April 5, 2007 **2007-004**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-004

Eastern Regional Integrated Health Authority ("Eastern Health")

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act (*the *"ATIPPA")* for access to the incident/occurrence report in relation to the death of a named individual who was a relative of the Applicant and who died at an institution operated by Eastern Health. Eastern Health refused to release the report claiming that pursuant to section 6(4)(a) of the *ATIPPA* it was prohibited from disclosing the record by section 8.1 of the *Evidence Act* and section 35 of the *Hospitals Act*. Eastern Health also claimed that the responsive record contained personal information and that it was therefore prohibited from disclosing the record by section 30(1) of the *ATIPPA.* In addition Eastern Health claimed that the Applicant not being the personal representative of the named individual could not exercise the rights granted under section 65(e) of the *ATIPPA.* The Commissioner did not accept the claim of Eastern Health that it was prohibited from releasing the record by section 8.1 of the *Evidence Act* and section 35 of the *Hospitals Act*. The Commissioner agreed with Eastern Health that it was prohibited by section 30(1) from disclosing the responsive record because it constituted personal information and agreed that the Applicant not being the personal representative of the named individual could not exercise the rights granted by section 65(e). The Commissioner agreed with the decision of Eastern Health to withhold the responsive record.

Statutes Cited: *Access to Information and Protection of Privacy Act,* S.N.L. 2002, c. A 1.1, as am. ss. 2(o), 3, 6, 7, 8, 12, 30, 43, 46, 47, 52, 64, and 65(e); *Evidence Act*, R.S.N.L. 1990, c. E-16, s. 8.1; *Evidence Act*, R.S.N.S. 1989, c. 154, s. 60*; Evidence Act*, R.S.B.C. 1996, c. 124, s. 51; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 60; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 66(a); *Hospitals Act*, R.S.N.L. 1990, c. H-9, s. 35; *Municipal Freedom*

of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, ss. 2(2) and 54(a).

Authorities Cited: *Re Ministry of Agriculture, Fisheries and Food,* 1994 CanLII 1374 (BC I.P.C.); *Tessier v. Workplace Health Safety and Compensation Commission and Woolfrey*, 2002 CanLII 45549 (NL S.C.T.D.); *McKenzie v. Kutcher and Samland*, 2004 NSCA 4 (CanLII); *Sinclair v. March*, 2000 BCCA 459 (CanLII); *Foley v. Cape Breton Regional Hospital*, 1990 CanLII 7262 (NS S.C.); Ontario OIPC Order M-820 (1996); Ontario OIPC Order MO-206 (1999); Ontario OIPC Order M-50 (1992); Ontario OIPC Order P-294 (1992);

Other Resources Cited: *Black's Law Dictionary*, Eighth Edition, St. Paul, Minn.: Thomson West (2004)

I BACKGROUND

[1] Under the authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request to Eastern Health dated 24 October 2006, wherein the Applicant requested access to the incident/occurrence report in relation to the death of a named individual who was a relative of the Applicant and who died at an institution operated by Eastern Health.

[2] In correspondence dated 31 October 2006, Eastern Health advised the Applicant that access to the responsive record was being denied and advised the Applicant as follows:

> *I regret to inform you that this request has been refused in accordance with the following exceptions to disclosure, as specified in the Access to Information and Protection of Privacy Act.*
>
> *Section 6(4) provides that "The head of a public body shall (a) refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another Act or regulation."*
>
> *Section 8.1(3) of the Evidence Act provides that "No report, statement, evaluation, recommendation, memorandum, document or information, of, or made by, for or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding."*
>
> *Incident or occurrence reports are considered to be reports made as re 8.1(2)(b) 8.1(3)*[sic] *and therefore disclosure of such reports are protected from disclosure.*

[3] In a Request for Review dated 30 November 2006 and filed with this Office on 7 December 2006, the Applicant requested a review of the decision of Eastern Health to deny access to the responsive record.

[4] By correspondence dated 12 December 2006, this Office informed Eastern Health of the Request for Review and requested pursuant to section 52(3) of the *ATIPPA* that Eastern Health forward to this Office the documentation necessary to complete the review of the decision to

deny the Applicant's access request, including a request for the records responsive to the Applicant's access request.

[5] In correspondence to this Office dated 30 November 2006, the Applicant provided information regarding the background to the request for the incident/occurrence report dealing with the death of the named individual. The Applicant indicated that shortly after the death of the named individual the Applicant contacted an official at Eastern Health and requested certain documentation regarding the circumstances of the death of the named individual and was given copies of three documents relating to those circumstances. In addition, the Applicant indicated in his correspondence that during a telephone conversation in Spring 2005 an official of Eastern Health advised the Applicant of certain details of the circumstances of the death of the named individual.

[6] In correspondence to this Office dated 22 December 2006 and 5 January 2007 Eastern Health expanded on its reasons for denying access under section 8.1 of the *Evidence Act* and outlined further reasons for denying access to the responsive report. It is also important to note that in this correspondence Eastern Health refused to provide a copy of the responsive record to this Office:

> *Pursuant to the aforementioned legislation, it is clear that the Applicant is not entitled to the requested Records, and accordingly we fail to see why the Records should be provided to you for your review.*

[7] In correspondence dated 4 January 2007, this Office wrote to Eastern Health explaining the difference between disclosure of a record to an Applicant and disclosure of a responsive record to the Office of the Information and Privacy Commissioner for the purpose of conducting a review under section 43 of the *ATIPPA.* In response to this correspondence, on 5 January 2007 Eastern Health forwarded a copy of the responsive record to this Office.

[8] Attempts to resolve this Request for Review by informal means were not successful. On 15 February 2007 the Applicant and Eastern Health were both notified that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA* and both

were given an opportunity to provide written representations to this Office pursuant to section 47 of the *ATIPPA*.

[9] In correspondence to this Office dated 28 February 2007, the Applicant provided a written representation.

[10] In correspondence to this Office dated 26 February 2007, Eastern Health provided additional information and indicated that its position with respect to its refusal to disclose the responsive record had been clearly outlined in its correspondence dated 22 December 2006 and 5 January 2007.

II EASTERN HEALTH'S SUBMISSION

[11] The submission of Eastern Health has been set out in correspondence dated 22 December 2006, 5 January 2007, and 26 February 2007.

[12] The submission of Eastern Health may be summarized as follows:

> (a) Pursuant to section 6(4)(a) of the *ATIPPA*, section 8.1 of the *Evidence Act* operates to prohibit the disclosure of the responsive record to the Applicant,
>
> (b) Pursuant to section 6(4)(a) of the *ATIPPA*, section 35 of the *Hospitals Act* operates to prohibit disclosure of the responsive record to the Applicant,
>
> (c) The responsive record contains personal information and section 30(1) of the *ATIPPA* prohibits disclosure of personal information to the Applicant, and
>
> (d) Section 65(e) of the *ATIPPA* provides that the right or power given to an individual under the Act may be exercised where the individual is deceased, by the individual's personal representative, where the exercise of the right or power relates to the administration of the individual's estate. Eastern Health takes the position that the

> Applicant is not the personal representative of the named individual's estate who is exercising a right or power that relates to the administration of the individual's estate.

[13] I will briefly outline each of the four arguments that Eastern Health puts forth for the denial of access to the responsive record.

(a) Denial of Access Pursuant to Section 8.1 of the *Evidence Act*

[14] Eastern Health submits that section 6(4)(a) of the *ATIPPA* is applicable and a public body such as Eastern Health is required to refuse access to information if the disclosure of that information is prohibited or restricted by another Act or regulation. Eastern Health takes the position that it is prohibited from disclosing the responsive record by section 8.1(3) of the *Evidence Act*.

[15] The submission of Eastern Health is that the responsive record contains incident or occurrence reports made for a quality assurance committee as set out in section 8.1(2)(b) of the *Evidence Act* and, therefore, those reports are protected from disclosure by section 8.1(3) of the *Evidence Act*.

[16] Eastern Health points out that section 8.1 of the *Evidence Act* assists Eastern Health and other health authorities in Newfoundland and Labrador. In correspondence dated 5 January 2007 Eastern Health made the following comment:

> ...[S*ection 8.1*] *provides protection from disclosure of quality assurance and peer review documents in the health care context. The intention is to encourage those within the system to come forward with opinions and recommendations for improvement without concern of disclosure. It is our fear that if not protected, this open and honest discussion will not occur and any opportunity to identify, share and apply learnings to prevent similar adverse events in the future, will be lost.*

(b) Denial of Access Pursuant to Section 35 of the *Hospitals Act*

[17] Eastern Health submits that section 35 of the *Hospitals Act* is applicable in that it provides a prohibition against disclosure of patient records except in specified circumstances.

[18] Eastern Health has not specifically stated in its submissions that it is relying on section 6(4)(a) of the *ATIPPA* in relation to section 35 of the *Hospitals Act* but it is implicit in its reliance on section 35. I understand the position of Eastern Health to be that section 35 restricts the disclosure of patient records to limited circumstances and, therefore, pursuant to section 6(4)(a) it must refuse access unless the disclosure is provided for in the limited circumstances set out in section 35.

[19] Eastern Health takes the position that the responsive record is a hospital record within the meaning of section 35 of the *Hospitals Act* and, therefore, pursuant to section 6(4)(a) of the *ATIPPA* it is restricted to disclosing the record only in the circumstances set out in paragraphs (a) to (d) of section 35(3), neither of which is applicable to the Applicant.

(c) Denial of Disclosure of Personal Information Pursuant to Section 30 of the *ATIPPA*

[20] Eastern Heath submits that the responsive record contains personal information and it is, therefore, prohibited by section 30(1) of the *ATIPPA* from disclosing the responsive record.

[21] Eastern Health acknowledges that section 30(2) of *ATIPPA* sets out a number of exceptions to the prohibition against the disclosure of personal information set out in section 30(1) but states that none of the exceptions are applicable to the Applicant or the responsive record.

(d) Denial of Access Where Individual is Deceased – Section 65 of the *ATIPPA*

[22] Eastern Health states that the responsive record contains personal information about an individual who is deceased and, therefore, section 65 of the *ATIPPA* could be applicable.

[23] Eastern Health takes the position that where the responsive record relates to a patient who is deceased then the record can be disclosed to the deceased's personal representative who requires the record for the administration of the patient's estate. Eastern Health submits that the Applicant has not indicated to it that the Applicant is the personal representative of the patient or that the record relates to the administration of the patient's estate.

III APPLICANT'S SUBMISSION

[24] The Applicant stated in correspondence dated 30 November 2006 that shortly after the death of the named individual he contacted an official at Eastern Health to request the "medical records, progress notes, doctor's notes, and the like" in relation to the named individual. The Applicant stated that he received a number of records and provided copies of those records to this Office. The Applicant indicated that "what was given to me was by no means complete".

[25] The Applicant further stated that in Spring 2005 he had a telephone conversation with another official of Eastern Health and this official described to the Applicant certain events surrounding the death of the named individual.

[26] The Applicant in his letter of 30 November 2006 commented on Eastern Health's reliance on section 8.1 of the *Evidence Ac*t to deny access to the responsive records. The Applicant stated:

> [*Eastern Health*] *reads more into section 8.1(3) of the Evidence Act than* [*it*] *should. "No report, statement etc. . . . shall be disclosed in or in connection with a legal proceeding." That means court work in a courtroom.*
>
> *In any legal proceeding regarding the death of* [*deceased*]*, the passage of time has caused me to be statute barred. Any possible civil suit had to be filed within two years of the date of* [*deceased's*] *death.*
>
> *Any criminal proceeding regarding the death of* [*deceased*] *is the purview of The Crown and the police, not me.*

[27] In further correspondence dated 28 February 2007 the Applicant commented on the death of the named individual:

> *He ceased being a patient at that time. Any paper work after that time is hospital records, not patient's* [*deceased's*] *medical records. . . . Eastern Health are deserving of censure for their capricious handling of* [*deceased's*] *medical records and their own hospital records.*
>
> *Indeed,* [*an official of Eastern Health*] *had the temerity to set up a three-way conference call between herself and* [*another official of Eastern Health*]*, and me where I was given some information from the requested incident or occurrence report.*

[28] The Applicant proposed a compromise as follows:

> *I am willing to compromise in this matter. Eastern Health may black out any names or titles or employee numbers or employee occupations mentioned in the incident or occurrence report whereby I can identify any of the doctors, nurses, licensed practical nurses or whomever may be mentioned in the incident or occurrence report. Privacy should be respected. At a minimum, that will be acceptable.*

IV DISCUSSION

[29] Before discussing the merits of the submissions of Eastern Health and the Applicant, I believe it is important to deal with the initial refusal of Eastern Health to provide my Office with a copy of the responsive record.

[30] As I stated above, Eastern Health had indicated in its letter of 22 December 2006 that it took the position that the Applicant was not entitled to the requested record and, therefore, it failed to see why the record should be provided to this Office for my review. In so doing, Eastern Health made reference to non-disclosure provisions of the *Evidence Act* and the *Hospitals Act*. This position taken by Eastern Health shows a misunderstanding of the difference between the denial of disclosure of a record to an Applicant making an access to information request and a denial of disclosure to my Office of a responsive record that is to be used by my Office in a review conducted pursuant to section 43(1) of the *ATIPPA*. In order to discuss this difference it is necessary to examine the applicable provisions of the *ATIPPA*.

[31] Section 8 of the *ATIPPA* sets out the right of a person to make a request for a record as follows:

> *8. (1) A person may access a record by making a request to the public body that the person believes has custody or control of the record.*

[32] The public body which receives a request under section 8 of the *ATIPPA* is required to inform the Applicant whether access to the record is granted or refused pursuant to section 12 of the *ATIPPA*, which provides as follows:

> *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.*

[33] If the public body decides pursuant to section 12 to inform the Applicant that access to the record is refused, then there is no obligation on the public body to provide the Applicant with a copy of the requested record. However, the decision of the public body to deny access to the record is subject to review by the Information and Privacy Commissioner pursuant to section 43(1) of *ATIPPA* which provides as follows:

> *43. (1) A person who makes a request under this Act for access to a record or for correction of personal information may ask the commissioner to review a*

> *decision, act or failure to act of the head of the public body that relates to the request.*

[34] When an Applicant makes a Request for Review to this Office in relation to the decision of the public body to deny access, it is my statutory responsibility and duty to investigate such a decision. Under the *ATIPPA*, a person has a specific right to request access to a record and when refused access, that person has a specific right to an independent review of the reasons for that refusal. As such, this Office has certain statutory duties and powers, including those powers set out in section 52 of the *ATIPPA* as follows:

> *52. (1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the Public Inquiries Act.*
>
> *(2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.*
>
> *(3) The head of a public body shall produce to the commissioner within 14 days a record or copy of a record required under this section, notwithstanding another Act or regulations or a privilege under the law of evidence.*
>
> *(4) Where it is not practicable to make a copy of a record required under this section, the head of a public body may require the commissioner to examine the original at its site.*

[35] It is important to note the reference in section 52(1) to the *Public Inquiries Act*. Sections 9 and 10 of the *Public Inquiries Act* provide specific powers to compel evidence and to inspect, respectively, including the ability to require the production of all records and documents that may relate in any way to the subject of the inquiry. In addition, section 11 allows for the issuance of a warrant where access under section 10 is refused or denied. I would also refer to section 12(3) of the *Public Inquiries Act*, which provides:

> *12. (3) Notwithstanding subsection (1), a person shall not refuse to disclose information to a commission or a person authorized by a commission on the grounds that the disclosure is prohibited or restricted by another Act or regulation.*

The language of the *ATIPPA*, together with the language of the *Public Inquiries Act* clearly sets out the jurisdiction of this Office with respect to this matter, notwithstanding the provisions of another Act or regulation or a privilege under the law of evidence.

[36] Under the authority of section 52(3) of the *ATIPPA* this Office by correspondence dated 12 December 2006 requested Eastern Health to forward to this Office the documentation necessary to complete the review of the decision to deny the Applicant's access request, including a request for the records responsive to the Applicant's access request.

[37] In response to the request from this Office, Eastern Health in correspondence dated 22 December 2006 made the following statement:

> *We have refused to provide this information in accordance with the following exceptions to disclosure, as specified in Section 6(4) of the ATIPPA.*
>
> *Section 6(4) provides that "The head of a public body shall (a) refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another Act or regulation."*
>
> *Section 8.1(3) of the Evidence Act provides that "No report, statement, evaluation, recommendation, memorandum, document, or information, of, or made by, for, or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding." . . .*
>
> *As you are most likely aware, Section 30 of ATIPPA and Section 35 of the Hospitals Act provide a blanket prohibition against disclosure of patient records prepared by Eastern Health. . . .*
>
> *Pursuant to the aforementioned legislation, it is clear that the Applicant is not entitled to the requested Records, and accordingly we fail to see why the Records should be provided to you for your review.*

[38] This statement indicates the misunderstanding of Eastern Health regarding when it is obligated to disclose a requested record. It also indicates a misunderstanding with respect to the language of the *ATIPPA* and the *Public Inquiries Act*. If a public body such as Eastern Health decides that an Applicant is not entitled to disclosure of a record, then the public body is not obligated to disclose the requested record. However, if an Applicant requests this Office to

review a decision by a public body to deny access, then section 52 of the *ATIPPA* becomes operative and certain obligations are placed on the public body with regard to the production of documents. One such obligation on a public body is that set out in section 52(2) which provides as follows:

> *(2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.*

[39] Thus, while there is no obligation on a public body to disclose a record to an Applicant if the public body decides it should not be disclosed, there is, however, an obligation on the public body to disclose a responsive record to the Information and Privacy Commissioner when requested to do so pursuant to section 52 of the *ATIPPA*. To deny this Office access to material that is clearly relevant to an investigation only serves to obstruct the mandate of this Office and to deny the Applicant his or her statutory rights.

[40] While Eastern Health eventually did provide a copy of the responsive record to this office, I am concerned with its initial refusal to do so. As such, I have recommended that in all future dealings with this Office, Eastern Health accept its responsibilities and duties as imposed on a public body under the *ATIPPA*, and cooperate with this Office in a manner that is consistent with the language, the spirit and the intent of the legislation.

[41] Having discussed Eastern Health's initial response to this Office, I will now turn to the merits of the arguments put forward with respect to disclosure of the responsive record.

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

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

(c) specifying limited exceptions to the right of access;

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and

(e) providing for an independent review of decisions made by public bodies under this Act.

(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.

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

7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of a fee required under section 68.

[44] When a public body makes a decision to deny an Applicant access to a record, the Applicant has a right pursuant to section 43 of the *ATIPPA* to request the Information and Privacy Commissioner to review that decision.

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

64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.

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

[46] A reading of sections 3, 7, 43, and 64 indicates that the purpose of the *ATIPPA* is to make public bodies more accountable to the public by giving the public a general right of access to records in the custody of or under the control of a public body subject only to limited and specific exceptions. When a public body has denied access to a record and the Applicant has requested a review of that decision by the Information and Privacy Commissioner then the public body bears the burden of proving that the applicant has no right of access to the record or part of the record pursuant to section 64(1).

[47] 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 *Re Ministry of Agriculture, Fisheries and Food*, 1994 CanLII 1374 (BC I.P.C.), the British Columbia Information and Privacy Commissioner applied the civil standard of proof and stated as follows at page 4:

> *The problem with this argument is that the applicant did not provide me with any evidence to support his assertion. I concluded in my first order that the application of any exception in this Act by a party holding the burden of proof required evidence that is detailed and convincing or detailed and persuasive in order for an exception to be successfully applied. This applies to the character or substance of the evidence. Once evidence is submitted, I will be in a position to weigh it against the appropriate standard of proof.*
>
> *The Act provides, essentially, a civil code of fair information practices to be applied to identified public bodies. In a Part 5 inquiry under the Act, the standard of proof to be applied to the evidence is the civil standard, that is, on a balance of probabilities. This means that the party who bears the burden of proof must do so by tipping the scales in his or her favour.*

[48] The civil standard of proof was discussed by the Supreme Court of Newfoundland and Labrador, Trial Division in *Tessier v. Workplace Health Safety and Compensation Commission and Woolfrey,* 2002 CanLII 45549 (NL S.C.T.D.). Leblanc J. stated at paragraphs 37-41:

> *[37] This being a civil case, the onus is on the plaintiff to establish her cause of action and damages on a balance of probabilities, sometimes referred to as being on a preponderance of the evidence. This standard, like the criminal standard of proof beyond a reasonable doubt, has been the subject of much judicial and academic comment. Without getting into the rather academic debate on the*

precise description of the civil burden of proof, I do intend to direct myself as to the application of the burden by reference to a few cases.

*[38] In **R. v. Clark** (1921), 61 S.C.R. 608 (S.C.C.) at p. 616, Duff J. referred to the civil burden being met "on such a preponderance of evidence as to show that the conclusion the party seeks to establish is substantially the most probable of the possible view of the facts". Similarly in **Miller v. Minister of Pensions** (1947), 2 All E.R. 372, Lord Denning referred to the level of cogency the evidence must reach to establish proof in accordance with the civil burden as follows:*

> *That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think that it is more probable than not", the burden is discharged, but if the probabilities are equal it is not.*

*(See also **Rental Shop Ltd. v. Wells**, [1993] N.J. No. 206 (Nfld. S.C.T.D.))*

*[39] The level of persuasion required to meet the civil burden has also been described in other cases. For instance, in **Continental Insurance Co. v. Dalton Cartage Co. Ltd. et al.**, 1982 CanLII 13 (S.C.C.), [1982] 1 S.C.R. 164 (S.C.C.) per Laskin C.J.C. and **Haynes v. Wawanesa Mutual Ins. Co.**, , 1963 CanLII 1 (S.C.C.), [1963] S.C.R. 154 (S.C.C.) per Ritchie J., a sliding scale of persuasion or differing degrees of probability are referred to in applying to the civil burden.*

*[40] Riche J. in **Parkway Enterprises Ltd. v. Zurich Insurance Co.**, [1996] N.J. No. 239 referred to the civil burden stating at para 45 that, "I often think of the standard as one where, following a thorough analysis of the evidence and making findings of fact, there is only one reasonable conclusion in which one can come to based on those facts".*

[41] The civil burden is to be applied in making findings of fact and reasonable inferences from those facts. The burden on the party having the onus is proof on a preponderance of the evidence, albeit that the preponderance must be established clearly.

[49] I adopt as the standard of proof to be met by the public body under section 64(1) the civil standard of proof. 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.

[50] In this Request for Review, Eastern Health has put forth four arguments in support of its decision to deny the Applicant access to the responsive record. These arguments are as follows:

> (a) Pursuant to section 6(4)(a) of the *ATIPPA*, section 8.1 of the *Evidence Act* operates to prohibit the disclosure of the responsive record to the Applicant,
>
> (b) Pursuant to section 6(4)(a) of the *ATIPPA*, section 35 of the *Hospitals Act* operates to prohibit disclosure of the responsive record to the Applicant,
>
> (c) The responsive record contains personal information and section 30 of the *ATIPPA* prohibits disclosure of personal information to the Applicant, and
>
> (d) Section 65(e) of the *ATIPPA* provides that the right or power given to an individual under the Act may be exercised where the individual is deceased, by the individual's personal representative, where the exercise of the right or power relates to the administration of the individual's estate. Eastern Health takes the position that the Applicant is not the personal representative of the individual's estate who is exercising a right or power that relates to the administration of the individual's estate.

[51] I will discuss each of these four arguments in turn.

(a) Denial of Access Under Section 8.1(3) of the Evidence Act.

[52] Eastern Health submits that pursuant to section 6(4)(a) of the *ATIPPA* section 8.1 of the *Evidence Act* operates to prohibit the disclosure of the responsive record. Section 6 of the *ATIPPA* provides as follows:

> *6. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.*
>
> *(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated*

in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.

(3) Subsections (1) and (2) shall come into force and subsection (4) shall be repealed 2 years after this Act comes into force.

(4) The head of a public body shall

(a) refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another Act or regulation; and

(b) give access and disclose information to a person, notwithstanding a provision of this Act, where another Act or regulation provides that person with a right to access or disclosure of the information.

I note that for the purposes of this Request for Review the 2 year time period referred to in section 6(3) had not elapsed and section 6(4) was still operative. The *ATIPPA* having come into force on January 17, 2005.

Section 8.1 of the *Evidence Act* provides:

8.1 (1) In this section

(a) "legal proceeding" includes an action, inquiry, arbitration, judicial inquiry or civil proceeding in which evidence may be given and also includes a proceeding before a board, commission or tribunal; and

(b) "witness" includes a person who, in a legal proceeding

(i) is examined orally for discovery,

(ii) is cross examined on an affidavit made by that person,

(iii) answers interrogatories,

(iv) makes an affidavit as to documents, or

(v) is called on to answer a question or produce a document, whether under oath or not.

(2) This section applies to the following committees:

(a) the Provincial Perinatal Committee,

(b) a quality assurance committee of a member, as defined under the Hospital and Nursing Home Association Act , and

(c) a peer review committee of a member, as defined under the Hospital and Nursing Home Association Act .

(3) No report, statement, evaluation, recommendation, memorandum, document or information, of, or made by, for or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding.

(4) Where a person appears as a witness in a legal proceeding, that person shall not be asked and shall not

(a) answer a question in connection with proceedings of a committee set out in subsection (2); or

(b) produce a report, evaluation, statement, memorandum, recommendation, document or information of, or made by, for or to, a committee to which this section applies.

(5) Subsections (3) and (4) do not apply to original medical or hospital records pertaining to a person.

(6) Where a person is a witness in a legal proceeding notwithstanding that he or she

(a) is or has been a member of;

(b) has participated in the activities of;

(c) has made a report, evaluation, statement, memorandum or recommendation to; or

(d) has provided information or a document to

a committee set out in subsection (2) that person is not, subject to subsection (4), excused from answering a question or producing a document that he or she is otherwise bound to answer or produce.

[53] The submission of Eastern Health is that section 6(4)(a) of the *ATIPPA* is applicable and a public body such as Eastern Health is required to refuse access to information if the disclosure of that information is prohibited or restricted by another Act or regulation. Eastern Health takes the position that it is prohibited from disclosing the responsive record by section 8.1(3) of the *Evidence Act*.

[54] Most provinces in Canada have a section similar to section 8.1 of the Newfoundland and Labrador *Evidence Act*. In *McKenzie v. Kutcher and Samland*, 2004 NSCA 4 (CanLII), the Nova Scotia Court of Appeal discussed the purpose of section 60 of the Nova Scotia *Evidence Act*, which is comparable to section 8.1 of the Newfoundland and Labrador *Evidence Act*. Hamilton J.A. stated at paragraph 24 of the report:

> *[24] Considering the foregoing, I accept Ms. Samland's suggestion that the purpose of s. 60 is "to support the activities of hospitals improving medical or hospital care or practice by ensuring confidentiality for the documents and proceedings of committees that are given the task of studying or evaluating medical or hospital care or practice."*

[55] The comment from the Nova Scotia Court of Appeal in *McKenzie* supports the position of Eastern Health as set out in its correspondence dated 5 January 2007 where it stated:

> ...[*Section 8.1*] *provides protection from disclosure of quality assurance and peer review documents in the health care context. The intention is to encourage those within the system to come forward with opinions and recommendations for improvement without concern of disclosure. It is our fear that if not protected, this open and honest discussion will not occur and any opportunity to identify, share and apply learnings to prevent similar adverse events in the future, will be lost.*

[56] Accepting as I do that section 8.1 of the *Evidence Act* is important for Eastern Health in its attempts to provide confidentiality in its quality assurance process, the burden remains on Eastern Health to prove that the responsive documents are covered by the operation of this provision.

[57] In its correspondence dated 22 December 2006, Eastern Health in referring to the responsive record stated:

> *Incident or occurrence reports are considered to be reports made as re 8.1(2)(b) and 8.1(3) and therefore disclosure of such reports are protected from disclosure.*

[58] It is clear that the application of section 8.1 of the *Evidence Act* requires the satisfaction of two conditions. First, the documentation or information at issue must be "of, or made by, for or to a committee as defined in section 8.1(2). Second, it must be directly associated with a legal

proceeding. I must determine, therefore, whether both of these conditions have been met with respect to the responsive record.

[59] Section 8.1(2)(b) of the *Evidence Act* states that the provision applies to a quality assurance committee of a member as defined under the *Hospital and Nursing Home Association Act*. Section 8.1(3) states that no report, statement, evaluation, recommendation, memorandum, document or information, of, or made by, for or to such a quality assurance committee shall be disclosed in or in connection with a legal proceeding.

[60] The responsive record consists of two documents. The first document is headed "Occurrence Reporting Form" and the second document is headed "Occurrence Report Follow-up Form".

[61] The first document headed "Occurrence Reporting Form" contains the following annotation:

> *This form is to be completed by the individual who identifies an occurrence (not employee injury). Complete all parts of the form stating facts only. This form is used for tracking purposes in the monitoring of Quality. Follow-up occurrences will be done by the Program/Department leaders.*

This document also contains the following instruction: "Completed original to be forwarded to the quality initiatives office within 48 hours."

[62] The second document headed "Occurrence Report Follow-up Form" contains the following annotation:

> *To be completed by the Program Director/Clinical Chief/Department Director or Designate in order to assist in the monitoring and continuous improvement of quality of care/services. All occurrences which cross other Departments/Programs and all serious complaints require completion of this form.*

This document also contains the following instruction: "Yellow copy: Quality initiatives Facilitator."

[63] Based on my examination of the documents in the responsive record, I find that the responsive record contains a "document or information, of, or made by, for or to, a" quality assurance committee within the meaning of sections 8.1(2)(b) and 8.1(3) of the *Evidence Act*, thereby satisfying the first condition described above.

[64] With respect to the second condition, the Applicant in his submission stated as follows:

> [*Eastern Health*] *reads more into section 8.1(3) of the Evidence Act than* [it] *should. "No report, statement etc. . . . shall be disclosed in or in connection with a legal proceeding." That means court work in a courtroom.*
>
> *In any legal proceeding regarding the death of* [*deceased*]*, the passage of time has caused me to be statute barred. Any possible civil suit had to be filed within two years of the date of* [*deceased's*] *death.*

[65] In his submission the Applicant is relying on the wording of section 8.1(3) and stating that it only operates to prohibit disclosure of a record when there is a "legal proceeding".

[66] The definition of legal proceeding is set out in paragraph (a) of section 8.1(1) of the *Evidence Act* as follows:

> *(a)"legal proceeding" includes an action, inquiry, arbitration, judicial inquiry or civil proceeding in which evidence may be given and also includes a proceeding before a board, commission or tribunal;*

[67] The position of the Applicant is that there is no legal proceeding pending or contemplated and the responsive record is not being disclosed "in connection with a legal proceeding" and, therefore, there is no prohibition against disclosure of the responsive record by the operation of section 8.1(3) of the *Evidence Act*.

[68] In correspondence dated 26 February 2007 Eastern Health made the following comment:

> *When considering the timeliness for protection under the Evidence Act, please keep in mind that other legal options (such as a public inquiry) remain available to individuals after the civil claim limitation period has expired.*

[69] By this comment, Eastern Health is taking the position that although there is no existing legal proceeding against it and the limitation periods for a civil action against Eastern Health in relation to the death of the named individual have expired, there may be other legal proceedings that may take place at some time in the future.

[70] Given the positions of the parties in relation to the operation of section 8.1 of the *Evidence Act*, it is necessary to discuss in which circumstances section 8.1 is applicable.

[71] A review of the provisions of the *Evidence Act* indicates that the act deals with such matters as the admissibility of evidence, the competency and compellability of witnesses, and the examination of witnesses in a legal proceeding. This leads to the conclusion that section 8.1 becomes operative when there is an existing legal proceeding as defined in section 8.1(1)(a). Until there is an existing legal proceeding, the second condition cannot be satisfied.

[72] In *Sinclair v. March*, 2000 BCCA 459 (CanLII), the British Columbia Court of Appeal discussed the protection from disclosure of documents relating to the work of a hospital committee provided by section 51 of the British Columbia *Evidence Act.* Section 51 serves the same purpose as section 8.1 of the Newfoundland and Labrador *Evidence Act*. At paragraph 21, Donald J.A. adopted the words of the Trial Judge as to the rationale of section 51 of the British Columbia Act:

> *The scope of the section is limited. It does not protect every activity of a hospital committee when those committees are broadly structured to undertake duties beyond those envisioned within the scope of s. 51. The most reasonable meaning extracted from the purpose and scope of the section relates to the key functional concept of improvement of medical care and practice. To 'improve' is to advance or raise to better quality or condition. Hospital committees are not to be fearful that their work to advance and enhance the quality of hospital care and practice will be exposed to scrutiny in the event of civil proceedings. But the section does not give blanket protection to all of a hospital's documentary workings under the rubric of improving patient care and practice. Such a broad interpretation would not achieve the balance intended by the legislature between the public interest in the search for truth in litigation and freedom to improve patient care. The duty not to disclose should not be lightly extended to other classes of documentation just because they involve personnel who provide or administer patient care in a hospital. The scope of public interest identified in the section does not go so far.*

> *At the same time, the section should not be given so restrictive a meaning as to defeat the intention of the statutory provision.* [Emphasis in the original]

[73] After conducting an analysis of the legislative history of section 51, Donald J.A. went on to say at paragraph 26:

> *It can be seen from this analysis that the Legislature intended to protect this area of hospital activity by preventing access by litigants. Rather than striking a balance of interests, the Legislature made a clear choice in favour of one interest, hospital confidentiality. In the course of deciding an issue under s. 51 a court should give the language of the enactment its full force and effect with the object in mind . . .* [Emphasis added]

[74] The comments of the British Columbia Court of Appeal in relation to section 51 of the British Columbia *Evidence Act* support the proposition that section 8.1 of this Province's *Evidence Act* is applicable when there is an existing legal proceeding. In the legal proceeding, section 8.1 determines the admissibility or inadmissibility of documents relating to the work of hospital committees such as the quality assurance documents which are the subject of this Review.

[75] Eastern Health argues that there may be a legal proceeding such as a public inquiry at a future date and, therefore, section 8.1 of the *Evidence Act* is applicable.

[76] In *Foley v. Cape Breton Regional Hospital*, 1990 CanLII 7262 (NS S.C.), the Nova Scotia Supreme Court dealt with the applicability of section 60 of the Nova Scotia *Evidence Ac*t. Section 60 is comparable to section 8.1 of the Newfoundland and Labrador *Evidence Act*. In *Foley*, the Court was dealing with an access request under Nova Scotia's *Freedom of Information and Protection of Privacy Act* for a report prepared in relation to a review of incidents involving a number of patients. The hospital argued that the record should not be disclosed because it was a peer review document. In commenting on the applicability of section 60 of the Nova Scotia *Evidence Act*, McAdam J. stated:

> *It no longer appears to be in disputed* [sic] *that s. 60 is not applicable because, in the present circumstances, the request for access and the decision by the Board,*

> *do not involve processes within the definition of "legal proceeding" contained in s. 61(a), nor are we involved with a "witness" being asked, in the course of a legal proceeding, to answer questions or produce documents as provided in ss. (b). In the event there may later be such "legal proceedings" and persons are called as "witnesses" then, pursuant to s. 60(1)(b), it will be for determination at that time whether, and to what extent if any, the privilege in s. 60(2) will be applicable. In this regard, I make no finding in respect to the application of s. 60(2) on such a legal proceeding and on such an application.*

[77] I follow the reasoning of McAdam J. in *Foley* and find that there is no existing legal proceeding in which the responsive record may be ruled admissible or inadmissible. If there is a subsequent legal proceeding in which the responsive record may be relevant, then it will be for the judge in that forum to determine whether or not the documents comprising the responsive record are admissible or inadmissible under section 8.1. The issue in this Review is not whether the responsive record should or should not "be disclosed in or in connection with a legal proceeding." There is no existing legal proceeding. The issue on this Review is whether the responsive record should be disclosed to the Applicant under the *ATIPPA*.

[78] Bearing in mind that the burden of proof is, pursuant to section 64(1) of the *ATIPPA*, on Eastern Health to prove that the Applicant has no right of access to the record and that the standard of proof is on a balance of probabilities, I find that Eastern Health has not proven that the Applicant should be denied access to the responsive record by the operation of section 8.1 of the *Evidence Act*.

[79] In summary, I find that the responsive record contains quality assurance documents as defined in section 8.1 of the *Evidence Act*. However, since there is no existing legal proceeding I find that section 8.1 does not operate to allow Eastern Health to deny access pursuant to section 6(4)(a) of the *ATIPPA*.

[80] Having found that the responsive record contains quality assurance documents within the meaning of section 8.1, it is necessary for me to comment on section 8.1(5) of the *Evidence Act*, which provides as follow:

> *(5) Subsections (3) and (4) do not apply to original medical or hospital records pertaining to a person.*

[81] By enacting section 8.1(5) of the *Evidence Act*, the legislature has made a distinction between those documents that are quality assurance documents and those that are medical or hospital records pertaining to a person. This distinction is important because Eastern Health has submitted on the one hand that the responsive record contains quality assurance documents and on the other hand has submitted that the responsive record is a record regarding a patient under section 35 of the *Hospitals Act*. The distinction must be kept in mind during the discussion of the second argument for denying access put forth by Eastern Health in which it relies on section 35 of the *Hospitals Act*.

(b) Denial of Access Pursuant to Section 35 of the *Hospitals Act*

[82] In correspondence dated 22 December 2006 Eastern Health made the following statement:

> *As you are most likely aware, Section 30 of ATIPPA and Section 35 of the Hospitals Act provide for a blanket prohibition against disclosure of patient records prepared by Eastern Health. This prohibition is made the subject of certain exceptions set out in those statutes, none of which apply to the Applicant…*

[83] I understand Eastern Health's position to be that section 35 of the *Hospitals Act* restricts the disclosure of patient records to limited circumstances and, therefore, pursuant to section 6(4)(a) of the *ATIPPA* it must refuse access unless the disclosure is provided for in the limited circumstances set out in section 35. Section 35 of the *Hospitals Act* provides in part as follows:

> 35. *(1) A record regarding a patient that is prepared in a hospital by a member of the staff of that hospital or by a person employed by the hospital authority exercising jurisdiction over that hospital is the property of that hospital authority.*
>
> *(2) A hospital authority shall not allow a person access to, or disclose to a person information contained in the records of the hospital authority.*
>
> *(3) Subsection (2) does not apply in respect of information provided by a hospital authority to*

> *(a) a patient or former patient of the hospital controlled by the hospital authority, or where that patient is an infant or under disability, to the parent or guardian of that person;*
>
> *(b) a person authorized in writing by a patient or person referred to in paragraph (a);*
>
> *(c) an agency or department of a provincial government or the Government of Canada, or an official of a provincial government or the Government of Canada acting in his or her official capacity, where that agency, department or official has received the prior approval of the minister for the release of that information and the content of that information to be released by the hospital authority is approved by the minister; or*
>
> *(d) a physician or other hospital authority within or outside the province, where the physician or hospital authority is in the course of treatment of the patient concerned,*
>
> *when the information is provided at the request of that person or department*

[84] Section 6(4) of the *ATIPPA* provides as follows:

> *(4) The head of a public body shall*
>
> *(a) refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another Act or regulation; and*
>
> *(b) give access and disclose information to a person, notwithstanding a provision of this Act, where another Act or regulation provides that person with a right to access or disclosure of the information.*

[85] Eastern Health takes the position that the responsive record is a hospital record within the meaning of section 35 of the *Hospitals Act* and pursuant to section 6(4)(a) of the *ATIPPA* it is restricted to disclosing the record only in the circumstances set out in paragraphs (a) to (d) of section 35(3), neither of which is applicable to the Applicant.

[86] As I indicated above, Eastern Health has classified the responsive record as both quality assurance records and as patient records. I found in my discussion of section 8.1 of the *Evidence Act* that the responsive record consisted of quality assurance documents and that there is a

distinction between quality assurance documents and medical or hospital records pertaining to a person.

[87] Section 35(1) of the *Hospitals Act* refers to "A record regarding a patient . . .". Such a record is not a quality assurance document. It is a medical or hospital record pertaining to a person. The responsive records being quality assurance documents do not pertain directly to a person but pertain to an incident or an occurrence. I find that section 35 of the *Hospitals Act* does not apply to the responsive record.

[88] Bearing in mind that the burden of proof is, pursuant to section 64(1) of the *ATIPPA*, on Eastern Health to prove that the Applicant has no right of access to the record and that the standard of proof is on a balance of probabilities, I find that Eastern Health has not proven that the Applicant should be denied access to the responsive record by the operation of section 35 of the *Hospitals Act*.

(c) Denial of Disclosure of Personal Information Pursuant to Section 30 of *ATIPPA*

[89] Eastern Heath submits that the responsive record contains personal information and it is, therefore, prohibited by section 30 of the *ATIPPA* from disclosing the responsive record. Section 30(1) provides as follows:

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

[90] Section 2(o) of the *ATIPPA* provides the definition of personal information 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;

[91] Section 30(1) is a mandatory provision of the *ATIPPA*. Once a public body determines that this section applies, no discretion lies with the public body to decide to release the record that has been requested, unless one of the conditions indicated in section 30(2) applies. Section 30(2) provides as follows:

(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.*

[92] The first issue to be discussed is whether the responsive record contains personal information as defined in section 2(o) of the *ATIPPA*.

[93] The definition of "personal information" as found in section 2(o) of the *ATIPPA* commences with the following wording:

> (o) "*personal information" means recorded information about an identifiable individual, <u>including</u>* [Emphasis added]

The use of the word "including" means that the Legislature did not intend the list of what constitutes personal information in paragraphs (i) to (ix) of section 2(o) to be exhaustive. In other words, there may be information about an identifiable individual that constitutes personal information which is not listed in paragraphs (i) to (ix) of section 2(o) of the *ATIPPA*.

[94] My review of the responsive record reveals that it constitutes personal information as defined in section 2(o) about the named individual and other individuals. In addition, the responsive record contains details about the circumstances of the death of the named individual. Although section 2(o) does not specifically list "cause of death" or "circumstances of death" as personal information, it is my view that information as to how, when, and where a person died is the type of personal information that the *ATIPPA* was enacted to protect from disclosure.

[95] My finding that information about "cause of death" or "circumstances of death" is personal information is supported by the finding of the Ontario Information and Privacy Commissioner in Ontario OIPC Order M-820 (1996). In that case, the Commissioner dealt with a request under Ontario's *Municipal Freedom of Information and Protection of Privacy Act* for information related to the investigation of the death of the applicant's wife. The Commissioner made the following comment on page 2 of the report:

> *Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Having reviewed the record, I find that the information is primarily about the appellant's wife and the circumstances surrounding her death. The record, therefore, contains her personal information. The record also contains the personal information of a number of other identifiable individuals, including the appellant. The appellant is identified in parts of the record as next of kin, and parts of the record refer to the contents of discussions with him.*

[96] My finding that information about a person's death is personal information raises the issues of whether a deceased person is entitled to protection of privacy in relation to his or her personal information and for how long that protection lasts.

[97] The issue of whether a deceased person maintains a right to privacy in relation to personal information was discussed by the Ontario Information and Privacy Commissioner in Ontario OIPC Order MO-206 (1999). In that case, the Ontario Information and Privacy Commissioner dealt with a request under Ontario's *Municipal Freedom of Information and Protection of Privacy Act* for access to a police report in relation to the applicant's sister and the Commissioner made the following comment at page 3 of the report:

> *The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to*

> *personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the Act, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years. In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.* [Emphasis added]

[98] Section 54(a) of the Ontario *Municipal Freedom of Information and Protection of Privacy Act* is equivalent to section 65(e) of our *ATIPPA* which provides as follows:

> *65. A right or power of an individual given in this Act may be exercised*
>
> . . .
>
> *(e) where the individual is deceased, by the individual's personal representative, where the exercise of the right or power relates to the administration of the individual's estate.*

[99] The reference in Ontario OIPC Order MO-206 (1999) to section 2(2) of the Ontario *Municipal Freedom of Information and Protection of Privacy Act* requires comment. This section limits the time period for the protection of privacy for deceased persons in relation to their personal information to a period of 30 years. The access to information legislation in some other provinces of Canada also has a similar limitation for the protection of privacy of deceased persons. There is no such limitation set out in the *ATIPPA*. Therefore, I must conclude that the Legislature of Newfoundland and Labrador made a decision not to place a time limit on the protection of the privacy of deceased persons in relation to their personal information. (I should indicate that section 42(c) of the *ATIPPA,* which is not yet in force, allows the Provincial Archives of Newfoundland and Labrador or the archives of a public body to disclose personal information for archival or historical purposes where the information is about an individual who has been dead for 20 years or more)

[100] The protection of the privacy of deceased persons was also considered by the Ontario Information and Privacy Commissioner in Ontario OIPC Order M-50 (1992). In that case, the Commissioner dealt with a request under Ontario's *Freedom of Information and Protection of Privacy Act* for access to any records relating to the involvement of the Metropolitan Toronto

Department of Ambulance Services in an incident in which the body of an individual was discovered in an apartment. The Commissioner found that the requested record contained personal information. Under the provisions of the act the Commissioner was now required to determine if the disclosure of the personal information would constitute an unjustified invasion of personal privacy, taking into account a number of factors listed in the act and other unlisted factors. In making that determination the Commissioner made the following comment on pages 4 to 5:

> *In the circumstances of this appeal, I feel that one such unlisted factor is that one of the individuals whose personal information is at issue is deceased. Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.*

[101] The *ATIPPA* differs from the Ontario Act dealt with in Ontario OIPC Order M-50 (1992) in two aspects. As indicated above, the *ATIPPA* does not limit the privacy protection of deceased persons to a period of 30 years. In addition, unlike the Ontario Act which allows for the disclosure of personal information if the disclosure would not constitute an unjustified invasion of personal privacy, the *ATIPPA* contains a mandatory prohibition against the release of personal information, except in those limited circumstances set out in section 30(2). If a public body determines that a record contains personal information, then there is no discretion to make a decision to release that personal information.

[102] Bearing in mind that the burden of proof is, pursuant to section 64(1) of the *ATIPPA*, on Eastern Health to prove that the Applicant has no right of access to the record and that the standard of proof is on a balance of probabilities, I find that Eastern Health has proven that the responsive record constitutes personal information as defined in section 2(o) of the *ATIPPA* and that the Applicant pursuant to section 30(1) of the *ATIPPA* has no right of access to the record or part of the record. I also find that none of the exceptions to the disclosure of personal information set out in section 30(2) of the *ATIPPA* are applicable to the responsive record or the Applicant.

[103] In summary, I find that the responsive record constitutes personal information, which includes information regarding the death of the named individual, and that the protection of

privacy in relation to personal information continues following a person's death and, therefore, the Applicant has no right of access to the responsive record that constitutes personal information.

(d) Denial of Access Where Individual is Deceased – Section 65 of the *ATIPPA*

[104] Eastern Health states that the responsive record contains personal information about an individual who is deceased and, therefore, section 65(e) of the *ATIPPA* could be applicable. Section 65(e) provides as follows:

> *65. A right or power of an individual given in this Act may be exercised*
>
> . . .
>
> (e) *where the individual is deceased, by the individual's personal representative, where the exercise of the right or power relates to the administration of the individual's estate.*

[105] Eastern Health takes the position that where the responsive record relates to a patient who is deceased then the record can be disclosed to the deceased's personal representative who requires the record for the administration of the patient's estate. Eastern Health submits that the Applicant has not indicated to it that the Applicant is the personal representative of the patient nor has the Applicant indicated that the record relates to the administration of the patient's estate, therefore, the record cannot be released to the Applicant.

[106] The term personal representative is not defined in the *ATIPPA*. *Black's Law Dictionary*, Eighth Edition, defines personal representative as follows:

> *Technically, while an executor is a personal representative named in a will, an administrator is a personal representative not named in a will.*

[107] I adopt that definition and find that personal representative in section 65(e) of the *ATIPPA* means either an executor or administrator of a deceased's estate.

[108] The Applicant indicated in a telephone interview with an Investigator from this Office on 12 February 2007 that the Applicant is not the personal representative of the estate of the named individual.

[109] The Ontario Information and Privacy Commissioner dealt with a situation similar to the circumstances that I am examining in this Request for Review in Ontario OIPC Order P-294 (1992). In that case, the requester was seeking pursuant to Ontario's *Freedom of Information and Protection of Privacy Act* access to documents related to investigations conducted in response to complaints made by the requester about the medical treatment given to his deceased father. The Appeals Officer had asked the requester if he could provide either a copy of his father's will naming him as executor, or letters of administration appointing him as administrator, and asked the requester to provide proof that his request was related to the administration of his father's estate. The requester did not provide the requested documentation. The Commissioner in commenting on section 66(a) of the Ontario *Freedom of Information and Protection of Privacy Act*, which is the equivalent to section 65(e) of our *ATIPPA*, stated at page 2 of the report:

> *The appellant would be able to exercise his father's right to request and be granted access to his father's personal information, if he is able to demonstrate that he is his father's "personal representative" and that his request for access to the information relates to the administration of his father's estate.*

[110] The Ontario Commissioner in Order P-294 (1992) after noting that the requester was unable to provide proof that he was the personal representative of his father stated at page 5 of the report:

> *Therefore, in the circumstances of this appeal, I am not satisfied that the appellant is entitled to exercise his father's right of access to personal information. Accordingly, the appellant's request for information, as it relates to his father's personal information, is subject to the mandatory provisions of section 21 of the Act.*

[111] I adopt the reasoning of the Ontario Information and Privacy Commissioner in Order P-294 and find that Eastern Health is correct in its decision that the Applicant cannot be granted access to the personal information of the named individual because he is not the personal representative of the named individual within the meaning of section 65(e).

[112] In these circumstances, it is clear that the Applicant is not the personal representative of the named individual and, therefore, cannot obtain the responsive record, which constitutes personal information regarding the named individual.

V CONCLUSION

[113] Eastern Health provided several reasons for its refusal to provide access to the responsive record. It relied on section 6(4)(a) of the *ATIPPA* to argue that the disclosure of the responsive record is prohibited by section 8.1 of the *Evidence Act* and section 35 of the *Hospitals Act*. I conclude that in relation to these two sections Eastern Health has not met the burden of proof required by section 64(1) in order for a public body to prove that the Applicant has no right to the record.

[114] Eastern Health has also argued that it is prohibited by section 30(1) from disclosing the responsive record because it contains personal information and that the Applicant has no right to disclosure of the responsive record pursuant to section 65(e) because the Applicant is not the named individual's personal representative. I conclude that Eastern Health has met the burden of proof required by section 64(1) and has proven that the responsive record constitutes personal information as defined in section 2(o) and, therefore, Eastern Health is prohibited by section 30(1) from disclosing the responsive record. I also accept that it is clear the Applicant is not the personal representative of the named individual and, therefore, the Applicant has no right of access to the responsive record pursuant to section 65(e) of the *ATIPPA*.

VI RECOMMENDATIONS

[115] I find that Eastern Health has proven that the Applicant has no right of access to the requested record and I therefore issue no recommendation with respect to the requested record.

[116] With respect to the initial refusal of Eastern Health to provide this Office with a copy of the responsive record, I recommend that Eastern Health review its policies and procedures regarding

Requests for Review conducted by this Office in accordance with sections 43 and 52 of the *ATIPPA* and ensure that they appropriately follow the duties and responsibilities imposed on a public body under the *ATIPPA*. More specifically, I recommend that Eastern Health cooperate with this Office in a manner that is consistent with the language, the spirit and the intent of the *ATIPPA*.

[117] Under authority of section 50 of the *ATIPPA* I direct the head of Eastern Health to write to this Office and to the Applicant within 15 days after receiving this Report to indicate Eastern Health's final decision with respect to this Report.

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

[119] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of April 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador