



ABOVE BOARD

A QUARTERLY NEWSLETTER BY THE OFFICE OF
THE INFORMATION AND PRIVACY COMMISSIONER

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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)*

- * Welcome New OIPC Commissioner
- * Legal Advice Exception, section 30
- * Information Related to a Workplace Investigation, section 33
- * Privacy Breach Statistics July 1–September 30, 2016
- * Fall APSIM Conference

Welcome New OIPC Commissioner

Donovan F. Molloy, Q.C. was born and raised in Marystown. He received a Bachelor of Laws degree with distinction from the University of New Brunswick in 1992 and a Bachelor of Science degree from Memorial University in 1995.

His career has primarily focused on public service. He began work as a prosecutor in 1993 at the then Marystown office of the Department of Justice’s Public Prosecution Division. Mr. Molloy transferred to St. John’s in 2002. In 2004 he moved to Alberta, where he worked as a prosecutor with Alberta Justice.

After returning to the Department of Justice’s Public Prosecution Division in 2007, Mr. Molloy became the Senior Crown Attorney (Eastern Region) in 2008. In 2010 he became the Assistant Director of Public Prosecutions and in 2012 the Director of Public Prosecutions/Assistant

Deputy Minister. Mr. Molloy has served as a Bencher with the Law Society of Newfoundland and Labrador since 2010 and was appointed as Queen’s Counsel in 2014.

Mr. Molloy was appointed the Information and Privacy Commissioner of Newfoundland and Labrador effective July 22, 2016.



LEGAL ADVICE EXCEPTION—SECTION 30

The Trial Division of the Newfoundland and Labrador Supreme Court recently reviewed the scope of the legal advice exception found in section 30 of the *Access to Information and Protection of Privacy Act, 2015* (the [Eastern Health case](#)). Many aspects of the decision confirm long held positions of this Office.

Under *ATIPPA, 2015* the default position is that citizens have a right of access to records subject to limited exceptions that are necessary to preserve the ability of government to function, to accommodate established and accepted rights and privileges of others and protect from harm confidential proprietary and other rights of third parties. The legal advice exception is intended to accommodate the established solicitor and client and litigation privileges.

Regarding solicitor client privilege, the Court noted that “the primary rationale for the privilege is to enable full and candid communication between a solicitor and client so that the client may obtain fully-informed and effective legal advice in order to exercise his or her legal rights in an informed manner” and that “an individual’s right to obtain such advice promotes both access to justice and the efficiency of the adversarial process.”

When relying on this exception it is important not to forget its purpose as this helps to define its scope and when it is appropriate to use.

A public body relying on the exception of solicitor and client (legal advice) privilege must be able to show that:

1. the document was a communication between a solicitor, acting in that capacity, and the client;
2. the communication entailed the seeking or giving of legal advice; and
3. the communication was intended to be confidential.

A public body relying on litigation privilege must be able to show that:

1. the dominant purpose for the preparation of the document must be the litigation in question; and
2. litigation must have been in reasonable contemplation at the time of preparation of the document.

The Eastern Health case listed many of the considerations that may arise when applying the privilege, in either form, and offered practical advice on its application. There is a more in-depth discussion of the case in our [guidance document](#) on this exception, which can be found at www.oipc.nl.ca.

WORKPLACE INVESTIGATIONS—SECTION 33

The Workplace Investigation section serves two purposes. In some cases it is a mandatory exception that requires that relevant information from a workplace investigation be withheld (i.e. where the applicant is a complete “outsider” to the investigation). However, it also provides for a mandatory right of access to all relevant information created or gathered for the purpose of a workplace investigation if the applicant is a party to an Investigation. Witnesses in a workplace investigation are only entitled to relevant information related to their own witness statement.

It is essential to determine the status of the applicant with respect to the investigation, as section 33(2) provides for a mandatory disclosure of relevant information to complainants and respondents, mandatory denial of access to outsiders and limits what witnesses are entitled to.

Much of the information collected in a workplace investigation is personal information. Usually, decisions with respect to the disclosure of personal information are made in accordance with section 40. However, section 33 was included in the legislation to give complainants and respondents to a workplace investigation a greater right of access to personal information (in the narrow context of a workplace investigation) than what might otherwise be available under section 40 to a non-party applicant.

When releasing information under this section, it is imperative that careful consideration be given to the word “relevant”. Only relevant information is to be considered under section 33. Non-relevant information is still subject to section 40. In the course of workplace investigations, a lot of information may be created or gathered that is ultimately not relevant to the investigation. Examples of such information might include medical diagnoses unrelated to the issue or specifics of medical treatment. While a general diagnosis or description of a medical condition may be relevant in some situations, sometimes detailed treatment notes or plans are not relevant. Similarly, detailed personal histories may be collected as part of a workplace investigation. Significant portions of the personal history may not be relevant to the investigation. Information that is not relevant to the investigation which is also an unreasonable invasion of personal privacy is still protected and should not be disclosed.

Decisions with respect to relevance are case specific, and as a result certain types of information may be disclosed in one case but not another. The relevance of the information is a decision that must be made by the public body given the specific circumstances of each file, and release of information in one instance should not be seen as “precedent setting.”

Our [guidance piece](#) on this section can be found at www.oipc.nl.ca.

ATIPPA PRIVACY BREACH STATISTICS July 1–September 30

In our most recent reporting period (July 1 – September 30, 2016), the OIPC received 41 privacy breach reports from 15 public bodies under the *ATIPPA, 2015*. This is down from the 66 reports from 19 public bodies received in the second quarter of 2016.

Privacy breach reports to the Commissioner are used primarily to allow the OIPC to advise public bodies about the breach response process, to discuss ways to avoid similar breaches and also to target specific issues or public bodies for privacy training.

If you want the OIPC to deliver training regarding privacy breaches, or any other topic relating to access or privacy, contact our Office to arrange a time.

Summary by Public Body		Summary by Breach Type	
Department of Advanced Education, Skills and Labour	3	E-mail	13
College of the North Atlantic	4	Fax	3
Department of Child, Youth and Family Services	7	In Person	6
Department of Finance	2	Mail Out	15
Department of Health and Community Services	1	Other	4
Eastern Health	1	Intentional	0
Human Resource Secretariat	3		
Memorial University of Newfoundland	1		
Newfoundland and Labrador Housing Corporation	1		
Newfoundland and Labrador Legal Aid Commission	1		
Newfoundland and Labrador Liquor Corporation	1		
Public Service Commission	2		
Service NL	8		
Western Integrated Health Authority	1		
Workplace NL	5		

FALL APSIM CONFERENCE—NOV 28-30, 2016

The Website and Registration for the Fall APSIM Conference “We Are Connected – Building On Community for Access, Privacy, Security and Information Management” is now live! We encourage everyone to go to www.apsim.gov.nl.ca to check out the details and to sign up for this fantastic FREE conference.

The Agenda includes:

1. Speeches from the Ministers of Finance, Justice and Public Safety and Health and Community Services;
2. Keynote addresses from Dr. Ian Kerr from the University of Ottawa, Patricia Kosseim from the Federal Information Commissioner’s Office, Shelley Smith the CIO of MUN, and Donovan Molloy, Commissioner of the OIPC;
3. Panel discussions on: Cloud Computing (both Security and Privacy perspectives); Accountability and what it specifically means to Access, Privacy, Security and Information Management professionals; and Decoding Information Governance;
4. Break out sessions on: PHIA Review Committee; Open Contracting; Cloud Computing – a Case Study; Health NL – the Provincial Electronic Health Record; Transitory Records; IT Security 101; Health Research and Privacy; *ATIPPA, 2015* Application; Case File Management –Marrying Service Delivery and Record Keeping; Privacy Breaches; BYOD – Access and Privacy Issues; and a Fax to Email Case Study

The Conference runs from November 28-30 and is being held at MUN’s Medical School. With workshops on PIA/PPIA and PHIA Review on the 28th.