December 14, 2007 **2007-018**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-018

Town of Portugal Cove-St. Philip's

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records relating to an application he made to the Town of Portugal Cove-St. Philip's (the "Town") for a building permit. The Town disclosed some of the requested records but denied access to the agendas for two privileged meetings of a Committee of Council, relying on the exception to disclosure set out in section 19(1)(c) of the *ATIPPA.* The Commissioner concluded that the Town was not entitled to refuse disclosure of the records because disclosing the information in the agendas would not reveal the substance of the deliberations of a meeting held in the absence of the public and he recommended release of the two agendas. The Commissioner also found that the Town, by not conducting a complete and accurate search for the responsive records, had failed to fulfil its duty to assist as mandated by section 9. The Commissioner in addition ruled that the Town had improperly destroyed records that were subject to the *ATIPPA.* The Commissioner recommended that the Town improve its procedures for searching for responsive records and update its Records Retention Policy in relation to notes taken at meetings by Councilors and staff.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(j), 2(k), 2(p), 2(q), 3, 7, 9, 19, 46, 47, and 64; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 12; *Municipalities Act, 1999*, S.N.L. 1999, c. M-24, ss. 2(1)(p), 25, 213; *Municipal Act, 2001*, S.O. 2001, c. 25, s. 239; *Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-004, 2007-004, 2007-009, 2007-010, and 2007-016; British Columbia OIPC Order No. 02-09; *London(City) v. RSJ Holding Inc*. 2007 SCC 29; Saskatchewan OIPC Report LA-2004-001.

Other Sources Cited:

Website of the Town of Portugal Cove-St. Philip's, available at http://ws959318.websoon.com/council.

Access to Information and Protection of Privacy Act Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at http://www.justice.gov.nl.ca/just/civil/atipp/Policy% 20Manual.pdf.

Government of Canada *Access to Information Review Task Force Report*, available at http://www.atirtf-geai.gc.ca/paper-transitory-e.html#intro.

Website of the Newfoundland and Labrador Office of the Chief Information Officer, available at http://www.ocio.gov.nl.ca/im/pdf/trim-bus-rules.pdf.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant on 13 February 2007 submitted an access to information request to the Town of Portugal Cove-St. Philip's (the "Town"), wherein he sought disclosure of records relating to his application to the Town for a building permit as follows:

> *All information (correspondence) which relates to the file (application)* [*Applicant's property*] *including:*
> *- Development Committee minutes (recommendations) from Nov. 28, Dec. 12, Jan. 9, Jan. 23, and Feb. 5*
> - *all notes that councilors or staff may have brought or taken during these meetings including recommendations made by staff.*
> *- All notes that any councilor/staff may have brought or taken during the following council meetings: Dec. 5, Dec. 19, Jan. 16, Jan. 30.*
> *- Executive Council minutes (recommendations) for the period from Dec. to the present (Feb. 11)*
> - *all notes that councilors/staff may have brought or taken during these meetings.*
> *- Any notes or correspondence that Town staff may have made or received including the Town's legal department.*
> *- Copy of regulations that this application does not meet.*
> *- Copy of Town's procedure with regards to the issuance of Stop Work Orders. Also, who has the authority to issue it?*
> *- Copy of any notes any councilor may have especially Councilor* [*Name*].
> *- Copy of any photos or other information that relates to this file.*
> *- Any other information that relates to file.*

[2] I note here that the Town denied the Applicant's request for a building permit and the Applicant is in the process of appealing the Town's decision.

[3] The Town by correspondence dated 21 March 2007 from its Access and Privacy Coordinator (the "Coordinator") disclosed some of the requested information to the Applicant and by further correspondence dated 22 March 2007 the Town released additional information to the Applicant. The Town did not provide all of the requested information and in its 21 March 2007 correspondence indicated that it was relying on section 19 of the *ATIPPA* to deny access to information regarding privileged meetings.

[4] The Applicant in a Request for Review dated 28 March 2007 and received in this Office on 30 March 2007 asked for a review of the Town's decision to deny access to some of the requested information. In his Request for Review the Applicant indicated that "the Town is very hard to get information from." He also indicated that he had a "feeling that there is more information being withheld" and that he "has knowledge that an email had been sent on Dec 21/2007 [sic]." (This is a reference to an e-mail exchange between a staff member and members of Council on 21 December 2006 and will be discussed later)

[5] During the informal resolution process the Town agreed to release additional information to the Applicant, but has refused to release the Agendas for meetings of its Planning and Development Committee held on 9 January 2007 and 6 February 2007. As such, attempts to resolve this Request for Review by informal means were not successful and on 30 July 2007 the Applicant and the Town were both advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office pursuant to section 47.

II APPLICANT'S SUBMISSION

[6] The Applicant's submission is set out in correspondence dated 8 August 2007. The Applicant expresses a concern that the Town may be withholding information that "no one on the outside would know about," particularly from "people that do not know how the system works." The Applicant also states that a councilor is supposed to retain all documents related to Council business and expresses concern that a member of Council shredded notes related to the Applicant's file.

[7] The Applicant further states that the Agendas for Committee meetings should not be privileged information and asks that the issue of municipal councils being "open" to the public be addressed in this Report. In that regard, the Applicant refers to a Supreme Court of Canada decision dated 21 June 2007.

III PUBLIC BODY'S SUBMISSION

[8] In response to the letter dated 30 July 2007 sent by my Office advising the Town of the opportunity to make a written submission, the Town forwarded to my Office an e-mail dated 8 August 2007 stating that "[t]he Head does not know what else can be offered in support of their decision . . . ." The Town further indicated that "[y]ou may proceed with the information that has been sent to you, it is believed that you have everything in your possession that we have." Therefore, in order to put forth the position of the Town it will be necessary to make reference to previous correspondence from the Town that has been filed with my Office.

IV DISCUSSION

[9] Before discussing the issues arising in this Request for Review, I will make some general comments on the *ATIPPA.*

[10] The purposes of the *ATIPPA* are set out in section 3, as follows:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of personal information about themselves;*
>
> *(c) specifying limited exceptions to the right of access;*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[11] Section 7 of the *ATIPPA* establishes the principle that there is a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions, as follows:

> *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[12] Section 64 of the *ATIPPA* sets out the burden of proof to be applied on a Request for Review made to the Information and Privacy Commissioner as follows:

> *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.*
>
> *(2) On a review of or appeal from a decision to give an applicant access to a record or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.*

[13] A reading of sections 3, 7, and 64 indicates that the purpose of the *ATIPPA* is to make public bodies more accountable to the public by giving the public a general right of access to records in the custody of or under the control of a public body subject only to limited and specific exceptions. When a public body has denied access to a record and the Applicant has requested a review of that decision by the Information and Privacy Commissioner then the public body bears the burden of proving that the applicant has no right of access to the record or part of the record pursuant to section 64(1).

[14] As I discussed in my Report 2007-004, the *ATIPPA* does not set out a level or standard of proof that has to be met by a public body in order to prove that an applicant has no right of access to a record under section 64(1). In my Report 2007-004, I adopted the civil standard of

proof as the standard to be met by the public body under this section. In order for the public body to meet the burden of proof in section 64(1), the public body must prove on a balance of probabilities that the applicant has no right to the record or part of the record.

[15] I will now discuss the issues before me in this Request for Review.

[16] The Town takes the position that the Agendas for meetings of its Planning and Development Committee held on 9 January 2007 and 6 February 2007 relate to privileged meetings of the Committee. In its letter dated 21 March 2007 the Town advised the Applicant as follows:

> *With regard to the Privileged Sessions, the Head wishes to advise that, under section 19 – Local Public Body Confidences, it may refuse to disclose to an applicant information that would reveal (c) the substance of deliberations of a meeting of its elected officials or governing body, where an act authorizes the holding of a meeting in the absence of the public.*

[17] Therefore, the Town submits that it is entitled to deny disclosure of the Agendas pursuant to section 19 of the *ATIPPA* which provides as follows:

> *19. (1) The head of a local public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts;*
>
> *(b) a draft of a private Bill; or*
>
> *(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.*
>
> *(2) Subsection (1) does not apply where*
>
> *(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*
>
> *(b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.*

[18] It is necessary at this stage to discuss briefly the role and composition of the Town's Planning and Development Committee. The following information is taken from the Website of the Town which is available at http://ws959318.websoon.com/council/committees.asp:

> *The Town of Portugal Cove-St. Philip's operates under a committee structure where each councillor chairs a separate committee. Every councilor also serves on an additional committee. The committees consist of three councilors and one staff person. The committees then address issues relevant to their particular mandate, and the Chair reports at the Public Council Meeting, held on the second and fourth Tuesday of every month.*

[19] The Town's Website also indicates that the Planning and Development Committee is comprised of three elected officials, one of whom serves as chairperson, and the Planning and Development Officer. The Committee's mandate is to provide direction and recommendations to council and staff regarding planning and development matters for the Town. (available at http://ws959318.websoon.com/council/com.asp?id=16)

[20] The two Agendas which are the subject matter of this Report are both entitled *Planning and Development Committee Agenda* and consist of a list of the matters that the Committee proposes to discuss at its meeting. Following the meeting, the Town's staff prepare another document entitled *Planning and Development Committee Report*, which provides an outline of the matters discussed at the Committee meeting along with the recommendations of the Committee in relation to those matters. The report is tabled at a public meeting of the Council and the matters in the Report are discussed in the open meeting.

[21] The Town has disclosed to the Applicant the *Planning and Development Committee Report* for the Committee meeting held on 9 January 2007 but takes the position that this document was released in error and that the Town was entitled to deny its disclosure on the basis of section 19(1)(c) of the *ATIPPA*.

[22] The Town has not disclosed the *Planning and Development Committee Report* for the meeting of 6 February 2007 claiming in an e-mail dated 18 June 2007 from the Coordinator as follows:

> *We advised that the Minutes of the Planning and Development Minutes (Report) were not responsive to this request. That was a correct statement.*
>
> *Following is a further explanation:*
>
> *The Planning and Development Agenda (prepared by staff as a guide for the Committee) is not a public document and, as in many cases all items are not discussed due to the lack of available time by the Committee. In this case items 7, 8, and 9 were never addressed. (A double check (again) with the Town Planner reassures that the meeting adjourned and these three items were not entertained- that time did not allow for it) Consequently these items did not form part of the subsequent Planning and Development Report.*

[23] I have reviewed that *Planning and Development Committee Report* for the meeting held on 6 February 2007 and I agree with the Town that it is not responsive to the Applicant's request because it does not contain any information in relation to the Applicant's building permit application. However, the *Planning and Development Committee Agenda* for the meeting of 6 February 2007 does contain information about the Applicant's matter. It appears that the Applicant's matter was on the Agenda for the meeting of 6 February 2007, but was not dealt with at the meeting due to time constraints.

[24] The Town has disclosed to the Applicant the Agendas and Reports for other privileged meetings of the Planning and Development Committee but now takes the position that these were released in error because the Town was entitled to rely on section 19(1)(c) to deny access to documents in relation to a privileged meeting. It is now necessary to discuss the meaning and purpose of section 19 of the *ATIPPA*.

[25] The British Columbia Information and Privacy Commissioner in Order No. 02-09 discussed section 12(3)(b) of the British Columbia *Freedom of Information and Protection of Privacy Act,* which has wording almost identical to section 19(1)(c) of the *ATIPPA*. The Commissioner stated at paragraphs 10 to 11:

> *[10] 3.2 Application of s. 12(3)(b) – The next issue is whether the City is authorized under s. 12(3)(b) of the Act to withhold portions of the disputed records. That section reads:*

> *12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal*
> *…*
> *(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.*
>
> *[11] Section 12(3)(b) is a discretionary exception to disclosure. The application of section 12(3)(b) must meet the criteria outlined by the Commissioner in several previous orders. See, for example, Order No.326-1999, [1999] B.C.I.P.C.D. No. 39 and Order 02-22, [2002] B.C.I.P.C.D. No. 22. The criteria are as follows:*
>
> *1. The local public body must establish that it has legal authority to meet in camera;*
> *2. The local public body must establish that an authorized in camera meetings was, in fact, properly held; and*
> *3. The local public body must establish that disclosure of the disputed records or information would reveal the substance of deliberations of the meeting.*

[26] I adopt the three criteria set out by the British Columbia Commissioner as those that must be met by a public body in order to refuse disclosure of information pursuant to section 19(1)(c) of the *ATIPPA*. I will discuss each of these criteria in relation to the facts disclosed on this Review.

1. Was there legal authority to hold a meeting in the absence of the public?

[27] Section 2(p)(iv) of the *ATIPPA* provides that "a local public body" is a "public body." The term "local public body" is defined in section 2(k)(iii) as including "a local government body." Section 2(j)(iv) defines "local government body" as including "a municipality as defined in the *Municipalities Act, 1999*."

[28] Section 2(1)(p) of the *Municipalities Act, 1999* defines "municipality" as including "a town and a region." Therefore, the Town is governed by the *Municipalities Act, 1999* and any authority given to the Town must be granted by that *Act* or the regulations made pursuant to that *Act*.

[29] The Town is authorized to establish committees pursuant to section 25(1) of the *Municipalities Act, 1999* which provides as follows:

> 25. *(1) A town council may establish the standing or special committees that it considers desirable to consider and make recommendations on matters referred to them by the council.*

[30] The holding of privileged meetings is dealt with in section 213 of the *Municipalities Act, 1999* as follows:

> *213. (1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.*
>
> *(2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.*
>
> *(3) A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.*

[31] Having reviewed the provisions of the *Municipalities Act, 1999*, I find that the Town has legal authority to appoint committees such as the Planning and Development Committee and these committees are authorized to hold privileged meetings, that is, to meet in the absence of the public.

2. Were meetings in the absence of the public properly held?

[32] I have found that the Town was authorized to establish a Planning and Development Committee and the Committee is authorized to meet in the absence of the public. Pursuant to this legal authority the Committee met in privileged meetings on 9 January 2007 and on 6 February 2007 in order to carry out its mandate to provide direction and recommendations to Council and staff regarding planning and development matters for the Town.

[33] I have reviewed the agendas and reports for the two meetings and find that the Planning and Development Committee properly held meetings in the absence of the public in order to discuss planning and development matters and to make recommendations which were to be subsequently discussed by councilors at a public meeting.

3. Would the disclosure of the agendas for the meetings reveal the substance of deliberations of the meeting?

[34] Section 19(1)(c) of the *ATIPPA* allows the Town to refuse to disclose to an applicant information that would reveal the substance of deliberations of a privileged meeting of a committee of its elected officials. The meaning of the phrase "substance of deliberations" was discussed by the British Columbia Information and Privacy Commissioner in Order No. 02-09 where the Commissioner stated as follows at paragraphs 20 to 21:

> *[20] The phrase "substance of deliberations" is found twice in s. 12. The first time is in s. 12(1), which refers to the "substance of deliberations" of a committee of Cabinet, and then again in s. 12(3), which refers to the "substance of deliberations" of a meeting of the elected officials of a local public body. The test for both is the same. In Order No. 8-1994, [1994] B.C.I.P.C.D. No. 8, Commissioner David Flaherty said the following at p. 4:*
>
> > *In my view, the "substance of deliberations" includes records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken. The "substance of deliberations" is what the B.C. Civil Liberties Association described as "the Cabinet thinking out loud" although its scope includes a range of records which would reveal what happened in Cabinet.*
> >
> > *...*
> >
> > *What is meant to be protected is the "substance" of Cabinet deliberations, meaning recorded information that reveals the oral arguments pro and con for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.*
>
> *[21] The British Columbia Court of Appeal, in judicial review proceedings involving Order No. 48-1995, [1995] B.C.I.P.C.D. No 48, upheld this interpretation. See Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner), (1998), 8 Admin. L.R. (3d) 236. The same analysis of s. 12(1) has been applied in relation to local public bodies under s. 12(3)(b). See, for example, Order No. 81-1996, [1996]B.C.I.P.C.D. No. 81, Order No. 114-1996, [1996] B.C.I.P.C.D. No. 114, and Order No. 00-49, [2000] B.C.I.P.C.D. No. 53.*

[35] The term "substance of deliberations" is also found in the *ATIPPA* in section 18, which contains an exception to disclosure dealing with Cabinet confidences. In my Report 2005-004, I discussed that term and accepted the test set out by the Nova Scotia Court of Appeal at paragraph 31:

> *[31] Saunders, J.A. of the Nova Scotia Court of Appeal, in O'Connor v. Nova Scotia, 2001 NSCA 132, sets out what he feels is an appropriate test when determining whether a record would reveal the substance of deliberations of Cabinet...*
>
> > *Is it likely that the disclosure of the information would permit the reader to draw <u>accurate</u> inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption …*
> >
> > [Emphasis in original]

[36] Therefore, in order to refuse to disclose information on the basis of section 19(1)(c) a public body must prove that it is likely that the disclosure of the information would permit the reader to draw accurate inferences about the substance of deliberations that took place in the meeting. The substance of the deliberations would include such things as what was said by individuals at the meeting, the opinions expressed, how individuals at the meeting voted, and the arguments given in favour of or against taking a particular action.

[37] The records to which the Town seeks to deny access on the basis of section 19(1)(c) consist of two Agendas that list proposed matters to be discussed at the Committee meetings on 9 January 2007 and 6 February 2007. I cannot accept that a document that is simply a list of matters that may or may not be discussed at a meeting can reveal such things as what was said by individuals at the meeting or how individuals voted on matters discussed at the meeting. Items listed on an agenda may not actually be discussed at the meeting. In fact, as was pointed out by the Coordinator, this is what happened in relation to the meeting on 6 February 2007. The *Planning and Development Committee Agenda* for that meeting lists the Applicant's request for a building permit as an item to be discussed. However, the *Planning and Development Committee*

Report completed after the meeting makes no mention of the Applicant's matter because it was not an item that was discussed at the meeting due to time constraints.

[38] Therefore, I find that the Planning and Development Committee had legal authority to hold, and did properly hold, meetings in the absence of the public on 9 January 2007 and 6 February 2007. However, I find that disclosing to the Applicant the Agendas for these two meetings would not reveal the substance of any deliberations that took place at those meetings.

[39] In conclusion, the Town has not met the burden placed on it by section 64(1) to prove that the Applicant has no right of access to the two Agendas.

[40] Although it is not an issue that I must decide in this Report, I will comment briefly on the Town's position that the agendas and reports for other privileged meetings of the Planning and Development Committee are excepted from disclosure by section 19(1)(c) and were released to the Applicant in error. In relation to the release of these other agendas, I will indicate as I did in relation to the agendas for the meetings in question. I cannot accept that an agenda that is simply a list of matters that may or may not be discussed at a meeting can reveal the substance of deliberations for that meeting. Therefore, it is my view that the agendas for the other Committee meetings are not excepted from disclosure by section 19(1)(c).

[41] In relation to the Town's position on the disclosure of the Reports on the other privileged meetings of the Planning and Development Committee that the Town claims were released in error, I will not express an opinion except to state that even if these reports do contain information that would reveal the substance of deliberations of the meetings, section 19(2)(a) may be applicable to those reports. The operation of this section means that if the subject matter of the deliberations of the privileged meeting has been subsequently considered in a meeting open to the public, then section 19(1)(c) does not apply and the information is not excepted from disclosure. For example, if a matter is deliberated upon in a privileged meeting of the Planning and Development Committee and subsequently the subject matter of the deliberations is "considered" in an open and public meeting of the Council, then section 19(1)(c) does not apply to except from disclosure the information relating to the matter deliberated upon in the privileged

meeting. Since I do not have to decide this matter for the purposes of this Report, I will leave for another time a potential discussion of the meaning of the important phrase that is contained in section 19(2)(a): "the subject matter of deliberations has been considered in a meeting open to the public."

[42] I will now discuss the concerns expressed by the Applicant in relation to the manner in which the Town dealt with his access to information request.

[43] As indicated, the Applicant stated in his Request for Review form that "the Town is very hard to get information from" and suggested in his written submission that municipal councils need to be more "open" to the public. On the issue of openness, the Applicant referred to a decision of the Supreme Court of Canada in *London (City) v. RSJ Holding Inc*. 2007 SCC 29. In that case, the Court decided that the City of London had breached section 239 of the Ontario *Municipal Act, 2001* by holding closed meetings of its Planning Committee and of Council at which a by-law had been passed. Therefore, the Court held that the by-law should be quashed because it was illegal and in so doing made the following comment at paragraph 4:

> *The open meeting requirement reflects a clear legislative choice for increased transparency and accountability in the decision-making process of local governments.*

[44] While the comment by the Supreme Court of Canada reflects one of the purposes of the *ATIPPA* as set out in section 3 ("to make public bodies more accountable to the public"), the finding in the *London (City)* case is not applicable to the facts of this Review. I have already found that the Town was authorized by the *Municipalities Act, 1999* to establish the Planning and Development Committee and the Committee had authority to holding meetings in the absence of the public. There was nothing illegal about the meetings of the Committee on 9 January 2007 and 6 February 2007. However, I fully endorse the recommendation by the Supreme Court of Canada "for increased transparency and accountability in the decision-making process of local governments."

[45] The Applicant's concern for the lack of "openness" by the Town was also expressed by his statement in his Request for Review that he had a "feeling that there is more information being withheld" and by his statements in his submission that the Town may be withholding information that "no one on the outside would know about," particularly from "people that do not know how the system works." These comments by the Applicant led me to investigate whether or not the Town has fulfilled its duty to assist as mandated by section 9 of the *ATIPPA*.

[46] Section 9 provides as follows:

> *9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*

[47] I have discussed section 9 in a number of previous reports, including Report 2007-016 where I commented as follows at paragraph 23:

> *[23] Certainly, the requirement to respond in an open, accurate and complete manner would place an onus on any public body to do a thorough search for responsive records. Any Review of a response which states that there are no responsive records must therefore involve an assessment of whether that conclusion was drawn only after a complete and accurate search was conducted. I have addressed this issue in several previous Reports. One example is Report 2006-009, in which I stated as follows:*
>
> > *[17] In this case, the Department is asserting that the record being sought simply does not exist. It is important to note that when an Applicant, in a Request for Review, takes the position that a public body is intentionally withholding a record or has not undertaken an adequate search for a record, there is some onus on the Applicant to present a reasonable basis for that position. As I noted in my Reports 2005-003 and 2006-006, adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. In Ontario Order M-909, the Inquiry Officer commented that:*
> >
> > > *Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.*

> . . .
>
> *[18] I noted in my Report 2005-006 that "the Inquiry Officer in Order M-909 also states that records searches 'must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.'" . . .*

[48] Thus, my previous comments indicate that a component of the duty to assist is the requirement to conduct a complete and adequate search for the records responsive to the Applicant's request. I discussed the standard to be applied in determining whether a public body has fulfilled its duty to assist in Report 2007-009, at paragraph 57:

> *[57] This brings me to the "duty to assist," which is one of the items which the Applicant asked me to Review. . . . I have no problem in accepting the College's assertion that "reasonableness" rather than "perfection" is the standard by which a public body should be judged in this regard.*

[49] I further discussed the duty to assist in Report 2007-010, at paragraph 42:

> *[42] . . . The duty to assist, in my view, involves dealing with applicants with due care and diligence, even when those dealings may occur after a Request for Review has been filed, and this Office is involved in brokering an informal resolution. It is essential to the basic purpose of the ATIPPA that applicants can count on public bodies to fulfil their commitments, . . .*

[50] The concern by the Applicant about the inadequacy of the Town's search for responsive records arises in part from the Applicant's efforts to obtain a copy of an e-mail dated 21 December 2006 sent by the Town Planner to members of Council. I will now discuss the Town's search for this e-mail and whether the Town met its duty to assist in relation to its efforts to locate this e-mail.

[51] In his access to information request the Applicant asked for "All information (correspondence) which relates to the file (application)" dealing with his application for a building permit and then he listed a number of specific items to which he wished to have access. As noted above, in response to the access request the Town sent two letters to the Applicant both enclosing information responsive to the Applicant's request. The letter dated 22 March 2007 from the Coordinator states: "I also checked again with respect to emails and have been advised there are no emails relative to your file." Obviously, at this stage the Coordinator was aware that

the Applicant was seeking e-mails related to his file and it appears she made at least two "checks" for such e-mails.

[52] Not being satisfied with the Town's response, the Applicant filed a Request for Review with our Office dated 28 March 2007 in which he stated, among other things, that he "has knowledge that an email had been sent on Dec 21/2007 [sic] – this can be confirmed by Councilor [Name]." In her letter dated 24 April 2007 sent to this Office after she received a copy of the Applicant's Request for Review, the Coordinator stated: "I have no knowledge of any e-mail."

[53] During the discussions my Office had with the parties in an attempt to bring about an informal resolution of this matter an Investigator with my Office obtained additional information from the Applicant regarding the e-mail dated 21 December 2006. The Applicant advised the Investigator that it was his understanding that the Town Planner had on 21 December 2006 sent an e-mail to all councilors regarding the Applicant's application for a building permit. The Investigator then asked the Coordinator whether or not such an e-mail was sent. In response to the Investigator's inquiry, the Coordinator stated in an e-mail dated 23 May 2007:

> *You referenced an email of December 21, 2006, it was not in his file, however I asked* [*the Town Planner*] *on today's date, to check her sent emails, which she did and she has advised that an email was sent on December 21, 2006.*

[54] The Town indicated to the Investigator that it would release to the Applicant a copy of the e-mail sent by the Town Planner to all councilors and subsequently did so. However, the Town did not give any indication that there were records containing e-mails sent by the councilors in response to the Town Planner's e-mail dated 21 December 2006. Later, the Applicant advised the Investigator that he was aware that some of the councilors had responded to the e-mail of 21 December 2006 and, as a result, the Investigator contacted the Coordinator and asked if there were any records containing the e-mail responses of the councilors. In response to the Investigator's question, the Coordinator stated in an e-mail dated 3 July 2007: "I was not aware of any emails, however I have gone back to the Town Planner and she is in the process of carrying out a thorough review of all emails relative to your request."

[55] The Town Planner did carry out a review of her e-mails and the Coordinator then contacted the Investigator by e-mail dated 4 July 2007 stating:

> *We have carried out a thorough review of emails and following is the results of the investigation . . .*
>
> *On March 6, 2007 an email was sent to, and/or a conversation was held with all Councillors. The councillors' response to this request was provided to you in an earlier communication.*
>
> *I provided the Town Planner with a copy of the applicant's Atipp request and asked her to prepare and compile the requested information. A copy of the information which was compiled by her, and her staff, was provided to you in an earlier communication.*
>
> *Since then, the applicant stated to you "that he is of the understanding that some of the councillors responded to the email of December 21, 2006", which you have brought to our attention by your most recent correspondence. Consequently we have revisited this matter with the Town Planner and as a result she has compiled a list of emails that is responsive to this request. She apologizes and states that this email never came up during the compiling of the information. Copies of emails are attached.*
>
> *In the early response from councillors (to me - the Coordinator) regarding the applicants Atipp request, not one of them made reference to the attached emails.*
>
> *Eg: Councillor* [*Name*] *provided only a copy of his notes from the meeting but he made no reference to his two emails, which were a direct response to* [the *Town Plannner's*] *email; Councillor* [*Name*] *responded by saying "I have no notes regarding that application besides the information distributed in the Councilors' package" this information was provided to you in our earlier correspondence.*
>
> *<u>Our Summary:</u>*
>
> *The Head, The Alternate Attip Coordinator, and myself-the Coordinator must take from this experience, that when an applicant references correspondence; we must stress that an email is correspondence, therefore, must be considered as such.*

[56] The Town agreed to disclose to the Applicant the responsive e-mails from the councilors that were revealed during the Town's review.

[57] A number of aspects of the Town's search for e-mails responsive to the Applicant's request are particularly troubling. In the Summary to her e-mail dated 4 July 2007, the Coordinator states that the Town "must take from this experience, that when an applicant references correspondence; we must stress that an email is correspondence, therefore, must be considered as such." Reading this statement, the impression is conveyed that councilors and staff of the Town had not considered that the Applicant was requesting e-mails related to his file when in his access request he asked for each of the following: "All information (correspondence) which relates to the file (application)"; "Any notes or correspondence that Town staff may have made or received …"; "Copy of any photos or other information that relates to this file"; and "Any other information that relates to file." I have great difficulty accepting that councilors and staff who communicate with each other on a regular basis by e-mail would not consider e-mails to be either "correspondence" or "information" related to the Applicant's file with the Town.

[58] Furthermore, when the Coordinator wrote to the Applicant on 22 March 2007 she stated "I also checked again with respect to emails and have been advised there are no emails relative to your file." The question that begs to be answered is: Where did the Coordinator check again for e-mails? The Coordinator must surely have checked with the Town Planner because as she indicated in her e-mail dated 4 July 2007: "I provided the Town Planner with a copy of the applicant's Atipp request and asked her to prepare and compile the requested information." However, initially the Town Planner did not compile the records containing her e-mail dated 21 December 2006 and the e-mails from the councilors in response. Subsequently, the Town Planner, after being provided with information from the Investigator, did what the Coordinator described as a "thorough review of all emails" relative to the Applicant's request. If this "thorough review" had been done when the Applicant had first submitted his request, then the responsive e-mails would doubtless have been located and sent to the Applicant.

[59] I must now determine whether the manner in which the Town handled the Applicant's request amounts to a failure to fulfil its duty to assist as set out in section 9. As noted above, I have indicated in previous Reports that the requirement to respond to an Applicant in an open, accurate, and complete manner requires "any public body to do a thorough search for responsive records." It is quite striking that the Coordinator in her e-mail dated 4 July 2007 used quite

similar language when she stated: "We have carried out a thorough review of emails and the following is the results of the investigation." It is apparent, and I so find, that if the Town had done its thorough review of e-mails when it first received the Applicant's request, then it would have located the responsive e-mails. Why the Town did not initially do a thorough search for the responsive records I cannot determine, however, by not doing a complete and accurate search in response to the access request the Town has failed to act with the due care and diligence that is required by section 9. Therefore, I find that the Town has failed to fulfil its statutory duty to assist the Applicant.

[60] I will now discuss the Applicant's concern regarding the shredding of notes made in relation to his request for a building permit. The Applicant stated in his submission as follows: "As a councilor, one is supposed to retain all documents related to council work – [Name of Councilor] shredded notes related to this file." The Applicant in his access request to the Town asked for copies of any notes made by councilors or staff at specified council and committee meetings, including certain meetings of the Planning and Development Committee and also for a "Copy of any notes any councilor may have especially Councilor [Name]." I note that the councilor from whom the Applicant specifically requested notes is the same councilor whom the Applicant states has shredded notes.

[61] In her letter dated 21 March 2007 the Coordinator advised the Applicant as follows:

> *I have requested from Council members and staff a copy of any notes that may have been taken at the Public Council Meeting and/or Committee Meetings (Privileged Session). Enclosed are the documents that are available. Other staff and Councillors have advised that they have no records respondent* [sic] *to this request.*
> . . .
> *In the meantime I did not receive any acknowledgement of any notes taken at the Planning and Development Committee Meeting.*

[62] As indicated, during the informal resolution process the Town agreed to release additional records to the Applicant, including e-mails sent by councilors in response to the Town Planner's e-mail dated 21 December 2006. The councilor from whom the Applicant had specifically

requested notes was one of the councilors who responded and in an e-mail dated 21 December 2006 he indicated that he had taken notes at a meeting of the Planning and Development Committee:

> *For the record, when asked at the council meeting why* [*the Applicant's*] *application was rejected I did not have my notes from the P & D committee with me . . .*
>
> *To ensure that council is given the complete rational* [sic] *at subsequent meetings of council, rather than trust to the memories of the councilors on the committee, I will bring my committee notes or if necessary request that the Town Planner or designate be present.*

[63] Given the apparent contradiction between what the Coordinator stated in her letter regarding the fact that she had no acknowledgement of any notes taking at meetings of the Planning and Development Committee and what was stated by the councilor in his e-mail regarding his taking of notes at one of those meetings, the Investigator contacted the Coordinator and received the following reply from her by e-mail dated 13 July 2007:

> *I had a conversation with Councillor* [*Name*] *and he informed me that he had, at that time jotted some comments at the privileged session, P & D Committee Meeting. He further advised that he had no responsive records as he considered these comments transitory and they have were* [sic] *shredded a long time ago.*

[64] I must now determine if the Town or the named councilor have violated the *ATIPPA* by shredding the notes. I will begin my discussion of this issue by first deciding whether or not the councilor's notes constitute a record under the provisions of the *ATIPPA*.

[65] The definition of a record is found in section 2(q) of the *ATIPPA* as follows:

> *2. (q) "record" means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;*

[66] As cited above, section 7 allows the Applicant a "right of access to a record in the custody or under the control of a public body."

[67] Section 5(2)(b) of the *ATIPPA* contains a provision dealing with the destruction of records as follows:

> *5(2) This Act*
>
> . . .
>
> *(b) does not prohibit the transfer, storage or destruction of a record in accordance with an Act of the province or Canada or a by-law or resolution of a local public body;*

[68] The Town has by a resolution of its Council on 15 August 2006 adopted a Records Retention Policy. The policy does not specifically deal with the retention or destruction of notes taken by Councilors at Council meetings or Committee meetings. The Records Retention Policy was amended by a resolution of Council on 12 September 2006 to add to the policy the following: "If files are active they are not to be destroyed."

[69] In his e-mail the councilor stated that he considered his notes to be "transitory." In light of the councilor's statement, it is necessary for me to discuss the concept of "transitory records." The concept or term "transitory records" is not found in the *ATIPPA* but it has been commented upon by a number of sources in Canada. The Access to Information Review Task Force established by the Government of Canada in its report stated as follows: "The term 'transitory record' is used in Canada to deal with records of a temporary nature of short-term value, found in both administrative and operational records created by a government institution." (available at http://www.atirtf-geai.gc.ca/paper-transitory-e.html#intro)

[70] The Newfoundland and Labrador Office of the Chief Information Officer (the "OCIO") defines a transitory record as: "records that are required only for a limited time to ensure the completion of a routine action or the preparation of a subsequent public record." The OCIO points out that the term "transitory records" does not include records required "to control, support, or document the delivery of programs, to carry out operations, to make decisions, or to account for the activities of the department." The OCIO provides the following as examples of

transitory records: information of short-term value, duplicate documents, draft documents and working materials, advertising materials, external publications, and personal information. (available at http://www.ocio.gov.nl.ca/im/pdf/trim-bus-rules.pdf)

[71] The *ATIPPA Policy and Procedures Manual* produced by the Access to Information and Protection of Privacy Coordinating Office of our provincial Department of Justice (available at http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf) defines "transitory record" on page 12 of its Glossary in Appendix 3 as follows:

> *A record that has only immediate or short-term usefulness and will not be needed again in the future. Transitory records contain information that is not required to meet legal or financial obligations or to sustain administrative or operational functions, and has no archival value.*

[72] The concept of transitory records was discussed by the Saskatchewan Information and Privacy Commissioner in Report LA-2004-001. In that Report, the Saskatchewan Commissioner dealt with an access request for notes taken by a participant at a closed committee meeting for which no minutes had been taken and with the destruction of the notes shortly after. In discussing whether or not the notes were subject to the Saskatchewan *Local Authority Freedom of Information and Protection of Privacy Act* the Commissioner stated at paragraph 20-21:

> *[20] The Division asserted that these notes were "personal notes" or a "personal record". Our office was advised that the notes were written by the one Division employee to be a "personal reminder" of meeting details. The implication of something being a personal record is that it would not be a record in the custody or control of a local authority and therefore would not be subject to the Act.*
>
> *[21] Our view is that such a record prepared by an individual employed by the Division concerning matters for which the Division is responsible should neither be classified nor treated as a personal record. A personal record might consist of someone's grocery list or a dry-cleaning receipt. To give "personal record" the expansive meaning ascribed to it by the Division would undermine the principle of transparency that is fundamental to the Act.*

[73] In his Report, the Saskatchewan Commissioner in deciding that the notes were not a transitory record commented at paragraphs 22-23:

> [*22] This does not appear to be the case. A transitory record is a record of temporary usefulness needed only for a limited period of time; to complete a routine task or to prepare an ongoing document. Once they have served their purpose, they would be destroyed.*
>
> *[23] Does the record or document provide evidence of a business activity, decision or transaction related to the functions and activities of the organization? In this case, the answer appears to be affirmative. Consequently, the notes should have been classified and retained.*

[74] The Saskatchewan Commissioner in Report LA-2004-001 discussed the retention and disposition of records at paragraphs 28 and 30:

> *[28] At the time an access request under the Act is received by a local authority, all undestroyed transitory records relating to the request would be subject to the Act. In these situations, existing transitory records cannot be destroyed until the Applicant's request has been processed and any appeal period exhausted.*
>
> . . .
>
> *[30] The notes of the August 26, 2003 meeting were destroyed before the Division received the Applicant's access request. We certainly have no evidence that the records of the meeting in this case were destroyed to evade a prospective access request. The destruction of these records is contrary to the purpose of the Act, particularly the right of access and the right to able to ask for a review of the decision of a local authority.*

[75] Having reviewed the various comments on and definitions of the term "transitory record," I will indicate that while I found them instructive I do not believe the term is a practical one for the classification of records subject to the *ATIPPA*. Section 2(q) of the *Act* sets out a broad definition of what constitutes a record and section 5(1) provides that the *Act* applies to "all records in the custody of or under the control of a public body," with specific exceptions. This is not to say that a record is not subject to "transfer, storage, or destruction" as set out in section 5(2)(b). But, in order to destroy a record subject to the *ATIPPA* the destruction must be done as provided for in section 5(2)(b), that is, "in accordance with an Act of the province or Canada or a by-law or resolution of a local public body."

[76] Clearly, section 5(2)(b) allows local public bodies such as the Town to develop a Records Retention Policy. Such a policy may provide that a record is to be maintained permanently, for a short period of time, or for any other appropriate period of time, with the length of the retention time being determined by the nature of the record involved. However, a record can only be destroyed in accordance with the authorized Records Retention Policy of the local public body.

[77] In order to continue the discussion of whether the councilor's notes are a record as defined in the *ATIPPA*, it is necessary to recall the committee structure used by the Town. The Planning and Development Committee meets to address issues relevant to its mandate and then the Chair of the Committee reports at the Public Council Meeting. It was at a meeting of the Committee that the councilor (who at the time was Chairperson of the Committee) took the notes during the discussion of the Applicant's request for a building permit. The Committee decided against granting the Applicant a permit. The councilor as Committee Chair was then required to report at the public meeting of Council regarding the rejection of the Applicant's application for a building permit. It was in reference to his reporting at the public meeting that the Councilor made his comments on his destroyed notes in his e-mail response to the Town Planner's e-mail dated 21 December 2006, which for convenience I will repeat here:

> *For the record, when asked at the council meeting why* [*the Applicant's*] *application was rejected I did not have my notes from the P & D committee with me . . .*
>
> *To ensure that council is given the complete rational* [sic] *at subsequent meetings of council, rather than trust to the memories of the councilors on the committee, I will bring my committee notes or if necessary request that the Town Planner or designate be present.*

It is these notes that the councilor considered transitory and, thus, were shredded.

[78] As I indicated above, following the meeting of the Planning and Development Committee there is prepared a document entitled the *Planning and Development Committee Report* which provides an outline of the matters discussed at the meeting along with the recommendation of the Committee on those matters, but without any detail as to why a particular recommendation is being made. Therefore, Council in the public meeting does not have a record of why the

Committee made a particular recommendation. As a result, the councilor had difficulty explaining the Committee's reasoning to the Council without his notes and commented that "To ensure that council is given the complete rational [sic] at subsequent meetings of council, rather than trust to the memories of the councilors on the committee, I will bring my committee notes . . ."

[79] As a result, the only document containing the rationale for the Committee's decision on the Applicant's building permit were the notes taken by the councilor. As the Saskatchewan Commissioner found in Report LA-2004-001, I find that these notes were not the personal notes of the councilor but a record in the custody or control of the Town. The notes, to use the words of the Saskatchewan Commissioner, "provide evidence of a business activity, decision or transaction related to the functions and activities of the organization." Therefore, the notes constitute a record within the meaning of the *ATIPPA*.

[80] Having found that the notes are a record, I will now consider whether the destruction of the notes was done contrary to the provisions of the *ATIPPA*.

[81] Section 3 of the *ATIPPA* provides that one of its purposes is to make public bodies more accountable to the public. This purpose is achieved through the operation of section 7 which grants an applicant a right of access to any record in the custody or under the control of a public body.

[82] As I indicated, section 5(2)(b) of the *ATIPPA* allows a local public body such as the Town to destroy records but only in accordance with a resolution passed by the local public body. The Town has by resolution approved a Records Retention Policy. This policy does not deal specifically with notes taken by a councilor at a public meeting of Council or at a committee meeting but does contain a provision which states that "If files are active they are not to be destroyed."

[83] I find that the file involving the Applicant's building permit was still active at the time he made his access request because he had appealed the decision of the Town denying him a

building permit. The destroyed notes form part of that active file. Furthermore, there is no provision in the Town's Records Retention Policy that would allow for the destruction of the records containing the councilor's notes. Therefore, the records were not destroyed in accordance with the approved Records Retention Policy. Since records subject to *ATIPPA* can, pursuant to section 5(2)(b), only be destroyed in accordance with an approved policy, the destruction of the notes was contrary to the *ATIPPA*.

[84] While I have found that the notes were destroyed contrary to the *ATIPPA*, I do not consider the circumstances to be such that an offence has been committed under section 72(d) of the *ATIPPA* which provides:

> *72. A person who wilfully*
>
> . . .
>
> (d) *destroys a record or erases information in a record that is subject to this Act with the intent to evade a request for access to records,*
>
> *is guilty of an offence and liable, on summary conviction, to a fine of not more than $5,000 or to imprisonment for a term not exceeding 6 months, or to both.*

[85] The evidence is certainly clear that a record subject to the *ATIPPA* has been destroyed, however, in my opinion there is not sufficient evidence to prove that the record was destroyed with the intent to evade a request for access to records. It appears to be the case that the councilor who made the notes was under the mistaken impression that the *ATIPPA* recognizes the concept of a "transitory record" and made the erroneous assumption that he could destroy records other than in accordance with the Town's authorized Records Retention Policy.

V CONCLUSION

[86] The Town has not proven that it is entitled to deny access to the Agendas for the meetings of the Planning and Development Committee held on 9 January 2007 and 6 February 2007.

[87] By not conducting a complete and accurate search for the records responsive to the Applicant's access request, the Town failed to carry out its duty to assist imposed by section 9 of the *ATIPPA*.

[88] The notes taken by the Town councilor at the Planning and Development Committee constitute a record within the meaning of the *ATIPPA* and the destruction of the notes was not done in accordance with the *ATIPPA*.

VI RECOMMENDATIONS

[89] Under the Authority of section 49(1) of the *ATIPPA*, I hereby make the following recommendations:

1. That the Town release to the Applicant the Agendas for the meetings of the Planning and Development Committee held on 9 January 2007 and 6 February 2007.

2. That the Town review and update its procedure for responding to access to information requests, particularly with regard to its method of searching for responsive records, and provide complete details of the procedure it develops to its Councilors and its staff.

3. That the Town review and update its Records Retention Policy to include a provision dealing with the notes taken by Town Councilors and the Town staff at public meetings of Council and at meetings of committees.

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

[90] Under authority of section 50 of the *ATIPPA* I direct the head of the Town of Portugal Cove-St. Philip's to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the Town's final decision with respect to this Report.

[91] Please note that within 30 days of receiving a decision of the Town under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[92] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of December 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador