NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2008-003

House of Assembly

Summary: The Applicant applied on 27 November 2007 under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA"*) for "information regarding what charities [a former Chief Electoral Officer] donated his MHA pension to during his term as Chief Electoral Officer, as per the terms of his accepting the position." The House of Assembly refused access to that information, claiming that it was the former Chief Electoral Officer's personal information and that therefore the House of Assembly was prohibited from disclosing it under section 30(1) of the *ATIPPA.* The Commissioner did not agree. Although the information requested could properly be characterized as personal information, it falls within one of the exceptions to the prohibition, section 30(2)(f), in that "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." The Commissioner agreed that under normal circumstances what a retired person does with his pension income is personal information that would be exempt from disclosure. However, it was clear from the record that the former Chief Electoral Officer was required by the terms of his employment contract to forego his pension income while serving as Chief Electoral Officer, and indeed was required to provide proof to the Speaker that he had directed his pension to a registered charity. The Commissioner concluded that those circumstances brought the information within the provisions of section 30(2)(f), and it was therefore subject to disclosure. The House of Assembly also argued that as of January 16, 2008, the protection of privacy provisions of the *ATIPPA* were in force, and consequently the House of Assembly was bound, under section 36, to protect personal information from access, and under section 38, to use that information only for the purpose for which it was collected. The Commissioner found that the privacy provisions of the *ATIPPA* did not apply to the present case, as the Applicant's request had

been made before the privacy provisions came into force. The Commissioner also held, however, that even if the Part IV privacy provisions had been in force, they would not have prevented disclosure. For these reasons the Commissioner recommended that the House of Assembly disclose to the Applicant the information he is seeking.

Statutes Cited: *Access to Information and Protection of Privacy Act,* S.N.L. 2002, c. A1.1 as amended, sections 2(o), 3, 30(1), 30(2)(f), 36, 38, 39.

Authorities Cited: Newfoundland and Labrador O.I.P.C. Report 2007-004; Ontario O.I.P.C. Order P-244, Order M-23, Order PO-2641; British Columbia O.I.P.C. Order No. 02-56, Order No. 54-1995, Order No. 139-1996.

I BACKGROUND

[1] On 27 November 2007 the Applicant submitted an access to information request to the House of Assembly pursuant to the *Access to Information and Protection of Privacy Act* (the *"ATIPPA"* or the *"Act"*). In his request, the Applicant asked for "Information regarding what charities [a former Chief Electoral Officer] donated his MHA pension to during his term as Chief Electoral Officer, as per the terms of his accepting the position."

[2] On 21 December 2007 the House of Assembly wrote to the Applicant in response, refusing access to the requested records as follows:

> *Please be advised that access to these records has been refused in accordance with the following exceptions to disclosure, as specified in the Access to Information and Protection of Privacy Act (the Act):*
>
> *section 30(1) The head of a public body shall refuse to disclose personal information to an applicant.*
>
> *Pension funds are not subject to the Act. Being comparable to that of personal income, what a person has chosen to do with his/her money is of a personal matter and therefore is deemed inaccessible.*

[3] In a Request for Review dated 2 January 2008 filed with this Office on 10 January 2008, the Applicant requested a review of the decision of the House of Assembly to refuse access to the responsive record.

[4] On 10 January 2008, this Office wrote informing the House of Assembly of the Request for Review, and requested, pursuant to section 52(3) of the *ATIPPA,* that the House of Assembly forward to this Office the documentation necessary to complete the review of the decision, including a copy of the responsive record. The House of Assembly delivered the documents requested for review to this Office on 16 January 2008.

[5] In further correspondence to this Office dated 28 January 2008 the House of Assembly expanded on its reasons for denying the responsive record to the Applicant. In that

correspondence it set out a number of arguments relating to its main ground for the refusal, that the information requested was personal information within the meaning of the *ATIPPA* and is therefore not to be disclosed. In addition, the House of Assembly in that correspondence raised the argument that the requested information is also subject to the newly-proclaimed privacy provisions of the *ATIPPA* and is not subject to disclosure for that reason. These arguments will be discussed in detail in the following pages.

[6] Attempts to resolve the issues raised by this Request for Review were not successful. Accordingly, on 13 February 2008, this Office notified the Applicant and the House of Assembly that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. Both parties were given the opportunity to provide written representations to this Office pursuant to section 47 of the *ATIPPA*.

[7] On 4 March 2008 the Applicant provided a written submission.

[8] In correspondence to this Office dated 20 February 2008 the House of Assembly stated that its 28 January 2008 correspondence would constitute its written submission.

II THE HOUSE OF ASSEMBLY'S SUBMISSION

[9] I have summarized the submission of the House of Assembly, as set out in its 28 January 2008 correspondence, as follows:

(a) The former Chief Electoral Officer, who had previously been a Member of the House of Assembly ("MHA") and was in receipt of an MHA pension, was subsequently employed by the government as Chief Electoral Officer ("CEO").

(b) The CEO position is one to which a different pension plan applies (the Public Service Pension Plan). The former Chief Electoral Officer, during his term as CEO, was fully entitled to receive both his MHA pension as well as his CEO salary.

(c) Once the former Chief Electoral Officer received his pension, it was his to use or dispose of as he saw fit. As with a salary, once it is paid out to an employee it becomes a private and personal matter.

(d) Section 2(o) of the *ATIPPA* defines personal information to include information about an individual's financial status or history. Information about how the former Chief Electoral Officer used or disposed of his pension is therefore personal information within the meaning of the *Act*.

(e) Section 30(1) of the *Act* provides that the head of a public body shall refuse to disclose personal information to an applicant. That is the basis of the House of Assembly's refusal of disclosure in this case.

(f) Section 30(2) of the *Act* provides for exemptions from the requirement not to disclose personal information, but the exemptions do not apply to the requested information.

(g) The money used to make the charitable donation was not money allocated or given by a public body, but the former Chief Electoral Officer's own funds. Because the pension is issued by a pension fund, it is not even issued by a public body.

(h) This is not changed by the fact that there was a contract of employment between the former Chief Electoral Officer and the House of Assembly respecting his employment as CEO, requiring him to provide proof of his donating his MHA pension to a charity. A contract of employment with a public body might contain such an obligation, and that contract may be subject to disclosure under the *Act*. However, any requirement to confirm fulfillment of that obligation is between the employee and his employer. It does not mean that an applicant can access that information under the *Act*.

(i) The name of the charity to which the former Chief Electoral Officer's pension was allocated remains his personal information, therefore, and the House of Assembly may not disclose it.

(j) In addition, any document from the former Chief Electoral Officer confirming fulfillment of the contractual obligation may show the actual amounts of pension received, tax deducted and other personal matters. This information also falls within the category of confidential financial and personal information that cannot be accessed by an application under the *ATIPPA*.

(k) Furthermore, Part IV of the *ATIPPA*, respecting protection of privacy, is now in force. The House of Assembly is bound, pursuant to section 36, to protect personal information from access, and, under section 38, to use that information only for the purpose for which it was collected, namely, to confirm compliance with a contractual obligation.

III THE APPLICANT'S SUBMISSION

[10] I have summarized the Applicant's submission, as set out in the correspondence of 4 March 2008, as follows:

(a) In February 2006, former MHA [….] was appointed to the position of Chief Electoral Officer. As a condition of his employment he was required by his contract to forego his MHA pension. He agreed to do so and to donate it instead to a registered charity.

(b) On 10 April 2006 the Finance Minister of the day confirmed in the House of Assembly that a retired employee receiving a pension could not be re-employed by government without having to forego their pension.

(c) The Speaker of the House of Assembly stated in May 2007 that he had the information confirming that the former Chief Electoral Officer donated his pension to a registered charity, but was unwilling to reveal the recipient, citing privacy concerns.

(d) This issue is not a matter of privacy but of public trust. Without the specific information being made public, the public has no way of knowing for sure that the former Chief Electoral Officer did honour a commitment he made, publicly, before accepting a high-ranking government appointment.

IV DISCUSSION

[11] The purposes of the *ATIPPA* as set out in section 3 and section 7 have been discussed on many occasions in previous reports issued by this Office. In summary, the purpose is to make public bodies more accountable to the public and to protect personal privacy, 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).

[12] As my predecessor discussed in 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 Report 2007-004, my predecessor adopted the civil standard of proof as the standard to be met by the public body under this section. This means that 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.

[13] There are three main issues to be dealt with in this Report:

1. Whether the information sought by the Applicant is "personal information" within the meaning of section 2(o) of the *Act*;

2. If the information is personal information, whether its disclosure is prohibited pursuant to section 30(1) of the *Act*, or whether it falls within one of the exceptions to the prohibition contained in section 30(2); and

3. Whether in any event, as claimed by the House of Assembly, the privacy provisions of the *Act* in sections 36 and 38 operate so as to prevent the disclosure of the information.

Issue # 1: section 2(o) - Personal Information

[14] Section 2(o) of the *ATIPPA* reads as follows:

> *2. (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;*

[15] I conclude that the information sought by the Applicant – the name of the registered charity to which the former Chief Electoral Officer donated his MHA pension during his term as CEO – is personal information. It is, first of all, "recorded information about an identifiable individual": the former Chief Electoral Officer. Secondly, it is information about how the former Chief Electoral Officer spent his pension income, and so it constitutes "information about the individual's financial status or history" within the meaning of paragraph (vii) of section 2(o). Information about the former Chief Electoral Officer's pension income, including the source, the amount and the manner in which he disposes of it, is clearly an aspect of his financial status or history. Thirdly, depending on the nature and purposes of the charitable organization to which the former Chief Electoral Officer chose to donate the money, the information sought could also be regarded as information related to his religious or political beliefs (paragraph (ii)), or as an expression of his personal views or opinions (paragraph (ix)).

Issue # 2: Disclosure under section 30

[16] Having reached the conclusion that the information sought is personal information within the meaning of the *ATIPPA*, I must next determine whether section 30(1) of the *Act* prohibits its disclosure. This requires an examination of the facts in light of the exceptions to prohibition contained in section 30(2). If the information falls into any one of the 14 categories listed there, then the section 30(1) prohibition does not apply, and the information must be disclosed.

[17] The House of Assembly argues that any and all information regarding the former Chief Electoral Officer's pension income is personal information that does not fall into any of the section 30(2) exceptions, and therefore is not subject to disclosure. It argues that pension income is different from information regarding the current salary of an employee of a public body. Salary information has been consistently held by this Office and by Information and Privacy Commissioners in other jurisdictions to fall into the category of information "about a third party's position, functions or remuneration as an officer, employee or member of a public body…" under section 30(2)(f). Even though it is personal information, the Legislature clearly

intended that in order to make public bodies more accountable to the public, the salaries, benefits, duties and responsibilities of public servants should be public information.

[18] The House of Assembly argues, however, that pension income is different. Information about a person's pension is not information about the "remuneration of an employee," since that person, in order to be receiving a pension, is retired and therefore is no longer an employee. The money is not even being paid to the individual by a public body, but by a pension fund. Therefore, the House of Assembly appears to be saying, there is not the same requirement under the *ATIPPA* for transparency and accountability with regard to such information.

[19] It is arguable that the pension income of a public servant is actually nothing more than deferred employment income. The contributions that fund such pension benefits are paid into the fund by the employer and the employee pursuant to the contract of employment, and the formula for determining an individual's pension benefit is linked to income from employment and years of service in that employment. It is arguable therefore that information regarding an individual's pension is really information about remuneration, and that the definition in section 30(2)(f) is broad enough to encompass it. However, that argument can be left for another time, because even if I agreed that information about the former Chief Electoral Officer's MHA pension itself is not covered by the exceptions in section 30(2), that is not the end of the matter.

[20] The fact is that, as the House of Assembly itself observes, while the individual in question is a former Member of the House who is in receipt of the MHA pension, he was also, for a period of time since ceasing to be an MHA, an *employee* of the House during his term as Chief Electoral Officer. He was employed as such under a contract of employment, and as the House of Assembly readily acknowledges, his contract of employment constitutes "information about a third party's position, functions or remuneration as an officer, employee or member of a public body" and is therefore subject to disclosure under section 30(2)(f) of the *ATIPPA.*

[21] Information and Privacy Commissioners have routinely held that a public servant's employment contract, save for certain purely personal details it might contain, falls into the category of information about "position, function and remuneration" and therefore is to be

disclosed in its entirety. (See, for example B.C.I.P.C. Order No. 02-56, where a complete employment contract, except for home address information, was ordered disclosed.) This itself is not in issue in the present case. The Applicant here has not requested a copy of the employment contract. Had he done so, no doubt he would have received it.

[22] The House of Assembly also acknowledges that the former Chief Electoral Officer's contract of employment, in addition to the usual terms such as salary and benefits, contains a term requiring him, as a condition of employment, to direct his current MHA pension to a registered charity, and to provide proof of that allocation to the Speaker of the House. The House of Assembly however argues that, in and of itself, this does not provide an opening whereby personal information becomes accessible to an applicant. The House of Assembly makes the analogy to personal health information, insurance information, MCP numbers and Social Insurance Numbers, some of which may be required by the human resources divisions of public body employers. Having that information, and requiring its production by an employee, says the House of Assembly, does not mean that an applicant can access it under *ATIPPA.*

[23] With respect, I do not agree with this analogy. It is true that employers routinely require information such as Social Insurance Numbers from employees in order to carry out statutory obligations or administrative tasks. In my view, however, such information as a Social Insurance Number contained in an employer's records is not information about the employee's "position, functions or remuneration" within the meaning of the exception in section 30(2)(f). Rather, Social Insurance Numbers are simply identifying numbers, within the meaning of section 2(o). That information constitutes personal information that does not fall within any of the exceptions to prohibition in section 30(2), and therefore must not be disclosed.

[24] There are other kinds of personal information related to health or insurance, for example, that may be collected by a public body employer from an employee for legitimate purposes. Whether or not it is subject to disclosure under an access to information request will depend on whether, in each case, it falls within one of the exceptions to prohibition contained in section 30(2), or one of the other provisions of the *Act* that permits disclosure.

[25] In the case before me, I conclude that the former Chief Electoral Officer's employment contract, including the condition requiring him to direct his MHA pension to a registered charitable organization, constitutes information about the position, functions or remuneration of the employee concerned, irrespective of whether or not the pension income itself constitutes "remuneration" of the employee. Directing it to a registered charity is in this case an obligation of the employee's employment contract. Furthermore, it was not a trivial or purely technical obligation, but an important one. The requirement to dispose of such a significant sum of money in this way is an important fact about the "position, functions or remuneration" of this employee.

[26] As the Applicant points out in his submission, the former Chief Electoral Officer's appointment to that position in 2006 was made in the context of widespread allegations of financial mismanagement in the provincial public sector, and in the context of the appointment of the provincial Auditor-General to investigate, among other things, MHA's constituency allowance claims, and nepotism and other improprieties in the Office of the Chief Electoral Officer itself. One of the issues that received widespread publicity at the time was the issue of "double-dipping" – whether a retired employee in receipt of a pension should be re-hired as a public servant and thus benefit from both a salary and a pension at the same time.

[27] As the Applicant and the House of Assembly both indicate, the former Chief Electoral Officer made public statements to the effect that upon his appointment as Chief Electoral Officer, he would receive only the salary for the position, and would donate his pension income to a charitable cause. The Minister of Finance was also questioned about this and related matters in the House of Assembly, and, as stated by the Applicant in his submissions, indicated to the House on 10 April 2006 that retired employees in receipt of a pension would not, in general, be re-employed without having to forego their pension income.

[28] I am satisfied that, given the above circumstances, and the seriousness with which the issue of "double-dipping" appears to have been treated, the obligation imposed on the former Chief Electoral Officer by his employment contract is a significant, non-trivial term of that contract and, therefore, constitutes part of the information about his position, functions or remuneration that is subject to disclosure under section 30(2)(f) of the *ATIPPA*.

[29] The Applicant, however, has not asked for the employment contract. He has asked for disclosure of the name of the charitable organization to which the former Chief Electoral Officer's pension has been donated – in other words, information showing that the contractual obligation has in fact been fulfilled. That information is not part of the former Chief Electoral Officer's employment contract. The contract itself does not prescribe that any specific organization must be the recipient of his donation. The question, then, is whether information demonstrating compliance with a fundamental term of an employment contract is also "information about the position, functions and remuneration" of an employee, or whether it constitutes information about an employee's employment history which, if it does not fall into the exception in section 30(2)(f), is not subject to disclosure .

[30] There are no previous cases under the *ATIPPA* in which this specific issue has been dealt with, and I am not aware of a previous similar case in any of the other jurisdictions with similar legislative provisions. In my view, however, there are a number of factors which must be considered.

[31] First, it is clear that we must distinguish the ordinary details of an employee's day-to-day fulfillment of the terms of his or her employment. Information about whether or not an employee is punctual or hard-working, or performs satisfactorily in the position, or takes excessive sick leave, or has good relationships with co-workers, or has been disciplined for work-related misconduct, in my opinion, falls into the category of "employment history" and will ordinarily be exempt from disclosure. Those things are matters, as the House of Assembly says in its submission, between the individual and the employer.

[32] There are numerous cases that are illustrative of this proposition. Information and Privacy Commissioners have routinely upheld refusals to disclose such information as employee performance records, details of job competitions, resumes, or disciplinary records. The principle underlying the distinction between employment history information, on the one hand, and information about an employee's position, functions or remuneration, on the other, is that while both are personal information, the public interest in the accountability of public bodies requires

that the basic elements of a public servant's terms of employment be disclosed. In the case of the individual's employment history, by contrast, the interests of privacy outweigh the interest in disclosure.

[33] There are perhaps categories of information about compliance with an employment contract which arguably may be qualitatively different. For the sake of illustration, it might be a requirement for a position as a solicitor with a public body that a candidate must become a member of the provincial law society in order to be entitled to practice law. This is not simply a routine term of employment, but a fundamental qualification or condition. In such a circumstance, would the public be entitled to know whether the individual has met the requirement?

[34] In Order P-244 (October 23, 1991) the Ontario Information and Privacy Commissioner dealt with a request to the Ministry of Health for information regarding the employment of a named individual by the Kingston Psychiatric Hospital, including information about the classification of his license and restrictions, if any, to which it was subject. The Ministry denied access to the records. The Commissioner upheld the denial of some of the records, including for example information about the individual's dates of employment, as personal information relating to employment history. The Commissioner held, however, that the individual's Hospital Practice License, although it had some connection to employment, as it must be obtained in order to work at a particular hospital, did not constitute employment history. He therefore decided that it should be disclosed.

[35] By contrast, the British Columbia Information and Privacy Commissioner has, in a number of cases, reached somewhat different conclusions. In Order No. 54-1995, the Applicant had requested information about the qualifications of an employee of the Workers' Compensation Board for the position he held. The Commissioner held that the WCB was authorized to refuse to disclose that information, stating that the public has a right to know about job descriptions and job qualifications in general terms, as these are information about the duties and functions of the position itself, but not the private information of a public servant with respect to these topics.

[36] Similarly, in Order No. 139-1996, where the Applicant had requested information about the qualifications, evaluations and academic specialties of individual school teachers, the Commissioner upheld the School District's refusal, distinguishing the contents of an individual's personnel file from the job descriptions or job qualifications of the position.

[37] The principle underlying such decisions seems to be that, in the ordinary case, the public is not entitled to information about the particular qualifications of individual public employees for the work that they do. In the ordinary case, as the House of Assembly argues, that is a matter between the employer and the employee. It is the responsibility of a public body to ensure that its employees possess the qualifications for their positions, just as it is its responsibility to monitor their performance in those positions. Accountability to the public in those circumstances is indirect. We expect that public bodies will establish administrative policies and procedures that will achieve the required results, and those policies and procedures are open to public scrutiny. We do not, however, permit public access to the personnel files of individual public servants, including qualifications, performance appraisals, evaluations, disciplinary records, and the like, because that is considered to be an unreasonable invasion of the individual's privacy. We are expected to accept that these personnel matters are dealt with internally. That is where the line between "the position, functions and remuneration of an employee," under section 30(2)(f), and "employment history," under section 2(o), has been drawn.

[38] There may be cases in which the qualifications of individuals in certain positions, or their performance in the position, are critical to the health, safety or well-being of the public, for example, or have taken on an extraordinary significance for other reasons. In such cases it may be arguable that such information is not merely an aspect of employment history, but a key aspect of the duties and responsibilities of the position. In such a case, it may not be enough to rely on the public body's assurance that the condition has been met. The public may be entitled to have access to that information directly.

[39] In the present case I have concluded that the requirement to donate his MHA pension to charity cannot be said to be a "qualification" for the Chief Electoral Officer's position. It has nothing to do with the description of the position itself, or with the duties and functions of the

incumbent in that position. However, it was made a condition of his employment, and was obviously considered important enough that the employee was obligated not only to make the donation, but to provide written proof that he had in fact done so. What, then, is the function of that obligation in the former Chief Electoral Officer's employment contract?

[40] I have concluded that it is an aspect of his *remuneration* for the position. In order to avoid creating a situation of "double-dipping" the House of Assembly could perhaps have chosen to reduce the salary of the position, by an amount equal to the employee's pension. Alternatively, (if it were legally feasible to do so) it could have required that payment of the pension to the individual be suspended as long as he was employed in the position. Instead, what it chose to do was to require him to divert the amount of his pension income to a charitable organization, thus ensuring that the net remuneration received by the former Chief Electoral Officer while he occupied the position would be no more than the salary for the position.

[41] The question then becomes: what, then, was the remuneration *actually received* by the former Chief Electoral Officer? Was it the net amount referred to above, or was it substantially more, as it would have been if he had not actually complied with the terms of his contract, but continued to receive and retain both his pension and his salary? Is the public entitled to have access to that information? That depends on whether the interpretation of "remuneration" in section 30(2)(f) of the *ATIPPA* is broad enough to encompass that information.

[42] What constitutes remuneration has been considered on many occasions in other jurisdictions with similar legislative provisions. It has been held to include, for example, not only base salary (or "salary range" in the case of the particular Ontario legislative wording), but bonus payments, merit pay, severance pay, incentives, and a whole range of additional entitlements such as health and other insurance-related benefits, sick leave, vacation and other leave, termination allowances including severance pay, reimbursement for expenses, and pension and death benefits. (See Ontario Information and Privacy Commissioner Order M-23.) It has also been held to include financial entitlements that may not have been part of a standard package, but were negotiated as part of the particular employment contract in question.

[43] It is important to note that in cases in which these issues have been considered, it has been held that remuneration information which is to be disclosed to the public includes not only the amounts to which an employee is entitled, but, for example, the amounts of severance pay, or reimbursements for expenses actually received. These decisions are consistent with the principle that where salaries and benefits are paid from the public purse, it is appropriate that the definition be given a "fairly expansive interpretation" in keeping with the purposes of transparency and accountability. (See, for example, Ontario Information and Privacy Commissioner Order PO-2641.)

[44] Applying those principles to the relatively unique circumstances of the present case, I have concluded that the Applicant would be entitled not only to information detailing what remuneration the former Chief Electoral Officer was entitled to in the position, but also to information confirming what remuneration he actually received. Upon receipt of a request, the House of Assembly would, of course, have to disclose the employment contract, and the amount contributed under the terms of the contract. In addition, however, in order to show what remuneration the former Chief Electoral Officer actually received, it would have to disclose whatever documentation has been submitted as proof of his compliance with the obligation to direct his MHA pension to a registered charity.

[45] I have further concluded that the documentation in question would logically have to include the name of the registered charitable organization in question. Without that information, it is not possible for someone to be certain that the recipient is in fact a registered charity as required by the terms of the contract.

[46] While the Applicant has not asked for the employment contract itself, it is clear from the wording of his Request for Review that he was aware that the contract contains a term requiring the former Chief Electoral Officer to donate his pension to charity, and it is obvious that the information he is seeking is the information that would enable him to confirm that the former Chief Electoral Officer has done so. Looked at another way, it is clear that the point of the request for information identifying the charity is precisely to confirm that the former Chief Electoral Officer's net remuneration in the position was the salary alone, not the salary and the

MHA pension combined. I have concluded therefore that the responsive record must disclose the name of the registered charitable organization.

[47] In a case such as this, given the importance of the principles involved, and given the nature of the public commitments made, it is appropriate that information about whether the obligation has been fulfilled is considered to be information about the individual's remuneration, to which the public is entitled. This conclusion is in keeping with the principles of accountability and openness that underlie the *Act*, and desirable for ensuring public confidence in the integrity of public bodies.

Issue # 3: Part IV – Protection of Privacy

[48] The House of Assembly argues that no matter what my conclusions might be with regard to whether the information requested may be disclosed under section 30 of *ATIPPA*, the information cannot in any event be disclosed because Part IV of the *Act*, respecting the protection of privacy, is now in force. The House argues that it is bound, pursuant to section 36, to protect personal information from access, and under section 38, to use that information only for the purpose for which it was collected, namely, to confirm compliance with a contractual obligation.

[49] I first wish to point out that Part IV of the *ATIPPA* was proclaimed on 18 January 2008. Prior to that date it was not in force, and nothing in the proclamation suggests that it has retroactive effect. The Applicant's access to information request was made on 27 November 2007. Part IV therefore cannot apply to the Applicant's request.

[50] There is, however, a more important point. It seems to me that the argument of the House of Assembly betrays a fundamental misreading of the *ATIPPA* with respect to the interrelationship between Parts II and III, respecting the right of access and exceptions to access, on the one hand, and Part IV, the protection of privacy, on the other. The privacy provisions of the *Act* referenced by the House of Assembly, sections 36 and 38, read as follows:

36. The head of a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

. . .

38. (1) A public body may use personal information only

(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose as described in section 40 ;

(b) where the individual the information is about has identified the information and has consented to the use, in the manner set by the minister responsible for this Act; or

(c) for a purpose for which that information may be disclosed to that public body under sections 39 to 42 .

(2) The use of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.

[51] Part IV as a whole is a set of comprehensive provisions governing the collection, use and disclosure of personal information of individuals by public bodies. section 36, above, sets out the rule that all public bodies must follow to protect personal information with reasonable security arrangements. section 38 governs how such information is to be used. The disclosure of personal information, however, is governed by sections 39, 40 and 41 of the *Act*. section 39 reads as follows:

39. (1) A public body may disclose personal information only

(a) in accordance with Parts II and III;

(b) where the individual the information is about has identified the information and consented to the disclosure in the manner set by the minister responsible for this Act;

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose as described in section 40;

(d) for the purpose of complying with an Act or regulation of, or with a treaty, arrangement or agreement made under an Act or regulation of the province or Canada;

(e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information;

(f) to an officer or employee of the public body or to a minister, where the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister;

(g) to the Attorney General for use in civil proceedings involving the government;

(h) for the purpose of enforcing a legal right the government of the province or a public body has against a person;

(i) for the purpose of

(i) collecting a debt or fine owing by the individual the information is about to the government of the province or to a public body, or

(ii) making a payment owing by the government of the province or by a public body to the individual the information is about;

(j) to the Auditor General or another person or body prescribed in the regulations for audit purposes;

(k) to a member of the House of Assembly who has been requested by the individual the information is about to assist in resolving a problem;

(l) to a representative of a bargaining agent who has been authorized in writing by the employee, whom the information is about, to make an inquiry;

(m) to the Provincial Archives of Newfoundland and Labrador, or the archives of a public body, for archival purposes;

(n) to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding, or

(ii) from which a law enforcement proceeding is likely to result;

> *(o) where the public body is a law enforcement agency and the information is disclosed*
>
> *(i) to another law enforcement agency in Canada , or*
>
> *(ii) to a law enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority;*
>
> *(p) where the head of the public body determines that compelling circumstances exist that affect a person's health or safety and where notice of disclosure is mailed to the last known address of the individual the information is about;*
>
> *(q) so that the next of kin or a friend of an injured, ill or deceased individual may be contacted;*
>
> *(r) in accordance with an Act of the province or Canada that authorizes or requires the disclosure; or*
>
> *(s) in accordance with sections 41 and 42 .*
>
> *(2) The disclosure of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.*

Of the 22 separate paragraphs above setting out particular circumstances in which personal information may be disclosed by a public body, it can be seen that the first such circumstance is "(a) in accordance with Parts II and III." In other words, if a public body is considering whether or not to disclose personal information pursuant to an access to information request, it is directed to make that decision in accordance with the provisions of Parts II and III. If, on the other hand, the question whether or not to disclose personal information arises in some other way, other than in connection with an access request, then the public body is directed to make that decision in accordance with the provisions of Part IV, specifically by determining whether the disclosure contemplated is covered by one of the paragraphs of section 39(1) other than paragraph (a).

[52] This means that if disclosure of personal information is sought pursuant to an access to information request, Part IV of the *ATIPPA* does not come into play at all. Part IV is intended to govern the actions of public bodies themselves, in how they collect, use and disclose personal

information in the course of their administrative operations. Parts II and III are intended to govern how public bodies respond to requests for information (including personal information) from the public. As a result, therefore, I conclude that even if Part IV of the *Act* had been in force at the time of the present request, it would have no application to the case at hand.

V CONCLUSION

[53] In summary, my conclusions with respect to the three issues to be dealt with in this Report are:

1. The information sought by the Applicant is "personal information" within the meaning of section 2(o) of the *Act*;

2. The disclosure of the information sought is not, however, prohibited by section 30 because it falls within the exception to prohibition in paragraph 30(2)(f), as information about the position, functions or remuneration of an employee of a public body;

3. The privacy provisions of Part IV of the *Act* do not operate so as to prevent disclosure of the information, since Part IV has no application to a request for access to information under Parts II and III.

[54] I agree with the Applicant when he states that the issue, ultimately, is one of public trust, not one of privacy, and that it is important that the public should be able to know for sure that a public commitment (and contractual employment obligation) has been honoured. Therefore it is my recommendation that the record requested be disclosed to the Applicant.

[55] Having reviewed the responsive record, I have ascertained that the name of the registered charity to which the former Chief Electoral Officer is said to have donated his pension income for the period in question is to be found in a number of different documents, including an official receipt from the registered charity, and a letter from the former Chief Electoral Officer's solicitor

to the Speaker of the House of Assembly, enclosing the receipt and an attached schedule. On inspection it is clear that the solicitor's letter and the attached schedule contain other personal information of the former Chief Electoral Officer or of the writer which must not be disclosed. It is, however, feasible to disclose redacted copies of that portion of the record, with the personal information severed. The official receipt presents no such difficulty, as it contains the information requested, while at the same time it contains no other personal or otherwise restricted information. My recommendation, therefore, is that a copy of the solicitor's letter and its attached schedule, redacted as I have indicated in a copy that I have given to the House of Assembly attached to this Report, and a copy of the official receipt, be given to the Applicant.

VI RECOMMENDATIONS

[56] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that the House of Assembly provide the Applicant with a redacted copy of the responsive record referred to above.

[57] Under authority of section 50 of the *ATIPPA* I direct the head of the House of Assembly to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the House of Assembly with respect to this Report.

[58] Please note that within 30 days of receiving a decision of the House of Assembly 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*.

[59] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of April 2008.

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