OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

November 4, 2019

BY EMAIL

The Honourable Justice Richard LeBlanc
Commission of Inquiry Respecting the Muskrat Falls Project
5th Floor, Suite 502
Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8

Dear Commissioner LeBlanc:

Subject: Duty to Document

I am writing at this time concerning the topics of the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA,* 2015) and the Duty to Document (D2D) that arose during the end of the hearings of the Commission of Inquiry Respecting the Muskrat Falls Project (Muskrat Falls Inquiry). As I had not been appointed as the Information and Privacy Commissioner until August 5, I did not have an opportunity to express my views at the time. Now having served some time in this capacity, and having had the opportunity to reflect on this role as well as my previous roles and consult with officials in the Office, I have formed some opinions and perspectives that I believe could be helpful as you form any recommendations you might offer regarding these topics.

I understand that the time for submissions has passed and that you are well into the process of writing your report. Nevertheless, it is my hope that you may be willing to consider these comments.

I can offer a unique perspective on access to information and the D2D. Prior to my appointment as Commissioner, I spent 10 years at the senior management level in the provincial public service, including seven years in executive roles, in a mix of central agency and line department roles. I served as Executive Director in Cabinet Secretariat from spring 2012 through summer 2015. At the tail end of that time, I was assigned to lead the government-wide change management associated with the implementation of *ATIPPA, 2015*. In this capacity, I supported the Minister of the day as the bill proceeded through the House of Assembly and worked with executive across government and external public bodies to prepare them for the cultural change that would be necessary for its implementation. Then, as Assistant Deputy Minister (ADM) in the Department of Health and

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Community Services, one of the departments with the largest volume of access for information requests, I became directly involved in the *ATIPPA, 2015* process including eventually becoming the executive process owner as the ADM responsible for information management.

My experience in these roles led me to be concerned with some of the sentiments I heard expressed during testimony at the Inquiry regarding *ATIPPA, 2015* and the D2D. In particular, my predecessor, now-Justice Donovan Molloy expressed concerns about a "chilling effect" of *ATIPPA, 2015* whereby senior government officials were less likely to document their decision-making for fear of those documents making their way into the public domain or alternatively, facing some sort of punishment, for having created such documents. Professor Kelly Blidook also, in his report to the Inquiry, reported that many among his senior government official respondents felt similarly. While I do not entirely disagree with these sentiments, my concern is that one might draw the conclusion, erroneous in my view, that the appropriate response might be to tighten the public's access to information in the upcoming statutory review of *ATIPPA, 2015* in order to provide public servants with more protection to share their views candidly, objectively and in writing.

First, and most importantly, *ATIPPA, 2015* may be the most progressive access to information and protection of privacy statutes in the country. It strikes an excellent balance between the public's right to access and the exceptions to access that protect public bodies' responsibilities to govern and operate. The hybrid ombud/order-making authority that it confers upon me as Commissioner is well suited for a small jurisdiction such as Newfoundland and Labrador. In consequence, citizens in this province are now getting more information from their public bodies than most of their counterparts elsewhere in the country, and in most instances they are getting it faster and for free. The intervening years since implementation of the Act have demonstrated that certain amendments may be beneficial, and my Office has been preparing to make a submission during the scheduled 2020 statutory review; however, in our view the Act is fundamentally sound, we are lucky to have it, and we should be very careful not to undermine its core principles.

If the concern that has emerged during the Inquiry is that documentation was lacking, which might have helped understand certain decisions regarding Muskrat Falls, then I reiterate my plea that restricting access to information legislation would be the improper remedy. It may indeed be the case that were there a statutory D2D and a more restrictive *ATIPPA*, there would be more documentary evidence available to the Inquiry. If so, this information would only be helpful for accountability purposes during a judicial inquiry or some other extraordinary process whereby production of such documents could be compelled, rather than readily available to the public on a regular basis as under *ATIPPA, 2015*. While better documentation is intrinsically good as it makes for better decision-making, it does not improve accountability if the public cannot access these documents, (subject of course to the exception provisions of the ATIPPA).

Conversely, I believe that to operate properly, a truly effective access to information statutory regime *requires* a statutory D2D. This is not a novel view. Canada's Information and Privacy Commissioners expressed it in a 2014 joint resolution of which my predecessor

was a signatory. The OIPC expressed this view to the 2014 Statutory Review Committee of the *Access to Information and Protection of Privacy Act* in 2014. As the Committee pithily put it in its report: "how can Information and Privacy Commissioners properly oversee access to information and privacy law in the absence of good records or, in some cases, no records at all?" As you are aware, these observations informed the Committee's recommendation that a D2D be imposed through the *Management of Information Act* (*MOIA*), subject to oversight by the OIPC, and supported by resources to public bodies developed by the Office of the Chief Information Officer (OCIO).

Proper information management practices are central to better public administration. A minister briefed on the basis of good documentation makes better decisions not only because a decision for which she is more easily held accountable is more likely to be a fair one, and thus a better one, but she is better informed in making her decision. The principles of natural justice and procedural fairness tell us that a decision supported by clear and written reasons is more likely to be fair, just and better. Some of Professor Blidook's respondents expressed concerns that accountability was undermined when ministerial briefings were not properly documented. I can personally attest that such meetings, while not the norm, were also not uncommon during my time in the provincial government and that wariness of access to information was one reason for that. I have been similarly concerned that poor documentation practices lead to poor operationalization by public bodies. It is certainly not uncommon in the provincial public service (and, to be fair, certainly in almost every organization in the world) for a course of action to be decided at a non-minuted meeting one week, only to reconvene the following week for participants to discover incomplete tasks because they had not been captured, communicated or understood. It was Max Weber's concern for military-inspired operational efficiency that led him to include formal rules-based processes at the heart of his bureaucratic principles. In short, in my view, the D2D, alongside an effective access to information regime, is central not only to improving democratic accountability but also to improving sound public policy-making and the delivery of public goods and services.

I believe that the demand for a statutory D2D in Newfoundland and Labrador is presently acute, driven by a number of trends that have emerged over the past fifteen years. However, I have also observed a number of trends that, in my opinion, set the stage for the successful implementation of a statutory D2D.

I started my career in the provincial public service in 2006 in the Intergovernmental Affairs Secretariat at a time when *ATIPPA* was a new statute. Intergovernmental officials were aware of *ATIPPA* but also aware of the exceptions in the Act related to matters harmful to intergovernmental relations and policy advice, among others, that were designed to, and were effective in, allowing us to provide our advice to our principals. Concisely and clearly providing both advice and information in written documentation, and preserving that documentation effectively while disposing of unnecessary transitory records was the clear direction from the deputy ministers in the Secretariat at that time (2006-2011). Added to my later experience in Cabinet Secretariat, I came to understand that the culture of central government during this period and prior to it was a traditional, paper- and rules-based

approach to information management. I don't believe that the impetus was accountability or transparency; indeed another principle – *secrecy* – was paramount. But these principles were seen to support sound decision-making and the outcome at that time was good information management.

While these principles formed the dominant culture of Executive Council and certain other key departments at the core of government, they were not universal within the provincial government. In a number of line departments with which I interacted with during my time in Executive Council, information management systems were often rudimentary. As for the departments in which I worked, both Children, Youth and Family Services and Health and Community Services had highly prioritized improving their information management systems during the periods I spent there (2011-2012 and 2015-2019 respectively) but both were dealing with challenging information management legacies.

A number of factors started to combine in the late 2000s that disrupted the above-referenced principles of information management. Resistance in the context of the full implementation of *ATIPPA* was certainly a contributing factor. In my opinion, response from within the public service to this new legislation variously arose from the cultural principle of secrecy, or the challenges of implementation in a context of poor documentation, or both. As noted, I do not entirely disagree with my predecessor or Prof. Blidook's respondents that there was a "chilling effect" that came along with *ATIPPA*. However, I think that other factors were even more disruptive – technology and generational change within the public service.

The availability of electronic communication and the generational change within the public service of staff who could and would comfortably use it, rather than traditional paper-based memo correspondence, dramatically increased the *supply* of information. There are now dramatically more documents created within public bodies than previous. I am far from the first to make this observation, but I make it to note another less-remarked upon: that the low resource cost of communication also increased the *demand* for information. Twenty years ago, in receipt of a document as part of the decision-making process, and faced with a question about it, a senior public servant or Minister might have chosen to send the document back for revision. Asking for a new draft would be time consuming and uncertain, and so the reader would tend to be judicious with his questions and would leave some to go unasked when approving the document to continue in the process. But the advent of, email allowed any and all questions to be asked *immediately*. Technology savvy-staff were increasingly comfortable with word processing and email, editing their own documents without administrative support, and answering questions often with the sole support of Google. Increasingly, therefore, answers could be expected along similar timeframes. Moreover, aware of this, principals began to expect that such documents can be prepared *now*. A Cabinet submission which once would have been reviewed within Executive Council and generated a page of questions now will often trigger a week's worth of emails between a Cabinet Officer and officials in a dozen departments, resulting in the creation of hundreds of records. The implications for the quality of those documents, and the information and accuracy of the information within, are obvious.

There is little question that the information age has contributed to our access to information with immense benefits to how well we can understand our world, but the demand for this understanding to be immediate has undermined many of those gains. The consequence has been a dramatic proliferation of documents of questionable quality – a steadily deteriorating signal-to-noise ratio. For any set of records, the truly valuable information and analysis supporting sound decision-making and operationalization and supporting transparency and accountability (i.e. the signal) is increasingly drowned out by unnecessary, often ill-thought-out and even inaccurate questions, information and analysis, (i.e. the noise) that would not have been produced if the face-value cost of doing this work did not seem so low because of the ease of email. My Office recently received a request for a time extension under section 23(1) of *ATIPPA, 2015* from a department related to a single, relatively mundane issue within a limited timeframe, for which there were 4,000 responsive records. We had little choice but to approve the extension out of consideration for the overworked Access and Privacy Coordinator tasked with responding to the request. However, I knew when authorizing it that not only would the applicant's right to access be compromised by the delay, but that when the records were ultimately provided, most would be of very limited value. At the same time, I also despaired of the departmental person-hours spent on producing these thousands of records in the first place and whether the noise itself compromised the integrity of the signal.

While the above trends cause concern and demonstrate the need for change, there are three ongoing positive trends that, in my view, have set the stage for a statutory D2D. In each case, these positive trends are responses to concerns highlighted above: progress on cultural change; the positive promise of technology; and increasingly consistent sophistication in information management.

First, in my view, the public sector in this province is undergoing cultural change that was initiated by the implementation of *ATIPPA, 2015*. The work and report of the 2014 Statutory Review Committee, the Bill that it produced, and the Act that was passed by the House of Assembly, identified and addressed many of the problems that the Government had been facing with transparency and accountability. By this point, all political actors had come to understand the public's visceral response to the regressive elements of Bill 29 and their political consequences. The universal acceptance of the core principles of *ATIPPA, 2015* by the political leaders of the day was clear direction to the public service. A strong message was sent to the public service by the Clerk of the Executive Council, in appointing a change management team led by an executive from her office, that these principles were to be incorporated into departmental realities. While this cultural change was initiated long after the Muskrat Falls Project had been sanctioned and achieved financial close, in my view and experience, it has indeed been initiated. In certain departments, and I can speak specifically about the department in which I worked, Health and Community Services, the shift towards openness progressed smoothly over the subsequent four years. I can also attest that attitudes within Cabinet Secretariat itself towards secrecy have also begun to change, with a shift from a focus on secrecy as an almost sacred and overriding concept, to a more mature and informed view of secrecy as it appropriately informs the constitutional principle of cabinet confidentiality. There is little question that the cultural change still has a way to go.

For example, the performance of Government on proactive disclosure, for example, has been disappointing. It has also been uneven. In my view there are certain departments, which I will not identify for the sake of discretion, which have not embraced the principles of openness as clearly as others due in roughly equal parts to institutional culture and the attitudes of their deputy ministers. That said, I am confident that change is occurring and the introduction of a statutory D2D at this juncture will only further support that change.

The second supportive trend is technology which, while contributing to the problem, also can help solve it. Every department in the provincial government now has implemented Hewlett Packard's Records Management (HPRM, formerly known as TRIM) and the Office of the Chief Information Officer (OCIO) provides support to the TRIM Administrators Group community of practice. The way in which HPRM is implemented in government department varies depending on the business needs of the department, its capacity, and its maturity, but as a centrally-supported enterprise solution, HRPM provides a core information management system to support the essential functioning of a D2D within core government. I am confident that major public bodies that would be covered by a D2D either already have or could, before long, implement a similar records management system to support them. Increasingly staff at all levels of public bodies in the province are sufficiently proficient with technology to effectively utilize these tools in a way that makes sense for their operations.

Finally, a third supportive trend is an increase in the consistency in information management across public bodies. While, as noted above, in the late 2000s and early part of the present decade there was a sharp difference between the formal and rigid information management systems of central government and the less coherent systems of many line departments, a significant amount of work by line departments and OCIO has increased the consistency of sophistication across the provincial government. Beyond supporting the many instances of HPRM/TRIM, OCIO has developed for, and supported the implementation by, public bodies of various guidelines, frameworks, policies and tools. These include guidelines on IM governance framework and program plans and tools such as the Information Management Capacity Assessment Tool (IMCAT) and the Information Management Self-Assessment Tool (IMSAT). While OCIO's leadership and work in this regard have been essential, at the same time departments and many other public bodies have been increasing the sophistication of their information management systems for their own business needs as they execute Government's policy priorities. There is little question that the level of sophistication will vary, particularly among small agencies, boards and commissions with limited capacity; however, there is little question that the trend is towards an increase in sophistication.

If the need is clear and the stage is set for a statutory D2D, what would this look like? To answer this question I largely draw on the work and recommendations of David Loukidelis, the former Information and Privacy Commissioner for British Columbia, as well as its former Deputy Minister of Justice and Attorney General. Then-Commissioner Loukidelis wrote a report on the D2D, the recommendations of which led to the introduction of statutory provisions in the *Information Management (Documenting Government Decisions) Amendment Act, 2017*. Mr. Loukidelis defines a D2D as "a legal duty requiring public

servants to adequately document specified decisions and actions". One concern that he addresses, to which I am very sensitive, involves the risk that an improperly conceived D2D may lead to the over-documentation of trivial matters. Indeed, I think that at present, trivial matters are entirely over-documented because of the ease of email communication and poor records management which leads to the improper retention of unnecessary transitory emails. This approach undermines access by exacerbating the above-noted signal-to-noise ratio and impedes sound public administration. A sound approach to D2D would provide direction on both what to record and what not to record, in the first place, and what to retain and not to retain, for the record. To achieve that, considering the diversity of public bodies in the province, an appropriate statutory D2D should be pitched at the level of principles. It should support, enable and mandate the development of specific D2D policies and procedures at the entity level, customized to the business needs of each entity. Design should be local, within an overarching policy framework.

This should involve:

- Each entity to which the statutory provision applies must be directed to adequately document decisions and actions.
- Direction must be provided to entities regarding the considerations to be applied in deciding what to document, including contextual factors such as the entity's mandate, legal framework, operations and implications for access to information and privacy.
- Legislation should delegate entities the authority to decide what to document and how.
- Each entity should be required to designate a responsible authority.
- Legislation should establish oversight by a central expert authority.

These are the principles that, broadly, inform British Columbia's statute. However, there is one matter in which my opinion differs from that of Mr. Loukidelis. He recommends that the central duty to document policy should be under the purview of the chief archivist or government records officer and I agree with him on this point. In this jurisdiction this role would be best performed by the OCIO. However, he views that monitoring and audit would also be best performed by this body. In the present BC statute, accountability for oversight rests with the responsible Minister via a chief records offer. The present Information and Privacy Commissioner for British Columbia has noted that the implication is that the Minister is responsible for investigating his or her own conduct and has called for oversight to be placed with the Office of the Information and Privacy Commissioner. I concur with this approach which, I note, is that recommended by the 2014 Statutory Review Committee. While the OCIO is well-positioned to be responsible for the policies, programs and other supports for public bodies, true oversight to engender the public trust requires the independence of a statutory officer of the House of Assembly. The discussion and debate around this matter during the Muskrat Falls Inquiry illustrates that there has been damage to the public trust that public bodies properly document their decisions. I am sensitive to potential criticisms that the assessment of D2D requires as much expertise in the principles

of information management and operationalization of programs and services as it does expertise in the area of access to information. Although some additional resources would be required, if responsibility for oversight was provided to the OIPC, I believe that the staff complement at present would be an excellent foundation on which such additional capacity could be built. OIPC staff deal with access and privacy complaints from the enormous variety of public bodies in the province on all manner of issues and through this have been exposed to the full range of government documents in every sector, as well as to some of the information management challenges that are sometimes at the root of access to information complaints.

As an aside, I should also note that instituting a D2D in this province is not wholly virgin territory. On December 17, 2017 the House of Assembly passed the following amendments to the *House of Assembly Accountability, Integrity and Administration Act*:

> *21.1 The commission, officers and staff of the House of Assembly service shall be responsible and accountable for ensuring that all advice, deliberations, decisions and recommendations of the commission that result from formal or informal meetings of the members of the commission are properly documented in accordance with the Records Management Policy of the House of Assembly.*
>
> *[...]*
>
> *66. (1) A person who fails to comply with section 21.1 is guilty of an offence.*
>
> *(2) A person having a duty to document decisions and maintain records of the commission, the speaker, the clerk or staff member of the House of Assembly service and a person who without lawful authority destroys documentation recording decisions of the commission, the speaker or the clerk, or the advice and deliberations leading up to those decisions, is guilty of an offence.*
>
> *(3) A person who is guilty of an offence under subsection (1) or (2) is liable on summary conviction to a fine of not more than $10,000 or to imprisonment up to 6 months.*

In speaking to the bill in the legislature, Minister Andrew Parsons referred back to the Green Report, which was the genesis for that Act. In his Report "Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters" Commissioner Hon. J. Derek Green refers back to the federal Gomery Inquiry in discussing the D2D, and at recommendation 9 at page 5-24 Green explicitly recommends a D2D as well as the creation of an offence for failure to do so. Apparently it took some time before this particular recommendation was fulfilled.

To conclude, I wish to reiterate that if there has been a "chilling effect" arising from *ATIPPA* since its first incarnation in 2005, then I urge you against concluding that an appropriate response might be to restrict that statute's application. We have come too far. Instead, as

has been recognized nationally and internationally, the implementation of a statutory D2D can address that problem by providing public servants with the legal authority they can use to resist the pressure to *not* document properly. At the same time, a properly designed D2D can support sound public administration in the context of a rapidly changing technological environment and public sector culture. In this province, recent developments not only make the need for such a requirement acute, but the conditions are right for this province to be leaders nationally in this area in the same way that four years ago *ATIPPA, 2015* established us as leaders in the area of access and privacy.

Again, I appreciate that your ability to consider my views in the development of your report and recommendations may be limited, but I appreciate any consideration that you may be able to give them.

Yours sincerely,

Michael Harvey
Information and Privacy Commissioner