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“The Commissioner’s role is to facilitate the effort of a requestor to seek access to information [...] and is effectively an ombudsman or liaison between the citizen and government in attempting to resolve the request by mediation or otherwise if documents or information known to be existing are being withheld in whole or in part for various reasons”

*Justice Harrington,
NL CA, NL (Information
and Privacy
Commissioner) v. NL
(Attorney General)*

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This edition reflects on the recent court decision *R. v. Spencer*, [2014] SCC 43 and its importance to the access and privacy field. We also highlight the revamped Newfoundland and Labrador Access, Privacy, Security and Information Management (APSIM) conference and the OIPC’s new role as hosts for the 2014 conference to be held in early December. Planning has been underway since January to provide what we hope is the best provincial APSIM conference yet – and one that is more than competitive with other similar Canadian events. Also in this edition, there is a summary of Report A-2014-007, as well as our regular features, and an updated Resource List.



Report A-2014-007

The Applicant made two access requests to the Department of Tourism, Culture and Recreation under the *ATIPPA* for access to records relating to big game hunting activities in three specific areas of Labrador and the 2004 tender and/or sale of three hunting and fishing lodges, including the disposition of any non-resident big game licenses connected to any of these lodges. The Department released the responsive records to the Applicant in part. The Applicant filed a Request for Review with our office (regarding both access requests) and the main issue was the adequacy of the search.

The Commissioner found that the Department had complied with the duty to assist pursuant to section 9 of the *ATIPPA* by performing a reasonable search for the responsive records and responding to the access request in an open, accurate and complete manner. He referred to **Report A-2009-011**, which summarized the content of the duty to assist as comprising three separate components: 1) the public body must assist an applicant in the early stages of making a request; 2) it must conduct a reasonable search for the requested records; and 3) it must respond

to the applicant in an open, accurate and complete manner. He also noted **Report 2006-009**, which highlighted that when an “Applicant takes the position that a public body is intentionally withholding a record or has not undertaken an adequate search for a record, there is some onus on the Applicant to...provide a reasonable basis for concluding such records may, in fact, exist.” The Commissioner further highlighted **Report 2005-006**, which noted “record searches must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.”

Based on the Department’s submission, the Commissioner was satisfied that the search had been conducted in this manner and that the Department had performed a complete review of the files of the officer responsible and had indicated what other Government sources would likely have the records surrounding the tender. Given that, the Commissioner accepted the Department had undertaken a reasonable search for the responsive records, that no records were found, along with its explanation for why no other records existed within its custody or control. As a result, no recommendations were made.

R. v. Spencer, 2014 SCC 43

In *R. v. Spencer*, [2014] S.C.R. 43 (*Spencer*), the Supreme Court of Canada (SCC) ruled against the reasoning of a previous case at the Ontario Court of Appeal on the matter of voluntary disclosure of subscriber data by ISPs. The SCC held that the police request of Internet service providers (ISPs) for basic subscriber information associated to a particular IP Address amounts to a warrantless search not authorized by law. In so finding, the Court defined the concept of “informational privacy” as including three distinct (though overlapping) branches: 1) privacy as secrecy; 2) privacy as control; and 3) privacy as anonymity. They also reviewed the concept of “anonymously undertaken online activity”, and defined that as engaging a significant new, modern privacy interest.

Background:

Police had obtained information about an internet user from his internet service provider without a warrant. The police asked for it using a "PIPEDA request" and the ISP simply provided it, relying on a broad provision in PIPEDA which it believed to permit certain disclosures to law enforcement.

Reasoning:

A “broad and functional approach” was emphasized by the Court as the appropriate manner in which to assess the subject matter of the impugned search. This requires examining the nature of the information sought as well as the nature of the information that it is capable of revealing. Additionally, account must be taken as to the information sought and its ability to support inferences in relation to other personal information when characterizing the subject matter of the search.



In *Spencer*, the Court found that the subject matter of the search was not simply the name and address of the subscriber, but rather the “identity of an Internet subscriber which corresponded to particular Internet usage.” The Court held that that an IP Address (once identified in relation to a particular individual), is capable of revealing the individual’s online activity in his or her home, which warrants s. 8 *Canadian Charter of Rights and Freedoms* protection.

The Court went on to find that the regulatory scheme under PIPEDA as well as the terms of use and privacy policy of the internet provider did not provide lawful authority for the voluntary provision of subscriber information to law enforcement.

What does this mean?

Internet users have a reasonable expectation of privacy and anonymity online.

Production Orders are now required to obtain basic subscriber information (customer name & address) from ISPs. Neither the combined terms of contracts of adhesion and the provisions of PIPEDA s. 7(3)(c.1) (ii) nor s. 487.014 suffice to authorize the request and receipt of subscriber data.

You can read the case in full here: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14233/index.do>

The 2014 Newfoundland & Labrador Access, Privacy, Security & Information Management Conference

The NL Connections conference series has operated for the past several years, with our office always offering support and endorsement. This year, however, we have stepped into a new role as hosts - intent on working hard with other stakeholder organizations to find ways to improve upon previous years and make the 2014 conference the most informative, practical and engaging one yet.



Since January, we have worked together on organizing and planning a conference that we hope appeals to those who work in a broad range of Access, Privacy, Security and Information Management (APSIM) fields, as well as at all levels of the spectrum - from those new to APSIM careers/issues through those who have been working in the field for some time and are now dealing with more advanced questions and concerns, right up to those at the director/managerial level overseeing employees/departments and concerned about these issues from that perspective.

With the endorsement of the Office of Public Engagement and the atmosphere of interest surrounding APSIM in Newfoundland and Labrador at the moment (the recent launch of the Open Government Initiative, the changing political landscape, and the current ATIPPA Review process), this year's conference theme was an easy first decision of the Steering Committee. We feel it is particularly timely and we hope it lends itself to lively presentations and debate:

"Changing the Culture: APSIM in an Era of Open Government"

December 1-3, 2014

Sheraton Hotel Newfoundland, St. John's, NL

In an effort to improve upon past conferences, we have taken great care in planning a full-day workshop with topics including: APSIM Bootcamp (Level 1 or 2), Breach Notification Fundamentals and Hypotheticals, Privacy Impact Assessment Seminar and Risk Assessment Nuts and Bolts.

We have also built a conference agenda that includes 2 keynote speakers (TBA), 4 plenary panel presentations (ex. APSIM Bear Pit, Perspectives on Surveillance), and over 20 breakout sessions covering a wide range of interests in the APSIM fields, including: Third Party Perspectives, Lifecycle of a Privacy Breach, Access & Privacy in the Workplace, BYOD, Youth Perspectives on Privacy and Surveillance in a Social Media World, Unleashing the Power of Open Data, Canadian and International Access and Privacy Landscape, The Role of Standards, and Communications, the Media and Privacy.

In the coming month we expect the agenda to be finalized and posted to the conference website. We encourage you to check out the site for more information on the conference, organizers and, most importantly, registration. We hope that the 2014 conference will be the best attended one yet!



Conference Website: <http://www.nlconnections.ca/index.php>

Registration page: <https://www.verney.ca/aapw1614/registration/index.php>

Resource List



<http://www.atipp.gov.nl.ca/info/schedule.html> (ATIPPA, Regulations and Fee Schedule)

<http://www.atipp.gov.nl.ca/> (ATIPP Office)

<http://www.atipp.gov.nl.ca/info/Protection-of-Privacy-Policy-and-Procedures-Manual.pdf> (Privacy Policy and Procedures Manual)

<http://www.oipc.nl.ca/accessreports.htm> (OIPC Commissioner's Reports on Access to Information)

<http://www.oipc.nl.ca/privacyreports.htm> (OIPC Commissioner's Reports on Privacy)

<http://twitter.com/#!/OIPCNL> (OIPC Twitter)

<http://www.nlconnections.ca/index.php> (2014 NL APSIM Conference Website)

www.parcnl.ca (ATIPPA Review Committee)

Access & Privacy News

As part of the ongoing review of the *ATTIPA*, all Access and Privacy Coordinators should have received a questionnaire from the committee convened to review the legislation.

This is an opportunity for the committee to get feedback from those working on the frontlines with the *ATIPPA* legislation and learn what issues and concerns are faced on a daily basis, as well as what tools and measures would be of assistance to those in these positions.

We welcome this opportunity for input from Access and Privacy Coordinators and encourage you to complete this document and

return it to the Review Committee by its deadline, **August 15th, 2014.**

The OIPC has added a new Access and Privacy Analyst to our office, Ms. Ruth Marks.

Ruth joins us on leave from her previous role with the Newfoundland and Labrador Center for Health Information. Many in the access and privacy world will be familiar with Ruth from her years of experience in this field.

We are happy to have her on board!

Council Corner

Also with the *ATIPPA* review, the committee has undertaken online consultations that are continuing into August and we encourage municipalities to publicize this opportunity to citizens in their jurisdiction to encourage more participation. Topics remaining for discussion include: Role and Powers of the Commissioner (August 1st), Making *ATIPPA* User-Friendly (August 11th), and *ATIPPA* Fees (August 23rd).

The online consultation can be accessed through the *ATIPPA* Committee website at www.parcnl.ca by clicking on the "Online Consultations" button.