third party of the access request, as provided for by section 28. This gives the third party the opportunity to either consent to the disclosure or to make representations to the public body explaining why the information should not be disclosed. Such representations may also help the public body in assessing the validity or strength of the section 27 claim.

Under section 28 as it is presently written, a public body *may* notify a third party at its own discretion. However, the *ATIPPA* only *requires* notification of a third party where the public body actually *intends* to release some or all of the information in question. In some cases the public body initially does not intend to disclose any of the information, and therefore chooses not to notify the third party.

However, once an applicant has filed a Request for Review with the Commissioner, the possibility arises that the Commissioner could reach different conclusions about the application of section 27 and might recommend the release of information relating to a third party. At that point it is clearly necessary that the third party be notified since, after all, it is the interests of third parties that are intended to be protected by section 27.

Indeed, section 47 of the *ATIPPA* (representation on review) requires the Commissioner, during formal investigation, to give an opportunity to make representations to a third party that was notified under section 28, *or would have been notified had the public body intended to give access.* This is a procedural safeguard provided to third parties to ensure that even if they have not been previously notified, no recommendation affecting their interests will be issued without their being given an opportunity to make representations to the Commissioner during the course of a review. It also triggers the right of a third party to eventually appeal, to the Supreme Court Trial Division, a decision to disclose third party information.

However, it has been our experience that late notification sent to a third party that its interests may be affected has the potential for causing considerable delay to the proceedings. It is therefore to everyone's advantage for the public body to notify a third party at the earliest possible stage. Also, in order for a third party to meaningfully participate in the review, it must be provided with a copy of the record in question, or at least an adequate description of it. However, it is our view that the Commissioner cannot provide a third party with a copy of the record, since section 56 of the *ATIPPA* states that we must not disclose information obtained in performing duties or exercising powers under the *Act*. We therefore find it necessary to request that the public body provide a copy of the responsive record to the third party. However, the *ATIPPA* at present does not require the public body to do so, nor does it give the Commissioner a means of enforcing such a request.

Other Jurisdictions

Several other jurisdictions in Canada have provisions that are similar to those of *ATIPPA* section 28, giving a public body the discretion whether to notify a third party. However, the Nova Scotia (s. 22(1)), New Brunswick (s. 34(1)), and Alberta (s. 30(1)) offer mandatory language for public body notification where third parties are impacted.

We recommend following their examples, and that the notification provision in section 28 of the *ATIPPA* be amended to remove the discretionary element requiring a public body to provide notification to a potentially affected third party in all cases.

Recommendations:	1. Amend subsection 28(1) to read: *(1) Where the head of a public body is considering a request for access to a record the disclosure of which might be harmful to the interests of a third party as described in section 27, the head shall, as soon as practicable, give the third party a written notice under subsection (2).* 2. Repeal the present subsection 28(2). 3. Re-number subsection 28(3) as 28(2), and amend paragraph 28(2)(b) to read: *(b) describe the contents of the record and offer to provide the third party access to a complete copy of the record upon request;* 4. Re-number subsection 28(4) as 28(3). 5. Consequentially, amend subsection 29(1) to eliminate the reference to the repealed subsection 28(2), by removing from the second line the words "or (2)". 6. In addition, it would be appropriate to amend paragraph 47(1)(b) by removing the reference to the intention of the head of the public body to give access to a record, and replace it with a provision allowing the Commissioner to safeguard the interests of a third party who, for one reason or another, has not been notified. Paragraph 47(1)(b) would then read as follows: *(b) a third party who was notified under section 28 or who, in the opinion of the Commissioner, should have been so notified;*

Section 30: Disclosure of Personal Information

Other jurisdictions have set the bar for release of personal information at "an unreasonable invasion of privacy" before their legislation prohibits disclosure. Here, the *ATIPPA* provides that all personal information shall be withheld unless it comes within the list of exceptions in s. 30(2). There is no harms test.

The Commissioner feels it is necessary for a revision to our legislation, as under its current formulation public bodies are required to withhold personal information where there would be no actual harm to the person if it was released. Furthermore, this Office has encountered a number of situations bordering on the absurd, where information which meets the strict definition of personal information must be severed, but there is no indication that the release of such information would cause harm. As it currently stands, both the Commissioner's Office and public bodies are at a

disadvantage within the Canadian context, because section 30 operates differently than most other similar provisions, and we have therefore been unable to utilize the case law and consider decisions from other Commissioners in interpreting this provision to the same extent as other jurisdictions. Our section 30 has been at the root of a number of complex Reports issued by the Commissioner, and it has caused significant challenges for public bodies. The OIPC has recognized this section as posing significant challenges from the early days of proclamation of the *ATIPPA*, and it is one which needs attention.

In an effort to support a reasonable balance between access and privacy within the *ATIPPA*, we believe a harms test is the most appropriate way to proceed. Elsewhere in Canada there are three different formulations of when personal information may be released:

Unreasonable Invasion, Defined

- This exception to disclosure is defined as an "unreasonable invasion". There is: a list of what is not an unreasonable invasion; a list of situations where the disclosure of the information is presumed to be an unreasonable invasion; and, a list of considerations that would support disclosure or withholding in certain circumstances. This formulation is found in BC, Alta, Man, New NB Act, N.S., PEI, Yukon, NWT, Nunavut. However, the New NB Act does not include a list of considerations.

A List, One of Which is Unjustified Invasion

- In the second formulation, the exception to disclosure is an outright "shall" refuse to disclose personal information. This blanket statement is then followed by a list of exceptions which includes "if the disclosure does not constitute an unjustified invasion of personal privacy". The legislation then provides a list of circumstances to consider when determining if release would constitute an unjustified invasion, a list of "presumed to constitute" an unjustified invasion, and, a list of "does not constitute" an unjustified invasion. This formulation is found in Ontario.

No Harms Test

- In the third formulation, there is no specific exception and requests for access to personal information are covered by privacy provisions regarding disclosure. In this version there is no harms test except that "public interest …clearly outweighs any invasion" and that disclosure "would clearly benefit the individual" (section 29(2)(o)). This formulation is found in Saskatchewan.

In the majority of jurisdictions (BC, Alta, Man, NS, PEI, Yukon, NWT and Nunavut) the burden of proof to support release of personal information is on the applicant. However in Ontario and NB this burden is still on the public body as their legislation does not distinguish the release of personal information for the release of any other type of information. This is also the case currently under the *ATIPPA* (see section 64).

The dominant system in Canada seems to be making an "unreasonable invasion" of privacy the exception to access, while listing: presumed to be unreasonable invasion; instances where there is no unreasonable invasion; and, circumstances to consider in all other cases. As well, given that the only two jurisdictions that do not place the burden of proof on the applicant when personal information is involved are silent on the issue, if the *ATIPPA* were to incorporate a harms test, we would also want to revisit our burden of proof section. We therefore recommend amendments to sections 30 and 64 as follows:

Recommendation:	30(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, (c) disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an enactment, (d) the personal information relates to eligibility for or receipt of income assistance, legal aid benefits, social service benefits or similar benefits, or to the determination of benefit levels; (e) the personal information relates to employment or educational history, (f) the personal information describes the third party's financial circumstances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party, (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, (i) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means, or

	(j) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations. (3) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if (a) the third party has, in writing, consented to or requested the disclosure, (b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party, (c) an Act or regulation of the province or Canada authorizes the disclosure, (d) the disclosure is for a research or statistical purpose and is in accordance with section 41, (e) the information is about the 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, (f) the disclosure reveals financial and other details of a contract to supply goods or services to or on behalf of a public body, (g) public access to the information is provided under the *Financial Administration Act,* (h) the information is about expenses incurred by the third party while traveling at the expense of a public body, (i) the disclosure reveals details of a license, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or (j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (2)(d), (k) the information is about the third party's business name, address, telephone number, facsimile number, electronic mail address or title, (l) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual, **or**

	(m) it discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons. (4) In determining under this section whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether (a) the disclosure is desirable for the purpose of subjecting the activities of the government or a public body to public scrutiny, (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment, (c) the personal information is relevant to a fair determination of the applicant's rights, (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people, (e) the individual to whom the information relates will be exposed unfairly to financial or other harm, (f) the personal information has explicitly or implicitly been supplied in confidence, (g) the personal information is likely to be inaccurate or unreliable, (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, (i) the personal information was originally supplied by the applicant, and(j) the personal information is about an individual who has been dead for 25 years or more.
	64(1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record, except (a) if the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; **or**

	(b) if the record or part that the applicant is refused access to contains information which has been withheld under section 27, the burden is on the third party to prove that the applicant has no right of access to the record or part.

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 is in the public interest to do so. However, several provinces do 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.

This would alleviate one issue identified by the OIPC which came to light with a disclosure which occurred from one public body to another in relation to the H1N1 issue in the fall of 2009. The Newfoundland and Labrador Centre for Health Information (NLCHI) disclosed personal information to the Department of Health and Community Services for use in relation to the Mass Immunization Program. This disclosure was the subject of a public news release by NLCHI, which cited section 31 at the time in undertaking the disclosure. In our view, the disclosure was not the best fit for section 31 because it was not a notification "about a risk of significant harm." The risk of harm associated with H1N1 was already well known in the public. The information disclosed was not "about a risk of significant harm," but rather was information such as names, addresses MCP numbers etc. which were used to set up and operate H1N1 clinics. A provision such as that found in Alberta's section 32(1)(b), being more general in nature, would much more clearly apply to the type of disclosure which occurred in that instance. The Commissioner is of the view that the ability of a public body to respond to serious matters of public health and safety should not be hindered by the *ATIPPA*. Even though the application of section 31 was questionable in that case, this Office did not make an issue of it because there was a clearly identifiable and justifiable public health rationale. That being said, it is important that the *ATIPPA* clearly account for such necessary disclosures, as similar issues could arise in the future, and public bodies may be unsure as to how to proceed when the law is not clear.

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. In the example of the disclosure of information by NLCHI to the Department of Health and Community Services, the disclosure involved so vast a number of people that mailing information was not a practical option, so instead they issued a public advisory (news release) as a form of notification. Although there is no provision in Section 31 for a public advisory to replace a mailed notice, it is our view that a mail-out would not have been as practical or effective, and may not have been able to be accomplished in the timely manner called for by the circumstances. We therefore suggest that an alternative to a mailed notice be considered for such instances.

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 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.	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 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, 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 (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 39 & 65: Disclosure of personal information and exercising rights of another person

There is currently no access to the personal information of a deceased person except in relation to the administration of the deceased's estate and for the purpose of notification of next of kin or friend. Outside of these exceptions the personal information of a deceased person remains confidential for a period of 20 years, after which the information can be disclosed only under section 42(c) for archival or historical purposes. Section 65 does not provide any assistance in this regard as it is very limited in scope.

This Office has encountered requests for access to personal information of deceased individuals, and has been required to agree with the denial of access to this information, as there are no provisions in the *ATIPPA* to allow for its disclosure or to allow for discretion to consider potentially releasing this information. While this Office believes that the deceased have privacy rights, we also acknowledge that such rights may, in certain circumstances, diminish with time.

In some jurisdictions, including Alberta, Saskatchewan and Manitoba, the disclosure of the personal information after death is discretionary upon the public body who must consider whether the disclosure would constitute an unreasonable invasion of privacy. In these jurisdictions the disclosure is limited to a spouse, partner, relative or next of kin of the deceased. In this manner, not only is the ability to disclose subject to a limitation, it is also limited in scope. This accounts for the fact that, in some circumstances, certain individuals may have valid reasons for needing to gain access to that information.

The *Personal Health Information Act* contains a provision relating to the disclosure of personal health information of a deceased person which is broader in its application than the *ATIPPA* as it now stands. For the sake of consistency between these two laws, and for the reasons outlined here, the *ATIPPA* should be brought more in line with the *PHIA*. Therefore, it is recommended that section 39(1)(q) be broadened to capture the unique family situations we encounter in today's society. Furthermore, section 39(1) must be amended to include a provision dealing with the disclosure of personal information after death. Any amendment of section 39(1) should be considered in light of

the proposed amendments to section 30, outlined earlier in this document, particularly 30(3)(m) and 30(4)(j).

Additionally, it should be noted that section 65(e) does not contemplate situations where a personal representative has not been appointed. This would result in an inability to access personal information which may be necessary to dispose of the deceased's estate, or for other valid reasons. Therefore, an amendment may be advisable which outlines who may act on behalf of a deceased where there is no personal representative.

Recommendation:	1. Section 39(1)(q) should be amended to expressly include common law spouses. 2. Section 39 should be amended to add an additional provision(s) providing for the disclosure of personal information after death: 1) for the purpose of identifying the individual; 2) for the purpose of informing a spouse, common law spouse or next of kin of the fact that the individual is deceased or presumed to be deceased and the circumstances of the death, where appropriate; and 3) for any other purpose where, in the discretion of the public body, to do so would not constitute an unreasonable invasion of privacy. 3. Section 65(e) should be amended to expressly provide for situations where there is no personal representative of the deceased. A hierarchy of relationships should be provided for.

Section 43: Review and Appeal

Subsection 43(1) provides that an access to information applicant may ask the Commissioner to review a decision of the head of a public body that relates to the request. Subsection 43(3) provides that a person who has made an access request may appeal a decision of a pubic body to the Trial Division within 30 days after being advised of that decision, and subsection 43(4) provides that a person who has appealed a decision of a public body directly to the Trial Division shall not ask the Commissioner to review a decision.

However, the *ATIPPA* currently has no prohibition against an applicant filing a request for review with the Commissioner under section 43(1) and then filing an appeal of that same decision with the Trial Division. In fact, we have experienced a situation where an applicant filed a request for review with our Office and indicated that if our Office had not resolved the matter within 30 days then the applicant would be proceeding to file an appeal with the Trial Division, and given the present wording of the *ATIPPA* there is nothing to prevent an applicant from proceeding in this manner.

This raises the issue of how the Commissioner's Office should proceed when the applicant has filed a request for review and then subsequently proceeds to file an appeal to the Trial Division in relation to the same decision of a public body. There is no existing provision which explicitly allows the Commissioner to discontinue such a request for review, although such a review would likely serve

no purpose if a court decision will ultimately decide the matter. In such situations, the public body is arguably now required to respond to the appeal in the Trial Division as well as the review process from the Commissioner's Office.

It may therefore be advisable to amend the *ATIPPA* such that an applicant has to decide whether to file an appeal with the Trial Division or to request a review by the Commissioner - an applicant should not be able to do both.

Alternately, consideration should be given to adding a provision in the *ATIPPA* setting out how the Commissioner is to proceed with a request for review when the applicant subsequently files an appeal dealing with the same matter in the Trial Division. A review of other access laws elsewhere indicates that the only other jurisdictions which allow an applicant to make a request for review and an appeal to the superior court are Nova Scotia (s. 32) and New Brunswick (s. 65 and 67 of the *Right to Information and Protection of Privacy Act,* S.N.B. 2009, c. R-10.6), but the latter does not allow the remedies to be concurrent.

While it is clear from section 43(4) that if a person appeals to the Trial Division, he or she cannot then ask the Commissioner to review a decision, it is less clear if whether or not a person first asks for a review by the Commissioner he or she can then appeal to the Trial Division, and if so, what the impact on the review before the Commissioner (assuming it is unresolved) will be. It makes sense in such a case for the Commissioner to be able to close a file, or at least hold it in abeyance until it is confirmed that the court will in fact decide the matter. Having said that, the reality of the matter is that an application may be made to court and it is possible that it might take some time before it is heard by the court.

Section 43(5) may lend support to the idea that the Commissioner may refuse to continue with a review where an appeal has been made to the Trial Division. It is important to recall that 43(4) provides that where an appeal has been made to the Trial Division, a person cannot ask the Commissioner to review the decision. That much is clear. What is unclear is whether section 43(5) may be interpreted to give the Commissioner the ability to discontinue a review when the applicant proceeds to the Trial Division after filing the request for review, but before awaiting the conclusion of the review process, and the resulting Commissioner's Report.

Worth noting, however, is the second part of section 43(4), which states that while a person who has appealed a decision directly to the Trial Division cannot ask the Commissioner to review a decision, another party to the request may do so. It is therefore also arguable that section 43(5) is in fact not intended to apply to the situation where the same person has first asked for a review and then appealed to the court, but rather where one person has applied to the court and another party to the same request has asked for a review. In such a case (so the argument would go), it is then up to the Commissioner to review the decision, act or failure to act. There is some support for this being a more accurate interpretation of section 43(5) in that the language lends itself more to the decision to *begin* a review as opposed to *continue* a review that has already been started.

Given the (at least) two interpretations of sections 43(4) and 43(5) in light of this scenario, and the possible confusion as to whether or not they address the situation of the *same* person first asking for a review then filing an appeal with the Court, it is perhaps worthwhile to consider an amendment that more clearly addresses this situation.

It is therefore recommended that there be an amendment to section 43 to make clear that an applicant cannot have the concurrent remedies of a request for review to the Commissioner and an appeal to the Trial Division.

Recommendation:	1. Maintain the right to appeal under section 43(3) but add the following provision in section 43: *Subject to section 60, if a person has filed a request for review with the commissioner under subsection (1), that person may not appeal that matter to the Trial Division;* **OR** 2. Amend subsection 43(5) to give the commissioner authority to discontinue a review if an appeal of the same matter is subsequently made to the Trial Division. The following is proposed: *(5) The commissioner may refuse to review or continue to review a decision, act or failure to act where an appeal of that decision has been made to the Trial Division.*

Section 45: Request for Review

Section 45 of the *ATIPPA* deals with the procedure to be followed when a request for review is made under section 43. Subsection 45(1) provides that the request for review shall be made to the Commissioner in writing within 60 days of the applicant's notification of the decision or the date of the public body's act or failure to act.

Subsection 45(3) provides that the Commissioner upon receiving a request for review shall provide a copy to the head of the public body concerned. It has been the practice of this Office to forward the copy of the request for review to the Access and Privacy Coordinator for the public body. The implementation of this practice takes into account the fact that the Coordinator is the person within the public body who would be most familiar with the access request and the person who would become involved in the request for review process.

It has been suggested by at least one public body that the copy of the request for review should actually be sent to the head of the public body rather than to the Access and Privacy Coordinator. It is the view of this Office that in the interests of time and efficiency the practice of sending the copy to the Access and Privacy Coordinator should be reflected in the *ATIPPA*. When this Office sends the copy of the request for review to the Coordinator we also request that the Coordinator, pursuant to section 52(3) of the *ATIPPA*, produce for our Office within 14 days a copy of the records that were sent to the applicant and a copy of all records responsive to the access request (whether or not these records were sent to the applicant). Our concern with sending the copy of the request for review to the head of the public body, rather than the Coordinator, is that it would delay the

Coordinator in responding to our request within the 14 day period set out in section 52(3). In practice, the head of the public body is often not as well versed in the *ATIPPA* as the Coordinator. Having responsibility for the operation of the entire public body, the head has many other responsibilities, and if requests for review were forwarded to the head, the result may sometimes be that such matters are not acted on as quickly as they need to be, or in fact as they currently are when sent to the Coordinator

Furthermore, our Office is of the view that our practice of sending the copy of the request for review to the Coordinator is in line with the designation required to be made by the head of the public body under section 67. Accordingly, our Office takes the position that the head of a public body is required, in accordance with section 67, to designate a person on staff to coordinate the processing of access requests and the person so designated is the Access and Privacy Coordinator. Therefore, when the Commissioner receives a request for review made under section 43 in relation to an access request, the appropriate person to receive a copy of that request for review, in accordance with section 45, is the Access and Privacy Coordinator.

Recommendation:	Therefore it is recommended that consideration be given to whether subsection 45(3) should be amended to explicitly state that a copy of the request for review be sent to the person designated by section 67 to deal with access requests on behalf of the head of the public body.

Current Language:	Proposed Language:
45(3) The commissioner shall provide a copy of a request for review to the head of the public body concerned and in the case of a request for review from a third party, to the applicant concerned.	45(3) The commissioner shall Provide a copy of a request for review to the head of the public body concerned **or to the person designated by the head under section 67** and in the case of a request for review from a third party, to the applicant concerned.

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 30 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.

It has been the experience of this Office that it is difficult to resolve many requests for review within the required 30-day period. One of the factors contributing to this difficulty is the time it takes to obtain the records from the public body, which is essential to the process. Upon receipt of a request for review, our Office pursuant to subsection 52(3), requests the public body to produce for

examination the records the public body has sent to the applicant and all records responsive to the applicant's request (whether or not these records were sent to the applicant). Subsection 52(3) allows the public body 14 days to produce the requested records and for most requests for review the 14-day period is close to expiration by the time our Office receives the records.

As a result, by the time our Office has received the records and commenced our examination of them about one-half of the 30-day period has expired, leaving about two weeks to facilitate an informal resolution between the parties. Experience has shown that this is usually not sufficient time.

The legislation in other jurisdictions in Canada authorizes the use of an informal resolution or mediation process prior to the conducting of a review or inquiry by the commissioner, and most do not set time constraints within which this process must be completed (NS and NB are exceptions, setting time limits of 30 and 45 days, respectively).

Recommendation:	It is recommended that section 46 be amended such that our Office does not have to work within the constraints of a 30-day period for informal resolution. This could be accomplished by amending the section to remove the 30-day time period. Alternatively, the section could be amended to give the Commissioner the discretion to extend the period of informal resolution.

Current Language:	Proposed Language:
46(2) Where the commissioner is unable to informally resolve a request for review within 30 days of the request, the commissioner shall review the decision, act or failure to act of the head of the public body and complete a report under section 48.	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 and complete a report under section 48.** **OR** 46 (2) Where the commissioner is unable to informally resolve a request for review within 30 days of the request **or within a longer period that may be allowed by the commissioner,** the commissioner shall review the decision, act or failure to act of the head of the public body and complete a report under section 48.

Section 47: Representation on Review

Subsection 47(1) provides that during an investigation the Commissioner shall give the following persons an opportunity to make representations:

> *(a) the person requesting the review,*
> *(b) a third party who was notified under section 28 because a disclosure of information may be harmful to that public body's business interests as set out in section 27, and*
> *(c) another person the Commissioner considers appropriate.*

Despite the fact that subsection 47(1) does not specifically provide that the public body involved is entitled to make representations, our Office has adopted the policy that a public body must have the right to make written submissions when a request for review proceeds to the formal investigation stage. Consequently, this Office always provides the public body with written notification of its entitlement to make written submissions. This policy is in line with subsection 45(3) which provides that the Commissioner is required to provide a copy of the request for review to the public body concerned and with the fact that the public body is involved in the informal resolution process outlined in section 45. It also reflects the burden of proof on public bodies established under section 64.

Recommendation:	A cross-jurisdictional survey indicates that all other provinces and territories have a provision which specifically gives the public body involved in a request for review the opportunity to make representations. Therefore, it is recommended that subsection 47(1) be amended to give the public body the right to make representations during an investigation.

Current Language:	Proposed Language:
47(1) During an investigation, the commissioner shall give the following persons an opportunity to make representations: (a) the person requesting the review; (b) a third party who was notified under section 28 or would have been notified had the head intended to give access; and (c) another person the commissioner considers appropriate.	47(1) During an investigation, the commissioner shall give the following persons an opportunity to make representations: (a) the person requesting the review; (b) a third party who was notified under section 28 or would have been notified had the head intended to give access; (c) **the head of the public body concerned; and** (d) another person the commissioner considers appropriate

Section 48 – Time Limit for a Review

Currently, section 48 of the *ATIPPA* states that the Commissioner "shall complete a review and make a report under section 49 within 90 days of receiving the request for review." The only provincial jurisdiction with a shorter time frame is New Brunswick, where the old *Right to Information Act* (which is about to be repealed and replaced by the new *Right to Information and Protection of Privacy Act*) provides a total time period of 30 days.

This change will leave the NL OIPC with the shortest and least flexible legislative time period in Canada within which to complete a review and issue a report. While several other oversight offices have a 90 day time period, they also have the power to formally extend that time period.

It was identified early on in the existence of the OIPC that the firm 90 day time period could cause problems for applicants requesting a review, as well as creating the potential for a legal challenge to the Commissioner when our deadline was not met.

The 90 day time period was dealt with, albeit indirectly, by the courts in this province in *McBreairty v. Information & Privacy Commissioner, 2008NLTD65*. In that case, the OIPC attempted to refuse to consider new requests for review from Mr. McBreairty until all of the reviews he had initiated which were presently part of the Office's caseload were concluded. At that time, the OIPC was facing a relatively large volume of such reviews already ongoing from that applicant. Because of the number and frequency of such requests, it became apparent that it would no longer be possible for the OIPC to continue to issue reports within the legislated 90 time frame, and we were uncertain as to how this might impact the status of our Reports issued after that time. We were also quite concerned that with such a volume of requests for review from one applicant impacting our overall caseload, we might be unable to adequately process requests for review and complaints from any applicants. Furthermore, a public body might issue a legal challenge to the validity of one of our Reports issued beyond the 90 day time frame, and this could seriously prejudice the rights of applicants under the *ATIPPA*.

Judge Seaborne concluded that Mr. McBreairty's substantive rights under the *ATIPPA* would be interfered with if the decision of the OIPC to bar further requests were to stand and that it failed the test of reasonableness, and was therefore quashed. Judge Seaborne suggested that the OIPC find another option, such as a "banking system" as was referenced in a decision from the Ontario Commissioner's Office. The OIPC did not appeal the decision, and adopted a banking system as an interim measure as per the court's suggestion, with the hope that this issue could be addressed through an amendment during this legislative review process.

It should be noted that the Ontario legislation does not list a definitive time frame for the issuance of a report or conclusion of a review. Therefore, a banking system in that jurisdiction is compatible with the applicable legislation. However, in this province, the OIPC is of the view that a banking system which allows us to consider certain requests for review to be inactive, and therefore in a "bank," is not compatible with the legislated 90 day time frame. Furthermore, neither the Federal Access Commissioner, nor those in Saskatchewan and Nova Scotia have legislated time frames for the issuance of a report.

Of those jurisdictions which have legislated time periods, the most common model is the one shared by Alberta, Manitoba, and PEI, as well as the new legislation awaiting proclamation in New

Brunswick. In those four jurisdictions, the 90 day time period is supplemented with a provision allowing the Commissioner to extend the time period for a review upon notification of the parties involved, as long as the Commissioner also provides an anticipated date for completion of the review. In the Yukon, the Commissioner may extend the 90 day period for an additional 60 days if necessary for mediation. Other models of note are the Northwest Territories, which provides for completion of a review within 180 days, and British Columbia, which stipulates a 90 day time frame, although the Commissioner may delay or adjourn the investigation for the purposes of informal resolution, and that delay or adjournment is not to be calculated as part of the 90 days.

The Court of Appeal in Alberta has ruled on the issue of time periods for the completion of a review by the Alberta Commissioner in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner), 2010 ABCA 26*. Any consideration of this matter may benefit from a careful review of that case and the related lower court ruling. It should also be noted that the Alberta Commissioner is pursuing an appeal to the Supreme Court of Canada in relation to this matter, although the case has not yet been heard.

Obviously there is a significant public interest at stake in the timely completion of reviews. Sometimes, access delayed is access denied, and when access is partly dependant on the outcome of a recommendation from this Office, delays can have serious consequences. As an impartial body which undertakes to support the public right of access to information with limited and specific exceptions, we always work towards the most timely outcomes. That being said, sometimes the 90 day time frame is impossible to achieve. As the public becomes more aware of their rights under the *ATIPPA*, our caseload has gradually increased. Once the Office falls behind, it is very difficult to catch up. For example, our Office is still working to complete the last of the reviews which were placed in a "bank" as a result of the decision by Judge Seaborne 3 years ago. We have no way of predicting whether a similar large volume of reviews will again be requested in a short period of time. Another consideration is the impact on our workload of the *Personal Health Information Act*, and the oversight role of this Office in relation to that legislation, when proclaimed. These are just a few of the variables which make the time period for completion of a report difficult to predict now and in the coming years.

Recommendation:	It is recommended that the *ATIPPA* be amended to allow for greater flexibility in the time frame for completion of a report. This should encompass some degree of flexibility, as well as account for sometimes lengthy but usually productive informal resolution processes which can involve multiple parties.

Current Language:	Proposed Language:
48 The commissioner shall complete a review and make a report under section 49 within 90 days of receiving the request for review.	48(1) The commissioner shall complete a review and make a report under section 49 within 90 days of receiving the request for review, **unless the Commissioner** **(a) notifies the person who asked for the review, the head of the public body and any other person given a copy of the request for review that the Commissioner is extending that period; and** **(b) provides an anticipated date for the completion of the review.** **(2) (a) The commissioner may defer beginning or may adjourn a review under section 43 to provide sufficient time to enable informal resolution of the matter as provided by section 46.** **(b) The period of adjournment or deferral under subsection 2(a) must not be included for the purpose of calculating the time period under subsection 1.**

Part C

Other Issues

Lack of Explicit Authority to Investigate Privacy Complaints (Part IV)

At present, there are no explicit provisions in the *ATIPPA* granting the commissioner the ability to investigate a privacy complaint. Section 43(1) provides that a person who has made a request for correction of personal information may ask the Commissioner to review a decision, act or failure of the head of a public body that relates to the request, however this is the only section that grants the Commissioner explicit authority to review an issue arising out of Part IV (Protection of Privacy). It may be surprising to many that there are no specific provisions granting the Commissioner the power to investigate a complaint or a reported privacy breach, or initiate his own investigation of an alleged contravention of the *ATIPPA* provisions relating to the collection, use and disclosure of personal information.

Section 51 of the *ATIPPA* sets out the general powers and duties of the Commissioner, including the mandate to "make recommendations to ensure compliance with this *Act* and the regulations," and the OIPC has relied on this section in order to support its ability to conduct investigations related to the privacy provisions in Part IV. However, it is the view of the Commissioner that it is necessary to amend the *ATIPPA* so as to clarify this ability, and in particular to confirm that the Commissioner has the ability to conduct reviews and to issue recommendations arising out of those investigations. Failure to do so may eventually result in a legal challenge from a public body on this matter, and it will then be left to the courts to make a determination as to the extent of the Commissioner's authority in this regard.

In the majority of the other jurisdictions in Canada, commissioners or their equivalent do have some explicit authority to conduct investigations relating to privacy complaints. In Alberta, British Columbia, Prince Edward Island, New Brunswick, and Manitoba, the commissioners have the authority to conduct investigations that would ensure compliance with the various access to information and protection of privacy acts, which would include the ability to conduct investigations to ensure compliance with the privacy provisions of these various acts.

Some jurisdictions state specifically that the commissioner has the ability to investigate and resolve complaints relating to the collection, use and disclosure of personal information, and these sections are distinct from the sections that provide individuals with the right to ask for a review. In Alberta, British Columbia, and Prince Edward Island, this is included as a "general" power of the commissioner.

What is not necessarily clear, however, is what is considered a "complaint". While logically these provisions confirm the commissioners' ability to investigate and attempt to resolve complaints filed with each commissioner by an individual, it is less clear whether these sections can also include complaints made in public, but not necessarily to the commissioner, or complaints made to the commissioner by someone other than a directly affected individual.

Certain jurisdictions clarify this issue through the inclusion of provisions that provide not only that the commissioner can investigate complaints by a person who believes that his or her personal information has been improperly collected, used, or disclosed, but also that the commissioner may

conduct an inquiry into privacy issues, whether or not a review is requested. There is some advantage in including this type of provision as it further clarifies the Commissioner's ability to initiate a review into privacy issues, whether or not a complaint has been made.

Most jurisdictions also provide that a person who believes that his or her own personal information has been improperly collected, used or disclosed can ask for a review by the commissioner. Such a provision is present in Alberta, British Columbia, Manitoba, New Brunswick, Northwest Territories, Nova Scotia, Prince Edward Island, and the Yukon.

Again, in most jurisdictions, once a complaint is filed, the commissioner will then follow the same sort of procedure that is in place for the investigation and resolution of access complaints. Generally, there are provisions to attempt to mediate and settle the issue. If this is not successful, the commissioner can then proceed to conduct an inquiry, which will result in a report that sets out the Commissioner's recommendations or orders (where the commissioner has the ability to make orders).
It is advisable to have this type of provision as it provides individuals with a clear right to ask for a review where they believe that their personal information has been improperly collected, used or disclosed, and it links to the notion set out above that a provision be included that the Commissioner may investigate and attempt to resolve such complaints.

The *Personal Health Information Act* (*PHIA*), which has yet to be proclaimed, includes provisions that set out the powers of the Commissioner in reviewing complaints made under that legislation. The wording used in *PHIA* addresses several of the above recommendations. Section 65 of *PHIA* confirms that an individual (a "complainant") may request the Commissioner to review not only an access to or correction of information issue, but also any "alleged breach" of a provision of the Act, which would include a breach of the privacy provisions. Section 66(3) of *PHIA* speaks as well to the ability of an individual to complain where there has been a contravention of one of the provisions. Importantly, the individual who files the complaint need not be the person whose own personal information was involved in a contravention of *PHIA*, because any person who has reasonable grounds to believe that there has been (or there is about to be) a contravention of that *Act* with respect to the personal information of another individual can also make a complaint. Arguably, this would allow the Commissioner to initiate an investigation himself.

Note that 67(1) of *PHIA* provides that the Commissioner may take steps to resolve a complaint informally. Section 67(2) provides that where an informal resolution cannot be reached, the "commissioner shall complete a *review* of the subject matter of the complaint if he or she is satisfied that there are reasonable grounds to do so." Once the review is complete, the Commissioner prepares a report that sets out his recommendations.

These provisions address the concerns raised in the proposed recommendations above. In particular, they reflect recommendation #3 (below) that the *ATIPPA* include a right for an individual to request a review by the Commissioner involving a complaint about the collection, use or disclosure of personal information. Such a process is then carried out in much the same way as an access to information request for review is addressed under *ATIPPA* (i.e. Commissioner undertakes informal resolution then moves to formal review once that is complete).

The language of *PHIA* is clearer than *ATIPPA* in its use of "complaint" and "review". While the *PHIA* language is helpful, it should be noted that it does not fully address some of the aspects set out in these recommendations.

The *ATIPPA* should include a general provision clarifying that the Commissioner has the ability to conduct investigations to ensure compliance with the Act. This would not be limited to conducting investigations relating to privacy issues. As noted above, this would also enable the Commissioner to address any other systemic issues that may arise under *ATIPPA* that are not necessarily clearly addressed in the Act. The Commissioner is presently charged under section 51(a) with the power and duty to make recommendations to ensure compliance with the *Act*, but practically speaking this is generally not possible without conducting an investigation to determine the nature of the particular compliance issues in order to make a relevant recommendation. As the *ATIPPA* now stands, public bodies have been cooperative during such investigations, however several have questioned the Commissioner's authority in this regard. Again, without specific amendment to the *ATIPPA* to address this question, it may eventually be left to the courts to make a determination, which is not in the interest of either complainants, public bodies, nor the OIPC. All parties in such a proceeding would be forced to expend their time and resources on that process, when the decision may in fact be better left to the legislature.

The *ATIPPA* should also provide that the Commissioner may investigate and attempt to resolve complaints that personal information has been improperly used, collected or disclosed, and that the Commissioner may initiate a review into a contravention of the privacy provisions and make recommendations once that review is complete.

Recommendations:	1. The *ATIPPA* should be amended to include a provision clarifying that the Commissioner has the ability to conduct investigations that would ensure compliance with the *Act*. 2. The *ATIPPA* should include not only a provision that the Commissioner may investigate and attempt to resolve complaints that personal information has been improperly used, collected or disclosed (which provision is not currently in the *ATIPPA*), but also a specific provision that the Commissioner may initiate a review into a contravention of Part IV and make recommendations once the review is complete. 3. The *ATIPPA* should be amended to include a right to ask for a review by individuals who believe that their own personal information has been collected, used or disclosed in contravention of Section IV, and that upon filing a request for review, the issue will be addressed in a similar manner as a request for review relating to an access to information complaint. 4. That the *ATIPPA* use the same language as *PHIA* with respect to the ability of an individual to file a "complaint" which, if not informally resolved, will then be subject to a "review" by the Commissioner.

Proposed Language:

50(1) In addition to the commissioner's powers and duties respecting reviews, the commissioner may

…

(g) conduct investigations to ensure compliance with any provision of this *Act*.

44 The commissioner may investigate and attempt to resolve complaints that

…

(c) personal information has been collected, used or disclosed by a public body in contravention of Part IV.

43(1.1) An individual who believes on reasonable grounds that his or her own personal information or the personal information of another has been or is about to be collected, used or disclosed in contravention of Part IV, may ask the Commissioner to review that matter.

Sections 21, 52, & 56: Impact of Court Decisions on Commissioner's Authority

The *Act* gives the Information and Privacy Commissioner the mandate to investigate and mediate complaints, as well as make recommendations to public bodies in respect of the proper application of the *Act*. This includes oversight of the proper application of section 21 (Legal Advice). An assessment of the existence of a claim of solicitor-client privilege under section 21(a) can require the Commissioner to examine the records at issue. Recently, the Commissioner has been involved in a court case involving sections 21 and 52 of the *Act* wherein the Public Body withheld the records in their entirety from both the Applicant and the Commissioner's Office citing section 21. Prior to this case, all records for which there was a claim of section 21 were routinely provided to the Commissioner by the public body when a request for review was filed by an applicant. The reason for this disclosure was solely for the purpose of verifying the existence of the privilege and only when necessary for that purpose alone. If this Office found that the records, or a portion thereof, did not fall under section 21, we would complete the review and recommend their release. If however, we agreed with the claim of section 21, those records would not be recommended for disclosure to the applicant. As stated by the Honourable Justice Fowler in his decision rendered 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. He can only recommend such release which can be refused by the head of the public body resulting in an appeal to the Trial Division."

Section 52 of the *Act* provides that the Commissioner may require a public body to produce to the Commissioner for examination any record in the custody or control of the public body which the Commissioner considers relevant to an investigation. Section 52(3) further provides that any record requested by the Commissioner must be provided to the Commissioner within 14 days of the Commissioner's request "notwithstanding another Act or regulations or a privilege under the law of evidence." The Commissioner takes the view that section 52 of the *ATIPPA* clearly requires public bodies to produce all records relevant to an investigation. However, the Public Body in the above-referenced case differed in its interpretation of the legislation, refusing to allow the Commissioner to review the records in question.

On February 16, 2010 the Honourable Madam Justice Valerie L. Marshall upheld the position of the Public Body, citing the development of the law surrounding solicitor-client privilege over the past number of years, and its elevation from a rule of evidence to a rule of substance. Prior to this case, this Office had dealt with 49 cases where solicitor-client privilege was claimed, and in all cases those records were provided to the Commissioner for review. Again, in all 49 cases the information was reviewed, and where the Commissioner agreed that the solicitor-client exception applied, the information was not recommended for release. With the subject case, the Public Body refused to provide any of the responsive records to the Commissioner citing section 21. This raises the question, does the Commissioner simply accept the opinion of the head of the public body that the information being requested does indeed fall under section 21? If that were the case, it could arguably be seen to erode the confidence of the public in the *Act* by the appearance or perception that the process is not independent, transparent or accountable. It could also be argued that the head of the public body could intentionally withhold information from review by the Commissioner by simply stating that it falls under section 21. What has occurred in this case is that the Public Body has applied a section 21 blanket exception to all the responsive records subject to the request based on the fact that the records were forwarded to legal counsel for review. The question then becomes, how can the Commissioner confirm that the exception is properly claimed?

Bearing in mind the relatively large number of previous requests for review where section 21 has been claimed, the current situation proves problematic and could significantly impact the Commissioner's mandate to provide appropriate oversight of the *ATIPPA*, particularly if section 21 continues to be claimed often, or perhaps if such claims were to increase in frequency.

One major impact from Judge Marshall's decision pertains to the informal resolution process. This Office takes great pride in the high percentage of reviews and complaints that are able to be resolved informally. This can only occur when applicants can be assured that the Commissioner's Office, as an independent body, has reviewed the records in question and can provide the necessary assurance that Applicants have received all appropriate records. The alternatives to informal resolutions would likely include more formal reports being issued by this Office, causing additional delay and greater impact on the time and resources of both public bodies and applicants. A further alternative would involve much more frequent recourse to the courts which would cause even greater impact on the time and financial resources of all concerned. With this latter route, the courts would simply be asked to take on the task (which was until recently undertaken by the Commissioner) of reviewing claims of solicitor-client privilege on a relatively routine basis. It is difficult to imagine that either of these outcomes will be viewed favourably by applicants or public bodies, both of whom will find the process more onerous.

The genesis of this situation we now find ourselves in can be traced back to a 2008 decision of the Supreme Court of Canada. In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, the Supreme Court of Canada held that the Privacy Commissioner of Canada did not have the right to access solicitor-client documents to determine whether a claim by a public body to withhold them on the basis of solicitor-client privilege had been properly claimed under the *Personal Information Protection and Electronic Documents Act*. In the Court's view that role is reserved for the courts unless there is clear and explicit language in the relevant legislation that permits a statutory official to "pierce" the veil of solicitor-client privilege.

The *Blood Tribe* decision is significant, despite the fact that it deals specifically with federal access to information legislation, for the administration of the *Act* as it clarifies how legal principles governing solicitor-client privilege apply to the interpretation of provisions in legislation like the *Act* that may affect solicitor-client privilege. The Supreme Court held that:

a. Solicitor-client privilege has a uniquely important status in our legal system and thus within the scheme of exceptions to disclosure in information and privacy legislation.

b. Legislative language that may result in incursions on solicitor-client privilege – including provisions for the confidential review of records for the purpose of verifying the existence of that privilege – must be interpreted restrictively. Explicit language must be used in document production provisions in access to information privacy legislation in order to include records that are protected otherwise by solicitor-client privilege.

c. Adjudicative review to verify the existence of solicitor-client privilege is an incursion on the privilege that may only be done when necessary to fairly decide the issue.

Following the decision in *Blood Tribe*, commissioners in a number of jurisdictions across Canada implemented a review process strictly for examining claims of solicitor-client privilege. These processes have proven to be a sound method of proceeding under the existing legislative framework in those provinces.

Nevertheless, some of the same jurisdictions continue to express the need for more explicit language surrounding solicitor-client privilege and a Commissioner's ability to independently review and verify claims of same in respect of exceptions to disclosure under access to information and protection of privacy legislation.

We recommend amendments to section 52 of the *Act* to make it explicitly clear that the Commissioner has the power to review records that a public body claims it is authorized to withhold on the basis of solicitor-client privilege. Section 44(2.1) of the *Freedom of Information and Protection of Privacy Act* of British Columbia also includes a provision which confirms that privilege is not affected by disclosure to the Commissioner:

> *(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.*

Therefore, we further recommend that section 21 of the *Act* be amended to include an affirmation of the existence of solicitor-client privilege despite the disclosure of records to the Commissioner which are found to, in fact, be solicitor-client privileged. Also, in keeping with the desire to preserve the protection afforded by solicitor client privilege, we recommend that section 56(4) of the *Act* be repealed.

The following amendments are proposed to deal with the problem of the Commissioner's fundamental right to examine records in order to be able to carry out his statutory function of reviewing a decision, act or failure to act of a public body in relation to a request for access to a record. These amendments will protect the fundamentally important right of solicitor-client privilege while at the same time enabling the Commissioner to appropriately and effectively carry out the mandate imposed by the *Act* to verify claims of solicitor-client privilege. (This proposed revision also applies to our recommendation regarding the Commissioner's ability to review records for which section 5 has been claimed – see above).

Recommendation:	The *ATIPPA* should be amended to expressly preserve and protect the substantive solicitor-client privilege despite the Commissioner's confidential examination of the records in issue, when such an examination is necessary to verify the existence of the privilege. Section 52 of the *Act* should be amended to explicitly permit the Commissioner to review records that are being withheld by a public body on the basis of solicitor-client privilege in order to verify that the privilege applies. This should include specific and explicit authority to investigate and mediate complaints, as well as make recommendations to public bodies in respect of whether a public body is authorized to refuse access to information on the ground of section 21, specifically solicitor-client privilege. Section 56 of the *Act* should be amended such that the Commissioner's discretion to disclose information relating to the commission of an offence to the Attorney General pursuant to subsection (4) is removed.

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*. (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 and may examine information in a record, including personal information. (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 another Act or regulations or a privilege under the law of evidence. (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.	52(1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the Public Inquiries Act. (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 (k) of this Act**, and may examine information in a record, including personal information. (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 another Act or regulations or **any claim of** privilege, **whether** under the law of evidence **or otherwise, including a claim of solicitor-client privilege, or that the record is described in paragraphs 5(1) (a) to (k) 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.

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 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 in the five years 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)

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

Frivolous or Vexatious Clause

This Office does not take lightly any proposal to restrict an applicant's right of access to information. Nevertheless, we recognize that applicants using this province's access and privacy regime may make requests for information for reasons that are inconsistent with the spirit of the *ATIPPA*, although this has certainly not been a major cause for concern from the perspective of the OIPC. If and when it does occur, however, it is arguable that the *ATIPPA* should be amended to provide better mechanisms to handle such instances.

Access and privacy legislation in most other provinces includes provisions that reconcile overarching principles of access with the reality that applicants might make requests that are repetitious, frivolous, vexatious, made in bad faith or place an unreasonable burden on the resources of a public body.

There are no provisions in Newfoundland and Labrador's *ATIPPA* that enable a public body to reject an access request if the head of a public body believes the applicant is making a frivolous or vexatious request, or otherwise acting in bad faith. However, there are provisions that offer public bodies recourse to deal with repetitive or unclear access requests, or requests that might require considerable time for a reasonable response to be prepared.

Section 8(2) requires that a request for information be in the form set by the minister responsible for the Act and that the request provide sufficient details about the information requested that an employee familiar with the records can identify the appropriate record. Section 13 permits the head of a public body to refuse to disclose a record if the request is "repetitive or incomprehensible or is for information already provided to the applicant." Section 16(1)(a) and (b) permits the head of a public body to extend the time limit for responding to an access request if the applicant does not give adequate details to enable the public body to identify the requested record, or if a large number of records is requested or must be searched, and responding within the 30 day time period would interfere unreasonably with the operations of the public body.

One province, Ontario, authorizes rejection of an access request if on reasonable grounds the head of a public body believes the request is frivolous or vexatious. Other provinces authorize their Information and Privacy Commissioner to consider a public body's request to disregard an access request as frivolous, vexatious or otherwise submitted in bad faith (e.g., Alberta, British Columbia, Prince Edward Island and Quebec). A number of provinces and territories also permit the Information and Privacy Commissioner to refuse to conduct a review of an access request (or abandon a review that has already begun) if it is determined that the request is frivolous or vexatious (e.g., Manitoba, Saskatchewan, Quebec, New Brunswick, North West Territories and Nunavut). Other grounds for refusing to conduct a review include bad faith, abuse of the right to make a request, trivial purpose and insufficient educative value.

Legislative committee debate in many provinces has identified concerns regarding the subjectiveness of the discretion to deem an access request frivolous or vexatious. Moreover, there is little uniformity across jurisdictions in the grounds identified in statutory provisions allowing a public body to reject an access request. In general, Commissioners have determined that the threshold to be met for a frivolous or vexatious clause is high. In turn, frivolous has been defined as lacking legal merit or trivial, while vexatious has tended to be defined as lacking ground for action, annoying or in bad faith.

It is worth pointing out that the provincial *PHIA* includes a frivolous or vexatious clause, which is applied by custodians and not the Commissioner. Section 58(3) authorizes a health information custodian to refuse an access request for a personal health information record where the custodian believes on reasonable grounds that the request for access is:

a. frivolous or vexatious,
b. made in bad faith, or
c. for information already provided to the individual

The language of this provision is similar to Ontario's *FIPPA* in that the public body is authorized to refuse an access request without prior recourse to the Information and Privacy Commissioner (In the Ontario provisions, as in our *PHIA*, an applicant may appeal to the Commissioner for Review after an access request has been rejected). Notably, section 27.1(1)(b) of Ontario's *FIPPA* requires

that written reasons be given explaining the head of a public body's decisions to reject an access request.

In a similar vein, section 58(3) of the *PHIA* is worded such that the discretion of a custodian to refuse an access request must be based on "reasonable grounds." In a review by this Office of an exercise of discretion by a custodian under section 58(3), this Office, like Ontario's, would likely require that the applicant be provided written reasons for the rejection of an access request. This would be in keeping with the requirement in section 58(3) of the *PHIA* that the custodian have "reasonable grounds" for exercising the discretion to reject an access request.

As noted above, several jurisdictions authorize public bodies to reject access requests only upon agreement by the commissioner. This Office agrees with this approach, but would recommend adoption of the *PHIA* frivolous or vexatious provision for two reasons:

1) The effective and efficient conduct of reviews by this Office would be better facilitated by the adoption of a consistent approach to a frivolous or vexatious clause in the *PHIA* and *ATIPPA*, considering that several large public bodies will be subject to both.

2) This approach ensures that any exercise of discretion by a public body to reject an access request is accompanied by written reasons, which can then be the subject of a request for review by this office.

The *PHIA* also authorizes the Commissioner in section 67(3)(d) to reject a Request for Review of a complaint regarding a custodian's actions in relation to an access request if it is determined that the complaint is trivial, frivolous, vexatious or made in bad faith. This is indeed a departure from the *ATIPPA*, which grants no discretion to the Commissioner to refuse to conduct a Review if one is requested by an applicant. That said, while this Office is reluctant to recommend adoption of a frivolous or vexatious clause for the *ATIPPA* because of our concerns regarding the subjectiveness of any exploration into the motives of an applicant who makes an access request, we recognize the value of ensuring that public bodies are not forced to expend considerable resources responding to access requests that are *not* submitted with the aim of achieving ends consistent with the purposes of the *Act*.

Recommendation:	If the Department of Justice chooses to amend the *ATIPPA* to include a provision permitting a public body to reject an access request as frivolous or vexatious, the OIPC recommends that the provision be substantially similar to section 58(3) of the *PHIA*. In turn, the decision of a public body to reject an access to information request should be reviewable by the commissioner and/or court. Furthermore, if an amendment to the *ATIPPA* is made to introduce a frivolous or vexatious clause, then the OIPC also recommends that the *ATIPPA* be amended to grant the commissioner the same discretion as that found in section 67 of *PHIA*.

Appeal where the OIPC is the Subject of the Complaint

Amendments to the *ATIPPA* in 2008 established the OIPC as a public body subject to the *Act*. Consequently, there is potential for the OIPC to become the subject of an appeal or complaint in relation to an access to information request which an applicant might file to this Office. Other jurisdictions provide an explicit alternative oversight for such situations. The prospect of having the Commissioner review a complaint about a decision made by his own Office is a non-starter. This could be remedied through legislative improvements which could provide for an adjudicator to investigate such complaints**.** We recommend that such a provision be included in the *ATIPPA*.

Recommendation:	That the following BC provision be adapted for this jurisdiction: **Adjudicator to investigate complaints and review decisions** (1) The Lieutenant Governor in Council may designate a person who is a judge of the Supreme Court to act as an adjudicator and (a) to investigate complaints made against the commissioner as head of a public body with respect to any matter referred to in section___; (b) to determine, if requested under section __, whether the commissioner as head of a public body is authorized to disregard a request made under sections __; and (2) An adjudicator may retain the services of any persons necessary to assist the adjudicator in performing his or her functions under this Act. (3) The government may pay out of the consolidated revenue fund, (a) to an adjudicator, the expenses a judge is entitled to receive under section 57(3) of the Judges Act (Canada) while acting as an adjudicator, and (b) to a person whose services are retained under subsection (2), remuneration for those services.

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 significant and 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. 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.