NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2008-012

Department of Municipal Affairs

Summary: The Applicant on 10 January 2008 filed a request under the *Access to Information and Protection of Privacy Act* (the *"ATIPPA"*) with the Department of Municipal Affairs for records for the period 1 September 2007 to 7 January 2008 relating to a former employee of the Town of St. George's. The Department on 8 February 2008 granted access to the records in part. A great deal of information was withheld on the basis of section 21 of the *ATIPPA* (legal advice), section 23 (disclosure harmful to intergovernmental relations) and section 30 (personal information). On 26 February 2008 the Applicant filed a Request for Review with this office objecting to the severing of the withheld information. The Commissioner determined that the Department had not attempted to make a case for the application of section 23, and recommended that all of the information withheld on that basis should be disclosed. The Commissioner found that some material had been appropriately withheld on the basis of sections 21 and 30. The Commissioner recommended the disclosure of the rest.

Statutes Cited: *Access to Information and Protection of Privacy Act,* S.N.L. 2002, c. A1.1, as amended, sections 2(o), 3, 7(1), 7(2), 9, 12, 20(1)(a), 21, 23(1)(a), 23(1)(b), 30(1), 30(2)(f), 46(1), 46(2); 64(1); *Municipalities Act, 1999,* S.N.L 1999, c. M-24; *Municipal Affairs Act,* S.N.L. 1995, c. M20.1.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-002, 2006-006, 2007-004, 2008-010; Newfoundland and Labrador *ATIPP Policy and Procedures Manual*, ATIPP Coordinating Office, Department of Justice, updated September 2004, available at: http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf

I BACKGROUND

[1] In the summer and fall of 2007, the Applicant made a number of inquiries to the Town of St. George's, (the "Town") asking for the details of a matter involving a former employee of the Town, which had been referenced in a note to the audited financial statements of the Town for 2006. Not being satisfied with the responses received from the Town, the Applicant on 28 September 2007 wrote to the Department of Municipal Affairs, (the "Department") asking that an investigation be conducted by the Department.

[2] The Department did in fact conduct an investigation, concluding that the matter had been handled in an appropriate manner by the Town, and so advised the Applicant. The Department did not however provide the Applicant with the details he had wanted.

[3] On 10 January 2008 the Applicant submitted an application pursuant to the *Access to Information and Protection of Privacy Act* (the *"ATIPPA"* or the *"Act"*) to the Department of Municipal Affairs for the following records or information:

> *All correspondence, reports etc. from Corner Brook Offices related to former employee of the Town of St. George's from September 1, 2007 to January 7, 2008.*

[4] On 8 February 2008 the Department replied to the Applicant's request, granting access to the records in part. However, a considerable amount of the information contained in the records was severed in accordance with a number of exceptions to disclosure under the *Act*: section 21 (legal advice), section 23 (disclosure harmful to intergovernmental relations or negotiations) and section 30 (disclosure of personal information).

[5] The Applicant, believing that he had not received all the records he was entitled to, on 26 February 2008 filed a Request for Review with this Office.

[6] On 5 March 2008 this Office received from the Department a copy of the record sent to the Applicant, and a complete and unredacted copy of the record that was considered responsive to the application. Upon review, the 84-page record consisted of a number of different kinds of

documents, many of them received by the Department from the Town in the course of the Department's investigation, and others being internal documents created by persons within the Department. In some cases it was clear from inspection of the document itself why certain information had been severed by the Department. In most cases, however, it was not. Therefore an investigator from this Office began the normal process of attempting to informally resolve the Request for Review, under section 46(1) of the *Act*, by initiating an inquiry with officials of the Department, in an attempt to get a fuller, detailed understanding of why specific items of information had been withheld, and what particular provisions of the *ATIPPA* were being claimed in justification.

[7] After a number of discussions, the investigator sent a lengthy written list of detailed questions to the Department on 19 March 2008. After repeated inquiries the Department responded on 28 April 2008 with a document of scarcely more than one page, which for the most part simply restated the section of the *ATIPPA* relied on by the Department. It became apparent that attempts by this Office to gain a fuller understanding of the Department's position would be fruitless, and therefore on 29 April 2008 the file was referred to the formal review process in accordance with section 46(2) of the *Act*. Written submissions were invited from the Applicant and the Department.

II DISCUSSION

(A) Preliminary Issues

(i) *Informal Resolution and Formal Review Processes*

[8] Before examining the records at issue in this review, I wish to make some preliminary comments about the review process itself, and the public body's role in that process. Under Part V of the *Act*, as part of the formal review process, the Applicant and the public body are given an opportunity to make written submissions on the matters in dispute. In the usual case, however, there is first an informal review process, consisting of communications between the parties and this Office, which can serve to narrow the issues. The fuller explanations provided by the public body for withholding specific documents or items of information can be discussed with the Applicant. Even though the Applicant cannot see the information that has been severed, the

investigator can discuss it in general terms with the Applicant, and explain the justifications for the severing that have been provided by the public body. Such a discussion will often result in an Applicant's conceding that certain information has been properly withheld. Alternatively, it can sometimes result in the agreement of the public body to reverse its decision on a particular item and disclose that information. In many cases the issues giving rise to a Request for Review can be completely resolved in this way, without the matter ever being referred to the formal process. In other cases, the informal discussions can at least enable the parties to focus on the underlying issues and on the reasons advanced by the public body for its decisions to withhold information, in order to make useful written submissions, if it should prove necessary to move to the formal review stage.

[9] In the present case, the informal discussion process effectively did not take place at all. This had two results. First, none of the issues were resolved, so that all of the Department's decisions respecting the severed information now have to be dealt with under the formal process. Equally important, this Office now has to rely entirely on formal submissions from the parties, along with its own review of the record, in reaching the conclusions to be set out in this Report. However, as the Applicant in the present case has remarked, there has been no informal discussion process which would have enabled the Applicant to have a better understanding of just what kind of information is missing from the record, and a clear understanding of the reasons claimed by the Department for withholding it. Therefore he has no real basis on which to make any formal submission. Accordingly, the Applicant in this case did not provide one.

[10] This problem was further compounded in the present case by the fact that on 8 May 2008, the day the Department's expected written submission was due, the Department notified this Office that the submission would not be forthcoming. No explanation for this decision was provided. As a consequence, the present Review must be conducted without this Office having the benefit either of informal discussions with the parties, or of written submissions from the Department justifying its decision. In my view, this was not a situation envisaged by the Legislature when the *ATIPPA* was passed into law. On the contrary, the *Act*, like many other statutes that provide for the adjudication of individual rights, anticipates that the Commissioner will receive

representations from the parties involved, and in particular from the public body that has made the initial decision and is therefore required, under the statute, to justify it.

[11] This latter point is particularly important. The *ATIPPA*, in section 64(1) provides that on a review (or on an appeal to the Court, if a matter should proceed to that forum) the burden of proof is on the head of a public body, to prove, on a balance of probabilities, that the applicant has no right of access to withheld information (see NL OIPC Report 2007-004, and other previous Reports). Put plainly, if the head of a public body cannot satisfy the Commissioner (or the Court, on an appeal) that its decision is the right one, then that decision will not be upheld. It is therefore critical to the proper operation of the *Act* that a public body put sufficient effort into articulating the reasons for its decisions. While the Commissioner has been given the power and duty to review such decisions and make recommendations, he is not expected to do so in a vacuum, nor is he expected to do the job of the public body for it. I will return to this issue in the course of dealing with the substantive considerations in this review.

(ii) *The Purposes of the Act*

[12] The purposes of the *Access to Information and Protection of Privacy Act* are clearly set out in section 3 and section 7, as follows:

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

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

[13] As previous reports from this Office and from other jurisdictions have discussed, the fundamental underlying principles on which the *Act* is based are the accountability of government bodies and other public institutions to the public, and the desirability of having better-informed members of society. It has been said that the *ATIPPA* demonstrates a "bias in favour of disclosure" – that in other words, information should always be disclosed unless it clearly falls within a specific exception to disclosure in the *Act*. (See NL OIPC Report 2005-002.)

(iii) *The Line by Line Review Process*

[14] This view of the *Act* is exemplified by the way in which the broad right of access is established under section 7(1), subject only to the principle in section 7(2) that excepted information should be severed and the remainder of the record should be released. The combination of the "bias in favour of disclosure" and the severability principle means that every request ought to be assessed with the object of disclosing the maximum amount of information that can be released under the *Act*. As the *ATIPP Policy and Procedures Manual* explains, to achieve this goal a line-by-line review of each document is essential, in order to determine what information may be subject to an exception to disclosure. In the process of review, information that is to be severed is covered with black marker, on a copy of the document, and the applicable section, subsection and paragraph of the *Act* is noted in the margin. This is a time-consuming process, and it must be carried out on every page of the document, line by line, if the result is to conform to the spirit and objects of the *Act*. (See *ATIPP Policy and Procedures Manual*, ATIPP Coordinating Office, Department of Justice, 2004, Chapter 3.)

(iv) ***The Requirement to Explain the Reasons***

[15] It is not enough, furthermore, to simply sever some information and release the rest. Every refusal - or partial refusal - must be accompanied by an explanation to the applicant. This explanation is necessary so that an applicant may be able to understand the decision to withhold some information, and have confidence that it has been done in accordance with the law. It is also necessary so that there can be a basis on which the applicant may eventually appeal the decision or ask for a review by the Commissioner. As section 12 of the *Act* clearly states:

> *12. (1) In a response under section 11, the head of a public body shall inform the applicant*
>
> *(a) whether access to the record or part of the record is granted or refused;*
>
> *(b) if access to the record or part of the record is granted, where, when and how access will be given; and*
>
> *(c) if access to the record or part of the record is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.*
>
> *(2) Notwithstanding paragraph (1)(c), the head of a public body may in a response refuse to confirm or deny the existence of*
>
> *(a) a record containing information described in section 22 ;*
>
> *(b) a record containing personal information of a third party if disclosure of the existence of the information would disclose information the disclosure of which is prohibited under section 30 ; or*
>
> *(c) a record that could threaten the health and safety of an individual.*

As clause (i) above provides, the public body, in addition to stating the provision of the *Act* on which the refusal is based, must give reasons for the refusal. This can only mean an explanation of what kind of material has been severed, together with an explanation of why the severing is legitimate. It is simply not enough to just cite a provision or state the applicable section of the *Act*. A cursory review of the exception provisions of the *Act* shows that many sections are lengthy and complex, with different types of exceptions contained in different subsections or paragraphs. If only the section number is cited in a particular case, the applicant is left to guess which of the specific provisions is meant to apply. This would obviously be unsatisfactory.

[16] Furthermore, the *ATIPPA* provides in section 9 that public bodies have a duty to assist applicants:

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

When the duty to assist in section 9 is viewed in conjunction with clause (ii) of section 12, above, requiring the public body to provide the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions, it is clear that the public body must be prepared to justify its decision directly and at some length. Someone is expected to be ready, willing and able to answer the applicant's questions about the refusal. That explanation will only be satisfactory if, at a minimum, it identifies with precision the applicable provision of the *Act*, describes the severed information, and demonstrates a rational link between the two. The record must therefore be carefully reviewed, and consideration must be given to a number of different exceptions to access in the *ATIPPA*, in the process of making decisions to sever information, since more than one exception may be applicable.

[17] Finally, the public body must not only be prepared to answer an applicant's questions directly, but also to respond to each request for review with a willingness to engage in a meaningful discussion with the assigned investigator from this Office. The informal resolution process, provided for in section 46 of the *Act*, is essentially a form of mediation, and is critical. Parties who can be assisted to reach agreement, rather than having a solution imposed on them

by an adjudicator, tend to be much more satisfied with the result. Informal resolution is also likely to get to the practical root of a dispute more quickly. Three-quarters of the requests for review received by this Office are resolved by this method, often in only a few weeks. By contrast, most of the reviews that go through the formal process end up taking three months or more to complete. However, the informal process requires that someone must be authorized and prepared to put the necessary time and effort into discussing with the investigator the reasons for the decision to withhold information, based on a reasoned and thoughtful application of the relevant provisions of the *Act*.

(B) The Record

[18] I now turn to a detailed examination of the 84-page record in the present case. As indicated earlier, the Department relied on three exceptions to access in the *ATIPPA* as grounds for withholding information from the record. In the following paragraphs of this Report, I will deal with each of the decisions to sever material, page by page and line by line, as explained above. Only pages that have been subject to severing will be mentioned – those pages not mentioned below have already been disclosed to the Applicant.

(i) Section 21 (Legal Advice)

[19] Pages 1 and 2 of the record are a letter from a solicitor to a Department official, dated 8 November 2007, and were severed in their entirety on the basis of section 21 of the *Act.* Section 21 provides that information that is subject to solicitor-client privilege, or that would disclose legal opinions provided to a public body by a law officer of the Crown, may be withheld. On inspection this letter is clearly a legal opinion, provided by the solicitor to the official. As such, it is subject to solicitor-client privilege, and so section 21 applies. However, previous decisions of this Office and others have held that, while the body and the subject-line of such opinion letters may be withheld, the privilege does not extend to the existence of the opinion, to the name of the solicitor or law firm consulted, or to the name of the recipient. For these reasons it is recommended that the Department sever the body and subject-line of the letter, but release the rest. (See NL OIPC Report 2007-015.)

[20] I note that there is a handwritten note in the margin of page 1 of the letter, from one Department official to another, which asks the recipient to take certain action. It is arguable that the content of that note could fall into the category of "advice or recommendations developed by of for a public body or a Minister" under section 20(1)(a) of the *ATIPPA*. If so, it would have been open to the Department to withhold the note, as section 20 is a discretionary exception to disclosure. However, if the Department gave any consideration to the application of that section to this page, it was not cited. I have concluded that this note must be released to the Applicant, for reasons that I will now explain.

[21] A particular difficulty arises when a public body fails to devote sufficient time and effort to the process of line-by-line review of the record. On the one hand, it may perhaps have appeared to the Department in this case that, because it had claimed solicitor-client privilege as the justification for withholding the entire 2-page document, it was unnecessary to look as well at other possibly applicable exceptions, such as section 20. Alternatively, the Department in its review may have noted that section 20 could apply to the handwritten note on page 1, but exercised its discretion to release the information. The problem is that I cannot tell which. With neither a thorough discussion of such matters in the informal review stage nor a detailed written submission in the formal process, this Office is left with no alternative but to undertake the entire review itself and resolve such questions unassisted.

[22] How, then, must I deal with situations where a possible exception from disclosure is either not cited at all, or cited generally but not explained, by the public body? The answer depends on the nature of the exception. There are two types – mandatory and discretionary. A mandatory exception states that a public body "shall refuse to disclose information" that falls within the exception. In that case, there is no discretion. The information must not be disclosed. The four mandatory exceptions under the *ATIPPA* are section 18 (cabinet confidences), section 27 (business interests of third parties), section 30 (personal information) and section 30.1 (House of Assembly records). The remaining eight exceptions are discretionary, and state that a public body "may refuse to disclose" information that falls within the exception.

[23] It is clear from the scheme of the *Act* that the prohibition against disclosure of information that falls into one or another of the mandatory exceptions is absolute, and applies equally to the public body and to this Office. The *Act* does not permit me to recommend disclosure of information that under a mandatory exception must not be disclosed. Therefore, where it appears to me that certain information may be covered by a mandatory exception to disclosure, even though the public body fails to claim it, or claims it but fails to meet the burden of proof with respect to the applicability of that provision, I am nevertheless required to decide that issue. (See NL OIPC Report 2008-010.)

[24] By contrast, it is equally clear that the disclosure of information that falls within one of the discretionary exceptions is not prohibited. Rather, it may be disclosed or withheld, at the option of the public body. In some cases the exercise of judgment by the public body is predicated on whether or not disclosure of the information could reasonably be expected to cause a particular sort of harm. Nevertheless, disclosure is still discretionary. If a public body wishes to exercise the option to withhold such information, therefore, the burden lies on the public body, under section 64(1) of the *Act*, to claim the exception and justify its decision.

[25] In circumstances where the public body fails to cite or claim a discretionary exception, I conclude that there is no issue that the *Act* requires me to decide. Instead, the *Act's* "bias in favour of disclosure" operates so that such information is then disclosed by default.

[26] Applying the above principles to the handwritten note on page 1 of the record, I note that the Department has not cited section 20, or any other justification apart from solicitor-client privilege, for withholding it. As solicitor-client privilege does not apply, and it does not appear that either of the other mandatory exceptions has any application, I conclude that the note must be disclosed.

[27] Page 3 is a letter dated 5 November 2007 from a Department official to the solicitor who wrote the 8 November 2007 legal opinion, and the Department has severed the second paragraph, citing section 21. On review, it appears that this paragraph is the request for the legal opinion, and it has been held that such a request is privileged along with the opinion to which it refers

(see NL OIPC Report 2007-015.) Other information in such a letter is not necessarily covered by the exception, however. In this case I find that the Department appropriately severed the second paragraph, and released the rest of the letter.

[28] Page 4 is a memo dated 19 October 2007 from one Department official to another and was released in part, with paragraph 4 and part of paragraph 5 severed on the basis of sections 21 (legal advice) and 23 (disclosure harmful to intergovernmental relations or negotiations). It was not clear which section applied to which paragraph. Later, in the short written reply to this Office dated 28 April 2008, the Department also stated that it "could have claimed" section 20 (policy advice or recommendations), but provided no elaboration for this statement. I will deal with each of the claimed exceptions in turn.

[29] The memo, including the severed portions, is a narrative of facts and a summary of the findings of the Department's investigation. The memo was not written by, or to, a lawyer, and it does not purport to summarize a legal opinion or legal advice. I conclude that there is no basis for the claim of legal advice or solicitor-client privilege under section 21.

[30] As noted above, the Department has stated that it "could have claimed" section 20 (Policy Advice or Recommendations). However, the Department has not supported that contention with any explanation. In accordance with the principles set out in paragraphs 22-25, above, in relation to unclaimed or unsupported discretionary exceptions, I conclude that there is no ground for withholding any part of this memo on the basis of section 20, and recommend that it be disclosed.

(ii) Section 23 (Disclosure Harmful to Intergovernmental Relations)

[31] Section 23 of the *ATIPPA* is intended to allow a public body to refuse to disclose information if it could harm intergovernmental relations. It reads as follows:

> *23. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*

> *(i) the government of Canada or a province,*
>
> *(ii) the council of a local government body,*
>
> *(iii) the government of a foreign state,*
>
> *(iv) an international organization of states, or*
>
> *(v) the Nunatsiavut government; or*
>
> *(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*
>
> *(2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of*
>
> *(a) the Attorney General, for law enforcement information; or*
>
> *(b) the Lieutenant-Governor in Council, for any other type of information.*
>
> *(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.*

[32] Section 23 is composed of two quite distinct and different types of provisions, and I will deal with the application of each of them in turn. The first, section 23(1)(a), refers to a reasonable expectation of harm to the conduct of relations between (in the present case) the Department and a local government body. I have previously held that to justify a refusal under this heading, a body must show, first of all, a clear link between the proposed disclosure and some specific kind of identifiable harm. Second, the body must show that the harm in question is not merely possible, but probable. (See NL OIPC Report 2006-006.)

[33] The Department's stated justification, in its response to questions from this Office, is that:

> *Municipalities need to have a level of comfort when providing information to Department Officials that are deemed to be of a confidential nature that they will be kept within the Department. This level of trust is paramount and relied upon by the Department and the municipalities when dealing with sensitive issues.*

The Department appears to be arguing that disclosing certain information would damage the level of trust between it and municipalities.

[34] In the present case, the Department conducted an investigation into (to use its own words from the disclosed paragraphs of this memo) "operational issues, and use of funds and recovery of same as reported in [the Town's] 2006 Financial Statements." This was part of the exercise of the Department's functional responsibility for oversight of, and support and assistance to, municipal bodies under the *Municipalities Act*, the *Municipal Affairs Act*, and associated regulations. The Department has not offered any evidence or reasons in support of the proposition that the disclosure of facts surrounding the investigation or the reasons for it, the results obtained and conclusions reached would cause harm of any kind to the conduct of relations between the Department and the Town. It is not clear how the disclosure of any of this particular information would damage the trust between the Department and the Municipality.

[35] It may occasionally be the case that a disclosure of this sort may cause embarrassment or awkwardness to town officials, but without convincing evidence it cannot be concluded that this in itself constitutes harm to the relationship with the Department. In the present case, it is even less likely that embarrassment or awkwardness would result from these disclosures, considering that one of the conclusions reached by the Department (which has already been disclosed to the Applicant) was that the various issues under consideration have been dealt with appropriately by the Town.

[36] It is sometimes argued that investigation details and results must be kept confidential, because the effect of such disclosure would be that people would be unwilling to cooperate with future investigations. First of all, in the present case as in many others, there is no actual evidence that such is the case. Furthermore, such a consequence is not always logically necessary. In reality, whenever this Department, under its statutory mandate, has cause to initiate such an investigation and exercises its authority to do so, a local government body has no legal choice but to cooperate. It is also in the best interests of a town and its resident taxpayers that it does so, because the town thereby benefits from the objectivity and expertise of the Department and from the support, assistance and direction that the Department provides. For these reasons, I

conclude that it is highly unlikely that disclosure of the details and results of investigations such as the present one would have the result of prejudicing the cooperation of local governments in future investigations. As a result, the Department has not met the burden on it to justify the application of section 23(1)(a), and I conclude that the severed portions cannot be withheld on that basis.

[37] The second part of this section, 23(1)(b), refers to disclosures that could reasonably be expected to reveal information received in confidence from, in this case, a local government body. In Report 2006-006 my predecessor analyzed this provision, and concluded that the phrase "received in confidence" is intended to mean that both parties have to have intended the information in question to remain confidential. In addition, there must be some actual evidence of that intention, dating from the time that the information was supplied and received. It is simply not enough to assert, after the fact, that confidentiality was intended. In its explanation cited above (paragraph 34) the Department has invoked the confidentiality provision of section 23(1)(b). However, the Department provided this Office with no written submission, and so the mere assertion that confidentiality was intended does not take us very far.

[38] In the present case, there is nothing in the record itself or in the correspondence received from the Department to indicate that either the Town or the Department, in the fall of 2007, had any expectation of confidentiality regarding the information that the Department sought, and the Town provided, in the course of the investigation. This would, furthermore, be consistent with the circumstances. The Town was not exercising a discretion to either provide information to the Department or not, at its choosing. The *Municipal Affairs Act* gives the Department ample authority to require the Town to provide the information it wants. It was not a situation where the Town could legitimately have refused to provide the information sought, or insisted that it be kept confidential as a condition of providing it. In any event, there is no evidence to support the assertion that the information was intended by either party to be confidential. Therefore section 23(1)(b) is not applicable. The redacted paragraphs of p. 4 cannot be withheld on that basis. It is therefore recommended that page 4 be disclosed in its entirety.

[39] Page 21 is a one-page letter from one Department official to another dated 5 October, 2007. It was withheld in its entirety by the Department, citing section 23. On inspection, it is a report on the Department's investigation and a summary of the conclusions arising from it.

[40] The Department, in summary, has provided no evidence or argument to support withholding all or any part of this letter on the basis of either branch of section 23 (either harm to intergovernmental relations, or information received in confidence.) After a careful review of the letter, and for the same reasons that I have given above in reference to page 4, I conclude that withholding it on the basis of section 23 cannot be justified.

(iii) Section 30 (Personal Information)

[41] Personal information is defined in section 2(o) of the *ATIPPA* as follows:

> *(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;*

[42] As I have pointed out earlier, personal information is one kind of information that is covered by a mandatory exception to disclosure, under section 30(1) of the *Act*. Section 30 provides as follows:

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

[43] To apply section 30 to a record requires a two-step process. First, one must determine whether the information in question is personal information within the meaning of section 2(o). If it is, then pursuant to section 30(1) it must not be disclosed, unless it in turn falls within one of the provisions of section 30(2), to which section 30(1) does not apply. After review of the one-page letter referred to above (page 21 of the record), I have identified four passages containing personal information, in paragraphs 2, 3, 5 and 6. I have concluded that these passages are either the writer's opinions about a certain individual, within the meaning of section 2(o)(ix), or information about that individual's employment history, within the meaning of section 2(o)(vii). I have concluded further that those passages do not fall within any of the provisions of section 30(2), and therefore should be severed. I recommend that the remainder of the letter be disclosed.

[44] Pages 22-26 are a 5-page memo, dated 20 September 2007, from one Department official to another. It has a large number of pages of attachments, which I will deal with separately below. The memo itself comprises a more detailed report on the investigation, documenting the actions taken by the writer (who was the investigator), the people interviewed, the documents collected and the factual information assembled. The Department has severed a few passages on each of several pages, and has withheld the second page entirely. I will deal with each of those severed passages in turn.

[45] On the first page of the memo (page 22 of the record) the name of a person has been severed in two places, and section 30 is cited. The Department has stated (without further elaboration)

that the name was severed, here and in other places, because "the person is now a private citizen and no longer an employee of the Town."

[46] There is no question that a person's name is personal information – it is specifically mentioned in section 2(o). However, whether it may be disclosed sometimes depends on the context in which it is found. In this case, that person had been an employee of the Town, and the references in context are to the fact of his employment and to various aspects of his remuneration as a Town employee. That constitutes information about a person's "position, functions or remuneration" as an employee of a public body, pursuant to section 30(2)(f), and thus its disclosure is permitted. The fact that the individual in question is no longer employed by the public body is not, in my opinion, relevant. Section 30(2)(f) of the *Act* makes no distinction between current and former officers, employees or members of a public body. I therefore recommend that this information on page 22 be disclosed.

[47] The second page of the memo (page 23 of the record) is essentially a summary of the pages of financial information attached to the memo. The Department has withheld this page in its entirety, citing section 23 and section 30. As I stated with regard to page 21, the burden is on the Department to demonstrate how section 23 applies to this information. However, in this case as well it has not done so. Therefore I cannot accept the Department's reliance on section 23.

[48] As for section 30, however, it is a mandatory exception to disclosure, and therefore I must attempt to apply it. For the most part, the personal information on this page is about the salary, overtime, vacation pay and work-related expenses of a Town employee. As such it is information about an employee's "position, functions or remuneration" under section 30(2)(f), and cannot be withheld as personal information. There is, however, in the second-last paragraph on page 23, a six-word phrase that refers to identifiable individuals who are not employees of a public body. That phrase constitutes personal information that must not be disclosed. I therefore recommend that page 23 be disclosed to the Applicant, with the exception of that one phrase that must be severed.

[49] The third and fourth pages of the memo (pages 24 and 25 of the record) were disclosed to the Applicant with nine redactions in various places, for which the Department cited sections 23 and 30. As with earlier passages to which the Department states section 23 applies, the Department has provided no justification for its position, and so I cannot apply it. The application of section 30 is a different matter. Of the redactions on page 24, I find that those in paragraphs 1, 3 and 4 are all about the remuneration of a Town employee within the meaning of section 30(2)(f), and therefore cannot be withheld. However, in paragraphs 7 and 8, I find that the severed words are not about the position, functions or remuneration of a public body employee. Rather, they are personal information that falls within the category of the employment history of an identifiable individual within the meaning of section 2(o)(vii), and therefore must not be disclosed.

[50] Similar considerations apply to page 25. The severed phrases or sentences in that case are all references to the employment history of a particular individual within the meaning of section 2(o)(vii) and thus constitute personal information that must not be disclosed.

[51] Page 27 is another memo dated 11 October 2007, from one Department official to another Department official, and it was withheld in its entirety. The Department cited sections 23 and 30. Again, the Department has given no explanation and has therefore not met the burden on it to provide justification for the application of section 23, so I have excluded it from consideration. There are however nine phrases or sentences in this memo that are either the employment history of an employee of a public body, or the personal information of third parties who are apparently not employees of a public body. I therefore recommend that this document be disclosed, but with the personal information severed.

[52] Pages 28, 31 and 36-39 are all hand-made spreadsheets that were attached to the memo (pages 22-26) above, detailing the payroll, overtime, vacation pay and expenses of one or sometimes two Town employees. The Department cited sections 23 and 30 in support of its decision to withhold them entirely. As before, I have excluded section 23 from consideration because no explanation was offered for its application. Although the Department stated that the information was received in confidence, no evidence of this was provided. As for section 30, the Department stated that salary and other salary-related documents are personal information. As I

have explained earlier, however, salary and related information, while personal, may be disclosed if it is about the remuneration of an employee of a public body. In the present case, the information on these pages is exclusively such information, and I therefore recommend that these six pages be disclosed.

[53] Page 32 is a fax cover sheet from a Town employee to the Department official who was conducting the investigation. The Department has severed two names, citing section 30. Those names are, however, the names of Town employees, and in the context are linked only to remuneration information, which under section 30(2)(f) may be disclosed. The Department has also severed one complete sentence citing section 23; however, as before, no justification is offered. I therefore recommend that this entire page be disclosed to the Applicant.

[54] Page 40 consists of handwritten notes on a memo pad, recounting how the writer of the notes asked for advice about a work-related issue from a named organization, and summarizing the advice received. The Department has severed approximately the first half, again citing sections 23 and 30. As before I have excluded section 23 from consideration. As for section 30, although the writer is not named, it is not difficult to infer from the content that it was a particular Town employee. However, I have concluded that the information in the severed sentences is not information "about" that individual personally, or part of that person's employment history. Rather, it is about certain duties that the person carried out in the course of employment, and thus is not personal information. I therefore recommend that this document be released to the Applicant in its entirety.

[55] Pages 42-55 are pages from a printed cheque registry provided by the Town's bank on 24 September 2007, and were withheld in their entirety by the Department, citing sections 23 and 30. Section 23 is said to be applicable because the information was received in confidence. However, there was no evidence provided to support that assertion, and so again I have excluded section 23 from consideration. It is clear that the information on these pages, consisting of information about cheques made payable to a particular individual during a particular period, including the dates and amounts, is personal financial information. However, as the amounts in question are stated to be payroll, overtime and vacation pay for a named Town employee, the

information falls into the category of remuneration of an employee of a public body under section 30(2)(f), and is not excepted from disclosure. As there is no other personal information on these pages I recommend they be disclosed.

[56] Page 56 is a page of handwritten rows and columns of numbers. The columns are headed "overtime adjustment" and "vacation pay," and although there is no identifying information, the document appears to contain the same figures as pages 36-38, and the obvious inference is therefore that it is payroll information of one or two Town employees. The Department has withheld the entire page, citing sections 23 and 30. As there is no evidence to support the application of section 23, and as there is no personal information in the document that must be withheld, I recommend that this page be disclosed.

[57] Pages 57-61 consist of photocopies of the fronts of cancelled cheques in various amounts, with various dates from 2002 to 2006, from the Town's general account. All cheques are made out to a former Town employee, whose signature is one of the two (presumably required) signatures affixed to each cheque. The other signature is that of either the Mayor or a councillor of the day. Most of the cheques are stated in the "re" line to be "vacation pay," "overtime adjustment," "salary" or "salary adjustment" although some bear no notation. Apart from the foregoing information there is no personal information of any individual on these pages. The Department has withheld all five pages in their entirety, citing sections 23 and 30. Once again I exclude section 23 from consideration as there is no evidence to support its application. The amounts are evidently all part of the remuneration of a public body employee, and thus may be disclosed. The signatures are those of the individuals apparently authorized to sign Town cheques, and in that context are information about the individual's position or function under section 30(2)(f). I recommend that all five pages be disclosed.

[58] Pages 62-75 and 78 are photocopies of 13 accounting journal pages, which have been withheld in their entirety by the Department, citing section 30. These pages show, for different Town employees, the hours worked each day, totaled by week and month, salary paid in respect of those hours, and certain deductions. Salary information generally falls into the category of remuneration under section 30(2)(f) and cannot be withheld under section 30(1). I recommend

that this information be disclosed, together with the name of the employee to whom the information relates.

[59] These pages, however, illustrate the importance and necessity of a line-by-line review in dealing with access requests. There is also information on many of these pages that is personal information and cannot be released. For example, at the top of many of these pages is the employee's Social Insurance Number and date of birth, and on some pages there is the employee's home address. This is personal information and is not subject to disclosure. In addition, there are a number of columns on these pages showing deductions from payroll for various things. Some such amounts, including benefits like pension, health insurance, unemployment insurance and provincial and federal income tax, are not always calculated simply on the basis of the position held by the employee, but may vary depending on the individual's financial, family or other circumstances. These amounts therefore may reveal personal financial information within the meaning of section 2(o)(vii), not just information about remuneration, and therefore must not be disclosed. Although it may be time-consuming, it is not difficult to redact the personal information from these pages and disclose the rest. As the *ATIPP Policy and Procedures Manual* explains in chapter 3, if severing can be done without rendering the remaining information meaningless, or disconnected snippets, then that is what must be done. I recommend disclosure accordingly.

[60] Pages 76 and 77 are two pages of handwritten columns of figures, evidently summarized from the previously-mentioned journal pages, showing a Town employee's gross salary followed by columns of deductions for certain benefits and taxes. The Department has withheld the two pages in their entirety, citing section 30. As with the journal pages, the deductions are personal information and not to be disclosed. The rest, however, may be disclosed if the deductions columns are severed. For completeness, I wish to add that in such situations, it is not necessary to go to the trouble of severing "net pay" figures. It is true that by subtracting net pay from gross pay one arrives at a result for total deductions. However, such a figure is meaningless as personal information, since the reader would have no way of knowing what portion of total deductions belongs in each benefits or tax category, and, therefore, no way of arriving at any accurate inference about the personal circumstances of the individual.

[61] The Department has severed most of page 79, which is a fax cover sheet from a Town employee to the Department official who conducted the investigation. The Department cites section 23 and states that the information was received in confidence. The Department offers no support for that claim, and there is nothing on the face of the document to suggest confidentiality. Furthermore, the severed portion of the handwritten message consists simply of statements by the Town employee about an unsuccessful search for certain information, and about the way that certain things were done in certain years. As such, the message is simply a narrative of business facts. I can think of no reason why it should not be disclosed, and I recommend accordingly.

III CONCLUSION

[62] The Department of Municipal Affairs has failed to comply with its obligations under the *ATIPPA* in this case, in two ways. First, it failed to meaningfully engage in the review process. It did not do a thorough review of the record, it did not attempt to justify its decisions to withhold information, and it failed to respond to requests from this Office in a timely way. Moreover, this is not an isolated case. There have been previous occasions on which the Department's participation has been less than wholehearted. In this respect the Department is not typical of public bodies, most of which participate fully, both in informal attempts at resolution and in detailed written argument in support of their positions when formal review is required.

[63] On the other hand, the Department is not entirely alone. Because such lack of participation and effort must be discouraged, I have taken the opportunity provided by this Report to spell out in some detail what is expected of a public body during the review process. Considering the time and attention that is given to access to information and review requests by most other public bodies, many of which are extremely limited in the resources they can devote to the process, I am very disappointed that the actions of a large and important body like the Department have necessitated this kind of report. It is perhaps time for this Department to give serious reconsideration to its approach to compliance with the *Access to Information and Protection of*

Privacy Act. Other public bodies that have been similarly remiss may also wish to take this as an opportunity to reassess their compliance.

[64] Even more importantly, because of the way in which the Department of Municipal Affairs has approached its responsibilities in this matter, it has also failed in its duty under section 9 of the *ATIPPA* to assist the Applicant. This duty, as the *ATIPP Policy and Procedures Manual* states in chapter 3, is an important underlying provision of the *Act*, and is critical during the Applicant's initial contact with the public body. The Department failed to do a thoughtful and well-reasoned review of the record, or, if it did, it has not shared those thoughts with either the Applicant or this Office. As a result the Department withheld most of the record. On subsequent review by this Office it is clear that most of the record ought to have been provided. By the time this Office has completed carrying out the review tasks that, for the most part, ought to have been undertaken in the first instance by the Department, and produced the present Report, more than six months will have passed since the Applicant made his original access to information request. This sort of delay in processing what has turned out to be a fairly straightforward request is beyond what can reasonably be justified.

[65] There are a great many public bodies in this province that are subject to the provisions of the *ATIPPA*, including several hundred municipalities with very few staff, who are hard-pressed to assign the necessary resources to deal with access to information requests in an effective and timely way. Nevertheless, for the most part those public bodies and their Access and Privacy Coordinators do an excellent job of achieving compliance with the *Act*. It is perhaps time for this Department to consider whether its present staffing arrangement is adequate to the task, and to add further resources if that is part of the problem.

IV RECOMMENDATIONS

[66] Under the authority of section 49(1) of the *ATIPPA* I hereby issue the following recommendations:

1. I recommend that the Department release to the Applicant all of the record in this matter, severing only the information that has been highlighted as excepted from disclosure on a copy of the record that has been provided to the Department along with this Report.

2. I recommend that in dealing with future access requests, the Department be mindful of the need to perform a line-by-line review of the record, giving due consideration to all applicable provisions of the *ATIPPA*, but being careful to sever only that information that can justifiably be withheld from the Applicant in accordance with the letter and spirit of the *Act*.

3. I recommend that in future, in the course of deciding whether to withhold information from an Applicant, the Department be mindful of the statutory requirement to be able to provide every Applicant with an explanation of its decisions. In particular, I recommend that in future the Department be prepared to either support the use of an exception to disclosure with detailed reasons, or not apply that exception at all.

4. I recommend that in future, when an Applicant requests that this Office review a decision of the Department, the Department be mindful of the different respective roles of the Applicant, the Department and the Commissioner, in cooperating fully with the Commissioner's Office and in discharging its burden of proof to the best of its ability. While this Office cannot force the Department to cooperate with informal efforts at resolution, I recommend that the Department review its approach and consider whether greater effort at the informal stage might serve the interests of all parties, in addition to fulfilling the spirit and intent of the *Act.*

5. I recommend that, if in future a request must proceed to a formal Review, the Department be prompt and diligent in providing this Office with detailed written submissions in support and justification of the Department's decisions.

6. I recommend that the Department review its overall approach to compliance with the *ATIPPA*, including its capacity to deal promptly with the volume of access and review requests it receives, and give consideration to the assignment of more trained staff.

[67] Under the authority of section 50 of the *ATIPPA* I direct the Head of the Department of Municipal Affairs to write to this Office and to the Applicant, within 15 days of receiving this Report, to indicate the Department's final decision with respect to this Report.

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

[69] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of July, 2008.

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