February 17, 2021

Access to Information and Protection of Privacy Statutory Review 2020
3rd Floor, Beothuck Building
20 Crosbie Place St. John's
NL A1B 3Y8

Attn.: The Honourable David B. Orsborn

Re: supplemental written submissions made to the ATIPPA Statutory Review Committee 2020

Dear Mr. Orsborn,

Memorial University of Newfoundland and Labrador ('**MUN**') in a second supplemental submission made on February 12, 2021[1] addresses, *inter alia*, the issue of access to records in native format. With due respect, MUN's submission obfuscates the matter instead of clarifying it. In what follows, some further clarifications as to native format of records responsive to access to information requests are offered.

Section **8(1)** of the *Access to Information and Protection of Privacy Act*, SNL 2015, Chapter A-1.2 ('**ATIPPA**') stipulates that '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' (emphasis added). The wording is clear: the requestor has a right of access to a record as opposed to its copy.

The difference between a copy of a record and its original is thus a necessary point of departure not only in the present discussion but also in any amendment of the ATIPPA. In practice, the right of access to a record means that the requestor is given an opportunity to examine the record. The concept of 'examination' in this context can be compared with that of 'inspection': a party may require 'the other party to produce the document for inspection or further inspection and to permit that party to make a copy thereof'.[2]

The definition of a 'record' includes paper records and digital records alike: its format is irrelevant in the context of the access to information and protection of privacy legislation. The examination of a paper record means physical access to it. The examination of a digital record means its provision in a format that 'that does not materially change the electronic information that was originally created, sent or received,'[3] i.e., native format.

In most of Canadian jurisdictions the requestor is entitled to the right to examine the record (Table). This province makes no exception in this respect.

[1] https://www.nlatippareview.ca/files/02112021-Memorial-University-SUPPLEMENTAL-submission.pdf
[2] Rule **32.05** of the *Rules of Supreme Court*, SNL 1986, c42, Schedule D.
[3] Section **4.1(1)(a)** of the *Management of Information Act*, SNL 2005, Chapter M-1.01.

**Table 4 'Right to examine a record, a comparison of various jurisdictions in Canada'**

| Province | Definition of a 'record' | Right to examine the record |
|---|---|---|
| Canada (federal)[4] | 'any documentary material, regardless of medium or form' | the applicant 'shall… be given an opportunity to examine the record' |
| NL[5] | 'a record of information in any form' | 'the head of a public body… shall… permit the applicant to examine the record' |
| NL[6] | 'a… electronically produced document and other documentary material regardless of physical form or characteristics' | |
| NS[7] | 'any… thing on which information is recorded or stored by graphic, electronic, mechanical or other means' | 'the head of the public body concerned shall… permit the applicant to examine the record… the head of the public body may give access to a record that is… information stored by electronic… means by… permitting… the applicant to access the record' |
| PE[8] | 'a record of information in any form' | 'the applicant may ask… to examine the record… the applicant shall be permitted to examine the record' |
| NB[9] | 'a record of information in any form' | 'the right of access to a record is met… if the applicant has asked to examine a record… by permitting the applicant to examine the record' |
| QC[10] | | 'Toute personne qui en fait la demande a droit d'accès aux documents d'un organisme public… Le droit d'accès à un document s'exerce par consultation sur place pendant les heures habituelles de travail' |

[4] Sections **3**, **12(1)** of the *Access to Information Act*, R.S.C. 1985, Chapter A-1 available at <https://laws-lois.justice.gc.ca/eng/acts/a-1/>.
[5] Sections **2(y)**, **20(1)** of the ATIPPA.
[6] Section **2f** of the MOIA.
[7] Sections **3(1)(k)**, **8** of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, Chapter 5 available at <https://www.nslegislature.ca/sites/default/files/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf>.
[8] Sections **1(l)**, **7**, **11** of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Chapter F-15.01 available at <https://www.princeedwardisland.ca/sites/default/files/legislation/f-15-01-freedom_of_information_and_protection_of_privacy_act.pdf>.
[9] Sections **1**, **16** of the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, Chapter R-10.6 available at <https://www.gnb.ca/0062/acts/BBA-2009/Chap-R-10-6.pdf>.
[10] Sections **9**, **10** of the *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, R.L.R.Q., Chapitre A-2.1 available at <http://legisquebec.gouv.qc.ca/fr/showdoc/cs/A-2.1>.

| | | |
|---|---|---|
| ON[11] | any 'documentary material, regardless of physical form or characteristics' | 'Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record' |
| MB[12] | 'a record of information in any form' | 'the right of access is met… if the applicant has asked to examine a record… by permitting the applicant to examine the record' |
| SK[13] | 'a record of information in any form' | 'a head may give access to a record… if it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record' |
| AB[14] | 'a record of information in any form' | 'the applicant… must be permitted to examine the record' |
| AB[15] | 'a record of information in any form' | 'the organization must… permit the applicant to examine the record' |
| BC[16] | 'any… thing on which information is recorded or stored by graphic, electronic, mechanical or other means' | 'the applicant must be… permitted to examine the record' |

*Note*: emphasis added throughout

It may be beneficial to clarify in the text of the ATIPPA that the right to examine a record involves physical access to a paper record. Quebec legislators explicitly connect the right to examine the record with the right to entry the premises of a public body: 'the right of access to a document may be exercised by examining it on the premises during regular working hours'. The Commission d'accès à l'information du Québec is of the opinion that the invitation of the applicant to examine records on the premises is a preferred response to an access to information request: 'on multiple occasions the Commission affirmed that the right of access under the Act does not allow an individual to request a certified copy of a record… [sic, 'une copie certifiée', as opposed to a simple copy] The access to a record is regulated by Section **10** of the Act [respecting Access to documents held by public bodies and the Protection of personal information]' (emphasis added).[17]

[11] Sections **2(1)**, **10(1)**, **30(2)** of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Chapter F.31 available at <https://www.ontario.ca/laws/statute/90f31>.
[12] Sections **1(1)**, **14(1)**, **14(2)** of the *Freedom of Information and Protection of Privacy Act*, C.C.S.M., Chapter 175 available at <https://web2.gov.mb.ca/laws/statutes/ccsm/f175e.php>.
[13] Sections **2(1)(i)**, **10** of the *Freedom of Information and Protection of Privacy Act*, Chapter F-22.01 of the Statutes of Saskatchewan available at <https://pubsaskdev.blob.core.windows.net/pubsask-prod/1893/F22-01r1.pdf>.
[14] Sections **1(q)**, **13(1)** of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, Chapter F-25 available at <https://www.qp.alberta.ca/documents/Acts/F25.pdf>.
[15] Sections **1(1)(m)**, **30** of the *Personal Information Protection Act*, S.A. 2003, Chapter P-6.5 available at <https://www.qp.alberta.ca/documents/Acts/P06P5.pdf>.
[16] Section **9**, Schedule **1** of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, Chapter 165 available at <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96165_01>.
[17] Paragraphs **10-11** of *A.V. c. Lac-Mégantic (Ville de)*, 2014 QCCAI 229.

If the requestor seeks access to a digital record, the examination can be arranged without the need to enter premises of the Public Body that has its custody and control. The provision of the record in native format will do the job.

A caveat has to be made before further discussing the access to digital records in native format. It is important not to overlook the duty to retain records when discussing the duty to provide access to records responsive to an access to information request. The duty to retain records is currently imposed on heads of the Public Bodies by the *Management of Information Act*, SNL 2005, Chapter M-1.01 ('**MOIA**'). This constitutes an additional reason for adding an explicit reference to the MOIA to the ATIPPA.

Most records currently generated by Public Bodies in the conduct of their affairs are digital: emails (**.eml**, **.msg** and **.pst**), Word (**.doc** and **.docx**), Excel (**.xls** and **.xlsx**) and Acrobat (**.pdf**), to list just a few file types. Digital records contain electronic information. The MOIA sets clear requirements as to retention of electronic information:[18]

> '(1) A requirement under this Act to retain a record is satisfied by the retention of electronic information where
> (a) the electronic information is retained in the format in which it was made, sent or received or in a format that does not materially change the electronic information that was originally created, sent or received; and
> (b) the electronic information will be accessible, and capable of being retained for subsequent reference, if required, by a person who is entitled to have access to the information or who is authorized to require its production.
> (2) Where the electronic information was sent or received, the requirement in subsection (1) is only met where information that identifies the origin and destination of the electronic information and the date and time when it was sent or received is also retained' (emphasis added).

The cited clause of the MOIA word-by-word repeats the federal *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5:[19]

> 'A requirement under a provision of a federal law to retain a document for a specified period is satisfied, with respect to an electronic document, by the retention of the electronic document if
> (a) the electronic document is retained for the specified period in the format in which it was made, sent or received, or in a format that does not change the information contained in the electronic document that was originally made, sent or received;
> (b) the information in the electronic document will be readable or perceivable by any person who is entitled to have access to the electronic document or who is authorized to require the production of the electronic document; and
> (c) if the electronic document was sent or received, any information that identifies the origin and destination of the electronic document and the date and time when it was sent or received is also retained'.

[18] Section **4.1** of the MOIA.
[19] Section **37** is available at <https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/page-9.html#h-417547>.

The same clause was replicated in several other jurisdictions in Canada: in Section **12(1)** of the *Electronic Transactions Act*, RSNB 2011, c 145 in the Province of New Brunswick; Section **14** of the *Electronic Commerce Act*, SNS 2000, c 26 in the Province of Nova Scotia; Section **12** of the *Electronic Commerce Act*, RSPEI 1988, c E-4.1 in the Province of Prince Edward Island and Section **13** of the *Electronic Commerce Act*, RSY 2002, c 66 in the Territory of Yukon.[20] In other words, the requirement to retain digital records in native format is well established.

The wording of the MOIA leaves no doubt that the duty to retain a digital record in native format is related to the access to information regulated by the ATIPPA. The electronic information shall be 'accessible… by a person who is entitled to have access to it' (emphasis added).

The proposed interpretation of the right of access is fully consistent with the other clauses of the ATIPPA, for instance the clause setting the modalities of provision of information in general and information in electronic form in particular:[21]

> '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'.

The retention of records in native format requires nothing but 'the normal computer hardware and software and technical expertise of the public body'. If a record was produced by the Public Body beforehand, it possesses necessary hard- and software, as well as know-how. Special computer hardware and software as well as technical expertise are needed precisely to change the format in which the electronic information was made, sent, or received.

The 'most basic example' discussed in MUN's second supplemental submissions in no way justifies this Public Body's unwillingness to release records responsive to access to information requests in native format even when the requestor clearly states his/her preference for this format:[22]

> 'For example, if a student requests a record of their transcript, an official paper transcript can be printed or an electronic pdf file can be generated. While both transcript formats present the same information and both are deemed acceptable formats, one could argue that neither the paper nor pdf is the 'native' format of that record. In order to produce the transcript, a Memorial employee with appropriate system access credentials must log in to Memorial's student information system (SIS) to generate the transcript. The employee runs a query of the SIS and SIS then presents the transcript to the SIS user and provides options to print or generate a pdf. Some may argue that the SIS and the applicable screens that display the data constitute the native format. But to go even further, the information used to generate a transcript is stored within a database in multiple database tables. It is the SIS that makes the request to the database to

[20] Available at <http://canlii.ca/t/lcjg>, <http://canlii.ca/t/jpr9>, <http://canlii.ca/t/52khw> and <http://canlii.ca/t/kfsq> respectively.
[21] Section **20(2)** of the ATIPPA.
[22] MUN's supplemental submission made on February 12, 2021 at page **6**.

> retrieve the record details, essentially making the database the 'native' format for the transcript.'

This hypothetical description (MUN does not state that such an issue has ever emerged) suggests that a responsive record, a student's transcript, is an element of a dataset, MUN's student information system. The access to information 'that is, or forms part of, a dataset' is regulated by a separate clause in the ATIPPA:[23]

> '(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.'

The Public Body is expected to produce the information for the requestor in an electronic form that is capable of re-use. The searchable PDF format will perfectly do the job. On the one hand, the information will be capable of re-use (searchable). On the other hand, the searchable PDF file is generated by the database, as admitted by MUN, as opposed to the ATIPP coordinator or a Public Body's staff member. It follows that the PDF searchable format in those circumstances does not change the information contained in the electronic document that was originally made, sent or received.

In other words, there is no loss of information in this hypothetical case, in contrast to the conversion of an email into a **.pdf** file. The conversion of emails as a particular type of digital records into PDF or other format entails loss of information. On the one hand, their metadata (internet headers) become inaccessible. The Sedona Canada Conference, an authority on uses of digital records in legal proceedings, defines metadata and explains its importance for the interpretation of other data in the context of judicial proceedings:[24]

> 'Nearly all electronic documents contain information known as metadata, which presents unique issues for the preservation and production of documents in litigation. Metadata is electronic information stored within or linked to an electronic file that is not normally seen by the creator or viewer of the file… Metadata can be used to objectively code documents or to properly interpret the meaning of other data… E-mail metadata… is often accurate and extremely useful for litigation purposes. Unlike the

[23] Sections **20(3), 20(4)** and **20(5)** of the ATIPPA.
[24] Pages **242-243** of *The Sedona Canada Principles Addressing Electronic Discovery*.

> metadata associated with loose electronic files, e-mail metadata (if collected properly) does accurately identify the e-mail's signatory ("From"), the recipients ("To" and "CC"), and the precise date and time sent ("DateTime"). These fields can be extracted and loaded into a review platform for efficient searching and review' (emphasis added).

On the other hand, in a converted format, digital records cannot be properly searched. The conversion of digital records into paper records excludes their reuse. Even if PDF copies of the records are provided, the format must be 'searchable PDF', which is rarely the case, at least in the case of MUN.

In some special cases, records in native format are simply not accessible, for instance, records stored on backup tapes of email servers. Emails deleted by a user are still stored on backup tapes. The Information and Privacy Commissioners in some provinces consider records stored on backup tapes searchable. However, the requestor can access their copies at best:[25]

> '…once a public body determines that it may have responsive records located on its backup tapes, and it determines that there is no other means of locating and reproducing these records in order to provide them to an applicant, it must take all reasonable steps, including any necessary and reasonable steps to convert them into a searchable format so as to locate responsive records, as well as all reasonable steps to reproduce copies so as to provide them to the applicant…
> Locating such records on backup tapes forms part of the duty to conduct an adequate search for responsive records under section 10(1) [duty to assist], while reproducing a copy of that record is part of the duty under section 13 [how access to be given]'.

In addition, the choice of the format is expected to be driven by the requestor. In this jurisdiction, the requirement to provide access to a record in the format requested is not legislated yet but considered as a good practice. The Government of Newfoundland and Labrador suggests that the Public Bodies use the following two-step procedure when responding to access to information requests:[26]

> '- ask the applicant the format in which they would like to receive any responsive records (electronic, paper, Excel, PDF, etc.) and provide in that format whenever possible;
> - if unable to provide records in the requested format, discuss with formats are available with the applicant'.

In some other jurisdictions in Canada, the duty to provide access in the format requested is legislated. The federal *Access to Information Act* requires the Public Bodies to 'provide timely access to the record in the format requested' (emphasis added).[27]

If the requestor wants to access record in native format, s/he is permitted to examine it. In the alternative, the requestor receives a copy in the format requested. If no particular format is specified in the ATIPP request, then the Public Body releases responsive records in the format of its choice, after consulting with the applicant.

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[25] Paragraphs **42-43** of *University of Alberta (Re)*, 2011 CanLII 96586 (AB OIPC).
[26] Page **36** of Government of Newfoundland and Labrador, *Access to Information*.
[27] Section **4(2.1)**.

The same applies to the access to redacted records: if some information if withheld, then those records cannot be released in native format, at least until the exemptions are reviewed by the Commissioner and/or the Court. Redacted records can be released on paper or in the searchable PDF format. No change in the ATIPPA is needed to account for this scenario: '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'.[28]

To conclude, the following changes in the ATIPPA would help reduce the scope of misinterpretation of what exactly the right of access to a record entails:

1. A definition of 'native format' is added to Section **2**: 'a format that does not materially change the electronic information that was originally created, sent or received. In the alternative: in the requested format'.
2. Section **8(1)** then then could read: 'A person who makes a request under section 11 has a right of access to a record <u>in native</u> format in the custody or under the control of a public body, <u>if requested</u>.'

[28] Section **8(2)** of the ATIPPA.