

January 5, 2021

The Honourable David B. Orsborn, Committee Chair
3rd Floor, Beothuck Building, 20 Crosbie Place
St. John's, NL A1B 3Y8
admin@nlatippareview.ca

Dear Chair Orsborn:

RE: Access to Information and Protection of Privacy Act, 2015 Statutory Review

I write further to your correspondence dated December 2, 2020, in relation to a submission received by your office regarding Orders in Council (OCs) and your review of the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015).

I note at the outset that while the submission referenced in your correspondence includes various examples of OCs as publicly released, it compares examples of OCs of different ages, released at different points in time pursuant to different legislation, and in different contexts. Such a comparison undoubtedly produces a variety of outcomes. This itself is not indicative of a deficiency with the current legislation or practice, but is a reflection of changes over time and the particular circumstances related to the disclosure of a specific record.

There were two specific issues raised in the submission referenced in your letter of December 2, 2020: the first relates to references to Minutes of Council (MCs) and the second relates to the distribution list for OCs. I will address each in turn, as well as the assertion in that submission that OCs constitute subordinate legislation. Prior to addressing these particular points, I would like to provide a brief overview of the methods by which OCs are made publicly available, as well as their status in relation to "cabinet records".

Public Availability of Orders in Council and Status as "Cabinet Records"

Orders in Council themselves are not "cabinet records" pursuant to ATIPPA, 2015 as they are the records of the Lieutenant-Governor in Council rather than records of the cabinet. MCs are the formal records of the decisions of cabinet and are not publicly available due to their confidential nature. Cabinet decisions that require the consent of the Lieutenant-Governor in Council are expressed through OCs. These OCs are publicly available through one of three ways:

1. OCs have been accessible to the public via the Cabinet Secretariat website since 2013, with OCs from 2004 to present available at the following link:

<https://www.exec.gov.nl.ca/exec/cabinet/oic/index.html>. This public availability of OCs is made outside of the requirements of ATIPPA, 2015, but is carried out in a manner that is consistent with the relevant considerations that would apply if those records had been requested pursuant to ATIPPA, 2015.

2. Cabinet Secretariat makes available, upon request, certified copies of OCs through its Information Management Division (IMD). While these requests for certified copies through the IMD are not made under ATIPPA, 2015, the IMD carries out each request consistent with the relevant considerations that would apply if the OC had been requested pursuant to ATIPPA, 2015.
3. Should an applicant so choose, OCs may be obtained by submitting a request to Cabinet Secretariat pursuant to ATIPPA, 2015, as an alternative to the two options noted above. Please note that applicants can readily access OCs without making a request under ATIPPA, 2015.

Regardless of the method by which OCs are accessed by the public, the relevant considerations under ATIPPA, 2015 are applied by Cabinet Secretariat in releasing the OCs. As noted above, an OC is not a “cabinet record” pursuant to ATIPPA, 2015 but may contain information that meets the definition of “cabinet record”. Paragraphs 27(1)(a) to (h), inclusive, of ATIPPA, 2015 define “cabinet record” and explicitly include an MC. Paragraph 27(1)(i) also defines as a “cabinet record” 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). All “cabinet records” as defined in subsection 27(1) are mandatory exceptions to access pursuant to paragraph 27(2)(a). An exception to this mandatory exception to access is found in paragraph 27(4)(a), which provides that this exception does not apply to information in a record that has been in existence for 20 years or more.

In addition to being a mandatory exception to access under ATIPPA, 2015, the need to protect cabinet confidentiality has been recognized by courts in Canada. In the case of **Babcock v. Canada (Attorney General)**, 2002 SCC 57, the Supreme Court of Canada noted at paragraph 18 that

“[t]he process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.”

The cabinet system is core to the method of government in the province and in the country and cabinet confidentiality is core to the cabinet system; all Ministers of the Crown are collectively responsible for all actions taken by the cabinet and must publicly support all decisions of cabinet. For this reason, many jurisdictions in Canada make express provisions in law to provide broad protection to cabinet confidences and Newfoundland and Labrador is no exception.

Taken collectively, the above provisions of ATIPPA, 2015 can produce an outcome whereby OCs less than 20 years old would require the removal of any information that meets the definition

of “cabinet record” whereas those in excess of 20 years old would not require the removal of such information.

Minute of Council Reference Numbers

As noted previously, MCs are the records of the actual decisions of the cabinet. There exists a mandatory exception to access for MCs themselves and for other records that contain information about the content of MCs. The numbers that are assigned to MCs form part of the content of the MCs. Therefore, this information is appropriately removed from OCs prior to release.

An OC may contain an MC number, cabinet submission number, and/or a Treasury Board Minute number, all of which are “cabinet records”, as defined by both the **Management of Information Act** and section 27 of ATIPPA, 2015. For this reason, when a request is received for an OC or an OC is published on the Cabinet Secretariat website, any information contained within the OC that meets the definition of “cabinet record” is removed. If an OC is over 20 years old, the IMD does not remove references to “cabinet records” contained therein, as this information would be released under an access to information request for the same information, pursuant to paragraph 27(4)(a) of ATIPPA, 2015.

Distribution Lists

With respect to distribution lists for OCs, I can confirm that the distribution list does not actually form part of any OC as made by the Lieutenant-Governor. A distribution list is compiled by officials within Cabinet Secretariat as an administrative function to ensure that OCs are received promptly by appropriate officials or others in order to take necessary action. As this is an administrative list compiled by officials, rather than a part of the OC itself as made by the Lieutenant-Governor, OCs are disclosed without this distribution list. To do otherwise would be to add information to a record that does not actually form part of that record. If, however, an applicant were to request the distribution list in respect of a particular OC, that distribution list would be disclosed as it does not meet the test of a “cabinet record”.

Status of Orders in Council as Subordinate Legislation

It is also important to note that, contrary to the assertion contained in the submission referenced in your letter of December 2, 2020, OCs are not generally considered to be subordinate legislation. The **Statutes and Subordinate Legislation Act**, RSNL 1990 c. S-27, defines “subordinate legislation” at paragraph 9(1)(e) as follows:

“ ‘subordinate legislation’ means a regulation, proclamation, rule, order, by-law or instrument that is of a legislative nature and made or approved under the authority of an Act including those made by a board, commission or other body, whether incorporated or unincorporated, the members of which, or the members of the board of management or board of directors of which, are appointed by an Act or by the Lieutenant-Governor in Council, but does not include a regulation, proclamation, rule, order, by-law, resolution or other instrument made by a local authority or, except as otherwise provided in this paragraph, by a corporation incorporated under an Act or by the board of directors or board of management of such a corporation.”

In addition to the above definition, subsection 9(2) also provides that:

“Where a regulation, proclamation, rule, order, by-law or other instrument is made or approved under an Act, by the Lieutenant-Governor in Council, a member of the Executive Council, or a board, commission, or other body described in paragraph (1)(e), if it prescribes, fixes or designates

- (a) a district, area, person, animal, or other thing; or
- (b) a period of time,

within, to, during, or in respect of, which the Act does or does not apply, in whole or in part, generally or in a restricted manner, or within, to, during, or in respect of, which the Act provides that a thing specified in the Act may or may not be done, or shall or shall not be done, the regulation, proclamation, rule, order, or by-law is subordinate legislation.”

Section 10 of the **Statutes and Subordinate Legislation Act** is compelling in that it requires that any instrument of a legislative nature made or approved under an Act – subordinate legislation – must be filed with the Registrar of Subordinate Legislation (the Office of the Legislative Counsel) or it is of no effect. Section 11 of that legislation also requires the subordinate legislation to be published in the **Newfoundland and Labrador Gazette**.

To be clear, I strongly but respectfully disagree with the assertions and recommendations contained in the submission referenced in your letter of December 2, 2020. The Office of the Executive Council supports the public’s right to access to information and protection of privacy and I submit that the practice of the Office of the Executive Council related to the disclosure of OCs is consistent with the principles and purposes underlying ATIPPA, 2015. Thank you for the opportunity to provide this additional information.

Sincerely,



GARY NORRIS