NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-001

Town of Portugal Cove – St. Philip's

Summary: The Applicant applied to the Town of Portugal Cove – St. Philip's (the "Town") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to copies of written complaints against him from employees of the Town, including one from an alleged complainant whom he identified by name. The Town refused access to the records based on sections 26(1)(a) & (b), and 30 of the *ATIPPA*, and further stated that there was no record responsive to his request in relation to the one employee he identified by name. The Applicant applied to the Commissioner for a Review. The Commissioner determined that there was a reasonable basis upon which to accept the Town's decision to use section 26 to withhold the written complaints of two of the four complainants. The Commissioner also determined that while names and other personal information must be removed as per section 30, the other two complaints, to the extent that they are about the Applicant (and thus comprise the Applicant's personal information), should be released to the Applicant. The Commissioner agreed with the Town's position that there were no responsive records in relation to the one employee named by the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(o), 3, 26(1), 30(1), 64; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996 c. 165; *Freedom of Information and Protection of Privacy Act* 1993, c.5, s.1.

Authorities Cited: *French v. Dalhousie University*, 2002 NSSC 22 (CanLII), British Columbia OIPC Reports 39-1995, 80-1996 & 138-1996; Ontario OIPC Reports P-694 & M-82; Newfoundland and Labrador OIPC Report 2005-005.

Other Resources Cited:

Sullivan and Driedger on the Construction of Statutes. Ed. Ruth Sullivan. 4th ed. Markham, Ontario: Butterworths Canada Ltd. 2002.

I BACKGROUND

[1] On 17 July 2006, the Applicant submitted an access to information request to the Town of Portugal Cove – St. Philip's under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for the following records:

> *Copies of 3 complaints against me, referred to by Councilor* [*name*] *in e-mail of 5/23/06 and copies of all other complaints, including complaint by* [*town employee*] *referred to by* [*other individual*] *July 11/06.*

[2] On 23 August 2006 the Town responded to the Applicant advising that access to the records was refused on the basis of section 26(1)(a) & (b), and section 30 of the *ATIPPA*. Furthermore, the Applicant was advised that there were no responsive records in relation to the portion of his request which identifies a particular employee as an alleged complainant against him.

[3] On 28 August 2006 the Applicant forwarded a Request for Review to this Office asking me to review the decision of the Town in relation to his request. This matter was not resolved informally, therefore in a letter dated 28 September 2006 the Applicant and the Town were notified that this file had been referred to the formal investigation process and each was given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. Both parties chose to provide submissions, which are summarized in this report.

II PUBLIC BODY'S SUBMISSION

[4] The Town's brief submission was received by this Office on 13 October 2006. Both exceptions relied upon by the Town were claimed with respect to all of the responsive records. The Town did not specifically comment on its use of section 30, but the Town provided some evidence to support its reliance on section 26(1) in relation to two of the four complaints by Town employees against the Applicant. Section 26(1) is an exception which allows public bodies to withhold records which, if disclosed, could reasonably be expected to harm public safety or the safety or mental or physical health of a person other than the applicant. The Town did not provide any evidence to support its claim of section 26 in relation to the other two complainants. None of the four employees referenced in the Town's submission was the one employee

identified by name in the Applicant's request, therefore the Town's submission maintains its original position that there are no responsive records in relation to any alleged complaints from that individual.

[5] The Town further indicated that "in retrospect we could have also applied section 19 [because] these documents were reviewed only by the Executive Committee (The Head)." The Town did not attempt to argue that this Office should accept section 19 as a late exception.

III APPLICANT'S SUBMISSION

[6] On 13 October 2006 the Applicant forwarded a formal submission to this Office outlining his position on the records as well as the exceptions which were used by the Town in denying him access. The Applicant indicated that after becoming aware that there had been some harassment complaints made against him by employees of the Town, he proceeded in an effort to determine the nature of the complaints, including the identity of the complainants. The Applicant indicated that in doing so he was operating on his understanding of the process to be followed by the Town in its official harassment policy, which should involve interviews with relevant witnesses, and a report to senior management. He indicated that he would expect that a list of relevant witnesses would include the accused and any witnesses named by the accused, but without knowing the nature or origin of the complaints he is at an unfair advantage, and is unable to defend himself. The Applicant also explained that in requesting copies of the complaints, he was operating under what he believes is "a basic right within Western democracy … that a person has a right to defend him/herself from accusation. Otherwise our whole judicial system would be meaningless."

[7] The Applicant also indicated that he had been contacted by an individual who was asked by the Town to look into complaints made against him by Town staff. He said he asked this individual to disclose the identities of those who had made the complaints against him, but he was only told one of the names. The Applicant notes that in his access request he had asked for copies of any complaints against him, including any complaints from the Town employee who

was named as a complainant by this individual. The Town's response indicated that there were no records of complaints from that Town employee.

[8] The Applicant expressed confusion in his written submission as to the intent behind the Town's use of section 26(1)(a) & (b):

> *Is the disclosure of information supposed to be harmful to me or to another individual? I can certainly see it as being harmful to my emotional state because no one wants to find himself in the position of being accused of harassment. But unless I know what I am accused of, it becomes more stressful. How can it be harmful to the personal safety of another individual? The accusers already know what they submitted so they already know what is contained in the complaint. If a person who submitted the complaint is in such an emotional state that having this information released to the individual whom that person accused, then that person should have been advised not to submit a complaint until that person was emotionally stable enough to deal with the implications and implications must include that the person accused must have the right to a fair trial. In fact, if a person is in such an emotional state that he/she cannot cope with the implications of his/her complaint, then I assume that person would not be well enough to be involved in any way in council or other town functions/work, etc.*

[9] The Applicant further explained that as a result of not having access to the contents of the written complaints nor the identity of the complainants, he is now limited in his capacity as an elected councilor. He says he feels he must refuse to meet with other councilors or staff one on one, "since that person may be one of my accusers and I will take no chance on what that person might say after my meeting." He says that when he eventually identifies his accusers, he will "remain at a safe distance and this safeguard is something I have a right to." At present, however, he says that by forcing him to avoid meeting with anyone with the Town one on one in case they might be one of his accusers, the Town is creating a worse problem:

> *By protecting the complaints and accusers based on personal information, ALL staff and councilors are suspect. This is unfair to them. Their rights must also be respected. In other words, it confounds a situation that should have been simple and straightforward.*

[10] The Applicant claims that the Town has misinterpreted its own Harassment Guidelines. He says that "by nature a harassment complaint is 'personal.' How can it be otherwise? 'Personal'

does not mean 'secrecy' which is how the Head appears to be interpreting it." He also says that the Town's own Harassment Guidelines state that "it is a serious matter to deliberately make a false accusation of harassment. If a complaint is found to have been made in bad faith, the complainant will be subject to disciplinary measures." He says that the Town's decision to withhold the complaints and the complainants' identities frustrates his ability to address whether any of the complaints might be false, and therefore frustrates part of the Town's own Harassment Guidelines. The Applicant says that in disclosing the complaints, "not only is the accused protected by his/her rights in this way, but innocent persons are protected from being falsely suspected."

IV DISCUSSION

[11] I must begin by mentioning the delay which occurred after the Town of Portugal Cove – St. Philip's forwarded the responsive records to this Office. Once my staff began to review the records, it became apparent that a page of the records was missing. Unfortunately, the Town's Coordinator was away when this discovery was made, which caused a delay of several days in obtaining the missing page, as no one else associated with the Town would act in the Coordinator's absence. This matter will be further addressed in the form of a recommendation at the conclusion of this Report.

[12] As per the policy of this Office, a public body must inform this Office and the Applicant within 14 days of being notified of a Request for Review that it intends to rely upon one or more additional exceptions. Public bodies are informed of this by way of a set of guidelines produced by this Office entitled "Preparing for a Review," which are forwarded to public bodies any time a Request for Review is received from an applicant. As the Town did not advise the Applicant and this Office within 14 days of its interest in using section 19, and given that section 19 is a discretionary exception, I will not consider it in relation to this matter.

[13] As noted above, one of the exceptions relied upon by the Town is section 26(1)(a) & (b) of the *ATIPPA*:

> *26. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to*
>
> > *(a) threaten the safety or mental or physical health of a person other than the applicant, or*
> >
> > *(b) interfere with public safety.*

[14] The *ATIPPA* places the burden of proof on the Town in applying any exception:

> *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.*

[15] Section 26(1)(b) allows the public body to withhold information which could reasonably be expected to "interfere with public safety." Nothing in the Town's submission would lead me to conclude that there is any reasonable expectation of a threat to public safety in relation to the responsive records. I will therefore focus on the application of section 26(1)(a).

[16] Section 26(1)(a) allows a public body to withhold information (including the personal information of an applicant) if it can establish a reasonable expectation that its release would "threaten the safety or mental or physical health of a person other than the applicant." Any use of an exception which would potentially prevent an applicant from accessing his or her own personal information cannot, within the overall context of the purpose of the *ATIPPA*, be taken lightly by public bodies. Section 3(1)(b) sets out one of the purposes of the *ATIPPA*:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> > *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves.*

[17] In this case, no evidence has been presented alleging physical threats or threats to the physical safety of any of the complainants. Based on the context of the records and the submission of the Town, the Town is taking the position that the release of the records would result in some form of threat to the mental health of the complainants.

[18] A public body wishing to use section 26(1) must present evidence of a reasonable expectation of such a threat to result if the records are released. The British Columbia *Freedom of Information and Protection of Privacy Act* contains in section 19 a provision equivalent to *ATIPPA* section 26(1)(a):

> *19. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) Threaten anyone else's safety or mental or physical health*

[19] The British Columbia Information and Privacy Commissioner has issued several orders in relation to reviews where section 19 was at issue. In Order 138-1996, he decided based on the evidence before him to withhold from an applicant the records of a workplace harassment investigation. Part of his decision was based on *in camera* evidence of the medical history of the applicant, which indicated that he had been in treatment for an illness which apparently had a significant impact on his disposition towards his fellow employees. The Commissioner also cited, without going into detail, past incidents involving the applicant and other employees. He indicated that despite receiving from the applicant "promises of reformation that may not withstand the test of time," he chose in his decision "to be guided by the record of past performance in acting prudently in a sensitive matter."

[20] In that case, the Commissioner did not cite any medical evidence of the third parties who were alleging that the disclosure of the records would threaten their safety or physical or mental health. The Commissioner used his judgment, based on the evidence before him, to determine that the threshold had been met for such a finding. The British Columbia Commissioner has also made similar findings, without necessarily relying on medical evidence to do so. In Order 39-1995, which was upheld on judicial review, the evidence presented in the form of affidavits by the third parties was so conclusive that the Commissioner agreed with the public body that the records should not be disclosed. In that case, the parties who submitted the affidavits provided detailed and convincing evidence:

> *The affidavits uniformly refer to the direct or observed experiences of verbal abuse and threats from Jane Doe, past, present, and future. The affidavits also refer to the writer's fears of verbal abuse, threats, and physical harm that might happen to them, their families, or residents of their homes, if their identities are revealed to Jane Doe.* […] *In addition, there are allegations of vandalism having occurred.*

In Order 39-1995, the Commissioner was able to conclude "without hesitation," that:

> *… the writers have presented detailed and convincing evidence which demonstrates that they have sufficient reason from their past experiences with Jane Doe to have legitimate reasons to fear for their safety or mental or physical health, if their identities are disclosed to the applicant in this case.*

[21] I will now turn to the complaints of the four individuals against the Applicant, which are the responsive records. As noted above, the Town provided evidence in support of its decision to withhold the records in relation to two of these individuals, which I will address shortly. As for the other two, the Town's response is brief and to the point.

[22] Apparently one of the employees is not currently employed by the Town and could not be reached to determine whether or not that person's letter of complaint should be disclosed. From the point of view of section 26, there is no basis upon which to withhold this person's letter in its entirety. In order to utilize section 26, I would expect to see something from the context of the letter of complaint itself, or some other written statement from the individual, putting forth a basis upon which to support the notion of a reasonable expectation that the person's safety or physical or mental health could be threatened. The description in the letter of complaint, while clearly stressful to the individual, does not allow me to conclude that its disclosure would meet the test of applying section 26.

[23] Another employee who has complained about the Applicant compiled a list of complaints about harassment from several sources, one of whom was the Applicant. While I have every reason to accept that this person may be under some stress at work, I do not believe that the disclosure of the portion of the material which refers to the employee's complaint against the Applicant could reasonably be expected to threaten the safety or mental or physical health of the

employee. If anything, it appears that this employee has complained about the overall work environment, and the complaint regarding the Applicant is just one component of that. Even though evidence presented in the letters of complaint suggests the appearance of workplace conflict, this does not persuade me to conclude that the release of the written complaints would threaten the safety or mental or physical health of the employee. Even if the events which led to the complaints have negatively affected the mental health of the employees, it is not clear to me that the release of their complaints about the incidents (which would then allow their employers to fully address the issues with the Applicant), would have the result contemplated by section 26.

[24] In relation to the other two employees who had submitted complaints against the Applicant, I have accepted evidence provided by the Town that the disclosure of these complaints and the resulting identification of the complainants would constitute a risk to the mental health of these two employees.

[25] Upon reviewing the written complaints in both of these cases, it is clear that some significant conflict occurred between the Applicant and these two employees, probably for one individual more than the other, but the incidents clearly affected the individuals. It is also clear that when both employees wrote these letters, they did so as official complaints, with the expectation (implicit in the case of one of the employees, explicit in the other), that the Town would proceed to deal with their complaints in a formal process. I am unclear as to whether these individuals still expect the Town to be able to deal with their formal complaints without allowing the Town to inform the Applicant of the nature of the allegations against him. That being said, I see no reason to doubt the evidence provided by the Town in this case, so I will accept the Town's use of section 26 to deny access to the complaints from these two individuals.

[26] As noted above, the Town has also relied upon section 30 of the *ATIPPA* to withhold the responsive records. As I have already accepted the Town's use of section 26 in relation to two of the complaints, it is not necessary for me to analyze how section 30 might apply to those as well. Instead, I will focus on the remaining two complaints in order to determine how section 30 might apply to them. Section 30 is a mandatory exception which requires public bodies to deny access to the personal information of parties other than the Applicant:

30. (1) The head of a public body shall refuse to disclose personal information to an applicant.

[27] Section 30(2) contains a list of provisions setting out specific situations where the mandatory exception of 30(1) does not apply:

30. (2) Subsection (1) does not apply where

(a) the applicant is the individual to whom the information relates;

(b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;

(c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;

(d) an Act or regulation of the province or Canada authorizes the disclosure;

(e) the disclosure is for a research or statistical purpose and is in accordance with section 41;

(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

(h) 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;

(i) public access to the information is provided under the Financial Administration Act ;

(j) the information is about expenses incurred by a third party while travelling at the expense of a public body;

(k) the disclosure reveals details of a license, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or

> *(l) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including*
>
> *(i) personal information that is supplied in support of the application for the benefit, or*
>
> *(ii) personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.*

[28] Newfoundland and Labrador is unique in Canada in its approach to personal information protection under the *ATIPPA* access provisions. The equivalent exception to the disclosure of personal information in other jurisdictions is arguably more nuanced. The standard approach elsewhere involves a harms test, placing some discretion in the hands of public bodies to release a certain amount of personal information when the harm in doing so is considered to be low. Similarly, Commissioners in other jurisdictions can order or recommend the release of some information which, even if it would meet the definition of personal information, would not constitute an unjustified invasion of personal privacy. In this province, section 30(2) outlines very specific circumstances where information which meets the definition of personal information should not be withheld, but no discretion exists to consider the relative harm of disclosure.

[29] To illustrate, Ontario Information and Privacy Commissioner Order P-694, which supported the severing of some information but ordered the release of other information, involved records originating from a workplace harassment investigation. The Ontario Commissioner in that case was able to look at the records of the entire investigation and make a determination of what parts of the record, if released, would constitute an unjustified invasion of personal privacy of persons other than the applicant. The Commissioner was also able to comment on the public body's appropriate use of discretion in the matter.

[30] Furthermore, an Ontario Inquiry Officer in Order M-82 (upheld on a judicial appeal) had some interesting comments to make, which although not directly applicable because of the different statutory approach to personal information in this province, are still relevant in the

sense that they provide some illumination on the subject of how information involving workplace harassment complaints should be treated in general:

> *In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace.*

[31] Although I support this perspective, it must be reiterated that it is one which reflects the statutory treatment of personal information in Ontario, which sets out a harms test for the disclosure of personal information of someone other than an applicant, requiring the public body to exercise its discretion, balancing the interests of privacy with those of natural justice.

[32] The *ATIPPA* requires that information must be withheld if it meets the definition of personal information, unless section 30(2) allows for its release. Personal information is defined in the *ATIPPA* as follows:

> *2. In this Act*
>
> *(o) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, address or telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*

> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
>
> *(vi) information about the individual's health care status or history, including a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, criminal or employment status or history,*
>
> *(viii) the opinions of a person about the individual, and*
>
> *(ix) the individual's personal views or opinions;*

[33] As noted above, section 30 of the *ATIPPA* is a mandatory exception, and a public body has no opportunity to exercise discretion in withholding information which falls under its definition (except as provided for in section 30(2)), nor is there a harms test to be applied. I referenced this in my Report 2005-005:

> *77 It is noted that* [*section 30(1)*] *of the ATIPPA does not include a harms test. Unlike some other jurisdictions, there is no test of reasonableness when dealing with the release of personal information. In the absence of any discretion, a public body simply has to determine if information meets the definition set out in section 2(o) and, if so, they must not release it….*

[34] Given the absence of a test of harm or reasonableness in assessing the use of section 30 by a public body, I must look exclusively to the provisions of section 30. As noted above, section 30 says that public bodies must not disclose personal information, and personal information is defined in section 2 as recorded information about an identifiable individual. One difficulty faced by public bodies in interpreting section 30 is the inherent contradiction in the *ATIPPA* relating to the definition of personal information.

[35] The definition of personal information found in section 2 of the *ATIPPA*, as noted above, includes both the opinions of a person about an identifiable individual, as well as the opinions or views of an identifiable individual (see section 2(o)(viii) & (ix). The *ATIPPA* says in section 3 that one of its basic purposes is to give individuals a right of access to their own personal information:

> *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.*

For illustration purposes, let us say that one of the complainants expresses an opinion about the Applicant in a letter of complaint. The paradox set up by the definition of personal information found in the *ATIPPA* means that the complainant's opinion about the Applicant is the personal information of both parties. Section 30(2)(a) means that a public body cannot refuse to disclose an applicant's own personal information, yet unless one of the other conditions outlined in section 30(2) is also present, section 30(1) says that the public body must refuse to disclose another person's personal information. In other words, the way the *ATIPPA* is worded, the Applicant would have a right of access to another person's opinion about him, because it is an opinion about him, yet at the same time he does not have a right of access to the same opinion because it is also the personal information of the person who expressed the opinion, according to the *ATIPPA* definition.

[36] This leaves public bodies in a quandary when attempting to determine whether an Applicant in such a circumstance would have a right of access to the personal information. As noted above, section 2(o)(viii) and (ix) of the *ATIPPA* say that personal information includes both opinions about the individual, and the individual's personal views or opinions, thus leading to the paradox of the same information being considered the personal information of two different individuals. A public body must start with the premise that applicants have a right of access to their own personal information. In order to disclose the information to one of them, the public body must violate the right of the other not to have his or her personal information disclosed.

[37] By way of comparison, Nova Scotia's *Freedom of Information and Protection of Privacy Act* (the "*FOIPOP*") has a different version of the definition of personal information found in *ATIPPA* section 2(o)(viii)and (ix). Section 3(1)(i) of the *FOIPOP* defines personal information. Clauses (viii) and (ix) of the *FOIPOP* are as follows:

> *(i) Personal information means recorded information about an identifiable individual, including*
>
> *(viii) anyone else's opinions about the individual*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else*
>
> (emphasis mine)

[38] Several other jurisdictions across Canada have an identical or similar provision. This part of Nova Scotia's legislation was explored fully by Nova Scotia Supreme Court Justice Moir in *French v. Dalhousie University*, 2002 NSSC 22 (CanLII). Justice Moir identifies at paragraph 17 of his decision the potential conflict which might exist if the provision "except if they are about someone else," had not been included in the *FOIPOP* section 3(1)(i)(ix), and discusses how it is to be interpreted:

> *[17] It appears that the Legislature has, in s. 3(1)(i)(ix), come to grips with one aspect of a clash inherent to a legislative scheme that attempts to balance access to information and protection of privacy. The clash arises where one person addresses a public body about another. The person who is the subject of the communication may have an interest in knowing what information was given, and the person also has a privacy interest at stake if others seek access to a record of the communication. The person who provided the information may also have a privacy issue at stake, where, for example, the information was provided in confidence. The interests of the two are mutually exclusive. The effect of s. 3(1)(i)(ix) is to come down on the side of the person spoken about where the information is a personal view or opinion about that person.*

[39] Justice Moir then goes on to comment in the same paragraph that "I think the choice of excluding opinions expressed about others is consistent with the scheme of the Act, as well as the stated purposes or objects." Essentially, under Nova Scotia's legislation, this matter with the Town of Portugal Cove – St. Philip's would be more straightforward. Your own recorded opinion is your personal information, and no on else can access it, unless your opinion is about

someone else. Your opinion about someone else is no longer your personal information, it is the personal information of the person about whom you gave your opinion. As Justice Moir points out in relation to Nova Scotia's *FOIPOP*, this is consistent with one of the purposes of the legislation, which is to provide individuals with access to personal information about themselves, a purpose also outlined in section 3 of the *ATIPPA*.

[40] As Commissioner, it is my role to make recommendations in order to ensure compliance with the *ATIPPA*. The contradiction inherent in the definition of personal information in the *ATIPPA* as I have outlined above means that I am forced to decide, because of the paradoxical wording of the legislation, whether the opinion of person A about person B is the personal information of person A or person B. The mandatory prohibition against the disclosure of another person's personal information as found in section 30 of the *ATIPPA* prevents me from interpreting it as being the personal information of both.

[41] The *ATIPPA* must be interpreted in such a way as to ensure that its provisions are workable, practical, and consistent with the explicit purposes of the legislators as set out in section 3, and I must therefore issue a recommendation on this matter which will resolve the contradiction while preserving the principles upon which the *ATIPPA* is founded. Ruth Sullivan in *Sullivan and Dreigder on the Construction of Statutes* comments extensively on situations where courts have dealt with contradictions in legislation. This excerpt from page 247 summarizes the problem:

> *From the earliest recognition of the golden rule, contradiction and internal consistency have been treated as forms of absurdity. Legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labeled absurd.*

Thus, I must attempt to resolve an apparently absurd contradiction, without producing an absurd result.

[42] Sullivan explores how courts have justified handling apparent inconsistencies and contradictions which can find their way into legislation. Sometimes inconsistencies and the like are more subjective in nature, and the task of justifying the necessity to "rewrite" or disregard

textual meaning is onerous. However, Sullivan writes on page 238 that "if absurdity is limited to cases of physical impossibility or logical contradiction, the problem of justification hardly arises." I share this perspective, given that the situation before me cannot be reconciled without resolving a significant inconsistency in the legislation. The absurdity in this case is a logical contradiction, and I cannot make a recommendation without attempting to remedy that absurdity.

[43] In resolving this contradiction, as I noted above, I am mindful of both the intent of the *ATIPPA*, as well as my own role as Commissioner. In addition, some comparison with similar statutes across the country has also been of assistance. The approach to personal information in access legislation in other jurisdictions is sufficiently different from the *ATIPPA* so as to make the comparison a challenging one. I believe that Nova Scotia's *FOIPOP*, however, serves as a good comparison under the circumstances, as I have explored above. The additional wording in the definition of personal information in the *FOIPOP* is crucial to the workability of that provision, and the lack of similar wording in the *ATIPPA* is the cause of the current conundrum.

[44] One potential source of clarification in the *ATIPPA* which might be useful in slightly different circumstances is found in section 30(2)(h):

> *… 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.*

[45] This clarifies that a public body cannot withhold the personal information of an applicant if the personal information constitutes the opinions or views of a person given in the course of performing services for a public body. The "except" in this provision refers to a situation where the person giving the opinion or view is doing so about a person other than the Applicant, ie, a third party. I do not see this as resolving the current matter, however, because a complaint of harassment, even if it involves an expository element which recounts things that happened in the course of performing services for the public body, this particular account of those events was compiled for the specific purpose of making a complaint. I do not believe that making a harassment complaint is a service performed for a public body, but instead, something of a more personal nature entailing human resources policies, employee discipline, and the like.

[46] Another provision in the *ATIPPA* which almost, but not quite, resolves this issue, is section 30(2)(a), which says that the prohibition against releasing personal information does not apply "where the applicant is the individual to whom the information relates." This appears to assist us here, in that a complaint about a person is clearly information related to that person. Unfortunately this is of limited use, due to the definition of personal information as found in section 2, which indicates that the same information, if it is an "opinion or view," would also comprise the personal information of the complainant, and thus cannot be released to the Applicant.

[47] In the matter before me, the "complaint" of one employee is simply a recounting of a single incident relating to the Applicant and involving the complainant. Although there is little information specifically "about" the Applicant as described in the examples in the definition of personal information found in section 2(o), it is clear that this is a complaint "about" the Applicant, and as such, the entire document is "about" the Applicant.

[48] As explored above, due to lack of discretion or flexibility in section 30, I am presented with another strange situation. In recommending the release of a portion of the records cited as complaints against the Applicant, I am still bound to withhold the name of the person making the complaint, despite the fact that the person's name will likely be obvious to the Applicant due to the details of the complaint. It is impossible to hide the identity of the complainant in a situation such as this, and still release the material. Be that as it may, I feel there is a strong argument to release the information, based on my interpretation of the definition of personal information in the *ATIPPA*, even if releasing the material without the name of the complainant allows the Applicant an opportunity to deduce the identity of the complainant. Although some may label this another absurdity in the *ATIPPA*, its effect is more of an irritant than an impediment.

V CONCLUSION

[49] I would be remiss in not mentioning once again the delay which occurred when my staff determined that there was a page missing from the records supplied to my Office for review by the Town of Portugal Cove – St. Philip's. Unfortunately, the Town's Coordinator was away when this discovery was made, which caused a delay of several days in obtaining the missing page, as no one else associated with the Town was able to act in the Coordinator's absence. Due to holidays, illness and other work commitments, it is expected that the Coordinator will have some periods of time during the year when he or she is unavailable. Therefore, whenever possible, public bodies should designate a backup coordinator who can at least be familiar with the files and be able to cooperate with the Commissioner's Office during an investigation in the absence of the Coordinator.

[50] In terms of my decision regarding the definition of personal information, the necessity of introducing this interpretation is an unavoidable consequence of a contradiction inherent in the legislation. I have chosen to resolve this contradiction in favour of deciding that an opinion about the Applicant is the Applicant's personal information, rather than the personal information of the person offering the opinion. I believe this to be consistent with the purpose of the *ATIPPA*, the overall legislative context of access legislation in other jurisdictions, as well as relevant case law.

[51] I agree that two of the four complaints against the Applicant may be withheld on the basis of section 26 for the reasons I have already outlined. Of the other two, based on my exploration of the application of section 30 to the records, I am recommending that the essence of both complaints against the Applicant be released, while removing any names and other personal information in order to comply with the mandatory nature of section 30. In the case of one of the complainants, some of the material provided to me by the Town references issues unrelated to the Applicant. I will consider the references to persons and matters unrelated to the Applicant to be unresponsive to his request, and these should also be withheld from the Applicant. A copy of the records has been provided to the Town indicating which information should be withheld and which should be released to the Applicant.

[52] I should also note that even though there were four individual complainants with written complaints against the Applicant, I find no evidence to dispute the Town's position that there is no responsive record in relation to the one Town employee named in his request.

[53] Complaints of personal harassment cannot be resolved or dealt with properly through an access to information request. Good policies and practices must be put in place by public bodies and followed consistently. In my opinion, the principles of natural justice would dictate that a person accused of harassment in a formal complaint must be advised of the nature of the accusation, which, if it is to be described clearly enough to be of any use in an investigation, would necessitate that the identity of the complainant be disclosed. Attempting to begin such a process with an access to information request is a poor means of doing so, as it may result in a more limited disclosure than necessary for the proper investigation of a complaint. Instead, public bodies who are unsure of the correct process to be used in handling complaints of harassment must seek guidance from those who have particular expertise in that area. This can sometimes be found within the ranks of the public body itself, but if not, a great deal of expertise in this area resides within the legal community, as well as the provincial Human Rights Commission.

VI RECOMMENDATIONS

[54] I hereby issue the following recommendations under authority of Section 49(1) of the *ATIPPA*:

1. I find that the Town correctly withheld some of the responsive records on the basis of sections 26 and 30 of the *ATIPPA*. However, I recommend that some information from two of the four complainants be released to the Applicant. A copy of the records indicating the portions recommended for release is provided to the Town with this Report.

2. I recommend that the Town ensure that a backup *ATIPP* coordinator be designated in order to ensure that personnel are in place at all times to deal with matters arising in relation to the *ATIPPA*.

[55] 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.

[56] 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 Trial Division in accordance with section 60 of the *ATIPPA.*

[57] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31st day of January, 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador