REPORT OF THE 2014 STATUTORY REVIEW

Access to Information *and* Protection of Privacy Act

NEWFOUNDLAND AND LABRADOR

VOLUME I: EXECUTIVE SUMMARY
VOLUME II: FULL REPORT

Clyde K. Wells, Chair | Doug Letto | Jennifer Stoddart

Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act*

VOLUME I | EXECUTIVE SUMMARY

Committee Members
Clyde K. Wells, Chair
Doug Letto
Jennifer Stoddart

March 2015

ISBN: 978-1-55146-544-9 Executive Summary (Volume I)
ISBN: 978-1-55146-545-6 Full Report (Volume II)
Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act*

Cover Design and Report Layout: Alison Carr
Report Editor: Claire Wilkshire
Cover Photo: © hanibaram, iStockphoto.com

Copies of this and other Newfoundland and Labrador publications are online at **http://www.gov.nl.ca/publications/index.html** and also available at:

Office of the Queen's Printer
P. O. Box 8700
St. John's, NL
A1B 4J6
Telephone: (709) 729-3649
Facsimile: (709) 729-1900
Email: queensprinter@gov.nl.ca

The Report is also available at **www.parcnl.ca** for one year following publication.

EXECUTIVE SUMMARY

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS

ATIPP	Access to Information and Protection of Privacy
ATIPPA	Access to Information and Protection of Privacy Act (Newfoundland and Labrador)
ATI	Access to Information
BC	British Columbia
CAPA	Canadian Access and Privacy Association
CAPP	Canadian Association of Petroleum Producers
CBC	Canadian Broadcasting Corporation
CFIB	Canadian Federation of Independent Business
CIPM	Certified Information Privacy Manager
CIPP	Certified Information Privacy Professional
CIPT	Certified Information Privacy Technologist
CLD	Centre for Law and Democracy
CMPA	Canadian Medical Protective Association
CNA	College of the North Atlantic
C-NLOPB	Canada-Newfoundland and Labrador Offshore Petroleum Board
DNA	DeoxyriboNucleic Acid
ECJ	European Court of Justice
EITI	Extractive Industries Transparency Initiative
FIPPA	Freedom of Information and Protection of Privacy Act
FOI	Freedom of Information
FOIA	Freedom of Information Act
FOIP	Freedom of Information and Protection of Privacy Act
FOIPOP	Freedom of Information and Protection of Privacy (Nova Scotia)
GiC	Governor in Council
GPS	Geo-positioning system
HIROC	Healthcare Insurance Reciprocal of Canada
HOA	House of Assembly
HOC	House of Commons
IAPP	International Association of Privacy Professionals
ICCPR	International Covenant on Civil and Political Rights
ICO	Information Commissioner's Office
IPC	Information Privacy Commissioner
IMCAT	Information Management Capacity Assessment Tool
IMSAT	Information Management Self-Assessment Tool
LA	Legislative Assembly (of another province)
LGiC	Lieutenant-Governor in Council
LPP	Legal Professional Privilege
MHA	Member of House of Assembly
MOI	Management of Information Act (Newfoundland and Labrador)
MRI	Magnetic Resonance Imaging
NA	National Assembly (Quebec)
NDP	New Democratic Party

NL	Newfoundland and Labrador
NLVMA	Newfoundland and Labrador Veterinary Medical Association
NSW	New South Wales
NTV	Newfoundland Broadcasting Company
OAS	Organization of American States
OCIO	Office of the Chief Information Officer
ODI	Open Data Institute
OECD	Organization for Economic Co-operation and Development
OIC	Office of the Information Commissioner
OIPC	Office of the Information and Privacy Commissioner (Newfoundland and Labrador)
OPE	Office of Public Engagement
PDF	Portable Document Format
PHIA	Personal Health Information Act (Newfoundland and Labrador)
PIA	Privacy Impact Assessment
PIPEDA	Personal Information Protection and Electronic Documents Act (Canada)
RCMP	Royal Canadian Mounted Police
RTI	Right to Information
SEC	Securities and Exchange Commission
SMS	Short Message Service (text message)
UDHR	Universal Declaration of Human Rights
VCPR	Veterinarian-Client-Patient Relationship

INTRODUCTION

Many of the people who came before the Committee at our public hearings, or who wrote to us, had their own unique stories about the *Access to Information and Protection of Privacy Act* (the *ATIPPA*).[1] A businessman told the Committee that after a tender was awarded for office supplies, he was forced to go to court to obtain tendering information in order to understand why his competitor made what he felt was an impossibly low bid. He felt more information should be available to bidders, with the resulting benefit of increasing competition and providing public bodies[2] with the best deal on tenders.

A former employee of a public body made an access request for personal information in a human resources file in December 2008, and was provided a package from the public body more than three years later. In the intervening time, there was an investigation by the Office of the Information and Privacy Commissioner (OIPC) and a decision from the Court of Appeal.

One journalist informed the Committee that a town council in her area was blacking out all the names of people making applications for development, the names of groups and organizations on documents, even the names of citizens on petitions to the town. It was being done on the apparent advice of the provincial Department of Municipal Affairs, in order to protect local councils from being sued for breaching the privacy provisions of the *ATIPPA*.

Another journalist told of the frustration associated with delays, and how even when she involved the Commissioner's Office, she felt she was being asked to negotiate for information from the public body, when what she actually needed was for the Commissioner to champion her cause.

A Member of the House of Assembly indicated that constituents needing government assistance sometimes refuse to pursue their case once they learn of a practice that could result in their personal information being shared with political staff in a minister's office.

An organization that represents small business owners told us their members were finding it more difficult to access information in the wake of the changes brought about by Bill 29, and that changes involving business interests of third parties "have placed information out of reach."

Those stories, and other accounts of how the *ATIPPA* functions, persuaded the Committee that the public lacks confidence in the integrity of the access to information system. The concerns expressed through those first-person accounts, the issues raised in oral presentations and written submissions, and the Terms of Reference required the Committee to examine rigorously all parts of the *Act*.

The discussion and recommendations that follow are the result of our work.

1 SNL 2002, c A-1.1 [the *ATIPPA* or the *Act*].

2 The term *public bodies* refers to all entities covered by the *ATIPPA*, including government departments; various Crown agencies, including health authorities and school boards; and municipalities.

Bill 29

In the early days of the Committee's existence, there were frequent references in the public generally and in the media to the "Bill 29 Inquiry." That term does not accurately capture the focus of the Committee's work, but it does highlight the perception that the Committee's appointment two years ahead of schedule was in part related to the Bill 29 amendments and their impact on access to information. It is also appropriate to draw attention to the Terms of Reference, which directed the Committee to "complete an independent, comprehensive review [of the *ATIPPA*] including amendments made as a result of Bill 29." As a result of this direction, there are frequent references in the report to the situation pre–Bill 29 and the impact of the amendments made as a result of the Bill, which was approved by the legislature in June of 2012.[3]

3 SNL 2012, c 25 [Bill 29].

Terms of reference

Statutory Review of the *Access to Information and Protection of Privacy Act*

Terms of Reference

The *Access to Information and Protection of Privacy Act*, SNL2002, c. A-1.1 (*ATIPPA*) came into force on January 17, 2005, with the exception of Part IV (Protection of Privacy) which was subsequently proclaimed on January 16, 2008. Pursuant to section 74 of the *ATIPPA*, the Minister Responsible for the Office of Public Engagement is required to refer the legislation to a committee for a review after the expiration of not more than five years after its coming into force and every five years thereafter. The first legislative review of *ATIPPA* commenced in 2010 and resulted in amendments that came into force on June 27, 2012. The current review constitutes the second statutory review of this legislation.

1. **Overview**

   The Committee will complete an independent, comprehensive review of the *Access to Information and Protection of Privacy Act*, including amendments made as a result of Bill 29, and provide recommendations arising from the review to the Minister Responsible for the Office of Public Engagement (the Minister), Government of Newfoundland and Labrador. This review will be conducted in an open, transparent and respectful manner and will engage citizens and stakeholders in a meaningful way. Protection of personal privacy will be assured.

2. **Scope of the Work**

   2.1 The Committee will conduct a comprehensive review of the provisions and operations of the *Act* which will include, but not be limited to, the following:

   - Identification of ways to make the *Act* more user friendly so that it is well understood by those who use it and can be interpreted and applied consistently;
   - Assessment of the "Right of Access" (Part II) and "Exceptions to Access" provisions (Part III)

to determine whether these provisions support the purpose and intent of the legislation or whether changes to these provisions should be considered;

- Examination of the provisions regarding "Reviews and Complaints" (Part V) including the powers and duties of the Information and Privacy Commissioner, to assess whether adequate measures exist for review of decisions and complaints independent of heads of public bodies;
- Time limits for responses to access to information requests and whether current requirements are appropriate;
- Whether there are any additional uses or disclosures of personal information that should be permitted under the *Act* or issues related to protection of privacy (Part IV); and
- Whether the current *ATIPPA* Fee Schedule is appropriate.

2.2 Consideration of standards and leading practices in other jurisdictions:

- The Committee will conduct an examination of leading international and Canadian practices, legislation and academic literature related to access to information and protection of privacy legislative frameworks and identify opportunities and challenges experienced by other jurisdictions;
- The Committee will specifically consult with the Information and Privacy Commissioner for Newfoundland and Labrador regarding any concerns of the Commissioner with existing legislative provisions, and the Commissioner's views as to key issues and leading practices in access to information and protection of privacy laws.

3. Committee processes

3.1 For the purpose of receiving representations from individuals and stakeholders, the Committee may hold such hearings in such places and at such times as the Committee deems necessary to hear representations from those persons or entities who, in response to invitations published by the Committee, indicate in writing a desire to make a representation to the Committee, and make such other arrangements as the Committee deems necessary to ensure that it will have all of the information necessary for it to fully respond to the requirements of these terms of reference.

3.2 The Committee may arrange for such accommodation, administrative assistance, legal and other assistance as the Committee deems necessary for the proper conduct of the review.

4. Final Committee Report and Recommendations

The Committee will prepare a final report for submission to the Minister. The report will include:

- an executive summary;
- a summary of the research and analysis of the legislative provisions and leading practices in other jurisdictions;
- a detailed summary of the public consultation process including aggregate information regarding types and numbers of participants, issues and concerns, emerging themes, and recommendations brought forward by citizens and stakeholders; and
- detailed findings and recommendations, including proposed legislative amendments, for the Minister's consideration.

In the recent past the law firm with which the Chair is associated has acted for both Memorial University and the College of the North Atlantic. Although those matters were not in any manner connected with this review, the Chair took no part in Committee determination of any issue in respect of which Memorial University or the College of the North Atlantic made recommendations.

1. THE STATURE OF THE RIGHT TO ACCESS INFORMATION AND THE RIGHT TO PROTECTION OF PERSONAL PRIVACY

The Committee thought it necessary to address the level of superiority attributed to the right of access in Canadian law and in judicial decisions. The Supreme Court of Canada has commented in several recent cases on the right of people to access information held by public bodies. In 2010, Chief Justice McLachlin and Justice Abella wrote in *Ontario (Public Safety and Security) v Criminal Lawyers' Association* that "access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society."[4]

While the Justices rejected the notion that section 2(b) (freedom of expression) of the *Charter of Rights and Freedoms* guarantees access to "all documents in government hands," they did conclude this: "Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government."[5]

That decision in 2010 built on a decision in 1997, in which Justice LaForest commented on the purpose of access to information legislation:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.[6]

Justice LaForest also commented on the right to privacy:

> The protection of privacy is a fundamental value in modern, democratic states…Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*.[7]

The Supreme Court addressed the stature of access to information in May 2014, with Justice Rothstein writing for the court:

> Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.
>
> However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information.[8]

Those comments show a consistent pattern of interpretation by the Supreme Court of Canada of what is meant by the right to access information. The views expressed to the Committee highlighted the importance of the "right" or "entitlement" of citizens to have access to information.

4 2010 SCC 23, [2010] 1 SCR 815, at para 1.

5 *Ibid* at para 30.

6 *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 61.

7 *Ibid* at paras 65–66.

8 *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 1–2 [*John Doe*].

The Committee concludes that according quasi-constitutional status to the right to access information is consistent with the stature indicated in the legislation in other Canadian jurisdictions, and that it reflects the views of the Supreme Court of Canada.

Addressing challenges to privacy

In the fall of 2013, and again at the conclusion of their annual meeting in October 2014, Canada's Privacy and Information Ombudspersons and Commissioners commented extensively on the challenge to both access and privacy rights in the digital era.[9] The group outlined the pervasiveness of digital technology and its capacity to produce great volumes of information. This state of affairs leaves such information vulnerable to falling into the wrong hands if adequate steps are not taken to secure and protect it.

The oversight agencies also expressed concern about new challenges to protecting personal information, such as wearable computing devices, use of the cloud to store information, and other developments that may lead to over-collection of information and inappropriate sharing and access. In this new environment where "the rapid development of technologies outpaces the capacity to appropriately manage" all sorts of records, the commissioners and ombudspersons recommended "bold leadership" from all governments to ensure access to information in the digital age, while protecting personal information. The *ATIPPA* incorporated several significant new steps for the protection of personal information in the 2012 amendments, but the Committee concludes even more must be done by public bodies to ensure that access and privacy implications are considered at all stages in the design of new services, programs, and legislation.

Putting the vision into practice

Given the importance accorded to the right of access to information and protection of personal information in Canada, it is essential that the Committee create a draft bill that would result in a revised *Access to Information and Protection of Privacy Act*.

In order to do that, the Committee is recommending significant changes that would

- recast the purpose expressed in the *ATIPPA* so that it reflects the Supreme Court of Canada's commentary on the stature of the right to access
- enhance the role, duties, and powers of the Information and Privacy Commissioner, including those relevant to investigating privacy complaints
- encourage preventative measures to protect personal information and enhance data security
- recommend changes so that more records of public bodies are open to disclosure
- broaden the public interest override
- enhance the role and responsibilities of ATIPP coordinators
- require removal of some legislative provisions that now take precedence over the *ATIPPA*
- make the *Act* more user friendly by:
  - eliminating application fees for all requests and significantly increasing the free search time for general access requests
  - refocusing the role of the Commissioner
  - recommending procedural changes to overcome delays
  - reducing existing time limits
  - simplifying complaint and appeal procedures

Purpose of the *Act*

As a result of the Committee's conclusion that the *ATIPPA* and its accompanying practices need to be overhauled, it was necessary to address the purpose of the *Act*. The *Act* is the public's portal to the information held by their government, and its purpose should respect that fundamental fact. The Committee believes it is necessary to state that the chief purpose of the *Act* is to facilitate democracy. Decisions of the Supreme Court of Canada respecting access have commented on the value of citizens'

9 Communiqué, Canada's Information Ombudspersons and Commissioners, 28–29 October 2014.

having the information to participate meaningfully in the democratic process, and of increasing transparency in public bodies so that they remain accountable to citizens. The purpose section of the draft bill also speaks to the importance of protecting personal information that citizens provide about themselves to public bodies. In its report, the Committee has made recommendations to widen substantially the application of the public interest test, and, in that spirit, emphasized that the public interest is an integral part in achieving the purpose of a revised *ATIPPA*.

The challenge

The individuals and groups that presented to the Committee helped us understand the challenges of the current *ATIPPA*, and they offered many helpful suggestions. Our own research pointed to the challenges faced in other jurisdictions and the solutions put in place to address those issues. Through our work, one central point became clear. Systems for access to information and protection of personal information can only work effectively if political leaders and senior executives are supportive and committed to the purpose of the *Act*.

Leaders must challenge themselves to lose their fear of giving up control when they release information to the public. At times this will require leaps of faith, and acknowledgement that despite the potential embarrassment about the disclosure of certain records, it is the right thing to do. This kind of attitude among leaders can signal important cultural shifts to others in public bodies. People do lead by example. This matter was addressed by the committee that reviewed the *Freedom of Information Act* in Queensland, Australia, in 2008:

> History in Queensland, as in many other jurisdictions, has proven unambiguously that there is little point legislating for access to information if there is no ongoing political will to support its effects. The corresponding public sector cultural responses in administration of FOI inevitably move to crush the original promise of open government, and with it, accountability.[10]

However, the success of the access to information regime is not entirely in the hands of public bodies. Oversight agencies must also do their part to champion access. They must become leaders in educating the public and public bodies about the law; undertake research into emerging issues so that policy makers can confront new challenges to both access and the protection of personal information; and be respectful in their consideration of complaints so that requesters receive speedy responses.

The Committee's research reveals that the Commissioner's Office must take some responsibility for the delay and frustration experienced by requesters. The model proposed by the Committee will address those and other important issues. It will ensure that Newfoundland and Labrador has a modern access and protection statute that serves the public well and will rank among the best internationally.

The reader's attention is drawn to the fact that all references to section numbers of the *ATIPPA* are to the existing *ATIPPA* and not to sections of the draft bill.

10 Queensland, Australia, The Solomon Report (2008), p 2.

2. HOW THE *ATIPPA* IS ADMINISTERED

The *ATIPPA* provides that individuals have a right to ask for information in order "to make public bodies more accountable and to protect personal privacy." That right is subject to limited exceptions. The *Act* provides for fees and processing costs, as well as time limits for various functions, such as responding to or transferring a request.

The administration of the *ATIPPA* was a source of much dissatisfaction, according to the submissions we received and the comments made at public hearings. Many of the criticisms addressed issues central to the practical operation of the *Act*, such as fees, charges, delays, and exceptions.

The Committee was especially interested in the role of ATIPP coordinators, and surveyed the coordinators to learn from their perspective.

2.1 Role of the ATIPP coordinator

The person at the centre of the process to gain access to information while ensuring the confidentiality of personal information is the ATIPP coordinator. The coordinator navigates the request through a public body and oversees the ensuing response. This key role affects the quality of the user's experience, as well as the accuracy with which the *ATIPPA* is interpreted and followed.

The law refers formally to the head of a public body as the person in charge of the *ATIPPA* process, and this person is either the minister, in the case of a government department, or the chief executive officer, in the case of most other public bodies. But it is usually the coordinator who actually receives the requests and analyzes whether the information can be released. The coordinator is also delegated to process and track requests, which includes assisting the requester.

While we heard many criticisms of the current access to information system, no one seemed to hold the ATIPP coordinators responsible for the failures that were noted. There were, however, a few exceptions to the general appreciation of the ATIPP coordinators, including criticism of the apparent lack of training of persons administering the *Act* in some municipalities and other public bodies. Government responded immediately to this perception. The Office of Public Engagement (OPE) announced that training for municipal ATIPP coordinators, administrators and officials was to take place in the fall of 2014. By the end of October, the OPE had completed a draft guide on how to handle information and held two training sessions for municipal officials in the province. In early December, the draft guide was sent to municipalities for feedback.

Another criticism was that some coordinators in core government departments and agencies did not give enough attention to their statutory duty to assist citizens with inquiries about publicly held information. One presenter expressed sympathy for the hurdles faced by the coordinators, who, she felt, might be withholding more information than necessary out of concern about making mistakes. She stated this does not instill confidence in citizens, who are expecting service from an expert with the authority to influence a fair outcome.

As a keen observer of the functioning of the ATIPP system over the last six years, the Commissioner put his

finger on one of the central issues. Many coordinators do not have the status that reflects their key role in the fair and efficient treatment of requests for information. Often, their work is combined with other tasks, perhaps partly because of the relatively small number of requests in some public bodies. But it could also be because the access role, as compared to other work, is undervalued. Some of the current delays in the system may occur because coordinators have to juggle several tasks.

Regardless, their ability to apply the law seems to be limited by their superiors or by ministers' political staff. There is no more telling indication of the control exercised over the administration of the *ATIPPA* system than the fact that the final communication with the requester, either to provide the information requested or to explain the reasons for the refusal, comes from the head of the public body and, in the case of government departments, is signed by the deputy minister.

Another issue is that internal policies and procedures implicitly encourage coordinators to identify the type of requester. For example, if it is a media request, communications staff must be consulted. The Committee concludes that while communications staff may be well placed to advise on the consequences for media reporting of the release of the requested information, they do not have the same expertise in the interpretation of the *ATIPPA*.

Conclusion

A significant change should be made to the current approach to administration of the *ATIPPA*, more importance should be placed on the role and necessary skills of the ATIPP coordinator. That person may consult others, but only to receive advice on the interpretation and application of the *Act* to the request at hand.

Requests for information should be anonymized (except in the case of requests for personal information or where the identity of the requester is necessary to respond to the request) before they leave the hands of the coordinator, and continue until the response is made. The coordinator should be the only one to communicate with the requester, and that person therefore needs delegated authority from the head of the public body to accomplish these tasks.

A final word needs to be said regarding the position of ATIPP coordinators within the public body hierarchy. The situation described by the Commissioner cannot continue:

> We find that our experience with ATIPP Coordinators varies from department to department within government. Some seem to function at a low level within the department hierarchy. They appear to be delegated little responsibility and are essentially carrying messages back and forth from someone higher in the organization, and often cannot explain the rationale for positions adopted by the department....There must be a way to ensure that ATIPP Coordinators are given a greater role in the process.[11]

ATIPP coordinators must be regarded as the access and privacy experts in their public body, and indeed, according to information provided by the Commissioner, that is the case in many public bodies. However, the Commissioner also stated there is no consistency across public bodies. The Committee concludes all coordinators must be provided the training and opportunity to develop the necessary expertise to properly apply the provisions of the *Act*. Still, that is not enough.

Coordinators must also be seen by their colleagues as having the organizational clout to challenge senior officials to release information, even when it is not politically expedient to do so. The coordinator position must become a role that senior officials aspire to, because of its status in the organization, the expertise that it requires, and the salary that it offers. It is repugnant to the spirit of the *Act* to be seen to be foisting the coordinator role on junior officials with little organizational clout or, worse still, to those who take on the role simply because they have no choice.

11 OIPC Supplementary Submission, 29 August 2014, p 4.

2.2 The duty to assist

Section 9 of the *ATIPPA* spells out the duty of public bodies to assist an applicant who makes a request for information. The provision is as follows:

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

The law sets out three principles. The public body must make a reasonable effort to assist the applicant, the response must be made in a timely manner, and the search must be thorough, so as to return as complete a set of records as possible. The amendments resulting from Bill 29 did not change this section of the *Act*.

The duty to assist was raised by a number of participants as they related their own experiences with access requests. Terry Burry recounted his experience in making requests, and concluded "[it] is not very user friendly…in terms of what seems sometimes [an] arrogant attitude."[12] Wallace McLean commented that "there are far too many ATI coordinators and others within public bodies, who need to be reminded [of] this legislative provision, and of the fact that they are mere custodians, not the owners" of public records.[13]

The CBC discussed the duty to assist in the context of delays and extensions. Peter Gullage advanced the view that "in a perfect situation" where a public body wanted to extend the time frame for responding to a request, "there would be a conversation with the requester to talk about that."[14] The Leader of the Official Opposition, Dwight Ball, commented on the letters public bodies write to requesters when responding to a request for information. When there is a refusal to disclose the information, the official often states that decision and quotes the relevant section of the *Act*. Mr. Ball commented: "if you are going to say no to somebody, at least give the courtesy of saying why you're saying no to it."[15]

Nalcor Energy provided a five-page "*ATIPPA* Timeline" document that sets out systematically all the steps to be taken by their organization, including communicating with the requester and numerous internal processes, in meeting the request for information. Jim Keating, Vice-President for Oil and Gas, stated the strength of such an approach is that it "provides certainty and clarity to all the folks that we have to engage" in responding to the request.[16]

Newfoundland and Labrador practices

There is substantial guidance for provincial public bodies with respect to what is meant by the "duty to assist." Several of the Commissioner's reports treat this issue in depth, including one issued in February 2014.[17] In that report, the Commissioner underscored three points about fulfilling the duty to assist:

- The public body must assist the applicant in the early stages of making a request.
- It must conduct a reasonable search for the requested records.
- It must respond to the applicant in an open, accurate, and complete manner.[18]

In the February 2014 report, the Commissioner also pointed to another source of information to help guide public bodies in assisting the requester: the *Access to Information Policy and Procedures Manual*[19] compiled by the Office of the Public Engagement ATIPP Office.

The duty to assist carries through until the request is disposed of, either with full or partial disclosure or with an outright refusal. The Commissioner's comments in a case involving a request to a municipality in 2007 underscored this point:

12 Burry Transcript, 24 July 2014, pp 40–41.
13 McLean Submission, August 2014, p 15.
14 CBC/Radio-Canada Transcript, 18 August 2014, pp 65–66.
15 Official Opposition Transcript, 22 July 2014, p 65.
16 Nalcor Energy Transcript, 20 August 2014, p 14; Appendix B of Nalcor Energy Submission.
17 *Department of Advanced Education and Skills* (6 February 2014), A-2014-004.
18 *Ibid* 25.
19 NL, *Access to Information Policy and Procedures Manual* (2014).

> When deciding to deny access to a record or part of a record outside of the *ATIPPA* process, as described in recommendation number 2, the Town must provide a complete and accurate explanation to the applicant, including an indication that the response is being given outside the scope of the *ATIPPA* and that the applicant will not have the ability to seek a review of the Town's decision by the Office of the Information and Privacy Commissioner.[20]

Conclusion

The fundamental underpinning of the duty to assist is exhibiting the qualities that are inherent in good customer service. The contact should start with a positive attitude, continue with ensuring there is clarity about what information is being asked for, and work toward satisfying the requester. If the information cannot be provided, or only some of it will be disclosed, the official needs to explain why.

The legal duty to assist has been legislated, but a good attitude cannot be a function of the law; that will depend on the personal qualities of the official who receives the request and their interaction with the requester until the end of the process.

The *Access to Information Policy and Procedures Manual* comments in detail on the duty to assist. It states the importance of the duty and its legal underpinning. The document adequately spells out the process, but it should go further and state that the key to successfully carrying out the duty is to practice good customer relations. This means providing the kind of assistance and service that would be provided in a business, where the objective is to have the customer return for more of the good service. It would be useful if training that is already in place for ATIPP coordinators emphasized such an approach.

20 *Town of Portugal Cove St. Philips* (26 June 2007), 2007–007 at para 30.

2.3 Fees and charges

The application fees and processing charges collected under Newfoundland and Labrador's *ATIPPA* do not come close to covering the cost of administering the *Act*. Persons seeking access under the current *Act* are required to pay a $5 application fee and receive four free hours of processing time. Once the free time expires, the cost is $25 an hour, and includes charges for the time involved in considering the use of various exemptions under the *ATIPPA*. The current legislative provisions allow for additional charges for making copies, producing electronic copies, and shipping.

When processing charges are estimated to be $50 or more, the public body has to provide an estimate to the applicant before the access request is processed. The applicant must pay half of that estimate in order for the work to continue. The second half of the charge is to be paid before the public body starts work on the remaining 50 percent of the work. The Office of Public Engagement told the Committee that the current cost recovery system creates problems, as it can lead to delays in responding to requests. Specifically, officials are unable to complete processing a request until all charges are paid and it can be difficult to determine when 50 percent of the request has been completed.

The current system for assessing charges under the *ATIPPA* lacks credibility with many users, a point that was made several times in submissions and during the hearings. There has been an especially strong reaction against the policy of counting as processing time, the effort public bodies make to determine what exemptions might apply to an access request.

Although several submissions advised that fees and charges should be eliminated, people generally seem not to object to paying an appropriate amount. What they do object to is that some fee estimates can appear overstated and punitive and, consequently, the estimate becomes a

deterrent to proceeding. As well, the *ATIPPA* does not allow for the fact that some applicants request information that it would be in the public interest to disclose.

The Committee concludes the best approach is to eliminate the application fee altogether and to institute a longer "free search" period of 10 hours for municipalities and 15 hours for all other public bodies. The only time to be counted toward processing costs would be the time searching for the requested records. Search time would not include the time it takes to work with the applicant to narrow a request or the time it takes to determine if exemptions should apply. Direct costs for services such as photocopying and mailing would be billed to the applicant. However, the applicant would not be charged for creating or supplying an electronic copy of the record, such as a PDF or a record made available in machine-readable or some other electronic format, such as a dataset.

In cases where there are estimated charges for general access requests over and above the "free period," applicants could request a waiver of fees, either because of their personal financial circumstances or because it would be in the public interest to disclose the information. In the event that fees were not waived and charges were deemed to be necessary because the required search would exceed the time allowed by the free period, the present $25 hourly rate would seem to be an appropriate amount. Requests for personal information would continue not to be subject to charges.

This approach to fees and charges is intended to remove some existing barriers to access and contemplates that charges should be made only for requests that involve extensive searches. The current legislative provisions allow charges to be waived where they would present financial hardship to the applicant. In the event of an extensive search where the fee waiver does not apply, it is recommended the public body work with the applicant to define or narrow the request.

As a final safeguard for requesters, disputes over fees, including a refusal of a public body to waive a fee, could be reviewed by the Commissioner, whose determination would be final.

It is useful to add a few comments on the matter of making a request. Currently, the *Act* requires a request to be in writing, unless the applicant has a limited ability to read or write English, or if they have a disability that impairs their ability to make a request. Several persons suggested it would be efficient to move the process online. The Committee concludes public bodies should accommodate online access requests, while continuing to provide for people to fill in a request form by hand and send it by mail. An online application process must take protection of privacy into account, as well as the apparent limitations on the ability of some public bodies, including most municipalities, to adopt such a system. Likewise an online payment system would be appropriate, where it is practicable.

2.4 Disregarding requests

Prior to the Bill 29 amendments, public bodies could refuse to disclose a record, or part of a record, where the request was repetitive or incomprehensible, or if it was for information already provided to the applicant. Public officials told Commissioner John Cummings[21] during the previous statutory review that the then existing protection was inadequate.

The current law gives the head of a public body the legal authority to disregard requests for a number of additional reasons. Those reasons include a request determined to be frivolous or vexatious; a request that is made in bad faith or trivial; and a request that, because of its repetitive or systematic nature, would unreasonably interfere with the operations of the public body. The head can disregard any of those requests unilaterally, without appeal to the Commissioner. It is only

21 Cummings Report (2011).

when a request is considered to be excessively broad that the public body must seek the Commissioner's approval before disregarding such request.

The new provisions in the *ATIPPA* gave rise to much concern in the public because the decision to disregard is often left entirely in the hands of the head of the public body. This provision has been used in seven decisions to disregard requests.[22] Even if there were no such decisions, the presence of this provision in the *ATIPPA* has obvious implications for how people view the *Act*, since a refusal by the head of a public body to disclose information can be perceived as self-serving.

The Commissioner stated at the public hearings that a significant issue with this section of the *Act* is that it gives the head of a public body unilateral authority to disregard requests. Other written and oral submissions revealed confusion, and even mistrust, about the meaning of terms such as "frivolous" or "vexatious." There were suggestions officials might use this section of the *Act* to hold back records that would prove to be embarrassing. Other presenters recommended terms such as "frivolous" and "vexatious" be defined, and that guidance documents be produced so that all parties have the same understanding of what is meant by those sections of the *ATIPPA*.

Conclusion

The Committee concludes that public bodies should have the discretion to disregard requests where they have valid reasons; however, it is inappropriate for public bodies to unilaterally disregard a request. All such decisions of the public body should be submitted to the Commissioner for approval within five business days of receipt of a request for information. Where the Commissioner approves the decision of the public body to disregard a request, the only right of appeal on the part of a requester would be to the Supreme Court Trial Division.

The Committee agrees with presenters who saw a need for guidance around this section of the *Act*. It is appropriate that such guidance be developed by the Office of the Information and Privacy Commissioner.

22 Six of the decisions were made by Nalcor Energy, based on similarly worded requests from one applicant, with respect to interests the corporation holds in various offshore oil licenses. In the other case, the English School District was asked to provide personal information for a nearly four-year period, involving email or other correspondence to or from 56 named people. The School District subsequently worked with the applicant to narrow the request.

3. ACCESS TO INFORMATION PROVISIONS

While the *ATIPPA* provides for access to information held by public bodies, it does not provide for access to all information. In cases where access to information is restricted, the legislated policy is that the exceptions should be limited. Many of the exceptions in the *Act* give public officials the discretion to release information, provided certain conditions are met. These discretionary exceptions apply to areas such as policy advice to ministers, certain information respecting law enforcement, and information related to intergovernmental relations or negotiations.

A significant provision in the Bill 29 amendments barred the Commissioner from requiring public bodies to produce to him two types of records. These are official Cabinet records and records where solicitor-client privilege is claimed. Previously, he had been able to consult those records to ensure the decision to withhold them was justifiable under the *Act*. The Information Commissioner of Canada told the Committee the expanded exceptions brought about by Bill 29 "tipped the balance in the *ATIPPA* excessively in favour of non-disclosure."[23]

The Committee has examined the additional exceptions brought about as a result of the Bill 29 amendments and concluded that nearly all of them work against the spirit and purpose of the *ATIPPA*, which is to provide information necessary to ensure that public bodies are accountable to the public. We have made recommendations to bring the exceptions in line with the purpose of the *Act*. The Committee is also recommending a broader public interest override that would apply to many areas where officials are given the discretion to refuse to release records.

23 Information Commissioner of Canada Submission, 18 August 2014, p 6.

3.1 Public interest override in access legislation

The public interest override in access laws recognizes that even when information fits into a category that should not ordinarily be disclosed, there may be an overriding public interest in disclosing it to an applicant or to the public at large. In that respect, the public interest test is a kind of lens that public officials must look through when they are exercising discretion as to disclosure.

The public interest override in the current *ATIPPA* is narrow in its application and applies, in urgent circumstances, only to "information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest." The Bill 29 amendments did not change the wording of the public interest provision.

A number of presenters referred to a public interest override, although it was not their primary concern. However, in nearly every case where presenters discussed the override, they felt the public interest should have a more significant place in the legislation, so that it applies to areas beyond public health and safety and the environment.

The Commissioner has assessed the public interest override in three cases since the access provisions of

the *ATIPPA* came into effect in 2005.[24] In each case, the Commissioner referred to the "significant" harm that must be shown in order to engage the current public interest override of the *ATIPPA*. The Commissioner's concerns about the "high standards" and narrow applicability for invoking the *ATIPPA* public interest override are shared by the Centre for Law and Democracy.

The Commissioner stated that a recent recommendation from the British Columbia Information and Privacy Commissioner "has value for this jurisdiction." The BC Commissioner had suggested her province make amendments to remove the urgency requirement and mirror the public interest clause in Ontario's *Freedom of Information and Protection of Privacy Act*:

> An exemption from disclosure of a record under [specified sections in the Ontario Act] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.[25]

The Ontario provision requires that the public interest be *compelling* and that it *clearly outweigh* the reason for the exemption in order to cause for information to be released in the public interest. Such restrictions reduce the value of a broader public interest override. The Committee suggests a different approach.

Conclusion

The approach to the public interest override in the *ATIPPA* is in need of an overhaul. It applies to few areas of public interest, and the wording suggests it is intended mainly for urgent matters. The existing section 31(1) is useful for the purpose for which it is intended, where it places a positive duty on the head of a public body to release information related to a risk of significant harm to the environment or to public health and safety. The Committee concludes that in a modern law and one that reflects leading practices in Canada and internationally, it is necessary to broaden the public interest override and have it apply to most discretionary exemptions. This would require officials to balance the potential for harm associated with releasing information on an access request against fundamental democratic and political values. These include values such as good governance, including transparency and accountability; the health of the democratic process; the upholding of justice; ensuring the honesty of public officials; general good decision making by public officials; and fair rules that are applied to business and consumers. Restricting the public interest to the current narrow list implies that these other matters are less important.

The Committee recommends that, in addition to retaining the current section 31(1), the *Act* also contain a new section. It would provide that where a public body can refuse to disclose information to an applicant under one of the exceptions listed below, the exception would not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception:

- section 19 (local public body confidences)
- section 20 (policy advice or recommendations)
- section 21 (legal advice)
- section 22.1 (confidential evaluations)
- section 23 (disclosure harmful to intergovernmental relations or negotiations)
- section 24 (disclosure harmful to the financial or economic interests of a public body)
- section 25 (disclosure harmful to conservation)
- section 26.1 (disclosure harmful to labour relations interests of public body as employer)

24 OIPC Reports, see: *College of the North Atlantic* (23 May 2007), 2007-006; *Memorial University of Newfoundland* (15 February 2007), 2007-003; *Department of Justice* (18 August 2010), A-2010-011.

25 RSO 1990, c F.31, s 23.

3.2 Ministerial briefing records

Prior to Bill 29, the *ATIPPA* made no specific reference to materials intended to brief ministers in preparation for a new ministry or for a sitting of the legislature. While Commissioner Cummings reported on "widespread concern" among officials about protection for the advice and recommendations they provided as briefing material for ministers and the heads of agencies, he did not recommend the changes that eventually made their way into section 7 of the *ATIPPA*. Those new provisions stipulated that briefing materials prepared solely for ministers assuming responsibility for a new department, secretariat, or agency, and records created solely to prepare a minister for a sitting of the House of Assembly were to be withheld for five years.

Nearly without fail, submissions made to the Committee recommended repealing the sections that put briefing books off-limits and that protected those records from disclosure for five years. The media was especially concerned about the effect of the 2012 amendments on their ability to discern policy approaches and positions on public issues. It should be stated that journalists said they recognized the importance of protecting policy advice. It was the factual information that they sought, and which brought value to their reporting on public issues, by adding context to their work. Journalists admitted to the futility of even asking for the briefing books now, given that they are categorically excluded.

Through its questioning of the various presenters, including the minister responsible for OPE, the Committee was able to identify a reasonable solution. The minister made this response to the Committee about whether it made sense to divide ministerial briefing books in sections, where factual material could be easily separated from policy advice:

> I don't see a reason why it can't be done because by the very nature, it's already being done. So this would just be…another way it would be done. So, certainly something we could consider.[26]

The deputy minister of OPE told the Committee she had prepared briefing books, and also acknowledged it would be possible to organize briefing materials in a way that made it possible to release some information:

> I think that we can find a way to organize it along the lines so that [a section], for example, can be just withheld in its entirety and the rest of it can be made public.[27]

Conclusion

The Supreme Court of Canada has clearly indicated the acceptability, in terms of good government, of the statutory protection that exists for policy advice.[28] The only remaining matter for discussion is how those records are assembled. The minister responsible for the OPE and the deputy minister suggest briefing records can be compiled in such a way as to enable factual material to be separated easily from policy advice and recommendations.

If that is so, it seems unnecessary to categorically prohibit disclosure of briefing materials under section 7 of the *Act*. Accordingly, the Committee concludes sections 7(4), (5) and (6) should be repealed.

26 Government NL Transcript, 19 August 2014, p 56.
27 *Ibid* 61.
28 *John Doe, supra* note 8.

3.3 Cabinet confidences

Without exception, every person who commented on Cabinet confidences was sensitive to the need for protection of matters that are properly confidences of the Cabinet. The overwhelming majority expressed the view that for the most part, the pre–Bill 29 provisions of the *ATIPPA* achieved a reasonable balance between the

need to protect Cabinet confidences and a level of access to information that would enable citizens to hold their government to account. The presenters almost universally maintained that the changes brought about by Bill 29 destroyed that balance.

While there were other criticisms, the strongest complaints expressed to the Committee focused on two points: (i) enabling the Clerk of the Executive Council to simply certify that a record was an "official Cabinet document," and (ii) removing the ability of the Commissioner to require production to him of any document certified by the Clerk of the Executive Council to be an official Cabinet document. Many of the presenters were also critical of the power of the head of a public body to refuse to disclose any one of a lengthy list of documents without having to show that the document would reveal the substance of deliberations of Cabinet.

Most of the presenters who suggested a return to full application of the substance of deliberations test acknowledged that the records listed under the definition of "cabinet record" were genuinely of the nature of Cabinet records. What the presenters objected to most strenuously was giving the Clerk of the Executive Council the unilateral right to designate any one of those records to be an "official Cabinet record," and thereby place it beyond the right of anybody else, including the Commissioner, to question the designation or even see the document in order to determine the validity of the designation. The Committee concludes that the designation of "official Cabinet record" should be removed and that the Commissioner should be able to examine any Cabinet record.

The Committee also concludes that there should continue to be absolute protection for official Cabinet records, subject to one exception. That is, the Clerk of the Executive Council would have the discretion to disclose a Cabinet record where the Clerk is satisfied that the public interest in disclosure outweighs the reason for the exception.

The Committee believes that including a basic list of records that are clearly Cabinet confidences and according those records absolute protection from disclosure should result in more efficient management of access to Cabinet records. It should also reduce delays and costs both for the requester and for public bodies, and be a process that would be easier to use. In short, it would contribute to making the *ATIPPA* more user friendly.

The Committee concluded that the only item on the list of records in the present definition that should be altered is what is presently item (iv): "a discussion paper, policy analysis, proposal, advice or briefing material, including all factual and background material prepared for the Cabinet." The Committee believes that the sections of these records that are factual and background material should be excluded from the definition of "Cabinet record."

Background material would be largely factual, and unless those facts dealt with earlier Cabinet consideration of the matter, the background matter should also be disclosed unless its disclosure would reveal the substance of Cabinet deliberations. If the factual or background material should genuinely be protected from disclosure, then the Commissioner would recognize that fact in his review following a complaint about the refusal to release it.

A couple of presenters suggested that the period of absolute protection for Cabinet records should be much shorter. Most did not have strong views. They felt that a time frame of 15 to 20 years would be generally acceptable. None of the presenters put forward a compelling argument to reduce or increase that period. The Committee concluded that the information before it does not support a decision that the present time frame should be changed.

The Committee concludes it is consistent with the Open Government initiative to proactively release as much Cabinet material as possible, especially on routine matters. Political leaders have an important role to play in the effective functioning of the access to information system. The proactive release of information will better inform the public of the issues involved in policy choices, and it will help foster a culture change that will see more, rather than less information released by public bodies.

3.4 Policy advice and recommendations

One of the pillars of good government is good advice. Political leaders depend on smart and well-informed officials to brief them on all possible scenarios, in order to reach well-considered decisions on public issues. It is widely agreed that officials must be able to present this advice freely and frankly, so that its value and meaning are clear. The Supreme Court of Canada has affirmed that the protection for policy advice plays an important role in our democratic government, and that it applies to a broad range of advice in the policy and decision making process.

Increasingly, however, citizens are demanding more information about the motivation for policy, including how internal and external events affect the choices that are put in front of ministers and why some options are chosen over others.

The changes brought about by Bill 29 added "proposals, analyses and policy options" to the categories of records that might be considered as policy advice or recommendations; they included a new provision to protect "consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister," and they gave the head of the public body the authority to refuse disclosure of a formal research report or audit report, that, in the opinion of the head, "is incomplete unless no progress has been made on it for more than 3 years."

The changes were widely condemned during the Committee's public hearings and in several written submissions. The Centre for Law and Democracy argued that the protection under section 20 is "clearly overbroad." Journalists expressed skepticism about the motive for the legislative changes, and speculated that the new provisions were broad enough to be used to withhold any record a public body did not want to release.

Conclusion

The additional protection for policy advice and recommendations that was added to the *ATIPPA* as a result of Bill 29 emanated from concern expressed by public bodies during the Cummings review that the existing *ATIPPA* provisions were not broad enough. The only apparent basis for those concerns was "media stories which revealed that ministers have requested that no briefing material be prepared on important issues" and "anecdotal evidence" that suggests "there is significantly less briefing material in the public sector since the introduction of the *ATIPPA*."[29]

A recent Supreme Court of Canada decision[30] ruled on the existing wording in the Ontario access law, which is similar to that which existed in the *ATIPPA* before the Bill 29 amendments. The court determined that policy options constitute advice, and that there is no requirement that policy options be connected with a decision in order to be withheld. The court concluded that advice or recommendations have broad application. The Committee accepts that explicitly stating "advice, proposals, recommendations, analyses or policy options" in the *ATIPPA* does nothing more than reflect what is implicit in the recent Supreme Court decision. Therefore, we do not suggest any change to section 20(1)(a).

The Committee has serious reservations about two other changes implemented as a result of the Bill 29 amendments, section 20(1)(b) and (c). While it accepts that some formal research and audit reports may have deficiencies that need to be addressed before they are released to the public, two aspects of this are problematic. The first is that the head of the public body alone determines if such reports are complete or not. This does not reassure the public. The second aspect is that any such report can be withheld for three years. It is unnecessary to attach a lengthy timeline to such reports. Limiting the exception to reports in respect of which updating has been requested within 65 business days of delivery of the report can address both aspects of the problem.

Our second reservation is about "consultations or deliberations" in section 20(1)(c) involving officers or

29 Cummings Report (2011), pp 42–43.

30 *John Doe, supra* note 8.

employees of a public body, a minister, or the staff of a minister. The Committee has expressed concern about the motivation for this section, and what it was intended to accomplish. Given the Supreme Court decision in John Doe, such protection is already implicit under policy advice or recommendations, and we recommend this section be deleted.

3.5 Solicitor-client privilege

Solicitor-client privilege is one of the oldest privileges for confidential communications.[31] Its status has been recognized by the Supreme Court of Canada as being "as close to absolute as possible,"[32] and the protection is grounded "on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system."[33]

The Bill 29 amendments brought changes that resulted in reduced oversight of public officials who claimed solicitor-client privilege as the reason for not disclosing records to requesters. Those changes concerned people who made presentations to the Committee. Requesters were deprived of the right to ask the Commissioner to review such a refusal. The changes also removed the right the Commissioner previously had to require production of the record for his review and to enter the office of a public body to examine such a record. The Commissioner was now required to appeal to the Trial Division in order to have a refusal reviewed.

Conclusion

The Committee concludes that the privilege is vital, not only to clients entitled to its benefits but to the interests of society as a whole. The views expressed in recent decisions of the Supreme Court of Canada demonstrate the importance of the privilege to the fair and efficient administration of justice. We should not make recommendations that would jeopardize the role of the privilege in the administration of justice in the province, nor adversely affect the interest of an individual or entity entitled to claim the benefit of the privilege.

On the other hand, the Centre for Law and Democracy and the other participants are justified in calling attention to its potential for abuse. The Commissioner drew the Committee's attention to the government's decision in 2010 to challenge in court his jurisdiction to review files where the solicitor-client privilege was claimed. During the time this matter was being decided, first in the Trial Division, and then by the Court of Appeal, 14 affected files were held in abeyance. The Court of Appeal determined the Commissioner did have jurisdiction to review such claims. The Commissioner told the Committee "it was a shock and disappointment" to learn that in most of those files, "the claims of solicitor-client privilege were groundless."[34]

The Committee is persuaded that abuse can occur if there is not a reasonably efficient and cost-effective way to objectively evaluate any claim that records cannot be released because they are solicitor-client privileged. The Committee concludes the Commissioner must be permitted to view all records, including those where the solicitor-client privilege is being claimed, as part of an investigation into a complaint.

31 Dodek, *Solicitor-Client Privilege* (2014) at para 1.4.

32 *R v McClure*, 2001 SCC 14, [2001] 1 SCR 455, at para 35.

33 *R v Campbell*, [1999] 1 SCR 565 at para 49.

34 OIPC Submission, 16 June 2014, p 52.

3.6 Business interests of a third party

Both the oral and written submissions commented forcefully that the changes to the *ATIPPA* in 2012 made it much more difficult to obtain disclosure. Changes to the provisions relating to business interests of third parties were part of that pattern. Before the amendments to Bill 29, the *ATIPPA* had a three-part test to determine whether a request for business information could be denied by the public body. In order to be held back, the information requested had to meet conditions (a) and (b), and its disclosure had to result in a reasonable expectation of probable harm as a result of at least one of the circumstances described under condition (c):

- (a) It had to reveal a trade secret, or commercial, financial, labour relations, scientific or technical information of a third party.
- (b) The information had to be supplied, implicitly or explicitly, in confidence.
- (c) The disclosure would reasonably be expected to result in any of the following:
  - harm *significantly* the competitive position or interfere *significantly* with the negotiating position of a third party
  - result in similar information no longer being provided to the public body when it was in the public interest to do so
  - result in *undue* financial loss or gain to any person or organization
  - reveal information supplied to a person appointed to resolve or inquire into a labour relations dispute

The Bill 29 amendments permitted denial by the public body if only one of the three conditions was met, instead of all three.

A second change involved the notice to a third party when information has been requested that might relate to business interests. Prior to Bill 29, the public body was required to give notice only if it **intended** to release the information being requested. The amendment made it mandatory to give notice, even if the public body was only **considering** whether to give access.

The discussion over business interests is about balancing the public's interest in transparency and accountability against a level of non-disclosure that prevents harm to business interests. The submissions to the Committee reflected these divergent views.

Journalists regard the current section 27 as being so broad that it stymies the quest for business information they feel should be made public. Two business interests felt the current wording of the section works against the transparency and openness that the *Act* is intended to promote. The two public bodies that advocated keeping the status quo said their motivation is to ensure the *Act* provides a proper level of confidence for business in their engagement with public bodies.

There has been some recent judicial interpretation of section 27, in its post–Bill 29 state. The Trial Division ruled that a claim to withhold documents under the *ATIPPA* must be accompanied by "clear, convincing or cogent evidence" showing either that the requested information was supplied in confidence or that release would harm the competitive position or result in financial loss.[35] In the *Corporate Express v Memorial University* decision, the Trial Division followed the law that has been developing nationally for more than 20 years.[36] Canadian information commissioners and ombudspersons have consistently treated speculation about harm as an insufficient reason to withhold information under the exemption that protects business interests of a third party. The third party in the *Corporate Express* case has, however, appealed to the Court of Appeal.

35 *Corporate Express Canada, Inc. v The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski*, 2014 NLTD(G) 107, Summary.

36 *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23 at para 192.

Conclusion

The Committee is satisfied that the legitimate interests of business are protected through the application of the three-part test that existed in the *ATIPPA* prior to the Bill 29 amendments. The three-part test is the law in several provinces, including Alberta, British Columbia, and Ontario. The Committee concludes that the growing body of legal decisions regarding business interests of third parties has brought certainty and stability to the interpretation of business interests.

Section 28 requires notifying the third party when the public body is considering whether to provide access to information covered by business interests of a third party. This recommendation was made in the previous review on the suggestion of the Commissioner's Office.[37] Prior to the amendments, third parties were notified if the public body intended to give access to a record covered by section 27.

The Committee believes that the notification required by the present section 28 has the potential to interfere with the public body's ability to arrive at an independent decision. The Committee concludes the right approach is for the public body to make reasonable efforts to notify a third party when it has formed the intention to release the information. Should the public body then decide to release the information, it would immediately inform the third party of its decision. If it objected, the third party could then file a complaint with the Commissioner or appeal directly to the Trial Division. The public body would withhold the requested information from the applicant until the matter was resolved.

37 Cummings Report (2011), p 52.

4. RECORDS TO WHICH THE *ATIPPA* DOES NOT APPLY

The pre–Bill 29 section 5(1) listed several types of records to which the *ATIPPA* did not apply, including records in a court file or records of a judge, personal or constituency records of ministers and members of the House of Assembly, and records of a registered political party or caucus. Two sections were added in the 2012 amendments: a record relating to an incomplete investigation of the Royal Newfoundland Constabulary and a record that would reveal the identity of or information provided by a confidential source to the Royal Newfoundland Constabulary. Based on court decisions to date, the effect of section 5(1) has been that the Commissioner does not have the authority to require any record described in that section to be produced in order to confirm whether the public body is properly withholding information from a requester. The issue is under review by the Court of Appeal.

Concern was expressed to the Committee that the practice of placing records outside the purview of the Commissioner can lead to an abuse of the access to information system because, other than the court, there is no independent oversight of the public body's decision. Journalist James McLeod of the *Telegram* referred to one of his unsuccessful access requests where section 5(1) was invoked. He stated: "without jumping to conclusions, [the lack of] independent review does not engender any confidence in the integrity of the system."[38] The Commissioner recommended there be no restriction on his authority to require production of any record in the custody or control of a public body.

38 McLeod Transcript, 26 June 2014, pp 6–7.

Conclusion

The Committee concludes the Commissioner should have the right to review records where section 5(1) is claimed, except those relating to:

- court files, judge's records and judicial administration records
- notes, communications, or draft decisions of people acting in a judicial or quasi-judicial capacity
- incomplete prosecution proceedings
- incomplete Royal Newfoundland Constabulary investigations
- records that would reveal confidential sources or the information those sources provide to the Royal Newfoundland Constabulary with respect to a law enforcement matter

The Committee also concludes it is necessary to add a new provision to provide full protection for records of Royal Newfoundland Constabulary investigations in which suspicion of guilt of an identified person is expressed, but for which no charge was ever laid.

The Committee believes the *ATIPPA* should explicitly enable the Commissioner to require production of the other records listed in section 5(1) when there is a dispute regarding this section of the *Act*. These are

- a personal or constituency record of a member of the House of Assembly that is in the possession or control of the member
- a personal or constituency record of a minister
- records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act*

- a record of a question that is to be used on an examination or test
- a record containing teaching materials or research information of an employee of a post-secondary educational institution
- material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person, agency, or organization other than a public body
- material placed in the archives of a public body by or for a person, agency, or other organization other than a public body

This additional authority will allow the Commissioner to oversee most records created by public bodies and help restore public confidence in the access to information system. In particular, the Commissioner's authority to order production of personal or constituency records of an MHA or a minister, as well as Cabinet records, will subject politicians to the highest standards of probity, transparency, and accountability. In order to facilitate this oversight, the Commissioner would also be given the authority to enter the offices of public bodies where these records are held.

The effect of this approach is that records that genuinely belong to the categories identified in this section will continue to be protected from access. The difference is that in the event of a complaint, the Commissioner will be empowered to have the information produced so that he can determine the appropriateness of the decision made by the public body.

5. LEGISLATIVE PROVISIONS THAT PREVAIL OVER THE *ATIPPA*

Several submissions addressed the explicit provision that allows a long list of statutes and regulatory provisions to prevail over the *ATIPPA*. Much of that discussion expressed apprehension about the possibility of access to information being prevented under any one of the provisions on that list.[39]

A second basis for criticism is the fact that under the existing legislative structure, the government can add to that list through the confidential discussions of Cabinet, without any public notice or discussion until after the addition is made.

The Commissioner recommended that each public body be required to make a "convincing case" for legislative provisions for which that public body is responsible continuing to be included on the list of statutes and regulatory provisions that prevail over the *ATIPPA*.[40] He suggested this could be accomplished by adding a sunset clause to the *Act*, so that the provisions taking precedence over the *ATIPPA* would automatically expire after a set period, unless that status was reviewed and renewed during each statutory review of the *Act*. The Commissioner also recommended the *Act* be amended to require the government to consult with his Office at least 30 days before designating further provisions to take precedence over the *ATIPPA*.

Nalcor Energy expressed its support for inclusion of two Acts—the *Energy Corporation Act* and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*. Nalcor Energy stated it is necessary for the *Energy Corporation Act* to prevail over the *ATIPPA* to assure majority private sector investors in oil and gas projects that their proprietary information would not be at risk. With respect to the provincial *Atlantic Accord Implementation Act*, Nalcor Energy explained the Act gives protection for important commercial information, such as seismic data, which is "the cornerstone, the foundation by which all that ancillary activity is derived."[41]

A counter-argument was expressed by Dr. Gail Fraser from the Faculty of Environmental Studies at York University. She described the difficulty she encountered while seeking environmental information related to operations under the Atlantic Accord when she requested that information under the federal access to information legislation. She expressed the view that this legislative regime "represents a significant obstacle in understanding the environmental impacts of offshore oil and gas in waters off [Newfoundland and Labrador]," in that it "allows industry to decide what information is disclosed while operating in public waters."[42]

Conclusion

The Committee's mandate to conduct a comprehensive review of the *ATIPPA* required that the effect of these separate provisions be examined, and it has concluded that the following six legislative provisions should be removed from the list:

- subsection 9(4) of the *Aquaculture Act*
- subsections 5(1) and (4) of the *Aquaculture Regulations*
- section 18 of the *Lobbyist Registration Act*

39 See the list in the *Access to Information Regulations*, NLR 11/07 s 5.

40 OIPC Submission, 16 June 2014, p 84.

41 Nalcor Energy Transcript, 20 August 2014, p 48.

42 Fraser Submission, 26 August 2014.

- section 15 of the *Mining Act*
- sections 47 and 52 of the *Royalty Regulations, 2003*
- sections 17.1 and 17.2 of the *Revenue Administration Act*

The exemptions for the remaining 19 legislative provisions, which concern matters such as investigation of fatalities, adoption, and care and protection of children, should be retained. However, the Committee has particular comments regarding sections of four of those acts that it concludes should be retained.

1. *Evidence Act*
2. *Fisheries Act*
3. *Fish Inspection Act*
4. *Statistics Agency Act*

The Committee concludes that more information is needed to properly assess the requirement for the continued inclusion of provisions of the four Acts listed above. Those legislative provisions should remain on the list until that assessment can be done. The Commissioner should have jurisdiction to require production of all records related to any issues arising in connection with the listed legislative provisions.

The Committee also concludes that during each five-year statutory review of the *ATIPPA*, there be a review of all statutory and regulatory provisions that prevail over the *ATIPPA* to determine the necessity for their continued inclusion on the list.

Currently, under most of the legislation concerned, it is the Cabinet that decides which legislative provisions prevail over the *ATIPPA*. There is no reference to the legislature, and that matter was raised as a concern during the Committee's hearings. The Committee shares that concern. Granting government the power to declare other statutes and regulations that will prevail over the *ATIPPA*, by which the House of Assembly is providing citizens with a means of holding government to account, is inconsistent with the purpose of the *ATIPPA*. It most certainly has the appearance of being so. The Committee concludes that the *ATIPPA* should be amended to remove that regulation-making power from the Lieutenant-Governor in Council and add the necessary provisions in a schedule to the statute itself. If circumstances arise where it is necessary to add to the list when the legislature is not in session, it could take place through an order that would expire at the end of the next sitting of the House.

This and other changes recommended by the Committee will require some of the regulation-making powers in section 73 of the *ATIPPA* to be deleted, while other powers would be slightly altered.

The Committee makes two other points with respect to the legislative provisions that prevail over the *ATIPPA*. In the case of the *Energy Corporation Act* and the *Research and Development Council Act*, the Committee proposes a higher level of objectivity be applied to the determination by the chief executive officer that disclosure of the information requested would be harmful. The Committee recommends the CEO be required to "take into account sound and fair business practices" in forming the reasonable belief that release of the information would harm the competitive position or interfere with the negotiating position of the public body, or result in financial loss or harm.

6. PERSONAL INFORMATION PROTECTION

6.0 Introduction

Concerns with personal information did not appear to be foremost on the minds of many who made submissions to the Committee. There were a few exceptions, such as the practice in some municipalities of redacting names of individuals from letters and other documents because of concerns about invasion of privacy. The most prominent theme in personal information protection was concern about the treatment of personal opinions given in the course of employment.

No privacy incident outside the health sector seems to have captured popular attention in recent time. And indeed, with a few significant omissions, notably those dealing with the powers of the Commissioner and provisions for privacy impact assessments, Newfoundland and Labrador legislation generally reflects best practices in comparable jurisdictions.

The Commissioner made several suggestions for improving his ability to take action to prevent misuse of personal information, investigate potential and real privacy problems more fully, and generally deal with privacy issues.

The concerns and suggestions we heard, as well as our own research into practices in other jurisdictions, are grouped below by theme.

6.1 Notice to affected persons

Legislation in some jurisdictions includes provisions for notifying affected persons when their personal information is being released. Memorial University suggested adding a similar section to the *ATIPPA*.

This is already part of Ontario and British Columbia legislation, where it is included in the section of the legislation concerning third party business interests. The notice provisions apply equally to the interests of third parties in respect of their personal information.

Notice is also an important matter in an emergency, where rapid and accurate identification of individuals is crucial. With natural disasters, global epidemics, and terrorism-related violence, emergency planning has taken on a new importance. This is one of the reasons personal information held by public bodies should be accurate and up to date. In a public emergency, the usual restrictions on the use, collection, and disclosure of personal information will not apply.[43]

Conclusion

Under the *ATIPPA*, where personal information of a third party may be disclosed in response to an access request, the head of the public body is required to consider whether disclosure would be an unreasonable invasion of a third party's privacy. In those circumstances, it would be wise to incorporate a notification requirement similar to those that exist in the British Columbia and Ontario legislation.

43 Privacy Commissioner of Canada, *Privacy in the Time of a Pandemic, Factsheet* (2009).

One of the advantages of such a notification requirement would be to give prior notice of an impending release of personal information to those affected. The third party would then be in a position to ask the Commissioner to review the decision before the release of personal information takes place.

The Committee further suggests an examination of how information rights (access and personal) of persons are best protected in emergency situations involving the population's health or safety.

6.2 Data breach

Data breach did not appear to be a major concern of participants in the review exercise, but it is clear that breaches are taking place in public bodies. The Office of Public Engagement informed the Committee that 39 privacy breaches were reported to the ATIPP Office of the OPE between January 2013 and June 2014. Thirty of the breaches were regarded as minor, and the remaining 9 were "serious involving sensitive personal information."[44]

The apparent serenity about personal information challenges may stem from the fact that there was relatively little provision in the *Act* before 2012, and therefore fewer actions could be taken by the OIPC. The *Act* refers once to data breaches; it requires the head of a public body to protect personal information by "making reasonable security arrangements" to prevent unauthorized access, use, disclosure, or disposal. Both the minister responsible for OPE and the deputy stated at the hearings that despite the silence of the *Act*, in practice, public bodies report breaches to the Office of Public Engagement and, when necessary, to the affected individuals. The minister said breach reporting had become standard practice.

The OIPC discussed the question of reporting data breaches at its appearances before the Committee in June and August. In its June 2014 appearance, it suggested a requirement for breach reporting both to the Commissioner and to the affected individual. It recommended further study to determine what magnitude of breach should merit this treatment.

At its second appearance in late August 2014, the OIPC had revised its view, and stated that all breaches experienced by the public body should be reported to the Commissioner. The Commissioner said reporting all breaches would allow his Office to identify trends and develop measures to address any systemic problems that might be observed.

Conclusion

Given the relatively few data breaches from public bodies that are documented, the optimal requirement would be to report all breaches to the Commissioner. His Office could recommend follow-up and, where necessary, notification of the affected parties, as well as preventative measures for the future. In his supplementary submission in August, the Commissioner said it would place no additional burden on his Office to be informed of all breaches, since the current practice of the OPE is that all breaches should be reported to the ATIPP Office of the Office of Public Engagement, and the same report can then be forwarded to his staff.[45] The Committee agrees.

The Committee also concludes that the standard for notifying individuals of a breach should take into account the risk of significant harm that they would be exposed to if their personal information is compromised.

44 Government NL Submission, August 2014, p 21.

45 OIPC Supplementary Submission, 29 August 2014, p 12.

6.3 Personal information and politics

This section deals with the often nebulous dividing lines between Government and political parties, those who form the Government of the day and those in the Opposition. There are three interrelated topics:

- the extent to which the political staff of a minister should be involved when a Member of the House of Assembly (MHA) is dealing with the public service in the course of assisting a constituent
- the responsibility and liability of MHAs who disclose personal information in the course of trying to help a constituent
- how political parties should collect, use and disclose the personal information of voters.

6.3.1 Political staff and constituent matters

A fundamental principle of the *ATIPPA* is that there are clear limits on the use of personal information by public bodies and, by implication, those who work for them. Several participants brought to our attention a practice that is not supported by the *Act* or by the advice contained in the *Protection of Privacy Policy and Procedures Manual*[46] prepared by the Office of Public Engagement ATIPP Office. That practice involves routing through a minister's office MHAs who are attempting to assist a constituent to obtain a benefit or entitlement, or resolve a problem with Government.

The existence of this practice was not contradicted by the minister responsible for the administration of the *ATIPPA*. In his appearance before the Committee, the minister of OPE expressed the opinion that this practice could make the system more efficient.[47]

Conclusion

It concerns the Committee to hear that political staff have interfered with the lawful attempts of MHAs to act on behalf of constituents by insisting on being involved in the disposition of constituents' matters. As well, providing such assistance will frequently involve exposure of the constituent's personal information. Political staff of a minister have no right to access personal information of the constituent. The Committee believes there should be a prohibition against political staff being involved in such matters, and in the event they do interfere, the MHA involved should raise it in the House of Assembly as a question of privilege.

Without a legitimate need to know, a need directly related to the purpose for which the personal information will be used, disclosure is not justified. This is the idea behind section 38 of the *ATIPPA*, which strictly limits the use or disclosure of personal information by a public body.

6.3.2 Risk of liability of Members of the House of Assembly

A second issue respecting Members of the House of Assembly is the potential for liability when they handle personal information on behalf of constituents. The *Act* provides that an MHA who is assisting a constituent may have access to his or her personal information held by a public body, which is an exception to the general rule of the confidentiality of personal information.

The Speaker of the House has asked the Committee to recommend an indemnity clause for MHAs who while acting in good faith, disclose that personal information when requesting help from government departments and other public bodies on behalf of constituents. The Speaker wrote that problems might arise in instances where the MHA's intervention did not produce the desired result for the constituent, and where the constituent might claim they did not understand or consent to the release of their personal information. The Speaker felt such a situation would leave the member "vulnerable to an action for breaching privacy."[48]

46 NL, *Protection of Privacy Policy and Procedures Manual* (2014).

47 Government NL Transcript, 19 August 2014, pp 155–156.

48 Speaker of the House of Assembly Submission, 13 August 2014, p 2.

Conclusion

The Committee concludes an indemnity clause should be added to section 71 of the *ATIPPA*. That section provides indemnity for all other public body officials who handle personal information, and such a clause would clarify and protect MHAs in assisting constituents. However, it should not be a substitute for obtaining written consent from the person requesting help, nor a substitute for implementing appropriate practices for handling personal information within the MHA's own office.

6.3.3 Personal information and political parties

The third and final issue to be explored under the topic of personal information and political parties is that of the personal information of voters and potential voters collected, used, and disclosed by provincial political parties.

The security of personal information in the hands of political parties is a matter of concern for those who value their privacy. The laws that apply to individuals and corporations (*Privacy Act*[49]), public bodies (the *ATIPPA*), and commercial organizations (*PIPEDA*[50]), do not cover political parties.

Conclusion

Clearly, a gap exists in the personal information protection available in the province. While it is not, strictly speaking, within the purview of this Committee because the *ATIPPA* does not apply to political parties, it is appropriate that the Committee draw the problem to the attention of the Government.

49 RSNL 1990, c P-22.

50 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

6.4 Other questions related to personal information

Few participants questioned the definition of personal information in the *Act*.[51] However, some questions did arise in the course of the Committee's work, and those are summarized in this section.

6.4.1 Recorded information

Because of advances in our understanding of DNA, personal information does not necessarily have to be recorded: it exists in bodily samples unique to each person. Therefore, defining it as **recorded** information may unnecessarily limit the scope of the definition.

The Commissioner stated that bodily samples from an individual are usually labelled or identified according to a system.[52] The *Personal Health Information Act* (*PHIA*) refers to "identifying information in oral or recorded form" and includes information that relates to "a bodily substance" in its definition. Under the *ATIPPA*, bodily samples would most likely only be used in the context of law enforcement, where special provisions relating to that context adequately protect the personal information contained in such samples. The Commissioner's Office committed to revisit the issue in the context of the *PHIA* review, scheduled for 2016.

Conclusion

Modification of the definition of personal information to include a reference to bodily samples is not necessary at this time, as the Commissioner will address the issue during the 2016 *PHIA* review.

51 Memorial University was critical of the changes made as a result of the Bill 29 amendments, which affected the treatment of opinions when a person requested access to personal information.

52 OIPC Supplementary Submission, 29 August 2014, *Appendix 2*.

6.4.2 Business contact and employee information, and work product information

Memorial University[53] suggested adopting the British Columbia definition of personal information, which specifically excludes business contact information.[54] The College of the North Atlantic supported the recommendation.

The college also submitted that the definition of what constitutes employee personal information should be added to the definition of personal information, under section 2(o) of the *ATIPPA*. It was suggested that this proposed amendment would enable public bodies to clearly identify what information is relevant to an applicant's request when the applicant is employed by a public body and submits a request for all of his or her personal information.

These two bodies also proposed a separate definition for "work product information." The concept of work product information is about information that is akin to professional or technical opinions, and that is generated by an individual in the course of work.

Conclusion

Although the recommendations from Memorial University and College of the North Atlantic appear to be useful, there needs to be further examination to ensure all the aspects of this question are explored. For example, excluding business contact information from the definition of personal information may negatively affect people working from home. In many cases, their business contact information may also be their personal contact information. It would be inappropriate for the Committee to recommend a change without further research.

Similarly, the policy reasons or the effects of creating a category for work product information in provincial law should be fully explored. The Government may wish to cause this to happen.

53 Memorial University Submission, 13 August 2014, p 5.

54 *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, Schedule 1, "Personal Information" means recorded information about an identifiable individual other than contact information [BC *FIPPA*].

6.4.3 Personal information of the deceased

This is a topic that attracted the interest only of the Office of the Information and Privacy Commissioner. Currently, section 30(2)(m) provides that the disclosure of personal information is not an unreasonable invasion of a third party's privacy where that personal information is about a person who has been deceased for 20 years or more. The Commissioner's commentary on the issues of privacy and dignity after death, however, is an eloquent one.

> While it is acknowledged that the privacy interests of the deceased are generally considered to decrease over time, we do not consider it appropriate to legislate a firm cut-off date after which the privacy rights of the deceased are completely extinguished. The disclosure of personal information of the deceased raises issues of personal dignity for the deceased as well as surviving family members.[55]

The Commissioner recommends instead a provision be added to section 30(5) to require public bodies to consider the length of time that has lapsed since death in making a determination whether a disclosure in response to an access request is an unreasonable invasion of privacy.

This would be similar to section 39 of the *Act*, in which a surviving spouse or relative may be a potential recipient of personal information of the deceased, as long as the disclosure is not an unreasonable invasion of privacy.

Conclusion

The Commissioner's suggestion should be followed to provide a more nuanced test for the release of information of the deceased.

6.4.4 Restrictions on the export of personal information from the province

After the adoption of the legislation known as the *Patriot Act* by the United States in 2001,[56] many Canadians were concerned about the protection of their personal information if it were sent to the United States for storage

55 OIPC Submission, 16 June 2014, p 33.

56 *Patriot Act*, 50 USC tit 50 § 1861 (2001).

or processing. There were concerns about the ability of the US government to obtain information from other countries, which was provided for in section 215 of the *Patriot Act*.

Anxieties in British Columbia were sufficiently acute in 2004 to prompt the addition of extra provisions in their public sector access and privacy legislation.[57] The general rule is that public bodies in BC must store personal information in Canada. Access to this information must also be from Canada. And if a public body received any type of request for personal information, even legally authorized, from a foreign court, an agency of a foreign state, or another authority outside Canada, the minister responsible for the administration of the BC Act was to be notified immediately.

Other Canadian jurisdictions, including Nova Scotia and Quebec, have also addressed storage and processing of information held by public bodies. Quebec set simpler rules for public bodies than British Columbia. Before releasing personal information outside the province, the public body must ensure that the information will receive protection equivalent to that under the provincial Act.[58] If not, the public body must refuse to release the information.

Conclusion

The issue of setting conditions on the export of personal information held by public bodies to entities outside Canada, or indeed outside the province, was not raised with the Committee. Before concluding on this subject, it would be prudent to await an in-depth assessment of the impact of the laws in other provinces.

The Government of Newfoundland and Labrador should continue to follow the ongoing debate about the privacy and security of the personal information of Canadians in order to determine if there are appropriate steps it might take.

57 BC *FIPPA*, *supra* note 54 s 30.1.

58 *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2, s 70.1.

6.5 Information on salaries and benefits

The amendments in Bill 29 changed the term "remuneration" to "salary range" in the allowable exceptions to what is considered personal information. The Commissioner referred to this amendment in his June submission, noting that the changes had the merit of preserving public accountability for most employees. However, the OIPC also pointed out that such an accountability mechanism was missing in the senior salary ranges, where there may be perks such as bonuses, severance pay, and vehicle or housing allowances.

When balancing the privacy needs of public employees with the public's right to know, modern values of transparency and accountability for public funds tip the balance in favour of disclosure. In some jurisdictions, this has resulted in the publishing of salaries and benefits for officials whose income exceeds a certain threshold. Ontario sets this amount at $100,000 and annually publishes what is referred to as a "Sunshine List."

In Newfoundland and Labrador, many employees of government departments already have their individual salary disclosed in the annual Departmental Salary Details publication that accompanies the budget. For example, in 2014–15, salaries for 89 positions in the Department of Finance were disclosed because the people holding those positions are the only people in that category in the department. Similarly, 102 individual salaries were disclosed in the Department of Transportation and Works, and 74 in the legislative branch, which includes the various statutory offices of the House of Assembly, including the Office of the Auditor General and that of the Information and Privacy Commissioner.

Conclusion

The Committee concludes it is unfair to single out employees at any particular income level, and recommends that salaries and benefits of all employees of public bodies be subject to disclosure.

6.6 Social media

The increasing use of social media suggests that the time is right to consider whether the *Act* should specify that information disclosed by an individual on a social media site should be treated as personal information.[59] This concern was not addressed during the Committee's work, but given the prevalence of communication through social media, it may be important to take the initiative and draw this matter to public attention.

In the provincial context, it is possible a public body could use information on social media to make a case for eliminating benefits or beginning an inquiry. (It is conceded the police are heavily present on social media, but they have powers under the Criminal Code.) Then, there are additional complexities that the individual is unable to control. For example, sponsoring companies have a history of overriding the privacy settings that an individual may have placed on their account, by changing those settings and terms of use without further consent, or by using unclear or complicated language in their privacy policy.

Conclusion

The Committee notes that the Communications Branch of the Executive Council has produced a document titled "Social Media Policy and Guidelines." The document states that only authorized employees may post government information and that in the case of their private postings on their own social media sites, they are posting on behalf of themselves and not on behalf of the government. The guidelines also state that all provincial laws must be followed by those who post online, including laws relating to protection of privacy and records management.

Social media is an important subject for public bodies, since they may increasingly feel pressured to use the medium to disseminate information to the public. It is also an area that the Commissioner could address through the research power that the Committee has recommended elsewhere in the report. Such research could inform an approach for public bodies on this question and help in the further development of a social media protocol.

59 See for example BC *FIPPA*, *supra* note 54 s 33.1(1)(r).

6.7 Privacy in the workplace

Matters involving privacy in provincially regulated workplaces outside the public bodies covered by the *ATIPPA* do not come under the Terms of Reference for this Committee. However, the Commissioner brought this issue to our attention; he felt this "longstanding gap in privacy legislation" should be addressed.[60] He also stated he has received requests from both employees and employers in the private sector who have questions about privacy law in private workplaces. The Commissioner

60 OIPC Submission, 16 June 2014, pp 86–87.

said he has to "unfortunately...advise them that their concerns do not fall within our mandate." He indicates he would like to be involved in discussions with the province so that the issue might be studied and a solution found.

Although Newfoundland and Labrador recognized early on that individuals needed a statutory right of action in cases where they felt their right to privacy was invaded, the *Privacy Act* applies only to certain situations where the actions of one person are felt to be detrimental to the privacy of another. It does not envisage an employment situation where the working conditions include constant surveillance by an employer, a reality more and more common in our technology-dominated society.

Personal information is often poorly protected in the workplace. From sensitive human resource files left carelessly on desks to unprotected data bases to surreptitious keyboard monitoring, the opportunities for serious privacy violations are numerous. Most vehicles now include a geopositioning system (GPS) that enables employers to locate their equipment and, with it, the whereabouts of the person operating it. Metadata, or data about data, is generated by each computer record that is created, allowing the reader to understand who created the record, how and when. The increasing use of surveillance cameras to protect property also tracks the people who pass in front of the cameras. Electronic access to premises also gives a minutely accurate record of employee whereabouts.

And what can employees do if they feel that they are subject to surveillance or being constantly tracked and measured? If they are unionized, they can negotiate to add some privacy protection to their collective bargaining agreement. If they work for a public body, the *ATIPPA* must be respected by their employer. If they work for a federally regulated employer such as a bank or an airline, the provisions of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) on the collection and use of personal information will apply to their workplace. But this leaves a broad swathe of the workforce in the province whose employers are not subject to regulation protecting personal information.

Conclusion

Both British Columbia and Alberta have included the protection of private sector employee personal information in their own private sector legislation. The province of Newfoundland and Labrador should consider whether there is a need to provide such protection in labour standards legislation for employees not covered by the *ATIPPA*.

7. THE INFORMATION AND PRIVACY COMMISSIONER

The Office of the Information and Privacy Commissioner (OIPC) plays a pivotal role in relationships among applicants, the public bodies, and third parties. The OIPC, through the Commissioner, oversees the *ATIPPA* operations and application. In connection with the oversight role under access to information, the Commissioner has the legal authority to conduct reviews of public body decisions as requested by users of the *Act*, to issue reports on those investigations, and to make recommendations to public bodies. With the consent of a requester, the Commissioner can appeal the decision of a public body to the Trial Division of the Supreme Court. The Commissioner can also intervene in an appeal under the *Act*.

The Commissioner's powers are limited with respect to privacy breaches or misuse of personal information. He may investigate a complaint and offer mediation services, but he is not required to make a report. And once he performs those statutory duties, he cannot take personal information complaints any further.

7.1 Oversight model

The role that the Commissioner plays in the access to information system depends on the oversight model that is adopted. Currently, under the *ATIPPA*, the Commissioner is an ombudsperson. He has only the power to recommend, not order-making power. The head of a public body can comply with his recommendations, but is not obliged to do so. The public body can only be compelled to act if a court conducts a complete new review of the whole matter and makes an order. The manner in which the current system is implemented leads to delays, and frequently means the requester can wait months, even years, for a final determination of an access request.

No single aspect of the operation of the *ATIPPA* attracted the diversity of opinions as did the powers, role and performance of the Commissioner. Most of the views expressed to the Committee concerned issues of access, delay, and transparency. Participants expressed a wish to have a strong, independent Commissioner who would speak out when appropriate and act when necessary, so that citizens' rights would be effectively enforced. Many suggested the Commissioner be given order-making power.

Perhaps the simplest, but most significant, statement of the Commissioner came during his comments at the first hearing. He observed that the reason the Office of the Information and Privacy Commissioner was created was "[t]o have a timely, cost effective mechanism to deal with this." By "this," he was referring to the need for citizens to be able to challenge refusals by heads of public bodies to disclose requested information, so that their entitlement to access the information is not arbitrarily or wrongly refused or delayed. That observation succinctly summarizes the primary oversight objective and is consistent with the direction in the Terms of Reference "to make the *Act* more user friendly."

There are many factors to consider in an assessment of the current state of affairs with respect to the role, duties, and powers of the Commissioner. The legislative changes in 2012 significantly reduced the Commissioner's

oversight capability. The time limits provided for in the *Act* add to the overall sense that the *ATIPPA* does not serve requesters as efficiently as it should. Although there have been improvements in public bodies meeting statutory time limits in the past year, users of the *Act* feel strongly that public bodies do not respond as quickly as they should in meeting their legal duty to provide information. But the delays and frustration cannot all be laid at the door of public bodies.

The Committee looked closely at the role of the OIPC, and concludes that the most serious delays are attributable to the lengthy process associated with reviews and with attempts to resolve requesters' complaints informally. In the 18 Commissioner's reports from 2 October 2013 to 20 August 2014, the average wait for a requester, from the time they filed the access request to the day the Commissioner's report was released, was just over 548 days. The average Commissioner's review occupied more than 491 of those 548 days. When those delays are considered, it becomes apparent that the review and informal resolution process works only after a great deal of effort, delay, expense, and frustration for the requester. In three of the cases under review, the wait for the requester was greater than 1000 days. In only three of the 18 cases was the wait shorter than 200 days.[61] It is fair to say that by the end of this process the information is either redundant or much less useful. To quote the Commissioner when he addressed the Committee, "access delayed is access denied."

The Committee cannot fail to comment that, based on the information it has gathered since the conclusion of the hearings, the vast majority of the delays occur while matters are under the exclusive control of the Commissioner. The Commissioner is given specific authority in the *Act* to ensure compliance, and that would include ensuring that timelines required by the *ATIPPA* are met.

61 The Committee examined the timelines for all 101 OIPC reviews for which a report was written over a six-and-a-half-year period, from February 2008 to August 2014. Full details are indicated in Table 9 and in Appendix F of Volume II of the report.

Conclusion

The Committee concludes that the current oversight model is not working, and that a new model is necessary. A hybrid system can work best, one that takes the best qualities of the ombuds and order-making models. In the current oversight model, the Commissioner has little power to persuade reluctant public bodies to cooperate with requesters, and his Office puts too much focus on negotiation, persuasion, and mediation, which lead to the long delays cited above, as well as to a sense among requesters that the current system is not adequate. The Committee proposes a process that would prompt a public body to act quickly. This would be accomplished through changes in the statute to require that once a public body receives an OIPC recommendation to grant access, it would have two choices—comply within 10 business days or apply to the court for a declaration that it is not legally obliged to comply.

The result for the requester is the same as if this was an order. It would also mean that the burden of initiating court review, as well as the burden of proof, would be on the public body, where it should rest. As well, the Commissioner, not being the maker of an order under review by the court, but still retaining a statutory responsibility to champion access, would be in a position to respond to the public body's application to the court. The Commissioner identified not being in a position to respond to such an application as the major disadvantage of the order-making model. The hybrid model would eliminate both the additional delays inherent in the order-making model and the disadvantage of the Commissioner's inability to respond to any court application by the public body.

There is an added advantage in adopting the hybrid model. There would be no need or justification for the excessive delays caused by the report-writing practices currently undertaken by the Commissioner. In all but the rare case, where huge volumes of records may be involved, this will greatly reduce the time required for the Commissioner to review an applicant's request and make an early recommendation.

7.2 Status, term of office, and salary of the Commissioner

The Commissioner is an officer of the House of Assembly, nominated for the position by the Cabinet, and approved by the legislature. His term is for two years, and he is eligible for reappointment. The Commissioner's salary is fixed by the Cabinet after consultation with the House of Assembly Management Commission.

The two-year term for the Commissioner is excessively short and makes reappointment a practical necessity. Worse still, appointment and reappointment are effectively determined by the government majority. An added problem with the current process is that the *ATIPPA* does not provide for objective determination of salary and other benefits. It is difficult to imagine a system or combination of factors more likely to create the perception of a Commissioner beholden to government. These concerns were raised frequently in comments to the Committee.

Status

The Commissioner, as leader of the oversight body, deals with senior officials in government. His status must be equivalent to that of the senior people with whom he interacts. Accordingly, the Committee concludes that the Commissioner should have the status of a deputy minister.

Term

Nearly all who presented recommended a longer term of office, in order to underline the value of an independent officer of the House. The Committee heard many suggestions, ranging from 5 years to 10 to 12 years. Some suggested there be five- or six-year terms and the possibility of reappointment, while others proposed a term of 10 to 12 years with no reappointment.

The Committee concludes a six-year term would be appropriate, with the opportunity for reappointment for a further six years. The initial appointment would be through a new method; it would be made from a list of qualified candidates compiled by a selection committee reporting through the Speaker of the House of Assembly. After consulting with the party leaders in the House, including the Premier and leaders of opposition parties, the Speaker would present the name of a candidate for the House to consider. Reappointment would require majority approval of the members on each side of the House of Assembly: a majority of the members on the government side of the House, and separately, a majority of the members on the opposition side of the House. That should avoid both the probability of a Commissioner making recommendations designed to increase the chances of reappointment and the perception of such decisions being made.

Salary

Few presenters commented on salary and benefits. For the same reasons that Government should not be reappointing for short terms, it should not be in a position to periodically revise the Commissioner's salary, on the basis of factors it wishes to consider, even after consulting with the House of Assembly Management Commission. Otherwise, the perception would remain of a Commissioner making recommendations likely to result in a more favourable salary increase. Periodic increases must be objectively determined.

The Committee believes the best option is to provide for a salary that reflects the level of responsibility given to the Commissioner and the expertise that is necessary to do the job. As the overseer of the public right to access and protection of privacy, the Commissioner makes recommendations that can be far-reaching and result in forcing parties to court. In addition, the role requires skill and expertise in applying the *ATIPPA*. The Committee recommends the salary be set at 75 percent of that of a provincial court judge.[62] Judge's salaries are determined objectively by a process that is independent of Government. Basing the Commissioner's salary

62 A provincial court judge's salary was approximately $215,000 in fall 2014. 75 percent of that amount would be $161,250. The 2014 Departmental Salary Details show the Commissioner's salary to be $150,091.

on that independent standard would provide actual independence, as well as the perception of independence. The report also recommends appropriate provision for pension contribution and benefits.

7.3 The role of the Commissioner

With few exceptions, members of the public and the media put great faith in the work of the Information and Privacy Commissioner's Office and deplored the limitations on his powers that resulted from the passage of Bill 29. The amendments significantly impaired the role of the Commissioner by removing his right to review certain records:

- section 18: Cabinet confidences
- section 21: Solicitor-client privilege

Throughout the hearings, the Committee discerned some resistance on the part of public bodies to the role the Commissioner is legally obliged to carry out. For instance, one deputy minister questioned security arrangements at the OIPC, and suggested solicitor-client privileged documents produced for review by a public body might be shared with outside legal counsel by the OIPC in the course of an investigation. The Commissioner responded by stating there has never been a concern expressed by a public body about security. Another sign of the tension that exists around the role of the Commissioner was his statement to the Committee that his staff must sign a confidentiality undertaking before examining documents which the government claims may contain Cabinet confidences. No reasons or examples were offered to justify these reservations.

In order for the *ATIPPA* to function as it should, the Commissioner must be cast in the role of public watchdog with the dual responsibilities of access champion and protector of personal information. The Committee concludes that in order to realize that vision, the Commissioner must be provided with an expanded role, including enhanced duties and additional powers.

Audit power

The Committee agrees with the many participants who suggested that the Commissioner ought to be empowered to audit, on his own initiative, the performance by public bodies of their full range of duties and obligations under the *ATIPPA*. The Committee concludes that in such situations it would be appropriate for the Commissioner to announce publicly that a particular public body was found wanting, or severely wanting, if that were the case. The prospect of being embarrassed by the publication of such audit reports would have the effect of pressuring underperforming public bodies to comply with the *Act*.

Banking system

The OIPC has written and published fourteen policies to provide guidance for those seeking to assert rights under the *ATIPPA*. Essentially, those policies describe the practices followed by the OIPC in handling all matters that are brought to the attention of that Office. One of the policies creates a "banking" system. This requires that when the Office has five review requests from the same applicant under active consideration, any further requests will be banked until one of the five active requests is closed. At that time the first banked file is brought forward for active consideration.

The policy was developed in 2007 after the Commissioner suspended the rights of two applicants who were responsible for more than 50 percent of the then workload of his Office. The Commissioner's decision led the requesters to launch a court action, and while the judge ruled in their favour, he speculated that a banking system could be a solution that would allow applicants to have the right to submit new requests for review, while also allowing the Commissioner to provide service to other requesters.

This appears to be a sensible solution to address a difficult issue. However, the problem is that the statute does not make specific provision for banking. The Committee recommends that a provision be included in the amended *ATIPPA* to give effect to this policy.

Privacy complaints and investigations

The limited powers of the Commissioner in respect of privacy violations reflect other aspects of the generally passive role in which the existing legislation casts him. This is at a time when the use of technology, from supercomputers to surveillance cameras to GPS systems, means that individuals are often unaware when they are tracked or under surveillance, or when their data in the hands of a public body has been compromised.

The Commissioner can currently accept a complaint where an individual believes his or her personal information has been collected, used, or disclosed contrary to the *Act*. He may also review a refusal by a public body to correct personal information, and he can investigate personal information issues when an individual complains about their own personal information, but he is not obliged to make a report when mediation fails. He can make a report only for correction of personal information, which results in a dissatisfied requester having the right of an appeal to the court. To his credit, the Commissioner has taken the initiative, under his general powers, to launch his own privacy investigations. However, these investigations do not allow for redress by the courts.

Changes should also be made to allow the Commissioner to accept such a complaint from a person or organization on behalf of a group of individuals, where those individuals have given their consent. The new provision should include the ability to make a complaint about the misuse, over-collection, and improper disposal of personal information of another individual, in addition to one's own. This is not currently possible. Moreover, the *Act* should specifically provide for privacy investigations on the Commissioner's own motion.

As with access complaints, the statute should require the Commissioner to issue a report to a public body following a formal privacy investigation. The Commissioner could recommend that a public body destroy information or stop collecting, using, or disclosing personal information. Where the public body agreed with the recommendation, it would have one year to comply. Where it disagreed with the recommendation, the public body would be required to seek a declaration in the Trial Division that its decision was in accord with the law.

Privacy impact assessments

The current *Act* is silent concerning Privacy Impact Assessments (PIAs). However, the Office of Public Engagement and the Office of the Chief Information Officer (OCIO) use such assessments "to ensure privacy issues are fully considered at an early stage of project development, particularly when there are significant privacy risks."[63] The *Protection of Privacy Policy and Procedures Manual* outlines the process for conducting PIAs, beginning with a preliminary checklist to determine if a PIA is necessary. If it is necessary, an assessment is carried out by a team "with significant privacy expertise, technical expertise and knowledge about the project."[64] The process concludes with production of a document that indicates any privacy concerns identified during the assessment, a letter from the ATIPP Office certifying that the project has been reviewed, and recommendations on how best to manage personal information as it relates to the project.

PIAs are an internationally recognized assessment method. They examine whether the proposed project or policy collects more personal information than is needed to meet the objectives of the initiative. They also assess the sharing of collected personal information with other persons or a public body, as well as the access, storage, collection, and disposal of personal information during its life cycle. A PIA contemplates the proposed duration of the program or policy and determines when a full review should be undertaken.

The Committee concluded that privacy impact assessments should be provided for in the *ATIPPA*. The

63 NL, *Protection of Privacy Policy and Procedures Manual* (2014), p 8.
64 *Ibid.*

PIA is the best way to protect personal information in the development of new programs and services. The first requirement is for departments to carry out privacy impact assessments where personal information is involved in the development of new government programs and services, and to submit the PIAs to the minister responsible for the *ATIPPA* for review and comment. Second, PIAs would be forwarded to the Commissioner for his review and comment if they pertain to departments that address a common or integrated program or service for which disclosure of personal information may be permitted under section 39(1)(u) of the *Act*.

Research

Research is essential to understanding personal information challenges and emerging methods of protection. It is hard to see how the OIPC can keep up with developments in technology affecting personal information use and security, as well as the evolution of information rights, without an acknowledged research function and the financial support it requires. An independent research function would also give the Office an autonomous view of the implications of legislation or programs regarding personal information that may be introduced by government.

Such a role is in place in some jurisdictions across Canada. For example, the Privacy Commissioner of Canada has the authority to fund research into topics that further the objectives of the federal Act. The Ontario Information and Privacy Commissioner, in association with the government, has launched the Privacy by Design Centre of Excellence, which provides resources and guidance to the more than 65,000 people working for Ontario public bodies. The Centre has produced several papers focusing on aspects of protecting personal information, such as the issues around third party access to energy usage data and a primer for developers of smart phone apps.[65] The Commissioner in British Columbia has the authority to carry out research "into anything affecting access and privacy rights."[66]

The Committee concludes that incorporating such a role in the Commissioner's powers would help make the Office of the Information and Privacy Commissioner a significant force for the expansion of knowledge respecting access and protection of privacy.

Education

The Committee recommends other measures to enhance the role of the Commissioner. There is particular concern that the Commissioner must take a more active role in helping the public understand the *ATIPPA*, including the responsibilities of all players in making the system more effective. The Commissioner must also be vigilant in discerning and acting on problems regarding access and privacy, so that he is seen to be a champion of best practices.

Government acquisition of information on its citizens

Governments everywhere are attempting to make better policies and find savings by combining information available from their own internal sources with other information available commercially. "Big data" is purchased through commercial data brokers who aggregate and analyze personal information acquired by private corporations. Loyalty cards, draws, analyses of website visits and online patterns, and registration for the provision of goods or services are a rich source of data about people's consumer and financial habits, opinions, daily choices, and even travel itineraries.

Without proper safeguards, the application of big data can lead to unplanned negative or discriminatory consequences by revealing individual identities in embarrassing or harmful ways. In the future, citizens will be increasingly subject to decisions based on information they did not give to the government and did not know was shared with the government. Individuals and communities could be unaware they were being profiled.

An Information and Privacy Commissioner in the 21st century must have some overview of the process by which the government obtains and uses information to profile its citizens. It would be wise to add to the

65 Ontario IPC *2013 Annual Report*, pp 19–21.

66 BC IPC website, *About Us*.

Commissioner's powers, as is found in British Columbia, the power to "authorize the collection of personal information from sources other than the individual the information is about."[67]

The Committee concludes that such a power would ensure that the Commissioner is informed and his authorization requested when the government goes to outside sources for information on citizens, unless those methods of collection are already authorized under the *Act*.

Special reports

In other jurisdictions, broad powers of reporting to the legislative body are a useful tool in the kit of a data protection authority. In Newfoundland and Labrador, the Commissioner's existing obligation, as described in section 59 of the *ATIPPA*, is only to make an annual report to the House of Assembly. By contrast, the Commissioner in British Columbia may make a special report to the Legislative Assembly in two circumstances: to express an opinion about the inadequacy of provisions for his or her office in the budget estimates or to underline similar concerns about support given by the BC Public Service Agency.[68]

In short, when the Commissioner feels there are not the resources to do a satisfactory job, this sentiment may be expressed directly before the entire provincial legislature. But a report need not be limited to matters affecting his Office. A special report also allows the Commissioner to focus on other important issues that affect the right of access and protection of personal information. A special report is typically an extraordinary recourse and is confined to the most serious concerns, and is always written in addition to the annual report.

This approach has been taken in the recently passed *Public Interest Disclosure and Whistleblower Protection Act*.[69] The citizens' representative has been given the authority to produce a special report related to any matter within the scope of his or her functions and duties under the Act.

The Committee concludes an identical power to produce special reports should be given to the Commissioner.

Conclusion

The Committee concludes it is necessary to recast the role of the Commissioner so that he can promote and facilitate efficient and timely access to requested information, and adopt additional practices to ensure the protection of personal information. This includes adopting practices and procedures to respond quickly to complaints, and to avoid excessive delays in the resolution of complaints. The Committee concludes the Commissioner's practice of banking complaints should be provided for in the *ATIPPA*. This will allow the Commissioner to hold new complaints in abeyance, when the same complainant has five outstanding complaints.

The Committee also sees an extensive role for the Commissioner as a proactive force for educating the public and public bodies about access and privacy, and in conducting or commissioning research on topics he deems important. The Commissioner's role as watchdog would be enhanced through new powers to audit access and privacy protection operations under the *ATIPPA*, and to write special reports to be presented to the legislature.

With respect to protection of personal information, the Commissioner must be consulted to provide his advice on the access and privacy impact of new legislation, no later than when it is introduced into the legislature. The Commissioner must also be in a position to review Privacy Impact Assessments carried out by departments in relation to a common or integrated government program or service. Public bodies would be required to report all privacy breaches to the Commissioner.

The Committee concludes that recasting the Commissioner's role and powers in this way, will make his office a positive force for watching over all aspects of the *ATIPPA* and facilitating the right of citizens to obtain information in a timely way.

67 BC *FIPPA*, *supra* note 54 s 42(1)(i).
68 BC *FIPPA*, *supra* note 54 s 41.
69 SNL 2014, c P-37.2.

7.4 Issues with the Commissioner's independent review process

Many requesters have experienced unduly long delays, virtually all of which they seem to have attributed to the public bodies. Indeed, the annual reports filed by the OIPC and comments in their submissions and at the hearings underline that impression. For presenters who believed the difficulty and delay in achieving their requested access was entirely attributable to public bodies, giving the Commissioner order-making power seemed an easy solution. The Committee explored this suggestion in some detail, but did not feel justified in recommending order-making power without fully considering all possible causes of the delays, all potential consequences of changing the model, and all alternative solutions.

It is not surprising that requesters generally attribute total responsibility for the excessive delays to the public bodies involved. The OIPC was always in a position to report to the requester that the public body was still resisting the Commissioner's efforts to achieve access during the whole of the informal resolution process, whether two, ten or fifty weeks had passed. While that was all accurate, after more extensive analysis, the Committee concluded that it was not the full story.

The Committee began by discussing the causes of the delays with the Commissioner and the OIPC Director of Special Projects on the first day of the hearings. Like most members of the public, the Committee was operating on the assumption that all delay resulted from public body action or inaction.

Because the OIPC's otherwise very detailed annual reports do not give any analysis of the time and delays involved in the OIPC's procedures, it was necessary for the Committee to examine the Commissioner's review reports for all matters where his office was asked to do a review and which were followed by a Commissioner's report. The requester wants the Commissioner to provide a speedy decision as to the requester's entitlement to access, not a six-month- or year-long academic exercise analyzing the pros and cons of the issues involved. That is for the court to do if appeal to the court becomes necessary. The requester wants access to the information within a timeframe in which the information will still have value.

In six and a half years, just slightly more than 10 percent of the Commissioner's reports were issued within 120 days. The time limits were not just slightly exceeded. Even if the time limit had been increased to 6 months, only 30 percent would have been issued within that time frame.

In most of the annual reports, the OIPC has emphasized its focus on informal resolution through extensive negotiation and persuasion, and it asserts positions like these:

> We promote and utilize negotiation, persuasion and mediation of disputes and have experienced success with this approach. Good working relationships with government bodies are an important factor and have been the key to this Office's success to date.
>
> The key tenet of our role is to keep the lines of communication with applicants, public bodies and affected third parties open, positive and productive.

The Committee agrees that the informal resolution process is a useful tool, but it is intended to produce results more quickly and with less difficulty. It was never expected to cause excessive delay. In the circumstances, the Committee can do no less than remind the Commissioner and the staff of the OIPC of the words they addressed to the public bodies in the 2012–2013 Annual Report, quoted above:

> If they cannot do their work within the time frames set out in the *ATIPPA*, they are undermining the very purpose of the law.

There is no justification for the elaborate assessment of previous report decisions from this jurisdiction and other Canadian jurisdictions that characterize the Commissioner's report-writing practices. In all but the rare case, eliminating that unnecessary approach and replacing it with a summary review and assessment process by the Commissioner will greatly reduce the time required for the Commissioner to review the request

and make an early recommendation. If there is an appeal, the court's review is effectively a new hearing, where it reviews the decision of the public body, not the investigation report of the Commissioner.

When one considers the OIPC description of the practices and times involved in the informal review process, which sometimes takes many months and occasionally a year or more, it is almost inconceivable that there would be anything new to discover by the end of that process. If the matter was still not resolved, it would seem that a report with a clear recommendation could be written in a matter of days at the most. It is inconceivable that it could require many more months and sometimes more than a year. But this was the case in the 18 reports the Commissioner issued in the 12-month period immediately preceding the conclusion of the Committee's hearings. The average time involved for those 18 review requests at the informal resolution stage alone was nearly 9 months. One cannot imagine why any remaining investigation or report writing would require on average another 7 months. Something is radically wrong.

Conclusion

The manner in which the Commissioner and his staff presently manage complaints and requests for review has resulted in unacceptable delay for the overwhelming majority of those who seek the assistance of the Commissioner.

It is clear that the system is not functioning in a way that comes even remotely close to achieving the objectives expressed in the *Act*, let alone reflecting the kind of statute the Committee has been asked to recommend, one that will be user friendly and that, when it is measured against international standards, will rank among the best.

Major changes in the approach, processes, powers, resources, and direction as to the primary role of the Commissioner are necessary.

7.5 Time limits and extensions / complaints, reviews, and appeals

Time limits and extensions for public bodies

Most presenters agreed that time limits were a problem in the administration of the *ATIPPA*. Beyond stated concerns that public bodies often ignored the 30-day time limit for an initial response, and that the head of a public body should not be able to extend that initial time limit for an additional 30 days without the consent of the Commissioner, presenters frequently told the Committee that time limits in the *Act* are viewed by public bodies as guidelines rather than absolute limits.

The OPE provided evidence that there has been a significant improvement in response times by public bodies since the spring of 2013. The statistics show an improvement from an average of 60 percent within the permitted times in the first three months of 2013 to an average of 95 percent in the first three months of 2014.

It must be stated however, that the statutory deadline is not necessarily limited to 30 days. It also includes the 30-day extension that the head of a public body can unilaterally decide to add, and additional time beyond that extension which may be approved by the Commissioner. Other provisions come into play when a request is transferred from one public body to another, and when notice is given to a business third party in order to respond to a request for information that involves their dealings with public bodies.

Conclusion

The *ATIPPA* has a confusing array of time limits with the potential to make a mockery of the 30-day initial period in which a public body must respond to a request. A request can be subject to a 60-day wait simply on the decision of the head of the public body. If the public body is successful in applying to the Commissioner for

additional time, the requester may have to wait three or four months before receiving a final response from the public body.

There may be cases where the public body does need more time to respond to the request, but it is harmful to the public's trust to have that decision taken unilaterally by the head of the public body. The appropriate process is that if the public body cannot respond to a request within the legislated time, it would need the Commissioner's approval for an extension. The Commissioner's decision would be final.

The present system cries out for a simpler overall approach—one that respects the requester who has a legal right to obtain information from a public body, and one that sets a real time limit for people in public bodies to respond to requests. The goal must be to respond fully to a request in a timely manner.

The Committee has concluded that it would be best to move to a system that specifies business days in all stages and processes involving a request, including a public body's response, and the Commissioner's role in the process. The Committee has recommended changes to clarify the time limits pertaining to the public body's response to a request for information, including, among others, the following:

- adjust the existing time limit, and require full response from the public body within 20 business days
- introduce a time limit of 10 business days to complete a preliminary document search in order to determine the extent of effort and time involved to respond fully to the request and, within those 10 business days, provide a preliminary response and advise the requester in writing of the same
- eliminate the ability of public bodies to unilaterally extend the basic time limit
- provide for an extension only that the Commissioner believes is reasonably required, and immediately advise the requester that the extension has been granted and the reason for it

Access complaints and appeals

The statistics that came to the attention of the Committee late in the process of its work indicated that the Commissioner has operated as though the time limits do not apply to the OIPC, even though that approach contravenes the strict time limits specified in the *ATIPPA*.

Public bodies, requesters, and third parties must be assured that there is a fair process for handling complaints about access to information. The Committee is confident that a straightforward complaints and appeals process, with relatively short time limits, is the most effective way to restore public trust in the administration of the *ATIPPA*. At the OIPC, this should be carried out in a summary and expeditious manner, with any detailed legal analysis left to the courts.

The Committee agrees with the Commissioner that one of the key features of the current ombuds model is the Office's ability to attempt to resolve a complaint informally. If both parties come to the process in good faith, this is preferable to an investigation resulting in a recommendation that could eventually be challenged in court. In its examination of informal resolution practices, however, the Committee has seen evidence that in most cases the process significantly prolongs the wait time for a requester who wanted access to public information at the time it was requested, not months or years later.

Conclusion

Accordingly, the Committee is recommending shorter timelines for this process. Indeed, by the time the Commissioner has in his possession the documents and arguments of the parties involved, he should be well aware of the issues and in a strong position to make a recommendation. The parties (the public body, the requester, or the third party) would have to comply with the recommendation or apply to the Supreme Court Trial Division for a different resolution of the matter.

By the time a matter is appealed to the Trial Division, the request will already have been subject to significant delay. Accordingly, the Committee believes an application to the court requires special urgency, and concludes the matter should proceed under those *Rules*

of the Supreme Court of Newfoundland and Labrador, 1986 which provide for expedited hearing, or any adaptation of those rules that the court or the judge considers appropriate.

The process recommended by the Committee will establish tighter timelines, put structure around informal resolution, and provide the Commissioner with the authority to quickly move a request toward resolution. Again, these changes would include, among others, the following:

- within 15 business days of the decision by the public body, the requester or third party may file a complaint with the Commissioner
- upon receiving the complaint, the Commissioner will notify the parties involved that if they wish to make a representation to the OIPC, they must do so within 10 business days
- the Commissioner may take steps he considers appropriate to resolve the complaint informally to the satisfaction of the parties
- within 30 business days of receipt of the complaint, if the Commissioner has not already done so, he must terminate the informal resolution process and proceed to a formal investigation, unless he receives a written request from each of the parties to continue the informal resolution process
- the informal resolution process may be extended for a maximum of 20 business days
- within 65 business days of receipt of the complaint, the Commissioner must release the report of his findings and any recommendations following a formal investigation (this time limit is firm, whether or not the Commissioner extended the time for informal resolution)
- within 10 business days of receiving the Commissioner's recommendations, the public body must decide whether or not to comply with them
- if the Commissioner recommends that access be granted and the public body disagrees, then the public body must, within 10 business days of receiving the Commissioner's recommendation, seek a declaration from the Trial Division that the public body is not required by law to comply
- if the public body fails to comply or fails to seek a declaration in court, then the recommendation to grant access could be filed as an order of the court
- a requester or third party who is not satisfied with the decision of the public body following a commissioner's recommendation to refuse or grant access may appeal to the Trial Division within 10 business days of the public body's decision.

8. MUNICIPALITIES—ENSURING TRANSPARENCY AND ACCOUNTABILITY WHILE PROTECTING PRIVACY

Submissions regarding municipalities revealed one of the clearest examples of the collision between privacy concerns and the right to access information, and the way some of those organizations apply the privacy provisions of the *ATIPPA*. We heard that this concern about privacy goes so far as to include the documents prepared for municipal councillors, and that in some cases, councillors were presented with only a summary of letters in order to protect the privacy of the sender.

A rigid interpretation appears to have been given by some municipalities to the disclosure of personal information in all circumstances. This appears to be neither the spirit nor the letter of the *ATIPPA*. The Committee heard that this restrictive interpretation of the right to access in some municipal governments is the result of input from the Department of Municipal Affairs and advice from the Office of Public Engagement ATIPP Office.

At its appearance before the Committee, the OPE indicated it would address municipal coordinator training before the end of the calendar year. In an update to the Committee in October 2014, the Office of Public Engagement stated it had begun drafting guidance for use by municipalities and was able to provide the Committee with a preliminary version. It also stated that two training sessions had already taken place. Similar draft guidelines were distributed to municipal councils in early December for their comment and feedback.

The draft guidelines released to municipal councils for feedback focus heavily on the need to protect personal privacy.[70] That is appropriate as far as privacy is concerned. But municipal governments must also be accountable for the taxes they collect from local residents and the decisions they make affecting the municipality. On balance the guidelines tilt toward withholding information that facilitates accountability.

The text of the draft guidelines circulated to municipal councils in December 2014 relegates to the last page the current legislative requirement in the *ATIPPA* that requires public bodies to consider if "the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny." This provision speaks to the importance of transparency and accountability in municipal government. Upon reading the draft guidelines, one can only conclude that those values are to be subordinated to the privacy provisions of the *ATIPPA*. That direction is wrong and must be corrected if citizens are to be assured that local governments are carrying out their duties in an open and transparent manner. This requires achieving a better balance between protection of personal information and the legislated duty to subject the activities of a public body to public scrutiny.

The Committee heard of one other matter respecting municipalities. The Commissioner expressed concern that corporations owned by one or more municipalities are not currently covered under the *ATIPPA*. The Commissioner recommended that the definition of public body be expanded to include a corporation or entity owned by or created by a public body or group of public bodies.

Conclusion

The Committee heard about problems arising from an interpretation of the *ATIPPA* that is not properly sensitive to the realities of municipal governance. The lack of guidance and training for municipal ATIPP coordinators is

70 NL, *Guide for Municipalities*, December 2014.

leaving them to interpret the law as best they can in often contentious situations. The problems really stem from the fact that there is no properly defined relationship between the principles and duties underlying municipal governance and principles underlying the *ATIPPA*.

The Committee concludes government should develop standards for management of information by municipalities that recognize the need for councillors and the public generally to have full access to information coming before council, and on which council makes decisions for the entire community. This will ensure that development issues before councils are fully understood and are addressed in an atmosphere of transparency. The proper place to express these principles is the *Municipalities Act, 1999*. Once the provisions are put in place, those sections respecting access should prevail over the *ATIPPA*.

The Department of Municipal and Intergovernmental Affairs should take the lead, perhaps with the assistance of Municipalities Newfoundland and Labrador, in establishing a list of the information that citizens of a municipality must be able to access. This should be done with reasonable consideration for the importance of protecting personal privacy. That consideration can best be obtained through consultation with the Commissioner and the Office of Public Engagement.

Based on the views expressed by the Commissioner and his emphasis on municipalities, the Committee also concludes that the definition of public body should be expanded to include entities owned by or created by or for a municipality or group of municipalities.

9. REQUESTED EXCEPTIONS TO THE ACCESS PRINCIPLE

Seven organizations, including three public bodies, made representations to the Committee respecting exemptions from access to information. Memorial University, College of the North Atlantic, the Newfoundland and Labrador Veterinary Medical Association, Newfoundland and Labrador College of Veterinarians, the Department of Child, Youth and Family Services, the Healthcare Insurance Reciprocal of Canada, and the Canadian Medical Protective Association pointed to special circumstances that they believe make their cases compelling.

9.1 Memorial University

Memorial University wished to have opinions of individuals about others revert to the pre-Bill 29 status, where personal opinions should be considered the personal information of both the person who holds the opinion and the person the opinion is about. The university further stated that an employee expressing a personal opinion cannot be deemed to have been directed by the employer. The university drew particular attention to staff email, which can currently be accessed through an ATIPP request. It raised the possibility of having to be held responsible for "ill-considered and unfounded opinions" by an employee, and the university posed the question: "why should the public body own an opinion expressed by one employee about another and be responsible for propagating it?"[71]

Memorial alleges that the *ATIPPA*, as it applies to the university environment, with its shared governing structure involving the administration, faculty, students, and the community, is harmful to freedom of expression. However, the university offered no examples of such harm.

71 Memorial University Transcript, 20 August 2014, pp 60–62.

Conclusion

It is difficult to understand how such an important public body could not be bound to observe the basic information rights enshrined in the *ATIPPA*. It should also be realized that the new provisions of the *ATIPPA* dealing with opinions have been in force for barely two years. Given the very long traditions of unfettered freedom of expression from which the university milieu has benefited, the adaptation period may take longer than in other public bodies. The Committee does not agree with the recommendation by Memorial University to amend the definition of personal information.

The university also requested an amendment to the section of the *ATIPPA* that enables it to use personal information in its alumni records for fundraising. In its submission to the Committee, it recommended removal of the requirement to post an opt-out notice in a newspaper because it is no longer effective and adds to the university's costs. The university communicates to alumni by other means, such as the alumni magazine and the monthly e-newsletter. The Committee agrees that the requirement for publication of the opt-out notice in a newspaper should be removed from the *Act*.

9.2 Professional advice given by veterinarians who are government employees

The Newfoundland and Labrador Veterinary Medical Association (NLVMA) stated that animal health records in the offices of public bodies should be kept confidential and recommended in their presentation that the *ATIPPA* be amended to exempt such records. They argued that providing such information is a violation of their professional oath to keep animal health information confidential. The Association was concerned about the position of government-employed veterinarians, who perform the dual roles of regulatory duty for the province and primary veterinary care for the public. The primary veterinary care at issue here takes place in rural areas where there are few veterinarians, and in food production, mainly for private aquaculture producers. Government-employed veterinarians provide this service because of the general shortage of veterinarians available to work in rural areas.

The NLVMA stated that the government-employed veterinarians are "constantly" asked to release health information under the *ATIPPA*. Research by the Committee showed there were only 9 such requests in the past two years, and that minimal information was disclosed.

Decisions by courts and adjudicators suggest that recorded information created by veterinarians enjoys no special status in the interpretation of access to information legislation. Such information is given to the government representative, the veterinarian, as a necessary condition under which the establishment, such as a fish farm, is allowed to operate.

A public body that is involved in the health of animals destined for human consumption hires veterinarians to ensure that these health conditions are maintained. In this context, the veterinarians do not have an exclusive and confidential professional relationship with the owners of establishments raising animals for food.

Conclusion

The Committee is not persuaded that there is merit in the position taken by the Newfoundland and Labrador Veterinary Medical Association, and concludes that records of government-employed veterinarians should continue to be subject to the provisions of the *ATIPPA*.

9.3 Information about prospective parents in an adoption process

The deputy minister of the Department of Child, Youth and Family Services voiced a serious concern about an apparent loophole in protected information originating in the adoption process. This is information about prospective parents who are not considered a suitable match with a particular child, according to the expert evaluations made in the adoption process. The concern is that disappointed potential parents could ask for their own evaluations under the *ATIPPA*, as the *Adoption Act, 2013* protects only the information of children at that stage of the adoption process. Access to and knowledge about evaluations of themselves could prompt the prospective adoptive parents to adjust their behaviour in attempts to adopt another child. The deputy minister said this could potentially put that other child at risk.

She stated that this had not yet happened but there was a recent case where her department was concerned that potential parents would make an access to information request. She asked for an amendment to the *ATIPPA* or to the *Adoption Act, 2013* to prevent this from happening in the future.

Conclusion

There appear to be no studies or statistics on the negative effects of the *ATIPPA* on the child welfare and adoption system. It is therefore difficult for the Committee to

conclude that changes should be made on the basis of apprehensions for which the *Act* may already provide a remedy.

The Committee concludes that the Department of Child, Youth and Family Services should consult with both the Child and Youth Advocate and the Information and Privacy Commissioner about making changes to the *Adoption Act, 2013* if they are necessary, in order to better protect the interests of individuals and children involved in the adoption processs.

9.4 Opinions given by health professionals in the course of quality or peer reviews

The Healthcare Insurance Reciprocal of Canada (HIROC) is the largest healthcare liability insurer in the country. The not-for-profit agency has close to 600 subscribers in the Canadian health services industry, including the four regional health authorities in Newfoundland and Labrador. HIROC asked the Committee to recommend an amendment to the *ATIPPA* that would exempt from access requests all reports and statements from quality assurance and peer review committees in the hospital and nursing home context.

In support of its argument, HIROC argues that research and policy papers have documented the reluctance of healthcare professionals to participate in such processes unless they are assured their comments will not be used in future lawsuits or disciplinary hearings. The organization states that the province's *Personal Health Information Act* makes such information inaccessible to the requester. It wants the same protection from the *ATIPPA*.

Conclusion

In the present patient-centred system of health care, transparency about information that can affect the quality of care is vital. A recent ruling by the Trial Division ordered that information from a quality assurance committee be made available for a disciplinary hearing, in a case where the legislation governing that disciplinary hearing is more recent than the *Evidence Act*.[72] In doing so, the court also set clear restrictions limiting general public access, the very type of concern HIROC has stated. This suggests that even with the status quo, the amount of information to be released, and to whom it will be disclosed, will depend on the context.

The Committee concludes that the matter is more appropriately addressed by *PHIA*. It came into force in 2011 and now determines the extent to which the reports and statements of those committees should be shielded. The *ATIPPA* does not need to be amended to further shield health care information from access requests.

72 *Eastern Regional Integrated Health Authority v Association of Registered Nurses of Newfoundland and Labrador*, 2014 NLTD(G) 33 at para 5. Presently under appeal.

9.5 College of the North Atlantic

The fifth organization seeking exemption from the access provision in the *ATIPPA* was the College of the North Atlantic (CNA). In its written submission, CNA stated that it has had extensive experience with *ATIPPA* since 2005, the year the *Act* was proclaimed. The college has particular concerns about its multi-year contract with the State of Qatar, where the college is named as the service provider, and the possible accessibility of in-

formation of its client, the State of Qatar, under the present wording of *ATIPPA*.

CNA expressed two concerns. It wants a general exemption for information created by a public body for a client (the state of Qatar in this case), where the public body is acting as a service provider. Secondly, CNA expressed concern about the wording of the *Act* under section 5(1), which states that the *ATIPPA* applies "to all records in the custody of or under the control of a public body." The college argues that in its role of service provider, it usually has custody of some or all of the information generated or compiled in order to fulfill the contract. However, control of the information rests with the State of Qatar, not with the college.

CNA argued that releasing the client's confidential or business information would harm the competitive positioning of the public body. It suggested section 5(1) be modified to state that the public body must have both custody and control of the information requested in order for the *ATIPPA* to apply. CNA pointed out that in the particular circumstances of this relationship, it may have copies of documents in its custody but the control remains with the client.

The college also made a suggestion about section 10(1) of the *Act*, which compels the public body to make a reproduction of the records for the applicant where the records exist in electronic form. The college pointed out that many public bodies continue to have paper records as well. It believed the provisions of section 10(1) should apply to all records, regardless of their form, whether paper or electronic.

Conclusion

Many of the issues raised by the college were relevant to a case presently before the Supreme Court, Trial Division in Corner Brook. At the time of the writing of this report, no final judgment has been issued in this case.

While the Committee concludes it would be inappropriate to comment on a matter before the court, it is within our mandate to comment on provisions as they should be expressed in future legislation. The *ATIPPA* is meant to cover all public bodies. It would not be useful to dilute the concept of custody or control in the *Act* to respond to a particular situation of one public body at a particular point in time. If such a change is necessary, it is best done by amending the legislation which applies only to that public body.

With respect to the second issue raised by the college, the form of the records that they hold, the Committee concludes those matters can be addressed through section 43.1 of the *Act*. It would seem contrary to the purpose of the *ATIPPA* to have the results of access requests vary depending on the form in which the information is stored.

10. INFORMATION MANAGEMENT

10.1 Information management and duty to document

The last statutory review of the *ATIPPA* conducted by John Cummings made several recommendations to enhance the information management systems of public bodies. There was no recommendation to require officials to document their decisions. However, "duty to document" is gaining status in government and information management circles. It has become a rallying cry for information and privacy commissioners[73] and, it seems, for good reason: how can they properly oversee laws on privacy and access to information in the absence of good records or, in some cases, any records at all? This issue was raised in the last statutory review, and it has been an issue in the United Kingdom.[74]

The *ATIPPA* assumes that records have already been created. The *Act* does not address how records should be managed, apart from the duty to protect personal information. A separate piece of legislation applies to records of public bodies excluding municipalities, the *Management of Information Act*.[75]

In September 2014, the Committee wrote the Office of Public Engagement and asked for an update on the progress in implementing the proposals relating to records and information management recommended in the Cummings report. The OPE reported on 31 public bodies that are serviced by the Office of the Chief Information Officer (OCIO), including all core government departments and some agencies. It stated there had been significant progress, and that all 31 public bodies have had their information management systems assessed "in a consistent manner" through a tool developed by the OCIO. However, they also stated there are some gaps in performance and that the development of information management programs is at "varying levels of maturity" in both departments and other public bodies.[76]

The OPE provided some additional comments on the "gaps" it identified. It stated there are many variables at play, including the size of the organization, how long the information management program has been in place in a public body, the allocation of resources, and the complexity of record holdings. Despite the identified issues, the OPE says use of the assessment tool has led to "an overall increase in the priority assigned to [information management] by departments."

It should hardly need to be stated that strong information management policies and practices are the foundation for access to information. Without those policies and practices, there is no certainty that the information being requested exists, or that it is usable even if it does exist. Information management was a concern raised by just a few submissions, mostly in the context of the discussion of the duty to document.

Duty to document

Canada's Information Commissioner, Suzanne Legault, recommended a legal duty to document decisions, "including information and processes that form the rationale for that decision." Commissioner Legault felt that without such a legal requirement, there is no way to

73 Communiqué, Canada Ombudspersons and Commissioners, 9 October 2013.

74 UK Justice Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000* (2012), pp 55–56.

75 SNL 2005, c M-1.01.

76 Government NL, Letter from Hon. Steve Kent, 17 October 2014.

ensure all information related to the decision making process is recorded. She was also concerned "the risk is compounded by the advent of new technologies used in government institutions, such as instant messaging."[77]

The OIPC also addressed "duty to document" and promoted the view expressed in the joint resolution by Canada's Information and Privacy Commissioners,[78] by recommending "the creation of a legislated duty on public bodies to document any non-trivial decision relating to the functions, policies, decisions, procedures and transactions relating to the public body." The OIPC also emphasized the need for internal policies and procedures to ensure documents created under such a direction are "maintained, protected and retained in proper fashion."[79] The OIPC said the suggested legislative changes could be placed within the *ATIPPA*, in another statute, or on their own in a stand-alone law.

The OPE's response to the Committee's written inquiry suggests a high level of awareness of the major issues involved in information management, including the need to protect personal information. It is also apparent from their assessment that more must be done.

Public bodies have no choice about complying with the *ATIPPA*. They have a legal obligation to do it. If some public bodies do not have the necessary resources for a strong information management system, senior officials have a responsibility to assign the necessary resources to fix the problem.

77 Information Commissioner of Canada Submission, 18 August 2014, p 8.

78 *Supra* note 73.

79 OIPC Submission, 16 June 2014, p 80.

Conclusion

As of January 2015, the *ATIPPA* has been in place for a decade. Most of the public focus has been on the access provisions of the *Act* and the practices around its administration. However, it must be realized that the success of the ATIPP system depends entirely on maintaining reliable records. Senior officials must ensure that appropriate resources are allocated to do the job completely, and that all public bodies understand the essential role that information management plays in a well-functioning access to information system. It is appropriate to observe that public officials, including political leaders should have a duty to document their decisions. A useful guide is the recommendation from the Newfoundland and Labrador Information and Privacy Commissioner.

The Committee concludes that such a duty does not belong in the *ATIPPA*, or in a stand-alone Act. The legislated duty to document should be expressed in the *Management of Information Act*. Implementation and operation of any such legislative provision should be subject to such monitoring or audit and report to the House of Assembly by the OIPC as the Commissioner considers appropriate.

10.2 Records in the form requested and machine-readable format

Many access to information laws allow a requester to state the form in which they wish to receive records or information. But there is a clause in most access laws that makes complying with the request conditional. In the case of the *ATIPPA*, it is where the record can be "produced using the normal computer hardware and software and technical expertise of the public body," and where "producing it would not interfere unreasonably with the operations of the public body." Also, "where a record exists, but not in the form requested by the applicant," it is left up to the head to decide whether to "create a record in the form requested."

Increasingly, governments are committing to release datasets and other types of material that can be further analyzed by the public. The Open Government and Open Data initiatives of the Government of Newfoundland and Labrador also contemplate this approach. This is leading to increased demand on the part of the

public that data be provided in a form that can be reused or further processed by a computer. The term for this is machine-readable data. Public officials are told in their *Access to Information Policy and Procedures Manual* that applicants will increasingly ask for electronic records. That is consistent with what the Committee heard from some participants. Some told the Committee they want access to datasets that can be manipulated on their own computers, in order to reorganize and sort the data, and to make their own spreadsheets.

If research from the United Kingdom can be used as a guide, it may take some time for the general public to go online and examine these types of information. The UK-based Open Data Institute (ODI), an organization that advocates an "open data culture to create economic, environmental and social value,"[80] found that the most frequent users of open data were "developers, entrepreneurs, some business specialists, and other tech-savvy agents."[81] ODI's conclusion was that ways have to be found to ensure the data can be more widely used by the general population. It said the UK government, for example, was placing too much emphasis on putting lots of data online, and not enough on "understanding, generating, and nurturing data demand or data use."[82]

The Committee determined that few submissions dealt with the kind of information or data that might be produced by the current Open Government or Open Data initiatives. Those who addressed the matter were either experienced access to information users, involved in public life, or, in the case of the Centre for Law and Democracy, an advocacy group with detailed knowledge of access to information issues.

The Government of Newfoundland and Labrador has consulted with the public on its Open Government initiative. If the government's initiatives are to evolve to the state envisioned by people who made submissions to the Committee, then public bodies will have to become responsive to requests for raw data. In order for the government to achieve the dialogue and collaboration that it desires, it will be necessary to view datasets and other machine-readable data in the same way as other information held by public bodies. This means electronic records would be disclosed in the same way as information in other records.

Conclusion

The Committee concludes that in order to achieve these objectives, the existing definition of records should be changed to include machine-readable records and datasets; public bodies should consult with requesters before creating such records; and the information should be provided in an electronic form that can be reused. The Committee notes there will be a learning curve for both public bodies and requesters in respect of machine-readable records and datasets. It would be helpful if public bodies were to work with requesters to ensure that there is awareness of such records and to develop practices so that full use can be made of the records.

80 Open Data Institute, About the ODI.
81 *Ibid.*
82 *Ibid.*

10.3 Additional powers of the Commissioner—publication schemes

An innovative approach to reformulating an aspect of the Commissioner's powers would be to borrow from the United Kingdom model and to give him the responsibility to create the templates or the guidelines for publication schemes for information held by public bodies. While the Office of Public Engagement plans to oversee publication schemes, it may be more appropriate for an arms' length body such as the OIPC to set out standards for the public bodies to apply.

A publication scheme is like an outline of the classes of information each public body will publish or intends to publish so it may be read and easily accessed by the

public. This approach would be an effective substitute for the information directory that is currently mandated by section 69 of the *ATIPPA*. The directory was to be an extensive listing of information about public bodies and a catalogue of personal information banks held by them. However, it has never been completed. OPE officials told the Committee that considerable work on a directory of information had been undertaken after the *Act* came into effect, but it quickly became outdated and was then abandoned.

Conclusion

Section 69 of *ATIPPA* should be revised, and responsibility for publishing information should be shifted from the minister responsible for the administration of the *Act* to the head of each public body. However, the minister should remain generally responsible for ensuring compliance. He should advise Cabinet to make regulations to specify which public bodies must make their information available and when they should make it available. This would allow a gradual coming into force of the practice of publishing information, with the largest public bodies presumably being able to comply most quickly.

The Committee concludes that the Commissioner should develop a model publication scheme and set out what minimal information is necessary, including lists of personal information databases. Much of this is already set out in section 69 of the *Act*. This would provide a standard template which each public body would adapt to its particular functions. The responsibility for developing the model should be added to the Commissioner's list of powers and duties.

11. OTHER ISSUES

11.1 The Commissioner's recommendations for specific amendments

The Commissioner recommended several miscellaneous changes to the existing *ATIPPA*, including

- section 22 respecting disclosure harmful to law enforcement
- section 22.2 respecting information from a workplace investigation
- section 30.1 respecting disclosure of House of Assembly service and statutory office records
- section 72 respecting offences

The Committee reviewed the Commissioner's proposals and concluded:

- Section 22 – The information provided by the Commissioner does not provide a sufficient basis for recommending changes to section 22.
- Section 22.2 – The Committee agreed that a change is necessary, although one that is somewhat different than was recommended by the Commissioner.
- Sections 30.1 and 72 – The Committee agrees with the Commissioner's recommendation respecting section 30.1 and section 72.

11.2 Sunset clause

Three submissions to the Committee recommended some version of a sunset clause. None of the participants advocated a general sunset clause for the *ATIPPA*, since that could imply the law itself might not have merit after a period of time. The Office of the Information and Privacy Commissioner recommended a sunset clause for the 25 legislative provisions that expressly prevail over the *ATIPPA*, suggesting that these designations should automatically expire unless a statutory review of the *ATIPPA* recommended their renewal. The other emphasis on sunset provisions referred to provisions that have specific protection periods. This includes protection for certain classes of information listed in the *ATIPPA* that expire after a prescribed time:

- *50 years* where the Provincial Archives may release information that is in a record for that period or longer
- *50 years* for information related to labour relations of the public body as an employer, either in the control of the Provincial Archives of Newfoundland and Labrador or in the archives of a public body
- *50 years* for business interests of a third party, or tax information of a business interest, where the information is either in the control of the Provincial Archives or in the archives of a public body
- *20 years* after death, for the personal information of the deceased
- *20 years*, where the Provincial Archives may disclose information about an individual who has been dead for that period or longer

- *20 years* for Cabinet records
- *15 years* for records involving local public body confidences
- *15 years* for policy advice or recommendations
- *15 years* for documents related to intergovernmental relations or negotiations
- *No limit* on disclosure that is harmful to financial or economic interests of a public body, or to conservation

Conclusion

The Committee concludes that these particular sections of the *Act* would benefit from additional scrutiny. However, the limited expression of public interest regarding protected disclosure periods during this review and the lack of information with which to exercise judgment on the issues makes it inappropriate for the Committee to draw conclusions at this time.

11.3 Extractive industries transparency initiative (EITI)

In December 2014, Canada joined a growing international movement mandating oil, gas, and mining companies to publish an account of taxes (other than income and consumption), royalties, and other payments that they make to governments and other entities when Royal Assent was given to Bill C-43, which enacted the *Extractive Sector Transparency Measures Act*.[83] Canada announced its commitment to establish mandatory reporting for the extractive industries two and a half years ago at the G8 conference in London. At the time it held consultations on the EITI, the federal government stated it would develop regulations during the winter of 2015 and bring the legislation into force on 1 April 2015.

Norway was the first nation to publicly require disclosure of taxes, royalties, and other payments by individual oil companies. In the four and a half years since, nearly four dozen other nations either have joined by becoming compliant with the new reporting regime or are candidates to become part of the Extractive Industries Transparency Initiative. Among the candidates for entry are Honduras, Indonesia, Ukraine, and the United States. Several other countries are preparing for entry, including the United Kingdom, Italy, and Germany. The UK has recently developed regulations that spell out its implementation of the EITI.

The federal government has stated it prefers having provincial and territorial securities regulators implement the standards, since provinces have jurisdiction over resource royalties and securities law.

The *ATIPPA* expressly forbids the detailed public release of tax and royalty information. The result is that amounts are reported in the public accounts in aggregated form. For example, despite there being several oil companies operating in the offshore, royalties are reported in the Newfoundland and Labrador budget estimates under a single heading, "Offshore Royalties."[84] Revenue from several mines operating in the province is reported in the same manner, and classified as "Mining Tax and Royalties." There is no breakdown by company or mine.

The Government of Newfoundland and Labrador was consulted as part of a national initiative undertaken by the Government of Canada. Provincial officials in the Department of Natural Resources told the Committee that they are delaying action until they can study the federal legislation.

83 *Extractive Sector Transparency Measures Act*, being Part 4, Division 28 of the *Economic Action Plan 2014 Act, No. 2*, SC 2014, c 39. As of the writing of this report, not proclaimed in force.

84 Government NL, *Estimates*, 2014–2015, p v.

Conclusion

This matter involves a policy decision for the Government of Newfoundland and Labrador and as such it is outside the mandate of this Committee to make a recommendation. However, given the developments in implementing the EITI worldwide, including in Canada, the Committee felt it was important in the context of a review of an access to information statute to discuss the issue and draw public attention to it.

12. RECOMMENDED STATUTORY CHANGES

Early in its work, the Committee concluded a major overhaul of the *ATIPPA* would be necessary, in order to address the issues raised by citizens and the Commissioner. The Committee decided it would be best to express its recommendations in the report in general terms instead of trying to specify the precise statutory language for each change being proposed. The Committee would then draft the legislative provisions based on those recommendations.

The Committee acknowledges that the proposed bill is not entirely new. We have simply transferred to the revised statute the many provisions of the existing *ATIPPA* that work well. Existing provisions have been retained to the maximum extent consistent with providing for the major changes the Committee is recommending.

The Committee recognizes that its recommendations involve a wide variety of changes, both to statutory provisions and to the existing approach to providing access to publicly held information and protection of personal information. Implementing those changes will likely result in substantial adjustment to existing practices and procedures of public bodies and the Office of the Information and Privacy Commissioner, and may well involve some increase in cost to the Government.

The Committee was sensitive to those possibilities when it was considering the information before it and the recommendations it would make. However, the Committee's mandate was to make recommendations that would produce a user-friendly statute which, when measured against international standards, will rank among the best. We have endeavoured to do this.

How and when to implement the changes outlined in the report and the draft bill, including the adjustment of practices and procedures, and the making of budgetary decisions, are policy decisions for the Government, and not matters on which the Committee should make further comment.

Finally, the Committee has prepared a consolidation of the recommendations set out at the conclusion of each chapter of the full report. That consolidation follows. The final recommendation includes the draft bill that the Committee recommends be placed before the House of Assembly.

CONSOLIDATED RECOMMENDATIONS

The reader's attention is drawn to the fact that all references in these recommendations to section numbers of the *ATIPPA* are to the existing *ATIPPA* and not to sections of the draft bill.

Chapter one:

The stature of the right to access information and the right to protection of personal privacy

The Committee recommends that

1. The purpose of the *ATIPPA* set out in the existing version of section 3 be recast to read:
    1. The purpose of this *Act* is to facilitate democracy through:
        a. ensuring that citizens have the information required to participate meaningfully in the democratic process,
        b. increasing transparency in government and public bodies so that elected officials, and officers and employees of public bodies remain accountable, and
        c. protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.
    2. The purpose set out in subsection (1) is to be achieved 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 the limited exceptions to the rights of access and correction that are necessary to:
            i. preserve the ability of government to function efficiently, as a cabinet government in a parliamentary democracy,
            ii. accommodate established and accepted rights and privileges of others, and
            iii. protect from harm the confidential proprietary and other rights of third parties,
        d. providing that some discretionary exceptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception,
        e. preventing the unauthorized collection, use, or disclosure of personal information by public bodies,
        f. providing for an oversight agency having duties to:
            i. be an advocate for access to information and protection of privacy,
            ii. facilitate timely and user friendly application of the *Act*,
            iii. provide independent review of decisions made by public bodies under this *Act*,
            iv. provide independent investigation of privacy complaints,

v. make recommendations to government and to public bodies as to actions they might take to better achieve the objectives of the *Act*, and
vi. educate the public and public bodies on all aspects of the *Act*.

Chapter two:

How the *ATIPPA* is administered

The Committee recommends that

2. The *Act* be amended to give delegated authority for handling a request solely to the ATIPP coordinator.

3. No officials other than the ATIPP coordinator be involved in the request unless they are consulted for advice in connection with the matter or giving assistance in obtaining and locating the information.

4. The *Act* be amended to anonymize the identity and type of requester upon receipt of the request and until the final response is sent to the requester by the ATIPP coordinator, except where the request is for personal information or the identity of the requester is necessary to respond to the request.

5. The head of each public body provide the designated ATIPP coordinator with instructions in writing as to the positive duty to provide to a requester the maximum level of assistance reasonable in the circumstances.

6. The *Act* be amended to
    a. eliminate the application fee for any information request
    b. eliminate the processing charges for the first 10 hours of search time for municipalities and the first 15 hours for all other public bodies
    c. include only search time in the cost estimate
    d. charge applicants whose search comes within the free period only for direct costs, such as photocopying and mailing
    e. ensure that where processing charges are to be levied, they are modest
    f. eliminate direct costs for electronic copies, such as a PDF or a dataset
    g. provide for the waiver of charges in circumstances of financial hardship or where it would be in the public interest to disclose the information
    h. enable a dispute respecting charges or waiver of charges to be reviewed by the Commissioner, whose determination would be final

7. The Office of the Information and Privacy Commissioner develop guidelines such as those provided by the United Kingdom Information Commissioner, to guide public bodies on how to process requests where the time estimate is greater than the free time allowed.

8. Provision should be made for an online application and payment system, where practicable.

9. Sections 13 and 43.1 of the *Act* be replaced with a provision along the following lines:
   The head of a public body may, within 5 business days of receipt of a request, apply to the Commissioner for approval to disregard a request on the basis that:
   a. the request would unreasonably interfere with the operations of the public body; or
   b. the request would amount to an abuse of the right to make the request because it is:
      i. trivial, or frivolous or vexatious,
      ii. unduly repetitious or systematic,
      iii. excessively broad or incomprehensible, or
      iv. it is otherwise made in bad faith; or
   c. the request is for information already provided to the applicant.

Chapter three:

Access to information provisions

The Committee recommends that

10. With respect to disclosure in the public interest:
    a. The provisions of section 31(1) be retained; and
    b. The *Act* also provide that where the head of a public body may refuse to disclose information to an applicant under one of the following discretionary exceptions in Part III of the *Act*, that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception:
       - section 19 (local public body confidences)
       - section 20 (policy advice or recommendations)
       - section 21 (legal advice)
       - section 22.1 (confidential evaluations)
       - section 23 (disclosure harmful to intergovernmental relations or negotiations)
       - section 24 (disclosure harmful to the financial or economic interests of a public body)
       - section 25 (disclosure harmful to conservation)
       - section 26.1 (disclosure harmful to labour relations interests of public body as employer)

11. The Office of the Information and Privacy Commissioner provide training for public bodies, as well as general guidance manuals on the public interest test, including how it is to be applied.

12. Sections 7(4),(5), and (6) of the *Act*, respecting briefing books prepared for ministers assuming responsibility for a new department or to prepare for a sitting of the House of Assembly, be repealed.

13. Public bodies change the manner in which briefing books are assembled, so that policy advice and Cabinet confidences are easily separable from factual information.

14. The *ATIPPA* contain a provision that would result in absolute protection from disclosure for the following Cabinet records:
    i. advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet,
    ii. draft legislation or regulations submitted or prepared for submission to the Cabinet,
    iii. a memorandum the purpose of which is to present proposals or recommendations to the Cabinet,
    iv. a discussion paper, policy analysis, proposal, advice or briefing material prepared for the Cabinet, excluding the sections of these records that are factual or background material,
    v. an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet,
    vi. a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy,
    vii. a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet,
    viii. a record created during the process of developing or preparing a submission for the Cabinet, or
    ix. that portion of a record which contains information about the contents of a record within a class of information referred to in subparagraphs (i) to (viii).

15. With respect to all other records, the *ATIPPA* require that information in those records that would reveal the substance of Cabinet deliberations not be disclosed.

16. The Commissioner have unfettered jurisdiction to require production for examination of any document claimed to be a Cabinet document.

17. The Clerk of the Executive Council have discretion to disclose any Cabinet record where the Clerk is satisfied that the public interest in disclosure of the Cabinet record outweighs the reason for the exception.

18. The present provision in the *Act* requiring release of Cabinet documents more than twenty years old be retained.

19. Consistent with its Open Government policy, the Government should proactively release as much Cabinet material as possible, particularly materials related to matters considered routine.

20. Section 20(1)(b) of the *ATIPPA* should be deleted and replaced with "the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made by the head within 65 business days of delivery of the report."

21. Section 20(1)(c) of the *ATIPPA* should be repealed. There is adequate protection for deliberations involving officials and their ministers, as it relates to the policy-making and decision process, in section 20(1)(a).

22. The revised *Act* contain a provision similar to existing section 21 respecting solicitor-client privilege.

23. The *Act* have no restriction on the right of the Commissioner to require production of any record for which solicitor-client privilege has been claimed and the Commissioner considers relevant to an investigation of a complaint.

24. The *Act* provide that the solicitor-client privilege of the record produced to the Commissioner shall not be affected by disclosure to the Commissioner pursuant to the *Act*.

25. The *Act* not contain any limitation on the right of a person refused access to a record, on the basis that the record is subject to solicitor-client privilege, to complain to the Commissioner about that refusal.

26. The *Act* contain a provision that would require the head of a public body, within 10 business days of receipt of a recommendation from the Commissioner that a record in respect of which solicitor-client privilege has been claimed be provided to the requester, to either comply with the recommendation or apply to a judge of the Trial Division of the Supreme Court for a declaration that the public body is not required, by law, to provide the record.

27. The *Act* contain provisions requiring that the application to the Trial Division for a declaration be heard by use of the most expeditious summary procedures available in the Trial Division.

28. The *Act* contain provisions prohibiting the imposition, by any public body, of conditions of any kind on access by the Office of the Information and Privacy Commissioner to a requested record for which solicitor-client privilege has been claimed, other than a requirement, where there is a reasonable basis for concern about the security of the record, that the head of the public body may require the Office of the Information and Privacy Commissioner official to attend at a site determined by the head of the public body to view the record.

29. The *Act* contain a provision that prohibits disclosure by the head of a public body of information that is subject to solicitor-client privilege of a person that is not a public body.

30. Section 27(1) of the *Act*, respecting third party business interests, revert to the wording that existed prior to the Bill 29 amendments.

31. Section 28(1) of the *Act*, respecting notice to third parties, revert to the pre-Bill 29 wording of "intention" rather than "consideration."

Chapter four:

Records to which the *ATIPPA* does not apply

The Committee recommends that

32. The *Act* provide for all items listed in existing section 5(1) of the *ATIPPA* remaining on a list of items to which the *ATIPPA* does not apply.

33. One further item be added to the list of items in section 5(1) to which the *ATIPPA* does not apply, namely:
    - a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

34. The *Act* provide for specific direction that the Commissioner is not empowered to require production of records presently described in items (a), (b), (k), (l), and (m) of existing section 5(1) of the *ATIPPA*, as well as the proposed new item referred to in Recommendation 33.

35. The *Act* provide for the granting to the Commissioner of express authority to require production of records relating to disputes regarding records described in items (c), (c.1), (d), (g), (h), (i), and (j) of existing section 5(1) of the *ATIPPA*, to determine whether those records fall within the Commissioner's jurisdiction or are properly claimed to be exempt from application of the *ATIPPA*.

36. Changes be made to section 53 of the *Act* that correspond to the changes in Recommendations 34 and 35 respecting the right of the Commissioner to enter offices of public bodies and to access and review records.

Chapter five:

Legislative provisions that prevail over the *ATIPPA*

The Committee recommends

37. The following provisions be removed from the list of legislative provisions that prevail over the *ATIPPA*:
    - subsection 9(4) of the *Aquaculture Act*;
    - subsections 5(1) and (4) of the *Aquaculture Regulations*;
    - section 18 of the *Lobbyist Registration Act*;
    - section 15 of the *Mining Act*;
    - sections 47 and 52 of the *Royalty Regulations, 2003*;
    - sections 17.1 and 17.2 of the *Revenue Administration Act*.

38. All of the remaining legislative provisions presently listed in the *Access to Information Regulations*, other than those specified in Recommendation 37 above, remain on a list of legislative provisions that prevail over the *ATIPPA*.

39. An amendment be made to the provision that is section 6(2) of the *Act*, to provide that the list of legislative provisions that will prevail over the *ATIPPA* are those listed in a schedule to the *ATIPPA*.

40. A provision be added to provide for the Commissioner having jurisdiction to require production of all records in respect of which exemption from disclosure is claimed under any of the legislative provisions specified in that schedule to the *ATIPPA*, and the corresponding right of entry under section 53 in respect of those records.

41. An addition be made to what is existing section 74, of a provision that will require that every statutory five-year review include review of each of the legislative provisions listed in that schedule to the *ATIPPA* to determine the necessity for continued inclusion in the list of provisions that prevail over the *ATIPPA*.

42. A section be added that will authorize the Lieutenant-Governor in Council, at any time when the House of Assembly is not in session and it is considered necessary to take action before the House of Assembly will next meet, to make an order adding a statutory or regulatory provision to that schedule to the *ATIPPA*, but such order shall not continue in force beyond the end of the next sitting of the House of Assembly.

43. Items (c), (o), (q) and (r) be removed from the items of regulation making powers in section 73 of the *Act*.

44. In addition to the foregoing recommendations respecting the *ATIPPA*:
    a. The Committee recommends that the Government consider placing a bill before the House of Assembly to amend section 5.4(1) of the *Energy Corporation Act*, and section 21 of the *Research and Development Council Act*, by inserting the phrase "taking into account sound and fair business practices" immediately before the words "reasonably believes" in each of those sections.
    b. The Committee recommends that more information respecting the justification for section 8.1 of the *Evidence Act*, section 5(1) of the *Fish Inspection Act*, section 4 of the *Fisheries Act*, and section 13 of the *Statistics Agency Act* being continued on the list of legislative provisions that prevail over the *ATIPPA* be made available to the next *ATIPPA* statutory review committee, for any of those provisions that are on the list at that time.

Chapter six:

Personal information protection

The Committee recommends that

45. A provision be added to the *ATIPPA* along the lines of the British Columbia *Freedom of Information and Protection of Privacy Act* provision that would require reasonable efforts to be made to notify third parties of the impending release of their personal information in the case of an access request. A third party would be allowed an opportunity to make a complaint to the Commissioner before such action is taken.

46. The Office of Public Engagement, in consultation with the Newfoundland and Labrador Fire and Emergency Services Agency, examine how the information rights (access and personal) of persons are best protected in emergency situations involving the population's health or safety.

47. Sections 30(2)(c) and 39(1)(p) of the *Act* be amended to include any form of communications appropriate to the circumstances.

48. The *Act* be amended to require a public body to:
    a. report all privacy breaches to the Commissioner and
    b. notify affected individuals when there is a risk of significant harm created by a privacy breach.

49. Section 71 of the *ATIPPA* should be amended to provide Members of the House of Assembly immunity in cases where they disclose personal information while acting in good faith in the course of attempting to help a constituent.

50. Section 30(2)(m) of the *Act* be deleted and there be added to what is presently section 30(5) a provision that would require public bodies to consider disclosing personal information of the deceased to an applicant where the length of time that has elapsed since death would allow a determination that disclosure is not an unreasonable invasion of privacy.

51. Section 30(2)(f) of the *Act* should revert to the pre-Bill 29 wording of "remuneration" rather than "salary range", and remuneration would include salary and benefits.

52. The Office of the Information and Privacy Commissioner should study the continuing use of social media by public bodies and make recommendations where necessary to modify the social media protocol of public bodies.

53. It is appropriate for Government to consider the need to provide, in labour standards legislation, for protection of personal information of employees where that information is held by employers not covered by the *ATIPPA*.

Chapter seven:

The Information and Privacy Commissioner

The Committee recommends that

54. The ombuds oversight model be retained, with the exception that decisions of the Commissioner respecting extensions of time, estimates of charges, waiving of charges and any other procedural matters be final and not subject to appeal.

55. The powers of the Office of the Information and Privacy Commissioner be increased to reflect proposals discussed elsewhere in this report.

56. The Office of the Information and Privacy Commissioner adopt the changes in procedures and practices presently employed in the Commissioner's review processes that are necessary to reflect the comments of the Committee in this and other chapters.

57. Oversight by the Office of the Information and Privacy Commissioner include responsibility for approving all extensions of time and all decisions to disregard an application, and that amendments to the *ATIPPA* result in:
    a. eliminating the ability of public bodies to unilaterally extend the basic time limit;
    b. providing for extension only for such time as the OIPC shall, on the basis of convincing evidence, approve as being reasonably required;
    c. requiring that the requester be advised without delay of the extension and the reasons for it; and

d. permitting a public body to disregard a request only upon prior approval of the OIPC, sought immediately upon the public body concluding that the request should be disregarded, and in no event later than five business days after receipt of the request.

58. The provisions of the legislation relating to the oversight model should indicate that, with respect to access to information and protection of personal information:
    a. priority is to be accorded to requesters achieving the greatest level of access and protection permissible, within the shortest reasonable time frame, and at reasonable cost to the requester; and
    b. the Office of the Information and Privacy Commissioner has primary responsibility to:
        - advocate for the achievement of that priority
        - advocate for the resources necessary
        - monitor, and audit as necessary, the suitability of procedures and practices employed by public bodies for achievement of that priority
        - draw to the attention of the heads of public bodies and to the Minister responsible for the Office of Public Engagement any persistent failures of public bodies to make adequate efforts to achieve the priority
        - provide all reasonable assistance to requesters when it is sought
        - have in place such procedures and practices as shall result in all complaints being fully addressed, informal resolution, where appropriate, being completed and any necessary investigation and report being completed strictly within the time limits specified in the *Act*
        - inform the public from time to time of any apparent deficiencies in any aspect of the system, including the Office of the Information and Privacy Commissioner, that is in place to provide for access to information and protection of personal information

59. The provision of the *Act* providing for appointment of the Information and Privacy Commissioner by the Lieutenant-Governor in Council on resolution by the House of Assembly be retained for future appointments, but that there be added thereto the following:
    a. Before an appointment is made, the Speaker of the House of Assembly shall put in place a selection committee comprising
        i. The Clerk of the Executive Council or his or her deputy,
        ii. The Clerk of the House of Assembly or if the Clerk is unavailable, the Clerk Assistant of the House of Assembly,
        iii. The Chief Judge of the Provincial Court or another judge of that court, designated by the Chief Judge, and
        iv. The President of Memorial University or a vice-president of Memorial University, designated by the President.
    b. The selection committee shall develop a roster of qualified candidates, and in the course of doing so may, if the committee considers it necessary, publicly invite expressions of interest in being nominated for the position, and submit the roster of persons qualified to the Speaker.
    c. The Speaker shall consult with the Premier, the Leader of the Opposition and the leader or member of another party that is represented on the House of Assembly Management Commission, and after doing so, cause to be placed before the House of Assembly for approval the name of one of the persons on the roster to be appointed Commissioner.

60. The Commissioner be appointed for a term of six years, and be eligible for one further term of six years, on re-appointment by the Lieutenant-Governor in Council after approval by a majority of the members on the Government side of the House of Assembly and separate approval by a majority of the members on the opposition side of the House of Assembly, with the Speaker having the right to cast a tie-breaking vote on either or both sides of the House of Assembly.

61. A provision be added to the *ATIPPA* to specify that in respect of all interactions with a public body, whether or not it is a public body to which the *Act* applies, the Commissioner have the status of a Deputy Minister.

62. The provision contained in section 42.5 of the *Act* respecting salary of the Commissioner be replaced by a provision to require that the Commissioner receive a salary that is 75% of the salary of a Provincial Court Judge, other than the Chief Judge, and, apart from pension, the additional benefits as provided to a Deputy Minister.

63. The provision respecting pension contained in section 42.5(3) of the *Act* be retained and there be added a provision that, where the Commissioner is not subject to the *Public Service Pensions Act, 1991* prior to his or her appointment as Commissioner, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the public service pension plan.

64. **With respect to the role of the Commissioner in access to information that the *Act* provide for:**
    a. a role and jurisdiction to promote and facilitate efficient and timely access to requested information unless there is a clear and lawful reason for withholding access;
    b. a jurisdiction that will enable the Office of the Information and Privacy Commissioner to carry out the duty to advocate for the principle of the fullest possible timely access to information while preserving from disclosure only those records that are of the limited class or kind specifically provided for in law;
    c. procedures that will enable the Office of the Information and Privacy Commissioner to respond to citizens' complaints or requests for assistance in an efficient and timely manner; and
    d. time limits for any procedure under the statute that will result in the information still having value to the requester.

65. **With respect to the role of the Commissioner in protection of personal information that the *Act* provide for:**
    a. The Commissioner being empowered to review, and if thought appropriate, authorize the collection of personal information from sources other than the individual the information is about, and section 51 of the Act being amended to that effect and the corresponding power being added to section 33(1)(a).
    b. Section 44(2) being eliminated and a new section being created encapsulating the Commissioner's power to accept a complaint from an individual concerning his or her own personal information or, with consent, the personal information of another individual, where he or she has reasonable grounds to believe it has been collected, used, or disclosed contrary to the Act.
    c. The Commissioner having the power to accept such a complaint from a person or organization on behalf of a group of individuals where the individuals have given their consent.
    d. The new provision to confer a power parallel to the Commissioner's power to review a complaint under section 43 and make a recommendation to a public body to destroy information or to stop collecting, using or disclosing information. If the head of the public body does not agree with that recommendation then the head could seek a declaration in the Trial Division. If the head does not seek a declaration and

does not comply, then the Commissioner could file the recommendation as an order of the court.

e. The Commissioner having the duty to review a privacy impact assessment developed by a department of government for any new common or integrated program or service for which disclosure of personal information may be permitted under section 39(1)(u).
f. A requirement for all public bodies to report privacy breaches to the Commissioner.
g. The Commissioner having broad powers to investigate on his own initiative.

66. With respect to the role of the Commissioner generally that the *Act* provide for:

a. a banking system to appropriately deal with circumstances where one person or one group continues to file complaints while that person or group has more than five complaints outstanding;
b. a mandate to develop and deliver an educational program aimed at better informing people as to the extent of their rights under the *Act* and the reasonable limits on their rights, and better informing public bodies and their employees as to their responsibilities and their duty to assist;
c. a mandate to engage in or commission research;
d. a mandate to audit, on his or her own initiative, the practices of public bodies in carrying out their statutory responsibilities under the *ATIPPA*;
e. a requirement that government consult with the Commissioner as soon as possible prior to and in no event later than the date on which notice is given to introduce a bill in the House of Assembly, to obtain advice as to whether or not the provisions of any proposed legislation could have implications for access to information or protection of privacy and a requirement that the Commissioner comment on those implications;
f. a duty to take actions necessary to identify, promote, and where possible, cause to be made, adjustments to practices and procedures that will improve public access to information and protection of personal information; and
g. the Commissioner should have the power to make special reports at any time on any matters affecting the operations of the *ATIPPA*.

67. There be added to the items listed in the section 70 of the *Act* respecting the annual report of the Minister, the following:

e. systemic and other issues raised by the Commissioner in the Office of the Information and Privacy Commissioner annual reports.

68. Each annual report of the Commissioner contain a time analysis generally consistent with that set out in Table 9 of Volume II of the report of the functions and procedures employed from the date of receipt of the application for access to the records or correction of personal information to the closing of the matter after informal resolution, the issuing of the Commissioner's review report, or the withdrawal of the request, whichever applies, for all complaints made to the Commissioner.

69. The Committee recommends that the revised statute make provision for the following:

i. Processing request for access

The head of a public body shall make every reasonable effort to assist an applicant in making a request for access to information or correction of personal information and to respond without delay to an

applicant in an open, accurate, and complete manner. Following the procedures and any applicable variations or extensions provided for in the statute, the head of a public body shall respond to the request within 20 business days of receipt of the request, or within the time resulting from application of the procedures set out in the sequence of actions and timelines in Recommendation 70.

ii. Making a complaint to the Commissioner

If a requester is dissatisfied with a decision, act, or failure to act of a public body, arising out of a request for access to information or correction of personal information, or a third party is dissatisfied with a decision to release information, either may, within 15 business days of notice of the decision being given by the public body, complain to the Commissioner about the decision, act, or failure to act of the head of the public body. Upon receipt of a complaint, the Commissioner shall provide a copy to the public body and any other party involved, and advise them and the complainant of their right to make representation to the OIPC within 10 business days of the date of notification.

The Commissioner may take any steps that he or she considers appropriate to resolve the complaint informally, to the satisfaction of all parties and in a manner consistent with the *Act*.

The Commissioner may terminate the attempt to resolve the matter informally at any time that he or she concludes it is not likely to be successful and shall terminate it within 30 business days after receipt of the complaint, unless before that time the Commissioner receives from each party involved a written request to continue the efforts to resolve the matter informally beyond the expiration of that period of 30 business days until the matter is informally resolved or a further 20 business days expire, whichever shall first occur.

The Commissioner shall, not later than 65 business days after receipt of the complaint, complete a report. That time limit is firm, whether or not the informal resolution period has been extended. The report is to contain the Commissioner's findings on the review, his or her recommendations, where appropriate, and a brief summary of the reasons for those recommendations. The Commissioner shall then forward a copy to each of the parties.

Within 10 business days of receipt of the Commissioner's recommendation, the public body shall decide whether it will comply with the recommendation of the Commissioner or whether it will seek a declaration from the Trial Division that it is not required by law to so comply, and shall within those 10 business days serve notice of its decision on all other persons to whom the Commissioner's report was sent, and inform them of the right of any party that is dissatisfied with the decision to appeal the decision to the Trial Division and of the time limit for an appeal.

If the public body fails to make that decision and serve the prescribed notice within the time specified, or having done so fails to carry out its decision within 15 business days after receiving the Commissioner's report, the Commissioner may prepare and file an excerpt from the Commissioner's report, that contains only the recommendation that the public body grant access to a record or correct personal information, in the Registry of the Trial Division of the Supreme Court, and the same shall constitute an order of that court.

Whether or not the public body decides to comply with the Commissioner's recommendation, if the requester or third party is dissatisfied with the decision received from the public body, the requester or third party may, within 10 business days of receipt of the decision of the public body, appeal to the Trial Division of the Supreme Court, and if requested, either or both of the Commissioner and the other party shall be granted intervenor status.

iii. Appeals to the Trial Division of the Supreme Court

Where an appeal by either a requester or a third party is taken to the Trial Division or a public body makes an application to the Trial Division for a declaration pursuant to the *Act*, the fact that there has already been significant delay in final determination of entitlement to access the requested information shall be sufficient to establish special urgency, and the matter shall proceed in accordance with the *Rules of the Supreme Court of Newfoundland and Labrador, 1986* providing for expedited trial, or such adaptation of those rules as the court or judge considers appropriate in the circumstances.

70. The Committee further recommends that the timelines and sequence of actions to be applied to all procedures from the making of the initial request for a record to the taking of an appeal to the Trial Division of the Supreme Court should be set out in a readily identifiable part of the statute. Those provisions should reflect the following:

Sequence of action and timelines

Day Request Received

Any employee of a public body, who is not the ATIPP coordinator of that public body, receiving a request for access to information or for correction of personal information shall date and time stamp the request and, without disclosing the name of the requester to any other person, forward the request to the ATIPP coordinator for the public body.

Upon receipt of that request the ATIPP coordinator shall advise the requester of its receipt and start the search process at the earliest possible opportunity. The ATIPP coordinator shall not disclose the name of the requester to any other person other than coordinator's assistant and the Commissioner, except where it is a request for the requester's personal information or the requester's identity is required to respond to the request.

Whenever any notice is to be given to, or information is to be received from, the requester or a third party by the public body, it shall be given or received through the ATIPP coordinator.

Business Day 1 to Business Day 5

The head of a public body may, upon notifying the requester that it is doing so, transfer a request for access to a record or correction of personal information to another public body, within 5 business days after receiving it, where it appears that the record was produced by or for or is in the custody or control of that other public body. That other public body shall thereafter treat the request as if it had received the request from the requester on the date it was received from the public body that received it from the requester.

OR

If the public body concludes that the request is frivolous or vexatious, or for any other valid reason it should be disregarded, the public body may, no later than 5 business days after receipt of the request, apply to the Commissioner for approval to disregard the request. The Commissioner shall respond to the public body's application without delay and in no event later than three business days after receiving it. If the Commissioner approves disregarding the request, the public body shall immediately advise the requester.

Business Day 10

The head of a public body will release the record if it is then available and the law does not permit or require the head to refuse release, or correct the personal information, if the requested correction is justified and can readily be made.

OR

The ATIPP coordinator shall forward an advisory response to the requester advising:

- any then-known circumstance that could result in denial of the request
- any then-known cause that could delay the response beyond 20 business days from receipt of the request and the estimated length of that possible delay
- the estimated cost, if any
- any then-known third party interest in the request
- possible revisions to the request that may facilitate its sooner and less costly response
- any other factor, of which the public body is then aware, that could prevent release or correction of the record as requested within the 20 business day basic time limit

Business Day 10 to Business Day 20

If circumstances make it reasonable that the requester be informed of factors arising in the course of addressing the request, of which the requester was not previously made aware, that may adversely affect disclosure or correction of the record as requested within the time required, the public body shall forward a further advisory response or responses to the requester.

OR

The public body will forward to the requester the final response as soon as it is possible to do so, but no later than 20 business days after receipt of the request, unless extension of that time has been approved by the Commissioner.

OR

As soon as the public body concludes that an extension will be required, and no later than 15 business days after the request was received, the public body shall apply to the Commissioner for an extension of time. The Commissioner may refuse the requested extension or, if satisfied that an extension is necessary and reasonable in the circumstances, grant an extension for the minimum period that the Commissioner considers to be necessary for the public body to fully respond. The head of the public body shall notify the requester of the extension, if approved.

If an extension of time is granted, any procedures otherwise applicable shall continue to apply during that extended period, and the public body shall provide the requester with a final response within the extended time approved by the Commissioner.

OR

Where the public body becomes aware of third party interest, upon forming the intention to release the requested record, the public body shall make every reasonable effort to notify the third party. Immediately upon the public body deciding to release the requested record, the public body shall inform the third party of its decision to release the record unless it receives confirmation from the third party or the Commissioner that the third party has within 15 business days filed a complaint with the Commissioner or appealed directly to the Trial Division.

If the public body receives confirmation that the third party has filed a complaint with the Commissioner or appealed to the Trial Division, the public body shall notify the requester and shall not release the requested record until it receives a recommendation from the Commissioner or an order of the court. Immediately after receipt of the Commissioner's recommendation, the public body shall notify the Commissioner, the requester, and the third party of its decision.

The public body shall withhold acting on its decision until the time limited for any appeal therefrom has expired and, if no appeal is taken, proceed with its decision, but if within that time an appeal is taken from that decision, the public body shall continue to withhold action on its decision pending an order of the court.

Chapter eight:

Municipalities—ensuring transparency and accountability while protecting privacy

The Committee recommends that

71. The Department of Municipal and Intergovernmental Affairs, after consultation with the Office of Public Engagement and the Commissioner, develop a standard for public disclosure generally acceptable in the provision of good municipal governance that takes reasonable account of the importance of personal privacy, but does not subordinate good municipal governance to it.

72. That standard be enacted in a section of the *Municipalities Act, 1999* and the *ATIPPA* be amended to add that provision to the legislative provisions that prevail over the *ATIPPA*.

73. Additional language be added to the definition of public body under section 2(p) of the *ATIPPA* to include municipally owned and directed corporations.

74. The Office of Public Engagement formalize and provide the necessary support to assist municipalities in conforming with the *ATIPPA*, including
    - a help desk at the ATIPP Office
    - refresher courses offered through webinars or regional meetings
    - *ATIPPA* guidance web pages on municipal council websites

75. That municipal access to information and protection of privacy policies be developed in line with the suggestion in the Municipal Handbook 2014 and be published on municipal council websites.

76. It is urgent that thorough and adapted training be given to municipal ATIPP coordinators throughout the province. The Office of Public Engagement should continue in its training, updating, and resource provision role in consultation with the Department of Municipal and Intergovernmental Affairs and the Commissioner's office.

77. A final version of the Guide to the interpretation of the *ATIPPA* in the context of municipalities, taking account of the concerns raised by this Committee, should be developed by the Office of Public Engagement as soon as possible after implementation of Recommendation 71, in consultation with the Department of Municipal and Intergovernmental Affairs and the Office of the Information and Privacy Commissioner.

Chapter nine:

Requested exceptions to the access principle

The Committee recommends that

78. Section 38.1(2)(c) of the *ATIPPA* respecting the use of personal information by post-secondary educational bodies for fundraising purposes be amended by removing the requirement to publish in a newspaper notice of the right to opt out.

Chapter ten:

Information management

The Committee recommends that

79. The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the *Management of Information Act*, not the *ATIPPA*.

80. Implementation and operation of this new section of the *Management of Information Act* be subject to such monitoring or audit and report to the House of Assembly by the OIPC as the Commissioner considers appropriate.

81. Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems.

82. The *ATIPPA* be amended to:
    a. define "records" in the *ATIPPA* to include datasets and other machine readable records;
    b. require that disclosure of such records be subject only to the limitations applied to all other records of public bodies;
    c. require that datasets be provided to the requester in a re-usable format; and

d. in relation to section 10(2) of the *ATIPPA*, the head of a public body consult the applicant before creating such a record.

83. As a matter of good practice, public bodies should work with applicants and other groups, so that datasets and other machine readable records can be understood and full use can be made of them.

84. Section 69 of the *ATIPPA* should be revised to:

a. give the Commissioner the responsibility for creating a standard template for the publication of information by public bodies;

b. give each public body the obligation of adapting the standard template to its functions and publishing its own information.

85. A new regulation-making power be added to the *Act* to enable Cabinet to prescribe which public bodies are required to comply with Section 69 of the *Act*.

Chapter eleven:

Other issues

86. The Committee recommends that the present subsection 22.2(2) of the *Act* be replaced with a subsection reading "The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation."

87. The Committee agrees with the Commissioner that where the head of a public body is in possession of records of a statutory office, section 30.1 of the *Act* should apply and recommends that section 30.1 be so amended.

88. The Committee recommends that section 72 of the *Act* be amended to provide for an offence provision that reflects the Commissioner's recommendation.

89. The Committee recommends that the next five-year statutory review of the *Act* be expressly mandated to assess the time limits for provisions that have specific protection periods.

Chapter twelve:

Recommended statutory changes

The Committee recommends that

90. The draft bill attached, be presented to the House of Assembly for consideration, and that

a. The Commissioner be consulted on the draft bill but care should be taken to ensure that the Committee's

concerns respecting timeliness and practices and procedures in the Office of the Information and Privacy Commissioner are addressed.

b. Consideration be given to phasing in the provisions of any resulting enactment in a manner that will allow appropriate time for implementation.

c. Where the House of Assembly enacts any of the Committee's recommendations, the Minister of the Office of Public Engagement report to the House of Assembly, within one year of such enactment, on the progress of its implementation.

THE DRAFT BILL

EXPLANATORY NOTES

This Draft Bill would revise the law respecting access to records and protection of personal information held by public bodies. The Bill would maintain the ombuds model for access and personal information protection but give the commissioner decision-making power in certain procedural matters. With respect to access to a record or correction of personal information, the Bill would

- provide a public interest override for specified discretionary exceptions to access;
- require anonymity in most requests;
- require the access and privacy coordinator to be the only person on behalf of a public body to communicate with an applicant or third party;
- enable disclosure of datasets;
- require the commissioner's approval before a public body disregards a request;
- provide for extensions of time beyond 20 business days only where approved by the commissioner, whose decision is final;
- eliminate application fees and reduce the costs to access records, with disputes respecting an estimate or waiver of costs to be determined by the commissioner, whose decision is final;
- remove the mandatory exemption from disclosure of briefing materials created for ministers assuming new portfolios or preparing for a sitting of the House of Assembly;
- revise the exceptions to access in the provisions respecting cabinet confidences, policy advice or recommendations, legal advice, information from a workplace investigation, third party business interests, disclosure harmful to personal privacy, and disclosure of statutory office records;
- provide for and require a more expeditious complaint and investigation process;
- allow a third party to complain to the commissioner or commence an appeal directly in the Trial Division of a public body's decision to disclose the third party's business information or personal information to an applicant;
- where the commissioner recommends access to a record or correction of personal information, require the head of a public body either to comply with the commissioner's recommendation or seek a declaration in the Trial Division that the head is not required by law to comply; and
- enable the commissioner to file an order of the court in the circumstances where the head of a public body fails to comply with the commissioner's recommendation to grant access to a record or make a correction to personal information or fails to seek a declaration.

With respect to privacy, the Bill would

- require public bodies to notify affected individuals of a privacy breach that creates a risk of significant harm to the individual and to report all privacy breaches to the commissioner;
- require government departments to prepare privacy impact assessments during the development of programs or services unless a preliminary assessment of the program or service indicates a full assessment is not necessary;

- provide for privacy investigations on the commissioner's own motion or on receipt of a complaint by an individual or by a representative of a group of individuals;
- require the commissioner to prepare a report following a privacy investigation and require the head of a public body to respond to that report, and enable certain recommendations to be filed as orders of the court;
- where the commissioner recommends that a public body stop collecting, using or disclosing personal information in contravention of the Act or destroy personal information collected in contravention of the Act, require the head of a public body either to comply with the commissioner's recommendation or seek a declaration in the Trial Division that the head is not required by law to comply; and
- provide for an order that the Trial Division may make.

The Bill would strengthen the role of the Office of the Information and Privacy Commissioner as an advocate for access and protection of personal information. The Bill would

- provide an appointment process, term and salary that supports the independence of the commissioner;
- give the commissioner the power to review cabinet records, solicitor-client privileged records and other records in the custody or under the control of a public body, except for some of the records to which the Act does not apply;
- give the commissioner the power to carry out investigations and audits and make special reports to the House of Assembly; and
- require the commissioner to create a standard template for the publication of information by public bodies and to review proposed bills that could have implications for access to information and protection of privacy.

The Bill would make further changes to

- expand the application of the Act to corporations and other entities that are owned by or created by or for municipalities; and
- strengthen the offence provision.

A DRAFT BILL
AN ACT TO PROVIDE THE PUBLIC WITH ACCESS TO INFORMATION AND PROTECTION OF PRIVACY

Analysis

5. Application
6. Relationship to *Personal Health Information Act*
7. Conflict with other Acts

PART II
ACCESS AND CORRECTION

DIVISION 1
THE REQUEST

8. Right of access
9. Public interest
10. Right to request correction of personal information
11. Making a request
12. Anonymity
13. Duty to assist applicant
14. Transferring a request
15. Advisory response
16. Time limit for final response
17. Content of final response for access
18. Content of final response for correction of personal information
19. Third party notification
20. Provision of information
21. Disregarding a request
22. Published material
23. Extension of time limit
24. Extraordinary circumstances
25. Costs
26. Estimate and waiver of costs

DIVISION 2
EXCEPTIONS TO ACCESS

27. Cabinet confidences

28. Local public body confidences

29. Policy advice or recommendations

30. Legal advice

31. Disclosure harmful to law enforcement

32. Confidential evaluations

33. Information from a workplace investigation

34. Disclosure harmful to intergovernmental relations or negotiations

35. Disclosure harmful to the financial or economic interests of a public body

36. Disclosure harmful to conservation

37. Disclosure harmful to individual or public safety

38. Disclosure harmful to labour relations interests of public body as employer

39. Disclosure harmful to business interests of a third party

40. Disclosure harmful to personal privacy

41. Disclosure of House of Assembly service and statutory office records

DIVISION 3
COMPLAINT

42. Access or correction complaint

43. Burden of proof

44. Investigation

45. Authority of commissioner not to investigate a complaint

46. Time limit for formal investigation

47. Recommendations

48. Report

49. Response of public body

50. Head of public body seeks declaration in court

51. Filing an order with the Trial Division

DIVISION 4
APPEAL TO THE TRIAL DIVISION

52. Direct appeal to Trial Division by an applicant

53. Direct appeal to Trial Division by a third party

54. Appeal of public body decision after receipt of commissioner's recommendation

55. No right of appeal

56. Procedure on appeal

57. Practice and procedure

58. Solicitor and client privilege

59. Conduct of appeal

60. Disposition of appeal

PART III
PROTECTION OF PERSONAL INFORMATION

DIVISION 1
COLLECTION, USE AND DISCLOSURE

61. Purpose for which personal information may be collected

62. How personal information is to be collected

63. Accuracy of personal information

64. Protection of personal information

65. Retention of personal information

66. Use of personal information

67. Use of personal information by post-secondary educational bodies

68. Disclosure of personal information

87. Term of office

88. Removal or suspension

89. Acting commissioner

90. Salary, pension and benefits

91. Expenses

92. Commissioner's staff

93. Oath of office

94. Oath of staff

DIVISION 2
POWERS OF THE COMMISSIONER

95. General powers and duties of commissioner

96. Representation during an investigation

97. Production of documents

98. Right of entry

99. Admissibility of evidence

100. Privilege

101. Section 8.1 of the *Evidence Act*

102. Disclosure of information

103. Delegation

104. Protection from liability

105. Annual report

106. Special report

107. Report – investigation or audit

PART V
GENERAL

108. Exercising rights of another person

109. Designation of head by local public body

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title

1. This Act may be cited as the *Access to Information and Protection of Privacy Act, 2015*.

PART I
INTERPRETATION

Definitions

2. In this Act

(a) "applicant" means a person who makes a request under section 11 for access to a record, including a record containing personal information about the person, or for correction of personal information;

(b) "business day" means a day that is not a Saturday, Sunday or a holiday;

(c) "Cabinet" means the executive council appointed under the *Executive Council Act*, and includes a committee of the executive council;

(d) "commissioner" means the Information and Privacy Commissioner appointed under section 85;

(e) "complaint" means a complaint filed under section 42;

(f) "coordinator" means the person designated by the head of the public body as coordinator under subsection 110(1);

(g) "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection

(i) has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or the carrying out of another function of the public body,

(ii) is factual information

(A) which is not the product of analysis or interpretation other than calculation, and

(B) to which section 13 of the *Statistics Agency Act* does not apply, and

(iii) remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adopted or otherwise materially altered since it was obtained or recorded;

(h) "educational body" means

(i) Memorial University of Newfoundland,

(ii) College of the North Atlantic,

(iii) Centre for Nursing Studies,

(iv) Western Regional School of Nursing,

(v) a school board, school district constituted or established under the *Schools Act, 1997*, including the conseil scolaire francophone, and

(vi) a body designated as an educational body in the regulations made under section 116;

(i) "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;

(j) "head", in relation to a public body, means

(i) in the case of a department, the minister who presides over it,

(ii) in the case of a corporation, its chief executive officer,

(iii) in the case of an unincorporated body, the minister appointed under the *Executive Council Act* to administer the Act under which the body is established, or the minister who is otherwise responsible for the body,

(iv) in the case of the House of Assembly the speaker and in the case of the statutory offices as defined in the *House of Assembly Accountability, Integrity and Administration Act*, the applicable officer of each statutory office, or

(v) in another case, the person or group of persons designated under section 109 or in the regulations as the head of the public body;

(k) "health care body" means

(i) an authority as defined in the *Regional Health Authorities Act*,

(ii) the Mental Health Care and Treatment Review Board,

(iii) the Newfoundland and Labrador Centre for Health Information, and

(iv) a body designated as a health care body in the regulations made under section 116;

(l) "House of Assembly Management Commission" means the commission continued under section 18 of the *House of Assembly Accountability, Integrity and Administration Act*;

(m) "judicial administration record" means a record containing information relating to a judge, master or justice of the peace, including information respecting

(i) the scheduling of judges, hearings and trials,

(ii) the content of judicial training programs,

(iii) statistics of judicial activity prepared by or for a judge,

(iv) a judicial directive, and

(v) a record of the Complaints Review Committee or an adjudication tribunal established under the *Provincial Court Act, 1991*;

(n) "law enforcement" means

(i) policing, including criminal intelligence operations, or

(ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment;

(o) "local government body" means

(i) the City of Corner Brook,

(ii) the City of Mount Pearl,

(iii) the City of St. John's,

(iv) a municipality as defined in the *Municipalities Act, 1999*, and

(v) a body designated as a local government body in the regulations made under section 116;

(p) "local public body" means

(i) an educational body,

(ii) a health care body, and

(iii) a local government body;

(q) "minister" means a member of the executive council appointed under the *Executive Council Act*;

(r) "minister responsible for this Act" means the minister appointed under the *Executive Council Act* to administer this Act;

(s) "officer of the House of Assembly" means the Speaker of the House of Assembly, the Clerk of the House of Assembly, the Chief Electoral Officer, the Auditor General of Newfoundland and Labrador, the Commissioner for Legislative Standards, the Citizens' Representative, the Child and Youth Advocate and the Information and Privacy Commissioner, and a position designated to be an officer of the House of Assembly by the Act creating the position;

(t) "person" includes an individual, corporation, partnership, association, organization or other entity;

(u) "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, except where they are about someone else;

(v) "privacy complaint" means a privacy complaint filed under subsection 73(1) or (2) or an investigation initiated on the commissioner's own motion under subsection 73(3);

(w) "privacy impact assessment" means an assessment that is conducted by a public body as defined under subparagraph (x)(i) to determine if a current or proposed program or service meets or will meet the requirements of Part III of this Act;

(x) "public body" means

(i) a department created under the *Executive Council Act*, or a branch of the executive government of the province,

(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,

(iv) a local public body,

(v) the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*, and

(vi) a corporation or entity owned by or created by or for a local government body or group of local government bodies,

and includes a body designated for this purpose in the regulations made under section 116, but does not include

(vii) the constituency office of a member of the House of Assembly wherever located,

(viii) the Court of Appeal, the Trial Division, or the Provincial Court, or

(ix) a body listed in Schedule II;

(y) "record" means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

(z) "remuneration" includes salary, wages, overtime pay, bonuses, allowances, honorariums, severance pay, and the aggregate of the contributions of a public body to pension, insurance, health and other benefit plans;

(aa) "request" means a request made under section 11 for access to a record, including a record containing personal information about the applicant, or correction of personal information, unless the context indicates otherwise;

(bb) "Schedule II" means the schedule of bodies excluded from the definition of public body; and

(cc) "third party", in relation to a request for access to a record or for correction of personal information, means a person or group of persons other than

(i) the person who made the request, or

(ii) a public body.

Purpose

3. (1) The purpose of this Act is to facilitate democracy through

(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;

(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and

(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

(2) The purpose is to be achieved 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 the limited exceptions to the rights of access and correction that are necessary to

(i) preserve the ability of government to function efficiently as a cabinet government in a parliamentary democracy,

(ii) accommodate established and accepted rights and privileges of others, and

(iii) protect from harm the confidential proprietary and other rights of third parties;

(d) providing that some discretionary exceptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception;

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

(f) providing for an oversight agency that

(i) is an advocate for access to information and protection of privacy,

(ii) facilitates timely and user friendly application of this Act,

(iii) provides independent review of decisions made by public bodies under this Act,

(iv) provides independent investigation of privacy complaints,

(v) makes recommendations to government and to public bodies as to actions they might take to better achieve the objectives of this Act, and

(vi) educates the public and public bodies on all aspects of this Act.

(3) 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.

Schedule of excluded public bodies

4. When the House of Assembly is not in session, the Lieutenant-Governor in Council, on the recommendation of the House of Assembly Management Commission, may by order amend Schedule II, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.

Application

5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to

(a) a record in a court file, a record of a judge of the Court of Appeal, Trial Division, or Provincial Court, a judicial administration record or a record relating to support services provided to the judges of those courts;

(b) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;

(c) a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;

(d) records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act*;

(e) a personal or constituency record of a minister;

(f) a record of a question that is to be used on an examination or test;

(g) a record containing teaching materials or research information of an employee of a post-secondary educational institution;

(h) material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person other than a public body;

(i) material placed in the archives of a public body by or for a person other than the public body;

(j) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

(k) a record relating to an investigation by the Royal Newfoundland Constabulary if all matters in respect of the investigation have not been completed;

(l) a record relating to an investigation by the Royal Newfoundland Constabulary that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter; or

(m) a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

(2) This Act

(a) is in addition to existing procedures for access to records or information normally available to the public, including a requirement to pay fees;

(b) does not prohibit the transfer, storage or destruction of a record in accordance with an Act of the province or Canada or a by-law or resolution of a local public body;

(c) does not limit the information otherwise available by law to a party in a legal proceeding; and

(d) does not affect the power of a court or tribunal to compel a witness to testify or to compel the production of a document.

Relationship to *Personal Health Information Act*

6. (1) Notwithstanding section 5, but except as provided in sections 92 to 94, this Act and the regulations shall not apply and the *Personal Health Information Act* and regulations under that Act shall apply where

(a) a public body is a custodian; and

(b) the information or record that is in the custody or control of a public body that is a custodian is personal health information.

(2) For the purpose of this section "custodian" and "personal health information" have the meanings ascribed to them in the *Personal Health Information Act*.

Conflict with other Acts

7. (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 Schedule I, that provision shall prevail over this Act or a regulation made under it.

(3) When the House of Assembly is not in session, the Lieutenant-Governor in Council may by order amend Schedule I, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.

PART II
ACCESS AND CORRECTION

DIVISION 1 THE REQUEST

Right of access

8. (1) A person who makes a request under section 11 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 excepted 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 may be subject to the payment, under section 25, of the costs of reproduction, shipping and locating a record.

Public interest

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

(a) section 28 (local public body confidences);

(b) section 29 (policy advice or recommendations);

(c) subsection 30(1) (legal advice);

(d) section 32 (confidential evaluations);

(e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

(g) section 36 (disclosure harmful to conservation); and

(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

(3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or

to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

(4) Subsection (3) applies notwithstanding a provision of this Act.

(5) Before disclosing information under subsection (3), the head of a public body shall, where practicable, give notice of disclosure in the form appropriate in the circumstances to a third party to whom the information relates.

Right to request correction of personal information

10. (1) An individual who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) A cost shall not be charged for a request for correction of personal information or for a service in response to that request.

Making a request

11. (1) A person may access a record or seek a correction of personal information by making a request to the public body that the person believes has custody or control of the record or personal information.

(2) A request shall

(a) be in the form set by the minister responsible for this Act;

(b) provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify and locate the record containing the information with reasonable efforts; and

(c) indicate how and in what form the applicant would prefer to access the record.

(3) An applicant may make an oral request for access to a record or correction of personal information where the applicant

(a) has a limited ability to read or write English; or

(b) has a disability or condition that impairs his or her ability to make a request.

(4) A request under subsection (2) may be transmitted by electronic means.

Anonymity

12. (1) The head of a public body shall ensure that the name and type of the applicant is disclosed only to the individual who receives the request on behalf of the public body, the coordinator, the coordinator's assistant and, where necessary, the commissioner.

(2) Subsection (1) does not apply to a request

(a) respecting personal information about the applicant; or

(b) where the name of the applicant is necessary to respond to the request and the applicant has consented to its disclosure.

(3) The disclosure of an applicant's name in a request referred to in subsection (2) shall be limited to the extent necessary to respond to the request.

(4) The limitation on disclosure under subsection (1) applies until the final response to the request is sent to the applicant.

Duty to assist applicant

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

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

Transferring a request

14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it, where it appears that

(a) the record was produced by or for the other public body; or

(b) the record or personal information is in the custody of or under the control of the other public body.

(2) The head of the public body to which a request is transferred shall respond to the request, and the provisions of this Act shall apply, as if the applicant had originally made the request to and it was received by that public body on the date it was transferred to that public body.

Advisory response

15. (1) The head of a public body shall, not more than 10 business days after receiving a request, provide an advisory response in writing to

(a) advise the applicant as to what will be the final response where

(i) the record is available and the public body is neither authorized nor required to refuse access to the record under this Act, or

(ii) the request for correction of personal information is justified and can be readily made; or

(b) in other circumstances, advise the applicant of the status of the request.

(2) An advisory response under paragraph (1)(b) shall inform the applicant about one or more of the following matters, then known:

(a) a circumstance that may result in the request being refused in full or in part;

(b) a cause or other factor that may result in a delay beyond the time period of 20 business days and an estimated length of that delay, for which the head of the public body may seek approval from the commissioner under section 23 to extend the time limit for responding;

(c) costs that may be estimated under section 26 to respond to the request;

(d) a third party interest in the request; and

(e) possible revisions to the request that may facilitate its earlier and less costly response.

(3) The head of the public body shall, where it is reasonable to do so, provide an applicant with a further advisory response at a later time where an additional circumstance, cause or other factor, costs or a third party interest that may delay receipt of a final response, becomes known.

Time limit for final response

16. (1) The head of a public body shall respond to a request in accordance with section 17 or 18, without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23.

(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.

Content of final response for access

17. (1) In a final response to a request for access to a record, the head of a public body shall inform the applicant in writing

(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, and

(ii) that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52, and advise the applicant of the applicable time limits and how to file a complaint or pursue an appeal.

(2) Notwithstanding paragraph (1)(c), the head of a public body may in a final response refuse to confirm or deny the existence of

(a) a record containing information described in section 31;

(b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy under section 40; or

(c) a record that could threaten the health and safety of an individual.

Content of final response for correction of personal information

18. (1) In a final response to a request for correction of personal information, the head of a public body shall inform the applicant in writing

(a) whether the requested correction has been made; and

(b) if the request is refused,

(i) the reasons for the refusal,

(ii) that the record has been annotated, and

(iii) that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52, and advise the applicant of the applicable time limits and how to file a complaint or pursue an appeal.

(2) Where no correction is made in response to a request, the head of the public body shall annotate the information with the correction that was requested but not made.

(3) Where personal information is corrected or annotated under this section, the head of the public body shall notify a public body or a third party to whom that information has been disclosed during the one year period before the correction was requested.

(4) Where a public body is notified under subsection (3) of a correction or annotation of personal information, the public body shall make the correction or annotation on a record of that information in its custody or under its control.

Third party notification

19. (1) Where the head of a public body intends to grant access to a record or part of a record that the head has reason to believe contains information that might be excepted from disclosure under section 39 or 40, the head shall make every reasonable effort to notify the third party.

(2) The time to notify a third party does not suspend the period of time referred to in subsection 16(1).

(3) The head of the public body may provide or describe to the third party the content of the record or part of the record for which access is requested.

(4) The third party may consent to the disclosure of the record or part of the record.

(5) Where the head of a public body decides to grant access to a record or part of a record and the third party does not consent to the disclosure, the head shall inform the third party in writing

(a) of the reasons for the decision and the provision of this Act on which the decision is based;

(b) of the content of the record or part of the record for which access is to be given;

(c) that the applicant will be given access to the record or part of the record unless the third party, not later than 15 business days after the head of the public body informs the third party of this decision, files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53; and

(d) how to file a complaint or pursue an appeal.

(6) Where the head of a public body decides to grant access and the third party does not consent to the disclosure, the head shall, in a final response to an applicant, state that the applicant will be given access to the record or part of the record on the completion of the period of 15 business days referred to in subsection (5), unless a third party files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53.

(7) The head of the public body shall not give access to the record or part of the record until

(a) he or she receives confirmation from the third party or the commissioner that the third party has exhausted any recourse under this Act or has decided not to file a complaint or commence an appeal; or

(b) a court order has been issued confirming the decision of the public body.

(8) The head of the public body shall advise the applicant as to the status of a complaint filed or an appeal commenced by the third party.

(9) The third party and the head of the public body shall communicate with one another under this Part through the coordinator.

Provision of information

20. (1) Where the head of a public body informs an applicant under section 17 that access to a record or part of a record is granted, he or she shall

(a) give the applicant a copy of the record or part of it, where the applicant requested a copy and the record can reasonably be reproduced; or

(b) permit the applicant to examine the record or part of it, where the applicant requested to examine a record or where the record cannot be reasonably reproduced.

(2) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and

(b) producing it would not interfere unreasonably with the operations of the public body.

(3) Where the requested information is information in electronic form that is, or forms part of, a dataset in the custody or under the control of a public body, the head of the public body shall produce the information for the applicant in an electronic form that is capable of re-use where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body;

(b) producing it would not interfere unreasonably with the operations of the public body; and

(c) it is reasonably practicable to do so.

(4) Where information that is, or forms part of, a dataset is produced, the head of the public body shall make it available for re-use in accordance with the terms of a licence that may be applicable to the dataset.

(5) Where a record exists, but not in the form requested by the applicant, the head of the public body may, in consultation with the applicant, create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

Disregarding a request

21. (1) The head of a public body may, not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard the request where the head is of the opinion that

(a) the request would unreasonably interfere with the operations of the public body;

(b) the request is for information already provided to the applicant; or

(c) the request would amount to an abuse of the right to make a request because it is

(i) trivial, frivolous or vexatious,

(ii) unduly repetitive or systematic,

(iii) excessively broad or incomprehensible, or

(iv) otherwise made in bad faith.

(2) The commissioner shall, without delay and in any event not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(3) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16(1).

(4) Where the commissioner does not approve the application, the head of the public body shall respond to the request in the manner required by this Act.

(5) Where the commissioner approves the application, the head of a public body who refuses to give access to a record or correct personal information under this section shall notify the person who made the request.

(6) The notice shall contain the following information:

(a) that the request is refused because the head of the public body is of the opinion that the request falls under subsection (1) and of the reasons for the refusal;

(b) that the commissioner has approved the decision of the head of a public body to disregard the request; and

(c) that the person who made the request may appeal the decision of the head of the public body to the Trial Division under subsection 52(1).

Published material

22. (1) The head of a public body may refuse to disclose a record or part of a record that

(a) is published and is available to the public whether without cost or for purchase; or

(b) is to be published or released to the public within 30 business days after the applicant's request is received.

(2) The head of a public body shall notify an applicant of the publication or release of information that the head has refused to give access to under paragraph (1)(b).

(3) Where the information is not published or released within 30 business days after the applicant's request is received, the head of the public body shall reconsider the request as if it were a new request received on the last day of that period, and access may not be refused under paragraph (1)(b).

Extension of time limit

23. (1) The head of a public body may, not later than 15 business days after receiving a request, apply to the commissioner to extend the time for responding to the request.

(2) The commissioner may approve an application for an extension of time where the commissioner considers that it is necessary and reasonable to do so in the circumstances, for the number of business days the commissioner considers appropriate.

(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16(1).

(5) Where the commissioner does not approve the application, the head of the public body shall respond to the request under subsection 16(1) without delay and in any event not later than 20 business days after receiving the request.

(6) Where the commissioner approves the application and the time limit for responding is extended, the head of the public body shall, without delay, notify the applicant in writing

(a) of the reason for the extension;

(b) that the commissioner has authorized the extension; and

(c) when a response can be expected.

Extraordinary circumstances

24. (1) The head of a public body, an applicant or a third party may, in extraordinary circumstances, apply to the commissioner to vary a procedure, including a time limit imposed under a procedure, in this Part.

(2) Where the commissioner considers that extraordinary circumstances exist and it is necessary and reasonable to do so, the commissioner may vary the procedure as requested or in another manner that the commissioner considers appropriate.

(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, make a decision to vary or not vary the procedure.

(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16(1).

(5) Where the commissioner decides to vary a procedure upon an application of a head of a public body or a third party, the head shall notify the applicant in writing

(a) of the reason for the procedure being varied; and

(b) that the commissioner has authorized the variance.

(6) Where the commissioner decides to vary a procedure upon an application of an applicant to a request, the commissioner shall notify the head of the public body of the variance.

(7) An application cannot be made to vary a procedure for which the commissioner is responsible under this Part.

Costs

25. (1) The head of a public body shall not charge an applicant for making an application for access to a record or for the services of identifying, retrieving, reviewing, severing or redacting a record.

(2) The head of a public body may charge an applicant a modest cost for locating a record only, after

(a) the first 10 hours of locating the record, where the request is made to a local government body; or

(b) the first 15 hours of locating the record, where the request is made to another public body.

(3) The head of a public body may require an applicant to pay

(a) a modest cost for copying or printing a record, where the record is to be provided in hard copy form;

(b) the actual cost of reproducing or providing a record that cannot be reproduced or printed on conventional equipment then in use by the public body; and

(c) the actual cost of shipping a record using the method chosen by the applicant.

(4) Notwithstanding subsections (2) and (3), the head of the public body shall not charge an applicant a cost for a service in response to a request for access to the personal information of the applicant.

(5) The cost charged for services under this section shall not exceed either

(a) the estimate given to the applicant under section 26; or

(b) the actual cost of the services.

(6) The minister responsible for the administration of this Act may set the amount of a cost that may be charged under this section.

Estimate and waiver of costs

26. (1) Where an applicant is to be charged a cost under section 25, the head of the public body shall give the applicant an estimate of the total cost before providing the services.

(2) The applicant has 20 business days from the day the estimate is sent to accept the estimate or modify the request in order to change the amount of the cost, after which time the applicant is considered to have abandoned the request, unless the applicant applies for a waiver of all or part of the costs or applies to the commissioner to revise the estimate.

(3) The head of a public body may, on receipt of an application from an applicant, waive the payment of all or part of the costs payable under section 25 where the head is satisfied that

(a) payment would impose an unreasonable financial hardship on the applicant; or

(b) it would be in the public interest to disclose the record.

(4) Within the time period of 20 business days referred to in subsection (2), the head of the public body shall inform the applicant in writing as to the head's decision about waiving all or part of the costs and the applicant shall either accept the decision or apply to the commissioner to review the decision.

(5) Where an applicant applies to the commissioner to revise an estimate of costs or to review a decision of the head of the public body not to waive all or part of the costs, the time period of 20 business days referred to in subsection (2) is suspended until the application has been considered by the commissioner.

(6) Where an estimate is given to an applicant under this section, the time within which the head of the public body is required to respond to the request is suspended until the applicant notifies the head to proceed with the request.

(7) On an application to revise an estimate, the commissioner may

(a) where the commissioner considers that it is necessary and reasonable to do so in the circumstances,

revise the estimate and set the appropriate amount to be charged and a refund, if any; or

(b) confirm the decision of the head of the public body.

(8) On an application to review the decision of the head of the public body not to waive the payment of all or part of the costs, the commissioner may

(a) where the commissioner is satisfied that paragraph (3)(a) or (b) is applicable, waive the payment of the costs or part of the costs in the manner and in the amount that the commissioner considers appropriate; or

(b) confirm the decision of the head of the public body.

(9) The head of the public body shall comply with a decision of the commissioner under this section.

(10) Where an estimate of costs has been provided to an applicant, the head of a public body may require the applicant to pay 50% of the cost before commencing the services, with the remainder to be paid upon completion of the services.

DIVISION 2 EXCEPTIONS TO ACCESS

Cabinet confidences

27. (1) In this section, "cabinet record" means

(a) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;

(b) draft legislation or regulations submitted or prepared for submission to the Cabinet;

(c) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;

(d) a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material;

(e) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;

(f) a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy;

(g) a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet;

(h) a record created during the process of developing or preparing a submission for the Cabinet; and

(i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).

(2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record; or

(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.

(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

(4) Subsections (1) and (2) do not apply to

(a) information in a record that has been in existence for 20 years or more; or

(b) information in a record of a decision made by the Cabinet on an appeal under an Act.

Local public body confidences

28. (1) The head of a local public body may refuse to disclose to an applicant information that would reveal

(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts;

(b) a draft of a private Bill; or

(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

(2) Subsection (1) does not apply where

(a) the draft of a resolution, by-law or other legal instrument, a private Bill or the subject matter of deliberations has been considered, other than incidentally, in a meeting open to the public; or

(b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.

Policy advice or recommendations

29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made by the head within 65 business days of delivery of the report; or

(c) draft legislation or regulations.

(2) The head of a public body shall not refuse to disclose under subsection (1)

(a) factual material;

(b) a public opinion poll;

(c) a statistical survey;

(d) an appraisal;

(e) an environmental impact statement or similar information;

(f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;

(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;

(h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a report on the results of field research undertaken before a policy proposal is formulated;

(j) a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body;

(k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;

(l) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or

(m) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

Legal advice

30. (1) The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

Disclosure harmful to law enforcement

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

(a) interfere with or harm a law enforcement matter;

(b) prejudice the defence of Canada or of a foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;

(c) reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement;

(d) reveal the identity of a confidential source of law enforcement information or reveal information provided by that source with respect to a law enforcement matter;

(e) reveal law enforcement intelligence information;

(f) endanger the life or physical safety of a law enforcement officer or another person;

(g) reveal information relating to or used in the exercise of prosecutorial discretion;

(h) deprive a person of the right to a fair trial or impartial adjudication;

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) facilitate the commission or tend to impede the detection of an offence under an Act or regulation of the province or Canada;

(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;

(m) reveal technical information about weapons used or that may be used in law enforcement;

(n) adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

(o) reveal information in a correctional record supplied, implicitly or explicitly, in confidence; or

(p) harm the conduct of existing or imminent legal proceedings.

(2) The head of a public body may refuse to disclose information to an applicant if the information

(a) is in a law enforcement record and the disclosure would be an offence under an Act of Parliament;

(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record; or

(c) is about the history, supervision or release of a person who is in custody or under supervision and the disclosure could reasonably be expected to harm the proper custody or supervision of that person.

(3) The head of a public body shall not refuse to disclose under this section

(a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act; or

(b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to interfere with or harm the matters referred to in subsection (1) or (2); or

(c) statistical information on decisions to approve or not to approve prosecutions.

Confidential evaluations

32. The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of

(a) determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body;

(b) determining suitability, eligibility or qualifications for admission to an academic program of an educational body;

(c) determining suitability, eligibility or qualifications for the granting of tenure at a post-secondary educational body;

(d) determining suitability, eligibility or qualifications for an honour or award to recognize outstanding achievement or distinguished service; or

(e) assessing the teaching materials or research of an employee of a post-secondary educational body or of a person associated with an educational body.

Information from a workplace investigation

33. (1) For the purpose of this section

(a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are

known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;

(b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and

(c) "workplace investigation" means an investigation related to

(i) the conduct of an employee in the workplace,

(ii) harassment, or

(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

which may give rise to progressive discipline or corrective action by the public body employer.

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.

Disclosure harmful to intergovernmental relations or negotiations

34. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:

(i) the government of Canada or a province,

(ii) the council of a local government body,

(iii) the government of a foreign state,

(iv) an international organization of states, or

(v) the Nunatsiavut Government; or

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.

(2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of

(a) the Attorney General, for law enforcement information; or

(b) the Lieutenant-Governor in Council, for any other type of information.

(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.

Disclosure harmful to the financial or economic interests of a public body

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

(a) trade secrets of a public body or the government of the province;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

(e) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;

(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or

(h) information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.

(2) The head of a public body shall not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for that public body, unless the testing was done

(a) for a fee as a service to a person or a group of persons other than the public body; or

(b) for the purpose of developing methods of testing.

Disclosure harmful to conservation

36. The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of

(a) fossil sites, natural sites or sites that have an anthropological or heritage value;

(b) an endangered, threatened or vulnerable species, sub-species or a population of a species; or

(c) a rare or endangered living resource.

Disclosure harmful to individual or public safety

37. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to

(a) threaten the safety or mental or physical health of a person other than the applicant, or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

Disclosure harmful to labour relations interests of public body as employer

38. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or

(b) labour relations information the disclosure of which could reasonably be expected to

(i) harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer,

(ii) result in significant financial loss or gain to the public body as an employer, or

(iii) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.

(2) Subsection (1) does not apply where the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Disclosure harmful to business interests of a third party

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax

return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or

(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Disclosure harmful to personal privacy

40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy 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 given in the form appropriate in the circumstances to the third party to whom the information relates;

(d) an Act or regulation of the province or of Canada authorizes the disclosure;

(e) the disclosure is for a research or statistical purpose and is in accordance with section 70;

(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;

(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 income or employment support levels; or

(m) the disclosure is not contrary to the public interest as described in subsection (3) and reveals only the following personal information about a third party:

(i) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or

(ii) receipt of an honour or award granted by or through a public body.

(3) The disclosure of personal information under paragraph (2)(m) is an unreasonable invasion of personal privacy where the third party whom the information is about has requested that the information not be disclosed.

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation;

(c) the personal information relates to employment or educational history;

(d) the personal information was collected on a tax return or gathered for the purpose of collecting a tax;

(e) the personal information consists of an individual's bank account information or credit card information;

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; or

(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable;

(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;

(i) the personal information was originally provided to the applicant; and

(j) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

Disclosure of House of Assembly service and statutory office records

41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information

(a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;

(b) that is advice or a recommendation given to the speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; or

(c) in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records connected with the investigatory functions of the statutory office.

DIVISION 3 COMPLAINT

Access or correction complaint

42. (1) A person who makes a request under this Act for access to a record or for correction of personal information may file a complaint with the commissioner respecting a decision, act or failure to act of the head of the public body that relates to the request.

(2) A complaint under subsection (1) shall be filed in writing not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16(2).

(3) A third party informed under section 19 of a decision of the head of a public body to grant access to a record or part of a record in response to a request may file a complaint with the commissioner respecting that decision.

(4) A complaint under subsection (3) shall be filed in writing not later than 15 business days after the third party is informed of the decision of the head of the public body.

(5) The commissioner may allow a longer time period for the filing of a complaint under this section.

(6) A person or third party who has appealed directly to the Trial Division under subsection 52(1) or 53(1) shall not file a complaint with the commissioner.

(7) The commissioner shall refuse to investigate a complaint where an appeal has been commenced in the Trial Division.

(8) A complaint shall not be filed under this section with respect to

(a) a request that is disregarded under section 21;

(b) a decision respecting an extension of time under section 23;

(c) a variation of a procedure under section 24; or

(d) an estimate of costs or a decision not to waive a cost under section 26.

(9) The commissioner shall provide a copy of the complaint to the head of the public body concerned.

Burden of proof

43. (1) On an investigation of a complaint 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 an investigation of a complaint from a decision to give an applicant access to a record or part of a record containing personal information that relates to a third party, the burden is on the head of a public body to prove that the disclosure of the information would not be contrary to this Act or the regulations.

(3) On an investigation of a complaint from a decision to give an applicant access to a record or part of a record containing information, other than personal 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.

Investigation

44. (1) The commissioner shall notify the parties to the complaint and advise them that they have 10 business days from the date of notification to make representations to the commissioner.

(2) The parties to the complaint may, not later than 10 business days after notification of the complaint, make a representation to the commissioner in accordance with section 96.

(3) The commissioner may take additional steps that he or she considers appropriate to resolve the complaint informally to the satisfaction of the parties and in a manner consistent with this Act.

(4) Where the commissioner is unable to informally resolve the complaint within 30 business days of receipt of the complaint, the commissioner shall conduct a formal investigation of the subject matter of the complaint where he or she is satisfied that there are reasonable grounds to do so.

(5) Notwithstanding subsection (4), the commissioner may extend the informal resolution process for a maximum of 20 business days where a written request is received from each party to continue the informal resolution process.

(6) The commissioner shall not extend the informal resolution process beyond the date that is 50 business days after receipt of the complaint.

(7) Where the commissioner has 5 active complaints from the same applicant that deal with similar or related records, the commissioner may hold an additional complaint in abeyance and not commence an investigation until one of the 5 active complaints is resolved.

Authority of commissioner not to investigate a complaint

45. (1) The commissioner may, at any stage of an investigation, refuse to investigate a complaint where he or she is satisfied that

(a) the head of a public body has responded adequately to the complaint;

(b) the complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this Act;

(c) the length of time that has elapsed between the date when the subject matter of the complaint arose and

the date when the complaint was filed is such that an investigation under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or

(d) the complaint is trivial, frivolous, vexatious or is made in bad faith.

(2) Where the commissioner refuses to investigate a complaint, he or she shall

(a) give notice of that refusal, together with reasons, to the person who made the complaint;

(b) advise the person of the right to appeal to the Trial Division under subsection 52(3) or 53(3) the decision of the head of the public body that relates to the request; and

(c) advise the person of the applicable time limit and how to pursue an appeal.

Time limit for formal investigation

46. (1) The commissioner shall complete a formal investigation and make a report under section 48 within 65 business days of receiving the complaint, whether or not the time for the informal resolution process has been extended.

(2) The commissioner may, in extraordinary circumstances, apply to a judge of the Trial Division for an order to extend the period of time under subsection (1).

Recommendations

47. On completing an investigation, the commissioner may recommend that

(a) the head of the public body grant or refuse access to the record or part of the record;

(b) the head of the public body reconsider its decision to refuse access to the record or part of the record;

(c) the head of the public body either make or not make the requested correction to personal information; and

(d) other improvements for access to information be made within the public body.

Report

48. (1) On completing an investigation, the commissioner shall

(a) prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and

(b) send a copy of the report to the person who filed the complaint, the head of the public body concerned and a third party who was notified under section 44.

(2) The report shall include information respecting the obligation of the head of the public body to notify the parties of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.

Response of public body

49. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

(3) The written notice shall include notice of the right

(a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or

(b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in section 51(1).

Head of public body seeks declaration in court

50. (1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

(a) grant the applicant access to the record or part of the record; or

(b) make the requested correction to personal information.

(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because

(a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;

(b) the head of the public body is required under this Part to refuse access to the record or part of the record; or

(c) the decision of the head of the public body not to make the requested correction to personal information is in accordance with this Act or the regulations.

(3) The head shall, within the time frame referred to in subsection (2), serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(4) The commissioner, the minister responsible for this Act, or a person who was sent a copy of the commissioner's report may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

(5) Sections 57 to 60 apply, with the necessary modifications, to an application by the head of a public body to the Trial Division for a declaration.

Filing an order with the Trial Division

51. (1) The commissioner may prepare and file an order with the Trial Division where

(a) the head of the public body agrees or is considered to have agreed under section 49 to comply with a recommendation of the commissioner referred to in subsection 50(1) in whole or in part but fails to do so within 15 business days after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply under section 50 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body either

(a) to grant the applicant access to the record or part of the record; or

(b) to make the requested correction to personal information.

(3) An order shall not be filed with the Trial Division until the later of the time periods referred to in paragraph (1)(a) and section 54 has passed.

(4) An order shall not be filed with the Trial Division under this section if the applicant or third party has commenced an appeal in the Trial Division under section 54.

(5) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

DIVISION 4 APPEAL TO THE TRIAL DIVISION

Direct appeal to Trial Division by an applicant

52. (1) Where an applicant has made a request to a public body for access to a record or correction of personal information and has not filed a complaint with the commissioner under section 42, the applicant may appeal the decision, act or failure to act of the head of the public body that relates to the request directly to the Trial Division.

(2) An appeal shall be commenced under subsection (1) not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16(2).

(3) Where an applicant has filed a complaint with the commissioner under section 42 and the commissioner has refused to investigate the complaint, the applicant may commence an appeal in the Trial Division of the decision, act or failure to act of the head of the public body that relates to the request for access to a record or for correction of personal information.

(4) An appeal shall be commenced under subsection (3) not later than 15 business days after the applicant is notified of the commissioner's refusal under subsection 45(2).

Direct appeal to Trial Division by a third party

53. (1) A third party informed under section 19 of a decision of the head of a public body to grant access to a record or part of a record in response to a request may appeal the decision directly to the Trial Division.

(2) An appeal shall be commenced under subsection (1) not later than 15 business days after the third party is informed of the decision of the head of the public body.

(3) Where a third party has filed a complaint with the commissioner under section 42 and the commissioner has refused to investigate the complaint, the third party may commence an appeal in the Trial Division of the decision of the head of the public body to grant access in response to a request.

(4) An appeal shall be commenced under subsection (3) not later than 15 business days after the third party is notified of the commissioner's refusal under subsection 45(2).

Appeal of public body decision after receipt of commissioner's recommendation

54. An applicant or a third party may, not later than 10 business days after receipt of a decision of the head of the public body under section 49, commence an appeal in the Trial Division of the head's decision to

(a) grant or refuse access to the record or part of the record; or

(b) not make the requested correction to personal information.

No right of appeal

55. An appeal does not lie against

(a) a decision respecting an extension of time under section 23;

(b) a variation of a procedure under section 24; or

(c) an estimate of costs or a decision not to waive a cost under section 26.

Procedure on appeal

56. (1) Where a person appeals a decision of the head of a public body, the notice of appeal shall name the head of the public body involved as the respondent.

(2) A copy of the notice of appeal shall be served by the appellant on the commissioner and the minister responsible for this Act.

(3) The minister responsible for this Act, the commissioner, the applicant or a third party may intervene as a party to an appeal under this Division by filing a notice to that effect with the Trial Division.

(4) Notwithstanding subsection (3), the commissioner shall not intervene as a party to an appeal of

(a) a decision of the head of the public body under section 21 to disregard a request; or

(b) a decision, act or failure to act of the head of a public body in respect of which the commissioner has refused under section 45 to investigate a complaint.

(5) The head of a public body who has refused access to a record or part of it shall, on receipt of a notice of appeal by an applicant, make reasonable efforts to give written notice of the appeal to a third party who

(a) was notified of the request for access under section 19; or

(b) would have been notified under section 19 if the head had intended to give access to the record or part of the record.

(6) Where an appeal is brought by a third party, the head of the public body shall give written notice of the appeal to the applicant.

(7) The record for the appeal shall be prepared by the head of the public body named as the respondent in the appeal.

Practice and procedure

57. The practice and procedure under the *Rules of the Supreme Court, 1986* providing for an expedited trial, or such adaption of those rules as the court or judge considers appropriate in the circumstances, shall apply to the appeal.

Solicitor and client privilege

58. The solicitor and client privilege or litigation privilege of a record in dispute shall not be affected by disclosure to the Trial Division.

Conduct of appeal

59. (1) The Trial Division shall review the decision, act or failure to act of the head of a public body that relates to a request for access to a record or correction of personal information under this Act as a new matter and may receive evidence by affidavit.

(2) The burden of proof in section 43 applies, with the necessary modifications, to an appeal.

(3) In exercising its powers to order production of documents for examination, the Trial Division shall take reasonable precautions, including where appropriate, receiving representations without notice to another person, conducting hearings in private and examining records in private, to avoid disclosure of

(a) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record; or

(b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2).

Disposition of appeal

60. (1) On hearing an appeal the Trial Division may

(a) where it determines that the head of the public body is authorized to refuse access to a record under this Part and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, dismiss the appeal;

(b) where it determines that the head of the public body is required to refuse access to a record under this Part, dismiss the appeal; or

(c) where it determines that the head is not authorized or required to refuse access to all or part of a record under this Part,

(i) order the head of the public body to give the applicant access to all or part of the record, and

(ii) make an order that the court considers appropriate.

(2) Where the Trial Division finds that a record or part of a record falls within an exception to access under

this Act and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, the court shall not order the head to give the applicant access to that record or part of it, regardless of whether the exception requires or merely authorizes the head to refuse access.

(3) Where the Trial Division finds that to do so would be in accordance with this Act or the regulations, it may order that personal information be corrected and the manner in which it is to be corrected.

PART III
PROTECTION OF PERSONAL INFORMATION

DIVISION 1 COLLECTION, USE AND DISCLOSURE

Purpose for which personal information may be collected

61. No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by or under an Act;

(b) that information is collected for the purposes of law enforcement; or

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

How personal information is to be collected

62. (1) A public body shall collect personal information directly from the individual the information is about unless

(a) another method of collection is authorized by

(i) that individual,

(ii) the commissioner under paragraph 95(1)(c), or

(iii) an Act or regulation;

(b) the information may be disclosed to the public body under sections 68 to 71;

(c) the information is collected for the purpose of

(i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary,

(ii) an existing or anticipated proceeding before a court or a judicial or quasi-judicial tribunal,

(iii) collecting a debt or fine or making a payment, or

(iv) law enforcement; or

(d) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual.

(2) A public body shall tell an individual from whom it collects personal information

(a) the purpose for collecting it;

(b) the legal authority for collecting it; and

(c) the title, business address and business telephone number of an officer or employee of the public body

who can answer the individual's questions about the collection.

(3) Subsection (2) does not apply where

(a) the information is about law enforcement or anything referred to in subsection 31(1) or (2); or

(b) in the opinion of the head of the public body, complying with it would

(i) result in the collection of inaccurate information, or

(ii) defeat the purpose or prejudice the use for which the information is collected.

Accuracy of personal information

63. Where an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body shall make every reasonable effort to ensure that the information is accurate and complete.

Protection of personal information

64. (1) The head of a public body shall take steps that are reasonable in the circumstances to ensure that

(a) personal information in its custody or control is protected against theft, loss and unauthorized collection, access, use or disclosure;

(b) records containing personal information in its custody or control are protected against unauthorized copying or modification; and

(c) records containing personal information in its custody or control are retained, transferred and disposed of in a secure manner.

(2) For the purpose of paragraph (1)(c), "disposed of in a secure manner" in relation to the disposition of a record of personal information does not include the destruction of a record unless the record is destroyed in such a manner that the reconstruction of the record is not reasonably foreseeable in the circumstances.

(3) Except as otherwise provided in subsections (6) and (7), the head of a public body that has custody or control of personal information shall notify the individual who is the subject of the information at the first reasonable opportunity where the information is

(a) stolen;

(b) lost;

(c) disposed of, except as permitted by law; or

(d) disclosed to or accessed by an unauthorized person.

(4) Where the head of a public body reasonably believes that there has been a breach involving the unauthorized collection, use or disclosure of personal information, the head shall inform the commissioner of the breach.

(5) Notwithstanding a circumstance where, under subsection (7), notification of an individual by the head of a public body is not required, the commissioner may recommend that the head of the public body, at the first reasonable opportunity, notify the individual who is the subject of the information.

(6) Where a public body has received personal information from another public body for the purpose of

research, the researcher may not notify an individual who is the subject of the information that the information has been stolen, lost, disposed of in an unauthorized manner or disclosed to or accessed by an unauthorized person unless the public body that provided the information to the researcher first obtains that individual's consent to contact by the researcher and informs the researcher that the individual has given consent.

(7) Subsection (3) does not apply where the head of the public body reasonably believes that the theft, loss, unauthorized disposition, or improper disclosure or access of personal information does not create a risk of significant harm to the individual who is the subject of the information.

(8) For the purpose of this section, "significant harm" includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property.

(9) The factors that are relevant to determining under subsection (7) whether a breach creates a risk of significant harm to an individual include

(a) the sensitivity of the personal information; and

(b) the probability that the personal information has been, is being, or will be misused.

Retention of personal information

65. (1) Where a public body uses an individual's personal information to make a decision that directly affects the individual, the public body shall retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

(2) A public body that has custody or control of personal information that is the subject of a request for access to a record or correction of personal information under Part II shall retain that information for as long as necessary to allow the individual to exhaust any recourse under this Act that he or she may have with respect to the request.

Use of personal information

66. (1) A public body may use personal information only

(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose as described in section 69;

(b) where the individual the information is about has identified the information and has consented to the use, in the manner set by the minister responsible for this Act; or

(c) for a purpose for which that information may be disclosed to that public body under sections 68 to 71.

(2) The use of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.

Use of personal information by post-secondary educational bodies

67. (1) Notwithstanding section 66, a post-secondary educational body may, in accordance this section, use personal information in its alumni records for the purpose of its own fundraising activities where that personal information is reasonably necessary for the fundraising activities.

(2) In order to use personal information in its alumni records for the purpose of its own fundraising activities, a post-secondary educational body shall

(a) give notice to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be used for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, give notice to the individual to whom the personal information relates of his or her right to request that the information cease to be used for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, publish in an alumni magazine or other publication, a notice of the individual's right to request that the individual's personal information cease to be used for fundraising purposes.

(3) A post-secondary educational body shall, where requested to do so by an individual, cease to use the individual's personal information under subsection (1).

(4) The use of personal information by a post-secondary educational body under this section shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.

Disclosure of personal information

68. (1) A public body may disclose personal information only

(a) in accordance with Part II;

(b) where the individual the information is about has identified the information and consented to the disclosure in the manner set by the minister responsible for this Act;

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose as described in section 69;

(d) for the purpose of complying with an Act or regulation of, or with a treaty, arrangement or agreement made under an Act or regulation of the province or Canada;

(e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information;

(f) to an officer or employee of the public body or to a minister, where the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister;

(g) to the Attorney General for use in civil proceedings involving the government;

(h) for the purpose of enforcing a legal right the government of the province or a public body has against a person;

(i) for the purpose of

(i) collecting a debt or fine owing by the individual the information is about to the government of the province or to a public body, or

(ii) making a payment owing by the government of the province or by a public body to the individual the information is about;

(j) to the Auditor General or another person or body prescribed in the regulations for audit purposes;

(k) to a member of the House of Assembly who has been requested by the individual the information is about to assist in resolving a problem;

(l) to a representative of a bargaining agent who has been authorized in writing by the employee, whom the information is about, to make an inquiry;

(m) to the Provincial Archives of Newfoundland and Labrador, or the archives of a public body, for archival purposes;

(n) to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding, or

(ii) from which a law enforcement proceeding is likely to result;

(o) where the public body is a law enforcement agency and the information is disclosed

(i) to another law enforcement agency in Canada , or

(ii) to a law enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority;

(p) where the head of the public body determines that compelling circumstances exist that affect a person's health or safety and where notice of disclosure is given in the form appropriate in the circumstances to the individual the information is about;

(q) so that the next of kin or a friend of an injured, ill or deceased individual may be contacted;

(r) in accordance with an Act of the province or Canada that authorizes or requires the disclosure;

(s) in accordance with sections 70 and 71;

(t) where the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40;

(u) to an officer or employee of a public body or to a minister, where the information is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or minister to whom the information is disclosed; or

(v) to the surviving spouse or relative of a deceased individual where, in the opinion of the head of the public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy.

(2) The disclosure of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.

Definition of consistent purposes

69. A use of personal information is consistent under section 66 or 68 with the purposes for which the information was obtained or compiled where the use

(a) has a reasonable and direct connection to that purpose; and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

Disclosure for research or statistical purposes

70. A public body may disclose personal information for a research purpose, including statistical research, only where

(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form;

(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest;

(c) the head of the public body concerned has approved conditions relating to the following:

(i) security and confidentiality,

(ii) the removal or destruction of individual identifiers at the earliest reasonable time, and

(iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body; and

(d) the person to whom that information is disclosed has signed an agreement to comply with the approved conditions, this Act and the public body's policies and procedures relating to the confidentiality of personal information.

Disclosure for archival or historical purposes

71. The Provincial Archives of Newfoundland and Labrador, or the archives of a public body, may disclose personal information for archival or historical purposes where

(a) the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40;

(b) the disclosure is for historical research and is in accordance with section 70;

(c) the information is about an individual who has been dead for 20 years or more; or

(d) the information is in a record that has been in existence for 50 years or more.

Privacy impact assessment

72. (1) A minister shall, during the development of a program or service by a department or branch of the executive government of the province, submit to the minister responsible for this Act

(a) a privacy impact assessment for that minister's review and comment; or

(b) the results of a preliminary assessment showing that a privacy impact assessment of the program or service is not required.

(2) A minister shall conduct a preliminary assessment and, where required, a privacy impact assessment in accordance with the directions of the minister responsible for this Act.

(3) A minister shall notify the commissioner of a common or integrated program or service at an early stage of developing the program or service.

(4) Where the minister responsible for this Act receives a privacy impact assessment respecting a common or integrated program or service for which disclosure of personal information may be permitted under paragraph

68(1)(u), the minister shall, during the development of the program or service, submit the privacy impact assessment to the commissioner for the commissioner's review and comment.

DIVISION 2 PRIVACY COMPLAINT

Privacy complaint

73. (1) Where an individual believes on reasonable grounds that his or her personal information has been collected, used or disclosed by a public body in contravention of this Act, he or she may file a privacy complaint with the commissioner.

(2) Where a person believes on reasonable grounds that personal information has been collected, used or disclosed by a public body in contravention of this Act, he or she may file a privacy complaint with the commissioner on behalf of an individual or group of individuals, where that individual or those individuals have given consent to the filing of the privacy complaint.

(3) Where the commissioner believes that personal information has been collected, used or disclosed by a public body in contravention of this Act, the commissioner may on his or her own motion carry out an investigation.

(4) A privacy complaint under subsection (1) or (2) shall be filed in writing with the commissioner within

(a) one year after the subject matter of the privacy complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant; or

(b) a longer period of time as permitted by the commissioner.

(5) The commissioner shall provide a copy or summary of the privacy complaint, including an investigation initiated on the commissioner's own motion, to the head of the public body concerned.

Investigation – privacy complaint

74. (1) The commissioner may take the steps that he or she considers appropriate to resolve a privacy complaint informally to the satisfaction of the parties and in a manner consistent with this Act.

(2) Where the commissioner is unable to informally resolve a privacy complaint within a reasonable period of time, the commissioner shall conduct a formal investigation of the subject matter of the privacy complaint where he or she is satisfied that there are reasonable grounds to do so.

(3) The commissioner shall complete a formal investigation and make a report under section 77 within a time that is as expeditious as possible in the circumstances.

(4) Where the commissioner has 5 active privacy complaints from the same person that deal with similar or related records, the commissioner may hold an additional complaint in abeyance and not commence an investigation until one of the 5 active complaints is resolved.

Authority of commissioner not to investigate a privacy complaint

75. The commissioner may, at any stage of an investigation, refuse to investigate a privacy complaint where he or she is satisfied that

(a) the head of a public body has responded adequately to the privacy complaint;

(b) the privacy complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under this Act;

(c) the length of time that has elapsed between the date when the subject matter of the privacy complaint arose and the date when the privacy complaint was filed is such that an investigation under this Part would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or

(d) the privacy complaint is trivial, frivolous, vexatious or is made in bad faith.

Recommendations – privacy complaint

76. (1) On completing an investigation of a privacy complaint, the commissioner may recommend that the head of a public body

(a) stop collecting, using or disclosing personal information in contravention of this Act; or

(b) destroy personal information collected in contravention of this Act.

(2) The commissioner may also make

(a) a recommendation that an information practice, policy or procedure be implemented, modified, stopped or not commenced; or

(b) a recommendation on the privacy aspect of the matter that is the subject of the privacy complaint.

Report – privacy complaint

77. (1) On completing an investigation of a privacy complaint, the commissioner shall

(a) prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and

(b) send a copy of the report to the person who filed the privacy complaint and the head of the public body concerned.

(2) The report shall include information respecting the obligation of the head of the public body to notify the person who filed the privacy complaint of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.

Response of public body – privacy complaint

78. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

Head of public body seeks declaration in court

79. (1) Where the head of the public body decides under section 78 not to comply with a recommendation of the commissioner under subsection 76(1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation,

(a) apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because the collection, use or disclosure of the personal information is not in contravention of this Act, and

(b) serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(2) The commissioner or the minister responsible for this Act may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

Filing an order with the Trial Division

80. (1) The commissioner may prepare and file an order with the Trial Division where

(a) the head of the public body agrees or is considered to have agreed under section 78 to comply with a recommendation of the commissioner under subsection 76(1) in whole or in part but fails to do so within one year after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply under section 79 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body to do one or more of the following:

(a) stop collecting, using or disclosing personal information in contravention of this Act; or

(b) destroy personal information collected in contravention of this Act.

(3) An order shall not be filed with the Trial Division until the time period referred to in paragraph (1)(a) has passed.

(4) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

DIVISION 3 APPLICATION TO THE TRIAL DIVISION FOR A DECLARATION

Practice and procedure

81. The practice and procedure under the *Rules of the Supreme Court, 1986* providing for an expedited trial, or such adaption of those rules as the court or judge considers appropriate in the circumstances, shall apply to an application to the Trial Division for a declaration.

Solicitor and client privilege

82. The solicitor and client privilege or litigation privilege of a record which may contain personal information shall not be affected by disclosure to the Trial Division.

Conduct

83. (1) The Trial Division shall review the act or failure to act of the head of a public body that relates to the collection, use or disclosure of personal information under this Act as a new matter and may receive evidence by affidavit.

(2) In exercising its powers to order production of documents for examination, the Trial Division shall take reasonable precautions, including where appropriate, receiving representations without notice to another person, conducting hearings in private and examining records in private, to avoid disclosure of

(a) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record; or

(b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2).

Disposition

84. On hearing an application for a declaration, the Trial Division may

(a) where it determines that the head of the public body is authorized under this Act to use, collect or disclose the personal information, dismiss the application;

(b) where it determines that the head is not authorized under this Act to use, collect or disclose the personal information,

(i) order the head of the public body to stop using, collecting or disclosing the information, or

(ii) order the head of the public body to destroy the personal information that was collected in contravention of this Act; or

(c) make an order that the court considers appropriate.

PART IV
OFFICE AND POWERS OF THE INFORMATION AND PRIVACY COMMISSIONER

DIVISION 1 OFFICE

Appointment of the Information and Privacy Commissioner

85. (1) The office of the Information and Privacy Commissioner is continued.

(2) The office shall be filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly.

(3) Before an appointment is made, the Speaker shall establish a selection committee comprising

(a) the Clerk of the Executive Council or his or her deputy;

(b) the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly;

(c) the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and

(d) the President of Memorial University or a vice-president of Memorial University designated by the President.

(4) The selection committee shall develop a roster of qualified candidates and in doing so may publicly invite expressions of interest for the position of commissioner.

(5) The selection committee shall submit the roster to the Speaker of the House of Assembly.

(6) The Speaker shall

(a) consult with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission; and

(b) cause to be placed before the House of Assembly a resolution to appoint as commissioner one of the individuals named on the roster.

Status of the commissioner

86. (1) The commissioner is an officer of the House of Assembly and is not eligible to be nominated for election, to be elected, or to sit as a member of the House of Assembly.

(2) The commissioner shall not hold another public office or carry on a trade, business or profession.

(3) In respect of his or her interactions with a public body, whether or not it is a public body to which this Act applies, the commissioner has the status of a deputy minister.

Term of office

87. (1) Unless he or she sooner resigns, dies or is removed from office, the commissioner shall hold office for 6 years from the date of his or her appointment.

(2) The Lieutenant-Governor in Council may, with the approval of a majority of the members on the government side of the House of Assembly and separate approval of a majority of the members on the opposition side of the House of Assembly, re-appoint the commissioner for one further term of 6 years.

(3) The Speaker shall, in the event of a tie vote on either or both sides of the House of Assembly, cast the deciding vote.

(4) The commissioner may resign his or her office in writing addressed to the Speaker of the House of Assembly, or, where there is no Speaker or the Speaker is absent, to the Clerk of the House of Assembly.

Removal or suspension

88. (1) The Lieutenant-Governor in Council, on a resolution of the House of Assembly passed by a majority vote of the members of the House of Assembly actually voting, may remove the commissioner from office or suspend him or her because of an incapacity to act, or for neglect of duty or for misconduct.

(2) When the House of Assembly is not in session, the Lieutenant-Governor in Council may suspend the

commissioner because of an incapacity to act, or for neglect of duty or for misconduct, but the suspension shall not continue in force beyond the end of the next sitting of the House of Assembly.

Acting commissioner

89. (1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting commissioner if

(a) the commissioner is temporarily unable to perform his or her duties;

(b) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is not in session; or

(c) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is in session, but the House of Assembly does not pass a resolution to fill the office of the commissioner before the end of the session.

(2) Where the office of the commissioner becomes vacant and an acting commissioner is appointed under paragraph (1)(b) or (c), the term of the acting commissioner shall not extend beyond the end of the next sitting of the House of Assembly.

(3) An acting commissioner holds office until

(a) the commissioner returns to his or her duties after a temporary inability to perform;

(b) the suspension of the commissioner ends or is dealt with in the House of Assembly; or

(c) a person is appointed as a commissioner under section 85.

Salary, pension and benefits

90. (1) The commissioner shall be paid a salary that is 75% of the salary of a Provincial Court judge, other than the Chief Judge.

(2) The commissioner is eligible for salary increases at the same time and in the same manner as salary increases of a Provincial Court judge, other than the Chief Judge, and in the proportion provided in subsection (1).

(3) The commissioner is subject to the *Public Service Pensions Act, 1991* where he or she was subject to that Act prior to his or her appointment as commissioner.

(4) Where the commissioner is not subject to the *Public Service Pensions Act, 1991* prior to his or her appointment as commissioner, he or she shall be paid, for contribution to a registered retirement savings plan, an amount equivalent to the amount which he or she would have contributed to the Public Service Pension Plan were the circumstances in subsection (3) applicable.

(5) The commissioner is eligible to receive the same benefits as a deputy minister, with the exception of a pension where subsection (4) applies.

Expenses

91. The commissioner shall be paid the travelling and other expenses, at the deputy minister level, incurred by him or her in the performance of his or her duties that may be approved by the House of Assembly Management Commission.

Commissioner's staff

92. (1) The commissioner may, subject to the approval of the House of Assembly Management Commission, and in the manner provided by law, appoint those assistants and employees that he or she considers necessary to enable him or her to carry out his or her functions under this Act and the *Personal Health Information Act* .

(2) Persons employed under subsection (1) are members of the public service of the province.

Oath of office

93. Before beginning to perform his or her duties, the commissioner shall swear an oath, or affirm, before the Speaker of the House of Assembly or the Clerk of the House of Assembly that he or she shall faithfully and impartially perform the duties of his or her office and that he or she shall not, except as provided by this Act and the *Personal Health Information Act*, divulge information received by him or her under this Act and the *Personal Health Information Act*.

Oath of staff

94. Every person employed under the commissioner shall, before he or she begins to perform his or her duties, swear an oath, or affirm, before the commissioner that he or she shall not, except as provided by this Act and the *Personal Health Information Act*, divulge information received by him or her under this Act and the *Personal Health Information Act*.

DIVISION 2 POWERS OF THE COMMISSIONER

General powers and duties of commissioner

95. (1) In addition to the commissioner's powers and duties under Parts II and III, the commissioner may

(a) conduct investigations to ensure compliance with this Act and the regulations;

(b) monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities and duties under this Act;

(c) review and authorize the collection of personal information from sources other than the individual the information is about;

(d) consult with any person with experience or expertise in any matter related to the purpose of this Act; and

(e) engage in or commission research into anything relating to the purpose of this Act.

(2) In addition to the commissioner's powers and duties under Parts II and III, the commissioner shall exercise and perform the following powers and duties:

(a) inform the public about this Act;

(b) develop and deliver an educational program to inform people of their rights and the reasonable limits on those rights under this Act and to inform public bodies of their responsibilities and duties, including the duty to assist, under this Act;

(c) provide reasonable assistance, upon request, to a person;

(d) receive comments from the public about the administration of this Act and about matters concerning access to information and the confidentiality, protection and correction of personal information;

(e) comment on the implications for access to information or for protection of privacy of proposed legislative schemes, programs or practices of public bodies;

(f) comment on the implications for protection of privacy of

(i) using or disclosing personal information for record linkage, or

(ii) using information technology in the collection, storage, use or transfer of personal information;

(g) take actions necessary to identify, promote, and where possible cause to be made adjustments to practices and procedures that will improve public access to information and protection of personal information;

(h) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants;

(i) make recommendations to the head of a public body or the minister responsible for this Act about the administration of this Act;

(j) inform the public from time to time of apparent deficiencies in the system, including the office of the commissioner; and

(k) establish and implement practices and procedures in the office of the commissioner to ensure efficient and timely compliance with this Act.

(3) The commissioner's investigation powers and duties provided in this Part are not limited to an investigation under paragraph (1)(a) but apply also to an investigation in respect of a complaint, privacy complaint, audit, decision or other action that the commissioner is authorized to take under this Act.

Representation during an investigation

96. (1) During an investigation, the commissioner may give a person an opportunity to make a representation.

(2) An investigation may be conducted by the commissioner in private and a person who makes representations during an investigation is not, except to the extent invited by the commissioner to do so, entitled to be present during an investigation or to comment on representations made to the commissioner by another person.

(3) The commissioner may decide whether representations are to be made orally or in writing.

(4) Representations may be made to the commissioner through counsel or an agent.

Production of documents

97. (1) This section and section 98 apply to a record notwithstanding

(a) paragraph 5(1)(c), (d), (e), (f), (g), (h) or (i);

(b) subsection 7(2);

(c) another Act or regulation; or

(d) a privilege under the law of evidence.

(2) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*.

(3) 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.

(4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

(5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where

(a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;

(b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or

(c) it is not practicable to make a copy of the record.

(6) The head of a public body shall not place a condition on the ability of the commissioner to access or examine a record required under this section, other than that provided in subsection (5).

Right of entry

98. The commissioner has the right

(a) to enter an office of a public body and examine and make copies of a record in the custody of the public body; and

(b) to converse in private with an officer or employee of the public body.

Admissibility of evidence

99. (1) A statement made, or answer or evidence given by a person in the course of an investigation by or proceeding before the commissioner under this Act is not admissible in evidence against a person in a court or at an inquiry or in another proceeding, and no evidence respecting a proceeding under this Act shall be given against a person except

(a) in a prosecution for perjury;

(b) in a prosecution for an offence under this Act; or

(c) in an appeal to, or an application for a declaration from, the Trial Division under this Act, or in an appeal to the Court of Appeal respecting a matter under this Act.

(2) The commissioner, and a person acting for or under the direction of the commissioner, shall not be required to give evidence in a court or in a proceeding about information that comes to the knowledge of the commissioner in performing duties or exercising powers under this Act.

Privilege

100. (1) Where a person speaks to, supplies information to or produces a record during an investigation by the commissioner under this Act, what he or she says, the information supplied and the record produced are privileged in the same manner as if they were said, supplied or produced in a proceeding in a court.

(2) The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner.

Section 8.1 of the *Evidence Act*

101. Section 8.1 of the *Evidence Act* does not apply to an investigation conducted by the commissioner under this Act.

Disclosure of information

102. (1) The commissioner and a person acting for or under the direction of the commissioner, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information that is necessary to

(a) perform a duty or exercise a power of the commissioner under this Act; or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(3) In conducting an investigation and in performing a duty or exercising a power under this Act, the commissioner and a person acting for or under his or her direction, shall take reasonable precautions to avoid disclosing and shall not disclose

(a) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record; or

(b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2).

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence under this or another Act of the province or Canada, where the commissioner has reason to believe an offence has been committed.

(5) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information in the course of a prosecution or another matter before a court referred to in subsection 99(1).

Delegation

103. The commissioner may delegate to a person on his or her staff a duty or power under this Act.

Protection from liability

104. An action does not lie against the commissioner or against a person employed under him or her for anything he or she may do or report or say in the course of the exercise or performance, or intended exercise or performance, of his or her functions and duties under this Act, unless it is shown he or she acted in bad faith.

Annual report

105. The commissioner shall report annually to the House of Assembly through the Speaker on

(a) the exercise and performance of his or her duties and functions under this Act;

(b) a time analysis of the functions and procedures in matters involving the commissioner in a complaint, from the date of receipt of the request for access or correction by the public body to the date of informal resolution, the issuing of the commissioner's report, or the withdrawal or abandonment of the complaint, as applicable;

(c) persistent failures of public bodies to fulfil the duty to assist applicants, including persistent failures to respond to requests in a timely manner;

(d) the commissioner's recommendations and whether public bodies have complied with the recommendations;

(e) the administration of this Act by public bodies and the minister responsible for this Act; and

(f) other matters about access to information and protection of privacy that the commissioner considers appropriate.

Special report

106. The commissioner may at any time make a special report to the House of Assembly through the Speaker relating to

(a) the resources of the office of the commissioner;

(b) another matter affecting the operations of this Act; or

(c) a matter within the scope of the powers and duties of the commissioner under this Act.

Report – investigation or audit

107. On completing an investigation under paragraph 95(1)(a) or an audit under paragraph 95(1)(b), the commissioner

(a) shall prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations;

(b) shall send a copy of the report to the head of the public body concerned; and

(c) may make the report public.

PART V
GENERAL

Exercising rights of another person

108. A right or power of an individual given in this Act may be exercised

(a) by a person with written authorization from the individual to act on the individual's behalf;

(b) by a court appointed guardian of a mentally disabled person, where the exercise of the right or power relates to the powers and duties of the guardian;

(c) by an attorney acting under a power of attorney, where the exercise of the right or power relates to the powers and duties conferred by the power of attorney;

(d) by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy; or

(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.

Designation of head by local public body

109. (1) A local public body shall, by by-law, resolution or other instrument, designate a person or group of persons as the head of the local public body for the purpose of this Act, and once designated, the local public body shall advise the minister responsible for this Act of the designation.

(2) A local government body or group of local government bodies shall

(a) by by-law, resolution or other instrument, designate a person or group of persons, for the purpose of this Act, as the head of an unincorporated entity owned by or created for the local government body or group of local government bodies; and

(b) advise the minister responsible for this Act of the designation.

Designation and delegation by the head of a public body

110. (1) The head of a public body shall designate a person on the staff of the public body as the coordinator to

(a) receive and process requests made under this Act;

(b) co-ordinate responses to requests for approval by the head of the public body;

(c) communicate, on behalf of the public body, with applicants and third parties to requests throughout the process including the final response;

(d) educate staff of the public body about the applicable provisions of this Act;

(e) track requests made under this Act and the outcome of the request;

(f) prepare statistical reports on requests for the head of the public body; and

(g) carry out other duties as may be assigned.

(2) The head of a public body may delegate to a person on the staff of the public body a duty or power of the head under this Act.

Publication scheme

111. (1) The commissioner shall create a standard template for the publication of information by public bodies to assist in identifying and locating records in the custody or under the control of public bodies.

(2) The head of a public body shall adapt the standard template to its functions and publish its own information according to that adapted template.

(3) The published information shall include

(a) a description of the mandate and functions of the public body and its components;

(b) a description and list of the records in the custody or under the control of the public body, including personal information banks;

(c) the name, title, business address and business telephone number of the head and coordinator of the public body; and

(d) a description of the manuals used by employees of the public body in administering or carrying out the programs and activities of the public body.

(4) The published information shall include for each personal information bank maintained by a public body

(a) its name and location;

(b) a description of the kind of personal information and the categories of individuals whose personal information is included;

(c) the authority and purposes for collecting the personal information;

(d) the purposes for which the personal information is used or disclosed; and

(e) the categories of persons who use the personal information or to whom it is disclosed.

(5) Where personal information is used or disclosed by a public body for a purpose that is not included in the information published under subsection (2), the head of the public body shall

(a) keep a record of the purpose and either attach or link the record to the personal information; and

(b) update the published information to include that purpose.

(6) This section or a subsection of this section shall apply to those public bodies listed in the regulations.

Amendments to statutes and regulations

112. (1) A minister shall consult with the commissioner on a proposed bill that could have implications for access to information or protection of privacy, as soon as possible before, and not later than, the date on which notice to introduce the bill in the House of Assembly is given.

(2) The commissioner shall advise the minister as to whether the proposed bill has implications for access to information or protection of privacy.

(3) The commissioner may comment publicly on a draft bill any time after that draft bill has been made public.

Report of minister responsible

113. The minister responsible for this Act shall report annually to the House of Assembly on the administration of this Act and shall include information about

(a) the number of requests for access and whether they were granted or denied;

(b) the specific provisions of this Act used to refuse access;

(c) the number of requests for correction of personal information;

(d) the costs charged for access to records; and

(e) systemic and other issues raised by the commissioner in the annual reports of the commissioner.

Limitation of liability

114. (1) An action does not lie against the government of the province, a public body, the head of a public body, an elected or appointed official of a local public body or a person acting for or under the direction of the head of a public body for damages resulting from

(a) the disclosure of or a failure to disclose, in good faith, a record or part of a record or information under this Act or a consequence of that disclosure or failure to disclose; or

(b) the failure to give a notice required by this Act where reasonable care is taken to ensure that notices are given.

(2) An action does not lie against a Member of the House of Assembly for disclosing information obtained from a public body in accordance with paragraph 68(1)(k) while acting in good faith on behalf of an individual.

Offence

115. (1) A person who wilfully collects, uses or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.

(2) A person who wilfully

(a) attempts to gain or gains access to personal information in contravention of this Act or the regulations;

(b) makes a false statement to, or misleads or attempts to mislead the commissioner or another person performing duties or exercising powers under this Act;

(c) obstructs the commissioner or another person performing duties or exercising powers under this Act;

(d) destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records; or

(e) alters, falsifies or conceals a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records,

is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.

(3) A prosecution for an offence under this Act shall be commenced within 2 years of the date of the discovery of the offence.

Regulations

116. The Lieutenant-Governor in Council may make regulations

(a) designating a body as a public body, educational body, health care body or local government body under this Act;

(b) designating a person or group of persons as the head of a public body;

(c) prescribing procedures to be followed in making, transferring and responding to requests under this Act;

(d) permitting prescribed categories of applicants to make requests under this Act orally instead of in writing;

(e) limiting the costs that different categories of persons may be charged under this Act;

(f) authorizing, for the purposes of section 28, a local public body to hold meetings of its elected officials, or of its governing body or a committee of the governing body, to consider specified matters in the absence of the public unless another Act

(i) expressly authorizes the local public body to hold meetings in the absence of the public, and

(ii) specifies the matters that may be discussed at those meetings;

(g) prescribing for the purposes of section 36 the categories of sites that are considered to have heritage or anthropological value;

(h) authorizing the disclosure of information relating to the mental or physical health of individuals to medical or other experts to determine, for the purposes of section 37, if disclosure of that information could reasonably be expected to result in grave and immediate harm to the safety of or the mental or physical health of those individuals;

(i) prescribing procedures to be followed or restrictions considered necessary with respect to the disclosure and examination of information referred to in paragraph (h);

(j) prescribing special procedures for giving individuals access to personal information about their mental or physical health;

(k) prescribing, for the purposes of section 68, a body to whom personal information may be disclosed for audit purposes;

(l) prescribing the public bodies that are required to comply with all or part of section 111;

(m) requiring public bodies to provide to the minister responsible for this Act information that relates to its administration or is required for preparing the minister's annual report;

(n) providing for the retention and disposal of records by a public body if the *Management of Information Act* does not apply to the public body;

(o) exempting any class of public body from a regulation made under this section; and

(p) generally to give effect to this Act.

Review

117. (1) After the expiration of not more than 5 years after the coming into force of this Act or part of it and every 5 years thereafter, the minister responsible for this Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operation of this Act or part of it.

(2) The committee shall review the list of provisions in Schedule I to determine the necessity for their continued inclusion in Schedule I.

Transitional

118. (1) This Act applies to

(a) a request for access to a record that is made on or after the day section 8 comes into force;

(b) a request for correction of personal information that is made on or after the day section 10 comes into force; and

(c) a privacy complaint that is filed by an individual or commenced by the commissioner on or after the day section 73 comes into force.

(2) Part IV, Division 1 applies to and upon the appointment of the next commissioner.

Consequential amendments

119. [It is anticipated consequential amendments will be prepared by Government]

Repeal

120. (1) The *Access to Information and Protection of Privacy Act* is repealed.

(2) Sections 4 and 5 of the *Access to Information Regulations*, Newfoundland and Labrador Regulation 11/07, are repealed.

Commencement

121. This Act or a section, subsection, paragraph or subparagraph of this Act comes into force on a day or days to be proclaimed by the Lieutenant-Governor in Council.

SCHEDULE I

(a) sections 64 to 68 of the *Adoption Act, 2013*;

(b) section 29 of the *Adult Protection Act*;

(c) section 115 of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*;

(d) sections 69 to 74 of the *Children and Youth Care and Protection Act*;

(e) section 5.4 of the *Energy Corporation Act*;

(f) section 8.1 of the *Evidence Act*;

(g) subsection 24(1) of the *Fatalities Investigations Act*;

(h) subsection 5(1) of the *Fish Inspection Act*;

(i) section 4 of the *Fisheries Act*;

(j) sections 173, 174 and 174.1 of the *Highway Traffic Act*;

(k) section 15 of the *Mineral Act*;

(l) section 16 of the *Mineral Holdings Impost Act*;

(m) subsection 13(3) of the *Order of Newfoundland and Labrador Act*;

(n) sections 153, 154 and 155 of the *Petroleum Drilling Regulations*;

(o) sections 53 and 56 of the *Petroleum Regulations*;

(p) section 21 of the *Research and Development Council Act*;

(q) section 12 and subsection 62(2) of the *Schools Act, 1997*;

(r) sections 19 and 20 of the *Securities Act*;

(s) section 13 of the *Statistics Agency Act*; and

(t) section 18 of the *Workplace Health, Safety and Compensation Act*.