Speak No Evil, Write No Evil: Exploring Chain-of-Command Communications and Documentation Practices in the NL Public Service

Report submitted to the Commission of Inquiry Respecting the Muskrat Falls Project

Newfoundland and Labrador

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Any errors or oversights are the responsibility of the lead researcher and author.

Executive Summary

Answers were sought to two questions arising from potential problems identified from testimony at the Inquiry Respecting the Muskrat Falls Project.

1) Does record keeping within the NL public service appear to be sufficient?

2) What constraints, if any, exist upon NL public servants communicating different viewpoints to superiors and why this may be so?

[redacted]Participants to the study identified problems in documentation practices, including inconsistency in procedures and misunderstanding of what should be documented and how it should be maintained, the impact of the province's Access to Information and Protection of Privacy Act upon limiting documentation practices, and a culture of focusing upon the negative aspects of information transparency, with the outcome often being avoidance of documentation when possible.

Participants also identified problems with providing information and advice to superiors when such information is seen as not fitting existing preferences of those superiors. These concerns included both that a precarious work environment may cause some senior civil servants to curtail their recommendations to superiors and ministers, and also a concern around insecurity of these civil servants even when there may not be a high risk involved with voicing their positions or analysis. Separately, but related, a number of participants also spoke about feeling that their contributions were simply not valued and are often dismissed.

Solutions suggested by participants include enhanced training in each of the identified areas for public servants, ministers and political staff. Other recommendations include a review of ATIPPA that recognizes the onerous nature of certain regulations upon government employees, addressing precarity where possible to improve job security and workplace morale, and having the premier re-affirm a commitment to open and honest dialogue in the workplace. The report also suggests further consideration of a "duty to document" based upon further input from civil servants in order to find a proper balance between transparent documentation practices and effective government workplace procedures.

1) Introduction

Stemming from testimony provided during the Commission of Inquiry Respecting the Muskrat Falls Project, the Commissioner requested a report looking at potential systemic problems within the Newfoundland and Labrador public service. The primary questions set forth for this report include:

1) Does record keeping within the NL public service appear to be sufficient?

2) What constraints, if any, exist upon NL public servants communicating different viewpoints to superiors and why this may be so?

[redacted] the first question seeks to understand if public servants have a sufficient system of documentation when communicating among themselves and to their superiors. Such a concern was noted in the *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*. Writing on the matter of information management and record keeping, Wells et al. state:

> "The other part of this equation, the *duty to document* is a term gaining status in government and information management circles. It has become a rallying cry for Information and Privacy Commissioners and, it seems, for good reason: how can Information and Privacy Commissioners properly oversee access to information and privacy law in the absence of good records or, in some cases, no records at all?"(309).[2]

As is further noted in that report, Access to Information laws can create a "chilling effect" among senior civil servants. In 2016, the Office of the Information and Privacy Commissioner highlighted the need for legislation imposing a "duty to document" for all public bodies.[3] [redacted]

Further, [redacted] the second question seeks to understand if sufficient warning systems – via expert opinion/advice from civil servants – exist. This question might be stated more succinctly as: Can civil servants be honest with their superiors? The question of how to structure the independence of bureaucracy from elected members of government is a complex one, and attention to it is

[2] Wells, Clyde K. Doug Letto, Jennifer Stoddart. 2015. *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*. https://www.oipc.nl.ca/pdfs/ATIPPA_Report_Vol2.pdf

[3] Office of the Information and Privacy Commissioner of Newfoundland and Labrador. 2016. Report A-2016-022 : Department of Natural Resources. https://www.oipc.nl.ca/pdfs/A-2016-022_NR.pdf

derived, in part, from increased warning signs in the late 20th and early 21st century indicating that effective independence was being eroded.[4]

As Sossin noted in 2005, viewing the civil service's independent role as a constitutional norm requires stepping away from a simplistic view of the bureaucracy as directly responsible to the executive, which in turn is directly responsible to the legislature.

> "If it is to remain coherent, bureaucratic independence must be a concept elastic enough to encompass highly adjudicative administrative tribunals and highly independent officials such as Crown prosecutors, on the one hand, and a range of policy analysts, line departmental staff members, and bureaucrats, on the other hand. It must be capable of adapting to what is sometimes referred to as the 'post-bureaucratic era' of change-oriented, citizen-centred forms of public service delivery and restructuring within the public service, which may include public–private partnerships, outsourcing tasks, and a variety of 'new public management' initiatives. These new pressures create confusion and dislocation in terms of the roles and responsibilities of the bureaucratic and political spheres of executive government"(4-5).[5]

The second question, then, seeks a general view from public servants in terms of how independence is understood and how it functions. Certainly the bureaucracy must serve those who have been democratically elected (and in turn, the public itself – hence the job title). Service is not simply a matter of carrying out orders, however, but rather one of helping shape outcomes that are in the public's interest. This is accomplished, in part, by producing analyses in an impartial manner that are based on sound evidence. A civil service that cannot effectively exercise independence cannot effectively serve the public.

The civil service is often seen by the public as bloated and expensive, and employment within it is usually seen as highly desirable due, in part, to its unionization, standardized working hours and pension.[6] However, it has also been shown within Canada that the civil service typically suffers from significant morale issues, and those working within it are highly susceptible to anxiety and mental health problems.[7] If our goal is to create a structure that can effectively carry out the tasks necessary to democratic governance, then we require a view of our civil service that is not only demanding and transparent, but also one that is understanding and empathetic.

This brief study pays close attention to a small group of interview participants in order to hear and understand what they have to say about possible problems within NL's public service. After outlining how this data was collected and how it is viewed as an important contribution to our

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[4] Savoie, Donald J. 2003. *Breaking the Bargain – Public Servants, Ministers, and Parliament*. Toronto: University of Toronto Press.

[5] Sossin, Lorne. "Speaking truth to power? The search for bureaucratic independence in Canada." *University of Toronto Law Journal*, vol. 55 no. 1, 2005, pp. 1-59.

[6] Standardized working hours apply to much of the civil service, but not to many senior-level bureaucrats such as those interviewed for this project.

[7] Savoie, Donald J. 2013. *Whatever Happened to the Music Teacher?: How Government Decides and Why.* Montreal: McGill-Queens University Press.

knowledge in the following section, this report will provide an analysis of the collected data in order to identify answers to the 2 research questions.

2) Method

In order to collect evidence to answer the two research questions, 15 interviews were conducted between the dates June 10, 2019 and July 3, 2019 with current and retired members of the NL public service. All interviewees are anonymous and a majority of interviews were with those no longer working in government (3 were currently employed within the NL public service). The proportion of ranks included 4 Directors, 3 Assistant Deputy Ministers, 6 Deputy Ministers, and 2 participants below the Director level. 5 interviewees were female[8]. Some participants have permitted allowing their highest rank within the public service to accompany quotations, though no other identifying information or breakdown of interviewee characteristics is provided in order to protect anonymity.

Interviewees were initially contacted via email by the Harris Centre[9] and were asked to contact the lead researcher if interested in participation.[10] This arms-length approach was considered an appropriate and trustworthy way to contact potential participants, and avoid having individual-level recruitment data given to the lead researcher – a process sometimes frowned upon by university research ethics boards. Most interviewees were recruited in this manner, though a small number of interviewees also came forward after having been told of the study by a participant.[11]

Interviews lasted approximately 1 – 1.5 hours in length, and probed matters relating to both documentation procedures and attitudes towards offering professional advice to superiors – in particular where that advice differed from the known position of superiors. Interview data was then analyzed to identify key themes arising from all interviews and to give a fair representation to the range of views expressed on these matters. In analyzing this data, all interviews were reviewed and coded according to recurring themes relevant to the report. The goal of this analysis is to determine not only the most important information that speaks to the questions asked, but also to determine the likely accuracy of that information. The themes covered in this

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[8] This data is reported based on name and is admittedly presumptuous. It is nevertheless considered helpful information to report despite its possible inaccuracy. No participants were asked for data on sex or gender identity, though such data would be logical to request with any large-n study of these topics.

[9] The Harris Centre was formed fifteen years ago as a merger of Memorial's Public Policy Research Centre (PPRC) and the Centre of Regional Development Studies (CORDS). Since that time the Centre has facilitated or hosted hundreds of sessions, events, and consultations, with involvement from the private and public sectors, and has developed a reputation for being the 'honest broker', refraining from partisan political actions. As a result, it has had the opportunity to work with members of the public service in a variety of ways, and it is from these contacts that it developed the contact list for this study.

[10] 34 potential participants were contacted with the main criteria for inclusion in recruitment being to focus heavily upon those who have held positions of Director or higher within the NL public service, and to include those who have worked within government recently (i.e. current employees and recent retirees). Of these 34 contacts, 19 were former civil servants, while 15 were current civil servants. No selectivity was used to highlight particular experience or expertise, however given the Harris Centre's general focus, it is possible those contacted are prone to have worked in public policy or in fields broadly related to regional development relevant to Newfoundland and Labrador.

[11] This process is known as "snowball sampling", though in this case the snowball grew very little.

report are such because of both the relevance and the frequency/consistency with which they came up across interviews. Where there is uncertainty or inconsistency on relevant matters, an effort has been made to identify this.

Caution should nevertheless be taken in generalizing the results of this report. First, while the sample of interviewees does capture a reasonably representative cross-section of the target population for the study, it is possible that the data does not accurately represent the views of all *possible* participants.[12] The set of participants are mostly those who have filled senior public servant positions and are valued based upon their specific experience. At higher ranks, civil servants constitute a relatively small population and can be seen as constituting elite interviews.

A key critique under these circumstances is that data drawn from a sample of this size can be skewed by only a few interviews if they represent outlier viewpoints. Even a larger sample may still suffer from a range of shortcomings; most notably *self-selection bias* – which results from having those who are more inclined to participate[13] skewing the sample in a systematic manner. Notably, even large survey samples displaying highly representative characteristics on various parameters typically suffer due to this particular bias. While the data produced from this particular sample indicate a broad range of views, and certainly does not appear biased toward any given set of viewpoints, it is not possible to state if certain viewpoints are over/underrepresented. For this reason, the sample is better understood as key informants rather than as a generalizable representative sample.

Another caveat with a sample that consists mostly of those who no longer work within government is that while these participants should feel enhanced freedom to speak on matters related to their employment, the sample also includes participants who have left to pursue other work, or those who have been terminated. If this latter component is greater than the proportion of the study population that has this particular characteristic, this may shift the average position/perspective away from what would be expected of a representative sample of all possible participants. On balance, however, the views of those who have left the civil service are of particular value, and the data does not suggest that these specific individuals have a collectively skewed viewpoint on the questions in this study.

Interviewees appeared honest, engaged, knowledgeable and fair in their responses.[14] While perceptions differ, there is a good deal of commonality among the information provided, indicating that this information is likely accurate, even if opinions varied. The analysis has been conducted in such a manner as to avoid privileging perspectives that only arise from a small number of the participants.

Finally, it should be noted that there was informal communication that reached the researchers indicating some current public servants were aware of the study but unwilling to participate,

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[12] As a random sampling procedure might produce.

[13] This may be due to stronger positive/negative feelings toward the study topic, a greater interest in the topic, a particular experience, or some other connection to the topic or mode of study.

[14] From the lead researcher's perspective, having reasonable experience in interviewing, there is no interviewee that stands out as having provided inaccurate or misleading information. No interviewee gave information that didn't fit at least partially with that of other interviewees.

which should be considered alongside the findings in this study. Indeed, even among those no longer working within government there was a heightened concern for anonymity among many participants. If there is a significant level of apprehension toward speaking on these matters, that in itself would indicate reasons for concern about the matters being studied. Nevertheless, invitations were made to a wide range of potential participants, though within a short timeframe. If the study findings are in any way inaccurate due to participation reluctance, hopefully reporting these findings will lead to an ongoing discussion that contributes to a more accurate understanding of the topics of interest.

3) Findings

This study arose out of perceived problems related to the Muskrat Falls hydroelectric project, and it is important to note at the start that many participants saw the processes leading to the sanctioning of that project as relatively unique. This should be understood within the context of the scope of the Muskrat Falls project, and this should not be seen as dismissing any connection between the practices that led to that project and current practices within government. However, a common view that arose from speaking to current and former senior-level civil servants is that if significant problems plagued the Muskrat Falls process, those same problems – while evident to some – are not as problematic or do not appear likely to result in a similar outcome. A number of participants in this study highlighted this point, with some suggesting that there were deliberate efforts to hide information with Muskrat Falls that are not in line with anything they have seen or experienced during their time working in the NL public service. Nevertheless, significant problems were identified and, while many participants may have seen these as unrelated to, or on a different scale from, perceived problems related to the Muskrat Falls sanctioning, these problems still have the potential to increase the risk of poor policy decisions.

3.1) Research Question 1: Does record keeping within the NL public service appear to be sufficient?

In order to get a general sense of perspectives on the 2 research questions, participants were asked to provide a response to 2 survey style questions relating to each topic. With interviews consisting of a range of questions, first in regard to documentation, then in regard to communicating different positions, participants would receive the survey questions at the conclusion of discussing the topic. In most cases, participant also had qualifications to their responses that have been considered with the other qualitative data collected.

While the tabulation of results should not be generalized as the perspective of all civil servants, these measures do give an indication of the views of the sample and help to summarize the viewpoints provided. The results also help to alleviate concerns that the sample was overly positive or negative toward the topic questions.

Table 1: *As a measure of general documentation practices within government would you say it is*:

0	Entirely sufficient
9.5	Usually sufficient
4	Neither sufficient nor insufficient
1.5	Usually insufficient
0	Entirely insufficient

As can be observed in Table 1, the overall view of documentation practices is relatively positive. Understandably, as participants are being asked a general question, there is a tendency to avoid responses on both extremes though, as will be seen, no participants chose the negative extreme (Entirely insufficient) for any of 4 survey-type responses. Partial responses indicate cases where a respondent gave a response as being between options.[15] Approximately two-thirds of participants felt that documentation practices are usually sufficient. While this doesn't paint a highly positive picture – with one-third feeling they cannot categorize documentation as being sufficient – it does suggest that the pool of participants, while still substantively critical, doesn't categorize the process of documentation as highly problematic in a general sense.

Note that these responses tell us something important about our sample. It would be very helpful to have similar data from the public service writ large, as well as a large sample of former employees, to see how it compares. Unfortunately such data doesn't currently exist and there was not sufficient time to conduct such a survey for this report. Nevertheless these responses provide a helpful snapshot of our sample, from which we have also gained helpful qualitative information. It is apparent that this isn't simply a group of people with an axe to grind or with a public relations story to spin.

Table 2: *And as a measure of your own approach to documentation, would you say it is:*

2	Entirely sufficient
8	Usually sufficient
3	Neither sufficient nor insufficient
1	Usually insufficient
0	Entirely insufficient

Similarly, when asked about their own documentation approach, participants were generally positive. Not surprisingly, there is a slightly greater tendency to view one's own practices in this

[15] In this case, one respondent chose between B and C, while another chose between C and D. Therefore, category B (usually sufficient) has a .5, as does category D (usually insufficient).

area as superior to those of the general, and so the average level of "sufficiency" is higher than in Table 1.[16] As is evident in much survey data, most people consider themselves above average.

Nevertheless, despite the generally positive views of many, a range of important criticisms was provided. The prominent themes of these criticisms will be outlined below by highlighting the responses of participants to interview questions.

3.1.1) Lack of consistency in documentation processes

One dominant theme among participants focused upon the lack of consistency among documentation practices. Many participants felt there was often uncertainty as to what should be documented, and also as to what should be done with various forms of documentation once it existed. While participants did, in some cases, speak about using HP Records Management (formerly TRIM) or CIS 3, it was suggested that the former is used inconsistently, and the latter is used for documentation of direct communication with clients. In short, most interviewees expressed that some form of inconsistency exists.

> "From my experience the flow of information could have been a lot better. And the flow of information could have resulted in better file keeping, better consistency, better decision-making capacity. So I think flow of information was inadequate in a lot of cases in our department" *(Interview H – Director).*[17]

> "As the deputy of [various departments], when I went to those departments or assumed the role of DM there were differing cultures. There is no consistent information management and documentation protocols in government. While there was the introduction of the ATIPPA legislation and that kind of stuff began to provide some broad parameters around the information management process—the collecting and disseminating of information and how to respond to requests—when you get granular in how that gets operationalized in departments there is no consistency" *(Interview A – Deputy Minister).*

Documentation practices are also dependent, as many interviewees indicated, upon the people involved. The Minister, the Deputy Minister, the Assistant Deputy Minister, can each play a role in terms of expectations and protocols. As was noted by *Interview A*, some Deputy Ministers are highly process oriented and want everything in writing, while others find documentation cumbersome or a drain on resources and will look for other means of arriving at decisions. This is an important point, mentioned often, that suggests personal/cultural variation that is not clearly driven by institutional factors.

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[16] One participant did not provide specific responses to all survey questions, and instead provided qualified explanations of areas of strengths and weaknesses. Therefore response totals do not always equal 15.

[17] As a note to study participants, the letter used to identify the interviewee does not correspond to the interview number provided on consent forms for each interview. In other words, Interviewee #1 is not the same person as Interview A.

Interview A went further to outline the role of executive council in terms of setting expectations and being able to use directives to adjust behaviour. It was noted, however, that what typically happens with regard to such directives is reactionary to the problems, and these often push practices toward extreme ends of a continuum. When practices are less stringent, the possibility of a lack of documentation arises and the reaction is to push for stronger practices. These, in turn, are onerous and use up additional time and resources, slowing down productivity and creating frustration, in which case the response is to weaken practices. This cycle was likened to a pendulum that constantly swings from one end to the other, but where balance has not been effectively achieved.

A number of participants also pointed to past training programs, long since cancelled, that aided public servants in a range of areas, and lamented the limited opportunities that now exist. Some spoke to the direction they sometimes receive in terms of documentation, but said this varies depending on whom is giving the direction.

> "I don't think there is clarity around what the expectation is for documentation. So some of the stuff you're seeing coming out on Muskrat Falls – is there an obligation on everybody in the room to document every single thing that happened in a meeting? Is there one person who is doing it and then everybody has to sign off on the record taking from it? What is just discussion and thinking out loud, versus what is actually a critical piece of information that's going to impact a future decision? A lot of that, in my view, is very subjective" *(Interview G – Deputy Minister).*

> "There have been some huge improvements and I wouldn't want to lose sight of those. But I do think that records kept as part of the policy making process are fewer and fewer than they were in the past. And briefing materials and those kind of things are becoming almost a thing of the past" *(Interview D – Assistant Deputy Minister).*

> "I have experienced meetings that required direction, and what I took away varied from what others took away. And in the absence of anything being written at the time, you have to regroup and come to consensus on what happened, whether that was a meeting with the Premier or outside parties. And that leads to inefficiency as we try to find out what the decision was and move ahead to implement" *(Interview L – Deputy Minister).*

This last point leads us toward the following two themes that look at the trend toward less documentation in general, and a preference for verbal communications.

3.1.2) ATIPPA as onerous

Almost all participants spoke about Newfoundland and Labrador's Access to Information and Protection of Privacy Act (ATIPPA) at some length, and a number pointed to it almost immediately as the main driver affecting behaviour around documentation practices during their experience. While there was general approval of the principles underlying the Act, there were many concerns regarding it. These ranged from those who saw inconsistent practices related to it, those who saw it as creating a chill on effective communication practices, and those who saw it as creating more work in an environment already short on resources. Despite provisions in

section 29 of the Act that can protect advice, proposals or policy options provided to public bodies or ministers, there appears to be a wide range of communications in these areas and other forms of communication that can be requested, and which drive concerns for those providing such communication. The altering of communications to produce less written information was a significant theme in all interviews, though despite substantial criticism it should be noted that some participants voiced positive viewpoints to some of these changes as well.

> "The ATIPP legislation in particular really makes it a challenge for government & civil servants to cope with all that. It is a very burdensome impact on the civil service. I'm not saying it's not necessary, I think some of it certainly is, but I think in particular because of the time frames associated with having to do searches for information, the sheer amount of materials that are covered, and the way the process works is a huge burden on government departments" *(Interview G – Deputy Minister).*

> "There has been a dramatic shift in not necessarily the documentation but the level of information leading to a decision. So ultimately the biggest issue of what we will call a paper trail that identifies people, process, recommendations relative to critical decisions have been dramatically reduced with the introduction of the [recent] changes to ATIPPA legislation, even though it was designed to make it more open and transparent. In my view ... it has severely restricted documentation because the practice is often to spend more time in managing the messaging into decision making rather than putting efforts into informing the decision making" *(Interview M).*

> "What you will hear from time to time is that people say you may not want to record something, or put it in an email because it may be ATIPPed. ... It is common, and it has come from the highest levels within government. ... The level of documentation that is available is quite high, but people can hide behind that; use the rules and hide behind them if they want" *(Interview L – Deputy Minister).*

> "At the executive level people are exceedingly more cautious in terms of what records get created and that caution is passed down the line. And where once a briefing note would have been required, that kind of activity is now no longer required. As there has been more and more training on ATIPPA and examples of things, this [evasive behaviour] is fairly wide spread on the policy side" *(Interview D – Assistant Deputy Minister).*

Another consideration that came up with multiple participants was the impact upon businesses looking to work with government, as various businesses see a risk in exposing strategic information. Despite language in section 39 of the Act that is meant to safeguard this issue, this concern hasn't been alleviated.

> "One of the big areas [was] when they changed what was injurious to commercial interests, what was considered to be commercially sensitive. I know ... there was a real concern in the sharing of information from companies with government because it could be ATIPPed. And of course ... after the act changed after that last ATTIPA overhaul, that was a real concern from business and remains a real concern from business" *(Interview A – Deputy Minister).*

Many participants also spoke about the use of black books for note-taking. There were varying concerns around the use of these books and the maintenance of them. In some cases, participants noted submitting these books when requested. Others noted, however, that it is not clear how to maintain these government records, or what should happen with them. One participant noted that such books are being used less so that no government record is being created.

> "Even now people's personal note books are under ATIPPA. There was a time when everyone at a meeting would have a black book and now that doesn't happen anymore. So people have shifted to other notes instead of black books. They're using note pads that are disposable. They may jot some notes down so they remember to do things but those are transitory records and destroyed, so you don't see the records produced that were in the past" *(Interview D – Assistant Deputy Minister).*

This participant also noted the increased tendency for turnover among senior bureaucrats brings with it a change of understanding in those positions, and this combined with a tendency to have less information on record means there is a limited history to draw upon, creating challenges for those in decision-making capacities.

> "I don't see it as a documentation problem, I see it as weakening the decision making process. I think there is adequate documentation. What isn't happening are the kind of briefing materials that used to be produced to ensure that executives and ministers understood all aspects of a problem and the pros and cons, different approaches and the full context. Those things aren't being documented for a minister" *(Interview D – Assistant Deputy Minister).*

Along with changes in personnel is the inconsistency across departments. One participant noted that the understanding of processes was distinctly different in different parts of the civil service. Various forms of deleting information or making information difficult to track were being employed.

> "I went from one place where people were very clear about their duties, to another where they had no idea. So somehow that all got missed. And when I told them about the changes they looked at me like I had two heads. 'What do you mean we have to do that?' And that involved deleting correspondence and getting rid of documents. They were not doing it maliciously" *(Interview C – Assistant Deputy Minister).*

> "I do know of an occasion where a colleague of mine was requested to delete a trail of emails. I remember that conversation and they were shocked that they were requested by the director to delete the email. That shouldn't be happening. It is not correct. I have never been asked but would tell them 'No.' How bad is something that you have to delete it and remove a trail?" *(Interview E).*

Again, it is important to recognize that not all expressions were negative with regard to the nature of documentation or changes to it that have taken place in recent years. Multiple participants noted that documentation is much stronger on financial matters, with the near elimination of soft money in budgets and effective tracking of grants and funding.

There were also interesting areas of disagreement, with some participants noting that transitory records really shouldn't be kept while others were concerned with limiting information that leads up to decisions. There was expression that what is transitory need a clearer definition and protocol.

> "It comes down to finding that balance of documentation and how the documentation is being dealt with, to making decisions and running departments. ... [In some cases] there were decisions being made every minute of the day. If I had to document every single time a director or an ADM or a supervisor came to me and said, 'Deputy we need some direction on this,' to be totally blunt about it we wouldn't have gotten anything done.
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> ...
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> You go to other departments where the type of business is ... an iterative process, for example child welfare, or business development. When you are talking to a client, you know everything you are talking about could be considered germane information that should be captured. We would try and instil in staff the need for progress notes, the need to record interactions with clients because these are things [we use CIS 3 for]. That is an example where the nature of the business is more suited towards documentation and the culture was built" *(Interview A – Deputy Minister).*

One question asked of participants probed perceptions of the "duty to document", the concept noted in the 2014 review of ATIPPA, and one that was regularly discussed by the OIPC. While this concept is not included in the current legislation, it was thought that there might be some common understanding around this concept. However, knowledge of what constituted the "duty to document" varied a good deal, with some respondents having not heard of it despite having worked in government during the period when it was being discussed. Responses included some trepidation regarding the concept, as well as some criticism of current practice that might be enhanced by a clear duty to document.

> "It was onerous enough just to deal with the actual ATIPP legislation. I remember that 'duty to document' concept was met with a lot of angst, around the executive table in particular. Not just angst. I think a lot of people viewed it as overly onerous. The civil service is generally struggling just to keep up with the volume of activity that it's being asked to do to run the province. To then layer on, on top of the ATIPP process – which consumes vast amounts of time and resources – a requirement that every single conversation be documented and entered into the records was viewed as just inappropriate and ill advised. First of all, the workload impacts would be massive. Secondly, I think it would be viewed as having a chilling effect on open conversation – on debate of concepts, what to do about a situation. If all of that had to be documented I think you'd get poorer outcomes" *(Interview G – Deputy Minister).*
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> "I think all the negativity is on the other side. Not the duty to document, but the duty to get rid of documents is what I am struggling with. Which may sound like the same thing but it doesn't feel that way to me. Like it is saying, 'You are not legally required to keep those things so don't keep them. Don't keep anything except the things you are legally required

to keep.' That is the current view and the current direction that we have" *(Interview D – Assistant Deputy Minister).*

"The big issue is not putting something in the file in the first instance or not putting something in writing because you have been cautioned not to because it may be ATIPPed. If you are cautioned not to write it, that is illegal. The premier can't caution you, the clerk of executive council can't caution you, the minister can't caution you. But that is happening" *(Interview L – Deputy Minister).*

One over-arching impact of ATIPPA seems to be a culture in which avoiding creating documents, or at least retrievable documents, is a primary consideration in day-to-day activities for many civil servants.

"We had a manager that would never send an email with a subject line. Just information in the body of the email you know? Could be something completely innocent—like, 'Hey can you get this done or that done?'" *(Interview E).*

"Maybe 10 years ago I would have sent out an email. Now I'm saying do I really want to do that, given that email will come back to me in a couple days with an ATIPP request? That's where I find the record keeping on a management level is weak. In terms of some of these major decisions, I would question not the record practices so much, but I'd challenge the whole project management regime of which record management is an aspect" *(Interview I).*

As some participants have deep concerns about the impact upon record keeping in the current environment, multiple participants also highlighted the degree to which government processes can be – and may be further – weakened by regulations that increase the need to produce records. They noted the need to take great care in any future regulations around documentation and to ensure that any new rules don't further impede the ability to conduct the work of government.

3.1.3) "Front Page of the Telegram" – limiting written communication

Perhaps the most common phrase coming from interviews is some version of the statement "Do you want to see it on the front page of the *Telegram*?", in reference to the practice of writing down information that will be subject to ATIPPA. This highlights the prominence of concerns around ATIPPA among public servants, and the degree to which it influences behaviour.

"Most people are cautious not because they don't want to document, but again, one piece can so easily be taken out of context. Giving advice to my superiors, whether in the political office or in my various roles as a civil servant, I always said to them, 'Look are you comfortable with this decisions on the front page of the *Telegram*? If so we are fine. If not we need to rethink it'" *(Interview C – Assistant Deputy Minister).*

"The expression was 'don't write anything that you would not want to see on the front page of the *Telegram*'. So that's something that was said quite often, and people took that to heart. It did play a large part, I think, in how briefing notes were crafted, the

language that was used. And I think things did change. Writing a briefing note 6,7,8,9 years ago was a different process" *(Interview H – Director).*

Some interviewees highlighted the tendency to truncate what is communicated, such as in briefing notes, as potentially a positive however. While on one hand there was the suggestion that information might be limited and therefore not as effective, some participants also suggested more positively that notes have become more focused on saying only what is necessary to include.

Documentation practices have, understandably, changed over time and should not be entirely attributed to recent changes in ATIPPA or to specific governments. A number of participants noted that concerns about having information in writing arose far earlier than the recent version of ATIPPA.

"The first time I recall the instruction coming about specifically not writing things down was – as far as I recall – ... it was for the briefing of new ministers coming in (I think) it was 2003 during the government change. And that was kind of a 'huh?' moment. These were ministers coming into – in our case – a fairly technical area, with basically no technical knowledge. And we weren't going to give them much in the way of briefing notes. ... Briefing notes, whenever there was a ministerial change, briefing notes were a major chore. You had to take all the issues that were current, assess, write down whatever was important for the incoming minister to be briefed on. And to not do this just seemed somewhat odd" *(Interview F – Director).*

"This focus on transparency in the revised ATIPPA heightened this sensitivity in the past 10 years but particularly in the past 4 or 5 years, so that even ministers getting briefings on critical pieces of policy wouldn't accept information that was provided to them, would pass the paper back, saying 'I don't want this in writing. Talk to me.' That was frequent. Frequent. And it crossed administrations. That happened even in the early 2000s. It has crossed both of the major party lines. It is not just one particular style of government" *(Interview M).*

This participant went on to note the changed culture around information generally, stating that the organization around requesting and exploiting information by opposition parties, media and organized groups creates a heightened level of concern and awareness around anything that is put into writing. Another participant noted that the timing with which it occurs – that a written note becomes part of an ATIPPA request – is often close to immediate.

3.1.4) Solutions

Despite varying views on some of the problems that exist with regard to record keeping, it is reasonable to conclude that there are significant issues that study participants have highlighted. Among suggestions put forward by participants to address these issue were to establish norms to better provide consistency, avoid making these norms overly onerous, and establish standardized training focused upon the public's interest so that practices don't fall to the interpretations or expectations of superiors in different departments.

> "... it needs to be from the perspective of what's in the public good. ATIPPA is in the public good, and we should have training in that perspective, as opposed to training on how to protect government" *(Interview L – Deputy Minister).*

> "I think the overhaul of ATTIPA is something that the executive council needs to focus on, and I don't know if it was the leadership at that time of the executive council, a clerk or whatever. I think you can see where this is starting to create some of the inconsistencies and what not. So I think it has to be driven from the centre. You need to try and build amongst the executive ranks, and then of course obviously then that would cascade down. A common understanding of 'duty to document'. A common understanding of the application of law in the ATTIPA. I think another remedy is to create a better equilibrium around business interests, I really do. I think it went too far" *(Interview A – Deputy Minister).*

> "I don't think we have the legislation in the right place right now and I think it is having some negative impacts and they are not the ones everyone thinks they are" *(Interview D – Assistant Deputy Minister).*

> "Review of ATIPPA with zero political involvement, with no sense of crisis, so it can find its way to the middle and be effective in preventing people from trying to hide things but becomes less of an impediment to civil servants doing their jobs because they are afraid to write something down" *(Interview C – Assistant Deputy Minister).*

Among more specific topics that arose where participants felt specific clarification should be given is upon the use and retention of black books for note keeping, and upon the definition of transitory records. While a couple participants felt the understanding around transitory records was relatively good, many highlighted this as a poorly defined and/or inconsistent area.

There was also concern that attention to record keeping specifically could impose greater burdens if only addressed with regard to enhancing what is maintained without some attention to also limiting requirements where possible. Alongside multiple participants suggesting a review of ATIPPA were those who were concerned that heightened attention to the matter of documentation would simply create more work in an environment with limited resources.

> "I'm concerned we're going to have every ADM saying to the Deputy 'I'm waiting to get a response back in writing'. The type of paralysis that's going to create in the system" *(Interview I).*

In 2016, the OIPC provided a backgrounder on the "Duty to Document", and highlighted the importance of avoiding an increase in what some fear as a potential burdensome regulation.

> "A duty to document does not need to be onerous. The focus is not on the creation of more records, but rather on the creation and retention of the right records. The documents to be created will depend on the business needs of public agencies and community expectations.

> In order to be effective, the duty to document must be accompanied by strong records management practices and standards, and independent oversight with sanctions for non-compliance."[18]

Logically, stemming from the evidence provided, it is apparent that a "duty to document" should be carefully constructed after consultation with civil servants in order to understand current practices and to address identified shortcomings. The goal should be to identify documentation practices that strike a balance between what is necessary for effective transparency and what may unnecessarily impose additional burdens on available resources.

3.2) Research Question 2: What constraints, if any, exist upon NL public servants communicating different viewpoints to superiors and why this may be so?

As with the first topic, participants were asked both a general and personal question around practices regarding communicating differing positions to superiors. These close-ended questions followed a range of qualitative interview questions covering the topic.

Table 3: *As a measure of communicating different positions within government would you say it is*:

1	Entirely sufficient
5	Usually sufficient
3.5	Neither sufficient nor insufficient
4.5	Usually insufficient
0	Entirely insufficient

In comparison to responses on documentation, participants' sense of the general process of communicating differing positions to superiors was slightly more negative. While one participant chose the extreme positive response, more than half of participants do not classify this type of communication as generally being at a level that is sufficient, with about one-third categorizing it as usually insufficient.

[18] Office of the Information and Privacy Commissioner. 2016. *Backgrounder on a Duty to Document.* https://www.oipc.bc.ca/media/16822/2016-01-25-backgrounder_duty-to-document_en.pdf

Table 4: *And as a measure of your own approach to communicating a different position, would you say it is*:

4	Entirely sufficient
8.5	Usually sufficient
0.5	Neither sufficient nor insufficient
1	Usually insufficient
0	Entirely insufficient

Table 4 aids in illustrating the fact that while most participants had stories of problems they observed or were aware of with regard to communication to superiors in government, relatively few had problematic stories of their own. Most participants saw themselves as having had few, if any, issues communicating a position or analysis to those above them or to Ministers they worked under (where relevant), though these responses were sometimes qualified in terms of how their communications were received. The following sections will illuminate this further, showing that there is an important distinction in terms of ability to speak, and the perception that the communication provided is valued.

3.2.1) Truth to Power: Saying what needs to be said (or not) or "Decision-based evidence"

Most participants indicated having had relatively few cases where they had difficulty or were unable to say what they felt they should to those above them. Most also stated that the circumstances for effectively communicating to superiors differ depending upon the people involved, with suggestions that some superiors were simply more difficult to deal with or highlighting a working relationship that was strained. *Interview B* spoke about experiencing intimidating behaviour personally on multiple occasions, while many interviewees spoke about others who had difficulty with superiors. The reasons for this difficulty typically divided between those who lacked the confidence to speak out, and those who were in identifiably risky circumstances while doing so. These two separate reasons could be seen as the same, but the perceptions expressed saw the problem as distinctly different – in one circumstance there are those who could speak up but are choosing not to (due perhaps to perceived risk), while in the other there is an actual risk that saying the wrong thing can lead to punishment. In the most extreme cases, the risk could include termination. Given that a large number of terminations have occurred at the senior executive level in recent years, this trend was seen as exacerbating a problem throughout the civil service where a heightened sense of precarious employment was introduced.

Multiple interviewees referred to the precarious nature of executive positions. When serving "at pleasure" without job security, it is easy to be concerned about the potential effect of stating a position that doesn't fit a minister's expectations. A few cases were mentioned where senior

bureaucrats were moved off of a file or out of government entirely.[19] The terms "apprehension", "trepidation" and "fear" were among those that some participants used to explain the feelings that some senior level bureaucrats experience. One participant (*Interview M*) stated an implied expectation that as you advance in your career to top levels, you will "toe the line."

Concerns were also raised with regard to increasing the precarity of certain positions beside those of executive by excluding them from the union, as well as taking promotions that include less job security.

> "Years ago, even our Policy Analysts used to be in the Union. All that changed around that same time when we got rid of a lot of them and we went with these Communication folks: then they became HL-21s. Once they lost the protection to speak freely – and I don't think there was any direction given – I do believe that their confidence level in speaking truth-to-power was compromised" *(Interview B – Deputy Minister).*

> "People are hesitating to move from management ranks to executive ranks because the perceived risk is much higher in terms of job security" *(Interview L – Deputy Minister).*

> "A lot of the executive operate out of fear because they see the way the executive is managed is 'Screw up and you are out the door.' But even if you move below the pleasure appointments, we don't have a performance management system in government" *(Interview A – Deputy Minister).*

Participants also highlighted cases where they are given the task of justifying a given preferred policy rather than effectively analyzing options. Most interviewees did not feel this was a standard manner of interaction, but many noted that it does occur, with some, like *Interview J*, noting that they've sometimes been told to "Just make it work".

> "We joke about 'decision-based evidence making'. It does happen sometimes. 'Here is what we want to do, so justify it.' It isn't the norm, but then again part of our job is to present the full story" *(Interview D – Assistant Deputy Minister).*

Multiple interviewees spoke to circumstances where job security concerns are negatively affecting behaviour. There were also expressions regarding career stage, where some public servants were seen as less inclined to provide differing or contrary advice due to retirement proximity. The implication was that some civil servants might feel compelled to provide information or advice that fits a given outcome – even though the risk involved may not always be significant.

> "Sometimes you would see where somebody might be a little bit more fearful for their job or closer to retirement and may not have been willing to be as vocal or rock the boat as much" *(Interview G – Deputy Minister).*

> "I think it's a problem of insecurity to a certain extent. ... A lot of decisions in government now are controlled and made by the ministers themselves. So senior bureaucracy has very little power, very little time, very little control to make those decisions. And as such they are insecure to share information with others around them because of the potential

[19] Some participants specifically referenced the period in 2016 when

inconsistency with what the minister may or may not want. So I think that's probably one of the biggest issues and challenges facing the bureaucracy right now is senior bureaucracy's inability to make the proper decision because quite often the decision you're trying to make is one that appeases the minister" *(Interview H – Director).*

"I know there were many times I mentored and coached directors after meetings when they said to me, 'You know Deputy, this is something I should have shared with the minister,' and I said, 'You are damn right you should have. Why wouldn't you share that.' and they'd respond 'Well I wasn't sure….' And I would tell them 'While you are in the same room you need to share those things.' So are there people because of hierarchy, because of… maybe it is the minister. Some of them are bullies. Some of them have persona or a way about them that they like to create a perceived culture of fear. So without a doubt there are people who … but I don't think it is pervasive." *(Interview A – Deputy Minister).*

"I know many of the current ministers and I am sure their DMs feel safe and secure giving them their best advice. I know other ministers, their senior executive would never speak up to them because it would cost them their jobs." *(Interview C – Assistant Deputy Minister).*

While the differing personal nature of ministers was highlighted by many participants, indicating there are those who encourage open and honest dialogue while others do not, there were very limited expressions of problems under specific premiers or governments. While there were concerns expressed particularly with regard to the current government due to a large number of executive-level terminations and suggestions of increased partisanship, a common response on this topic usually indicated that the premiers themselves did not inhibit the ability to speak truth to power.

3.2.2) Not valued

A separate concern that some participants voiced was not that they were limited in what they could say, but rather that they felt their input was not valued. Some participants indicated they felt that they were no longer being asked for their expertise or to do what they viewed as their job. One participant expressed that the reason for having left the public service was due to feeling that their input and the use of evidence simply wasn't valued. Another suggested that there has been a recent decrease in support for providing input.

"There may be things that government do for political reasons but when you as a civil servant do the work, you bust your butt and it is all dismissed, it just crushes you. And can paralyze the division when people feel they're not valued" *(Interview J).*

"I have worked under numerous political regimes in the province and that has varied. It is not so much about the ability to [provide advice] as the receptiveness of those in power to acknowledge it and be supportive of it. My sense in recent years is that it is a bit fragile" *(Interview L – Deputy Minister).*

"Too often individuals who have expertise, who are often senior management because they have risen through the rank and file of the civil service – too often their expert advice

is not solicited or is not considered. I have witnessed significant dismissiveness of senior management on public policy. That can have a significant impact on people" *(Interview M).*

"You just turn red in the face after a while trying to get your opinion heard …. An opinion that is likely right will just be shoved aside. So you feel useless. You feel powerless. The power of my knowledge is something. You have to believe in your staff and knowledge and experience and ability. I don't see that now" *(Interview E).*

*"*Over time as a director, I probably felt more empowered 8 or 9 or 10 years ago than what I did [more recently]. And that's not just me. That's a fairly consistent statement from the whole organization. Other directors felt the same*" (Interview H – Director).*

In contrast, however, some interviewees countered the view that having their input rejected meant that their work was not valued. A statement that came up regularly was "fearless advice and loyal implementation" – referring to the ability of a civil servant to say what needs to be said, and then carry out their duties as determined by the Minister regardless of what decision was ultimately made. Many interviewees also felt that some civil servants have difficulty with their advice being rejected, which in part highlights differences in personality. It is clear that the experience of participants ranged widely with regard to having felt valued, and perhaps also in their dispositions regarding being able to find value in what work they were doing.

"This is a fine line, right? Do you feel that they have heard enough around alternatives, around other strategic considerations, political considerations? … As a deputy I [am] charged to share views with them, but then say 'OK'. So they've clearly got their mind made up. Then you just lay your tools down and say, 'Okay, let's just focus on making that happen.' There come those times where resisting makes no sense. That's where you flip from fearless advice to loyal implementation. It's no more complex than that." *(Interview A – Deputy Minister).*

"For career longevity it best to roll with it. It is just the issue of the day and not a hill to die on. There will be another issue tomorrow. You are not the one who was elected" *(Interview O).*

Both of these preceding viewpoints are clearly apparent in the data: one viewpoint is that of feeling powerless, while the other seems like flicking a switch between fearless advice and loyal implementation. Again, these differences likely reflect both differing circumstances and different personalities. Nevertheless, expressions of feeling undervalued were prominent, and the manner in which these were expressed indicates a clear problem and a disconcerting trend that should be taken seriously.

Finally, there were expressions of general exclusion or of select people being given a privileged role in certain circumstances.

*"*There was a small circle of people who were involved in the major files and the flow of information from the close circle to 'the worker bees' was not there. So quite often there was a lot of inconsistency between certain groups of people in the department on the file, versus others. Some people would have privileged information and would be well versed on certain things, while others who should be involved in that file were not. So flow of

information didn't always occur because people were kind of left out. Because of that you've got different understandings of where a file might be, inconsistencies that pop up, and so forth" *(Interview H – Director).*

"It changed quite a lot actually, before I left. It was like 'here's what we're going to do, so write a note that says how we're going to do it'" *(Interview F – Director).*

This participant expressed the view that they had been free to provide advice and only recalled one superior who had been unreceptive to their input. However, there was a sense of decreasing value placed upon their work.

"Sometimes – not with everything – but sometimes I received the impression that the decision was already made as to what the course of action would be, maybe before I ever even heard of it." *(Interview F – Director).*

While there are likely key differences in what precisely some participants experienced, and possibly differences in terms of why input may have been valued to greater or lesser extents – as in any workplace – the result is a very real concern around employees feeling their work is not valued by their superiors. There is also a reasonable concern that de-valuing of work or exclusion of certain inputs might be a product of certain decision-makers not wanting to consider available options or evidence. At the same time, rejection of advice also needs to be recognized as something that must occur in the normal course of pursing goals. Sensitivity to this matter is certainly warranted.

3.2.3) Solutions:

A number of participants attributed many of the problems surrounding communication with superiors to individuals in those positions – with some noting that moves to different positions (i.e. working with different superiors) have highlighted greater or lesser degrees of openness. While individuals are always going to vary in terms of behavioural patterns, there are likely some institutional structures that can aid in the effectiveness of communication and the use of expertise within government hierarchies.

Again, a prominent suggestion from participants in this study was in regard to training programs. This was focused both upon the civil service and upon politicians and their political aids while in office. With regard to civil servants, it was recommended that training could involve understanding how to deal with potentially antagonistic atmospheres and possibly with the precariousness of their position. Precarious work can be draining, and concerns over precarity may inhibit work effectiveness. This problem may also be worsened by the sense that communication is constantly monitored.

With regard to training for politicians, participants highlighted the importance of politicians understanding what the proper role of the civil service is, and recognizing the importance of both impartiality and independence from the political considerations of those holding elected office.

"I think more could be done by cabinet secretariat with educating new ministers about what their role is, about what the role of the civil service is, what they should [and should

> not] expect from their deputy ministers ... particularly around political involvement and those types of things. And that's not to say those conversations don't take place. They do, but I think more could be done to try to set the stage. As well, to protect deputies, who do need to speak truth to power. Again, if you serve at the pleasure of the [lieutenant governor in council], who's able to protect you if you have a contentious issue and you want to really bring forward something? Nobody's got your back apart from the Clerk, who is in the same boat as you are really. They've got to be careful too" *(Interview G – Deputy Minister).*
>
> "There's training for cabinet ministers when they come, but it is not what it should be" *(Interview B – Deputy Minister).*

Alongside training, some consideration should be given to a structure that can limit the precarity of employment where possible. The need to have executive roles that serve "at pleasure" is certainly recognized as fundamental and was not questioned by any participants, though some lower positions were seen as those where union membership might be possible. Greater transparency of the performance contracts of Deputy Ministers was also suggested as a means to achieving greater stability.

Another participant pointed to the effectiveness of performance reviews, which were identified as something Premier Williams had attempted to initiate, but which were not seen as effectively implemented.

> "We use technology to enable some of that. There are peer assessments done. ... It creates a culture of sharing and communicating. Then if people do have issues [and they feel empowered] they will communicate the good, bad and ugly about their work place. Where things work and where they don't. We do simple things like look at the things we need not only to do but to stop doing. The things that bog us down, the things that are working and the things that might work if we started doing them." *(Interview A – Deputy Minister).*

Finally, an important starting place for establishing a principle of open and honest dialogue between civil servants and their ministers may come from a firm commitment by the premier of the province to ensure that such avenues for dialogue are available.

> "The premier of the province, his office has to almost re-establish a culture of speaking truth to power." *(Interview L – Deputy Minister).*
>
> "I think it needs to come from the top. Public service needs to feel that their views are welcomed, first off. And that there will be no consequences to offering a professional opinion on a file." *(Interview B – Deputy Minister).*

At the same time, as a complementary action, it might serve everyone well for the premier to ensure that ministers are cognizant and appreciative of, or at least not negatively disposed toward, this set of instructions and any shift in executive behaviour that may result.