OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Supplementary Submission of the Information and Privacy Commissioner to David B. Orsborn, Committee Chair of the *ATIPPA* Statutory Review Committee 2020 on the Review of the *Access to Information and Protection of Privacy Act (ATIPPA, 2015)*

May 14, 2021

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Introduction

The OIPC appreciates the opportunity to make a supplementary submission responding to the submissions of other parties. Due to the ongoing demands of carrying out our day-to-day mandate overseeing compliance with the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA,* 2015 or Act) and the *Personal Health Information Act* (*PHIA*), this supplementary submission will attempt to focus on the more substantial recommendations from written submissions which we believe would represent a retrenchment or a step back from the hard-won rights and effective procedures found in *ATIPPA, 2015*. It is difficult to be comprehensive given the vast array of recommendations outlined in the many submissions received from public bodies, so we are not able to address every single recommendation, proposal or assertion with which we disagree. Furthermore, we have generally refrained from commenting on the positive and helpful recommendations meant to enhance or protect the rights of Newfoundlanders and Labradorians that were also found in some submissions. We have also attempted to refrain from revisiting issues that we believe we have already addressed sufficiently in our initial submission.

As a general observation, it is interesting to note that a number of written submissions and oral presentations during this review have begun by saying how important *ATIPPA, 2015* is, before proceeding to list various ways in which it should be weakened. One theme that does run through many of the submissions from public bodies relates to the challenges faced by Coordinators in implementing access to information. The introduction to the main OIPC submission also recognizes and addresses these challenges. From our broad perspective across the entire ATIPP system, in which we hear the points of view of not just public bodies, but also access to information requesters and third parties, many of these challenges are 1) inherent in any access to information statutory regime and 2) in many cases are best addressed through procedural improvements rather than statutory amendment.

The Department of Industry, Energy and Technology, for example, has recommended efficiencies in the tracking of requests through the TRIM databases as well as enabling automatic request acknowledgments for requests that come through the online portal. Any administrative initiatives that can make the request process more efficient without impacting the rights, safeguards, and oversight in *ATIPPA, 2015* should be considered.

The access system under the *Act* is currently working and we are concerned that some of the changes suggested by others may make alterations to the system to fix small problems but instead have unintended, larger consequences. For example, we will discuss fees below, but what seems to be a simple change like re-instating the application fee to encourage applicants to "assign value to the request" (as suggested by JPS in the presentation on May 10) leads to public bodies assessing the motivation behind the request, something that has no relevance to the processing of an access request.

Several submissions proposed adding provisions of specific Acts to Schedule A such that they would prevail over *ATIPPA, 2015*. Any such addition to Schedule A should be done purely on

the basis of necessity rather than convenience. If exceptions to access exist in *ATIPPA, 2015* which attain a public policy goal comparable to that intended to be achieved by adding a provision to Schedule A, in our view there is no basis to add a provision to Schedule A. Furthermore, if information can now be disclosed which public bodies argue should be withheld through the addition of provisions to Schedule A, there should be convincing evidence that such disclosure would cause harm before an addition is made to Schedule A.

Any suggestion by public bodies that further steps beyond additions to Schedule A, such as listing categories of records in section 5 or removal from the definition of public body deserve much higher scrutiny. Records containing personal information that are no longer subject to the *Act* are not only exempt from access to information, they are also no longer subject to the privacy and security protections of *ATIPPA, 2015*, including the independent oversight of the Commissioner for the purposes of complaint investigation or audit, as well as independent investigation where a public body has experienced a privacy breach. The OIPC would consider this to be an extreme and unjustifiable step which would harm the privacy interests of Newfoundlanders and Labradorians.

When considering the many proposals for curtailment of access to information rights which have been brought forward in submissions to this review, it is important to consider whether such proposals primarily benefit the party that is proposing the amendment, or whether they support the public right of access to information. Sadly, we have seen few of the latter, and many of the former.

The Centre for Law and Democracy added some useful context to the discussion when it pointed out that while *ATIPPA, 2015* is a leading statute in Canada, it is by no means at the top internationally. While Canada was an early innovator in access to information, those first generation statutes are now in the middle of the pack internationally in terms of the level of government transparency and personal privacy protections they grant. Through its methodology for comparing access to information statutes, the Centre also determined that despite its strengths, *ATIPPA, 2015* already ranks low in terms of the breadth and scope of exceptions to access.

Canadians who support strong access to information laws have struggled for decades to advocate for the kind of advances that are contained in *ATIPPA, 2015*. Our statute has been a beacon of hope for those who continue in that struggle, which is part of the ongoing effort to build and maintain democratic institutions around the world. Newfoundlanders and Labradorians are not clamouring for less access to information – they assume that fight was won with the passage of *ATIPPA, 2015*, and they are busy fighting other battles right now. It would be a shame if the rights established under *ATIPPA, 2015* were to be downgraded as they were during the Bill 29 era, and the additional comments provided in this supplementary submission are intended to argue against such a regressive outcome.

The Premier's Economic Recovery Team has also noted that this is hardly the time to go backward, from the perspective of transparency when it noted in its recent Report:

> *First, accountability and transparency must be improved in decision-making in all types of governance: in the cabinet room, in the public service, in agencies and commissions, and in the boardrooms of corporations and major institutions, whether private or public. Transparency is important — as noted by American Justice Louis Brandeis's, "sunlight is the best disinfectant." Citizens must ensure that leaders and Government spend wisely, use evidence to make decisions, and are open about how and why decisions are made.*

Information Security

The Office of the Chief Information Officer (OCIO) has provided clear and cogent argument regarding the importance of protecting against disclosure of information security arrangements. We agree that this is an important public policy goal that serves the public interest. Section 31(1)(l) is a broadly worded provision that does not require proof of harm. It already establishes a low threshold to protect such information. In our view, OCIO has not established a rationale for why section 31(1)(l) is inadequate for its intended purpose. No examples have been cited where information security arrangements have been required to be disclosed by a court or recommended to be disclosed by this Office.

In its supplementary submission dated December 18, 2020, Memorial University endorsed OCIO's perspective on information security and suggested that a separate section on "IT Security Protection" be added to *ATIPPA, 2015*. While section 64 of *ATIPPA, 2015* requires the head of a public body to take steps that are reasonable in the circumstances to protect personal information, it should be borne in mind that the security of information that is not personal information is outside the scope of *ATIPPA, 2015*. This is more properly the purview of information management. Information management includes considerations such as the security of that information, and that is a subject which falls squarely within the scope of the *Management of Information Act*:

> 6*(1) A permanent head of a public body shall develop, implement and maintain a record management system for the creation, classification, retention, storage, maintenance, retrieval, preservation,* ***protection****, disposal and transfer of government records.*
>
> [emphasis added]

The *Management of Information Act* applies to all public bodies as defined in that *Act*. While the definition of "public body" in that *Act* is narrower than the definition in *ATIPPA, 2015*, it is our understanding that Memorial University is subject to it. While it is mission critical for public bodies to protect confidential information of all kinds, when it comes to non-personal information, public sector access and privacy statutes do not typically reference information security except a) in a provision such as section 64, a version of which is common among Canadian public sector access and privacy statutes; and b) as an exception to the right of

access (section 31(1)(l)), which, as already noted, is a broadly-worded provision that public bodies can use to deny access to information without proof of harm.

Special Exception to Access for Records where the Public Body is a Service Provider

The College of the North Atlantic (CNA) has proposed that additional language be added to *ATIPPA, 2015* to protect information of third parties that have been provided to a public body for the purpose of facilitating a contract where the public body is a service provider. In our view, CNA has not explained in sufficient detail why sections 35 and 39 do not operate to sufficiently protect against disclosure of information in that circumstance. No evidence of past harm from such disclosures was brought forward by the College, and we are not clear as to the specific statutory gap which it wishes to see filled.

Section 19/39 – Disclosure Harmful to the Business Interests of a Third Party

Section 39 – Disclosure Harmful to Business Interests of a Third Party

As we indicated in our original submission, one of the advantages of the three-part harms test as currently found in *ATIPPA, 2015* is that it is shared with the larger jurisdictions of Alberta, British Columbia and Ontario. As a result, decades of jurisprudence has been developed, and there is a great deal of clarity regarding the interpretation of this exception. Therefore we maintain our original recommendation that the elements of the test under section 39 should not be amended.

However, since a hypothetical revision was suggested by the Chair during this review, and several submissions proposed changes, we will speak on this issue.

Elimination of "Supplied in Confidence" Part 2

Nalcor and the Oil and Gas Corporation say in their submissions that information in a contract cannot meet part 2 of section 39. While this is often the case, it is not always the case. The exception is immutable information, i.e. information that the third party cannot change. Changeable information is the subject, and the result, of the negotiation between the parties that led to an agreement. Even if no actual negotiation occurs (ie, an offer is made and accepted with no further discussion), a contract arrived at between two parties is the product of both parties. This negotiated information must be disclosed so that the public can scrutinize how much a public body is paying, to whom, and for what. These are the specifications, unit prices and quantities that are the core of every procurement contract. This is the essence of accountability, and there is no more important measure of the effectiveness of an access to information statute than the mechanisms through which it makes available information about how and on what public money is spent.

It is not because the disclosure of the information in such contracts cannot affect confidentiality, or the competitive position of suppliers – sometimes it will. Rather, it is

fundamentally because government procurement must be done on the basis of open contracts, openly arrived at. Some loss of confidentiality, or intensification of competition, is to be regarded as a necessary effect of doing business with public bodies.

Industry Energy and Technology (IET) submitted that the definition of "supplied" must be changed, that third party companies may not do business in the province because of the current wording of section 39 or that the province may lose opportunities. To this submission we reiterate our original submission – jurisdictions operating with the three-part test that is now in *ATIPPA, 2015* have been doing so for decades (and in this province for the past 5 years) and fears that third parties will no longer do business with public bodies, unless access to information is weakened, have not been borne out.

Another important rationale for retaining the current three-part test with the "supplied in confidence" threshold which is common to several jurisdictions across Canada, is that it facilitates informal resolution of complaints. When we have a well-established, clear threshold in the statute, we have the ability to walk through the guidance and case law with third parties to resolve cases that would otherwise absorb the resources of public bodies and third parties, and potentially delay access for applicants unnecessarily. It will be much more difficult to resolve those cases if step 2 was removed and the test primarily revolves around proof of harm.

The key to the predictable, smooth and efficient operation of this provision of the *Act* is not the harms test, or even the confidentiality test. It is the "supplied" test. It neatly and clearly encapsulates the distinction between the terms of a negotiated agreement, on the one hand, and other background information that may be provided by the third party to support its position, on the other hand. That is the distinction between what is "negotiated" and what is "supplied."

Certainty and ease of operation require that the "negotiated or supplied" distinction should be kept as a component of section 39. Without it, we lose the clarity we now have, and along with it, thirty or more years of Canadian case law.

Tourism Culture and Recreation (TCAR) and IET recommend a threshold of 2 out of 3 rather than all 3 parts of the test. JPS has recommended a move to the Manitoba/Nunavut version, which is an exception to the standard across Canada and would be the lowest threshold in the country. Either would lead to a reduction in the public right of access.

Other Proposed Changes

Redesigning a statutory provision in *ATIPPA, 2015* by carving out a special place for trade secrets seems unnecessary because it is extremely unlikely that trade secrets will be subject to access to information requests because of the apparent rarity of such information actually being disclosed to public bodies by third parties. If such information is captured by an access

request, as pointed out in our earlier submission on section 39, the statute already protects this type of information appropriately.

Changing 39(1)(b) to read "information of or about a third party" is intended to correct an issue that does not frequently arise. There will rarely be records about a third party that is not involved in some sort of direct relationship with the public body. The one instance we have encountered will itself be resolved by the Court of Appeal, who will decide whether or not the section should include parties that are not the primary owners of the information, but perhaps have some lesser degree of proprietary interest. Our position is that the Court will resolve any ambiguity and further clarity through this statutory review is not required.

The proposed revision of adding section 39(4), a discretionary public interest override, raised many practical complications for us. As we set out in our response to the proposal, it is our view that the hypothetical section 39(4) could not result in a recommendation for disclosure once we have concluded that the exception applies, as such a recommendation would likely not survive a declaration application, or for that matter, an appeal by a third party. Functionally, the hypothetical section 39 cannot be considered to be an "override" provision because it does not actually over-ride the exception. It merely inserts an additional decision point where the public body has an opportunity to exercise discretion.

In the presentation by JPS on May 10th they relied on section 9(3) as providing protection in the public interest, but the protection afforded by section 9(3) is limited to when there is a "risk of significant harm to the environment or to the health or safety of the public or a group of people". This excludes the possibility of serious financial mismanagement or fraudulent business practices rising to the level of public interest. Therefore section 9(3) is not an adequate replacement for making section 39 subject to section 9(1), the full public interest override.

Section 19 – Notice

The ATIPP Office also submits that there is confusion about the threshold for notifying a third party. It believes, with regard to the notification threshold in section 19, that "intending" and "considering" are the same. We disagree. "Considering" is a decidedly lower threshold. Any time information about a third party appears in a record, the public body has to consider it. Intending to release information means that, based on the public body's assessment, the information must be released.

Some submissions have relied on *Beverage Industry Association v. Newfoundland and Labrador (Minister of Finance), 2019 NLSC 222* in making points about the notification regime in the statute. That decision is now before the Court of Appeal.

The ATIPP Office suggests that guidance and decisions from the OIPC in conflict with recent court decisions. The court decisions emphasized that the notification threshold is low, and we acknowledge that it is low, but it is also recognized that a low threshold does not mean no

threshold. The threshold is based on the words in the statute, and we base our decisions and guidance on that. We believe that those decisions and our guidance are not in conflict with the court rulings.

As we indicated in our initial submission – section 19 exists for circumstances that fall into a grey area, where there is a lack of certainty about whether or not section 39 applies. If the public body determines that section 39 applies, it is a mandatory exception and the public body must refuse disclosure. No notification is required, and the public body bears the burden of proof in the event of a complaint. If the public body determines that section 39 does not apply, it must disclose, without notification. Section 19 speaks to that "in-between" circumstance, where there is at least a "reason to believe" that section 39 "might" apply. Absent that reason, the information should be released to the applicant.

In practice, notice provides an opportunity for a third party to object and provide any argument or evidence in support of its position against release of the information. It is our view that if the notification in section 19 were broadened that it would have no measurable impact on the protection of third party business information. It would, however, cause an increase in complaints and court appeals, slowing down the access to information process. One of the things we have found is that no third party has yet won a claim in court, and in fact most appeals have been discontinued by the third party on the eve of a court hearing.

The 2014 review understood this, which is why the provision was amended. We note as well, whether out of an abundance of caution or a desire to maintain a positive relationship with a third party, public bodies sometimes issue a section 19 notification even when they have indicated they know the exception does not apply. This is not a neutral decision, as it can substantially impact the applicant's rights by significantly delaying disclosure where there are no grounds to do so.

The current notification regime ensures that legitimate section 39 claims are protected. The most recent statistics published by the ATIPP Office, from the 2018-2019 year, show that section 39 was relied on by public bodies 122 times. This demonstrates that requests are being made and refusals are being issued for information that falls under section 39. No section 19 notification to third parties would occur in the case of such a refusal. This demonstrates that public bodies are usually getting it right, in that they are refusing access when the exception applies, rather than issuing notifications under section 19. When public bodies get it right, that means that very few third party appeals would be successful, because if the public body claims the exception and refuses access, no notification is required to be given. The third parties who have made representation to this statutory review may only be aware of the decisions issued by the OIPC that have not accepted the third party's claims, but they may not be aware of the 122 times that section 39 was applied by public bodies.

The ATIPP Office has also proposed that additional time be built into section 19 for the third party process. This will also unnecessarily delay access. In many cases, third parties can be identified shortly after receipt of a request, and if notification is required it can be done at that

time. If additional time is necessary, an application to the Commissioner can be made for an extension.

The ATIPP Office has also proposed that section 19(1) be amended to change "notify" to "consult with". We have no objection to this proposal.

Section 33 – Workplace Investigation

This provision is unique in Canada. It creates a mandatory exception, but also a mandatory disclosure provision depending on the identity of the party requesting it. The OIPC's initial written submission addresses our proposals for amendment of this provision, which are:

1) Make Certain Exceptions Paramount:

Although we did not reference it in our initial submission, some parties have expressed that section 41(c) should also be paramount to section 33. We have no objection to that proposal. We are of the view, however, that section 33 should be subject to the public interest provision. In circumstances where high-level public officials are involved in perpetrating serious workplace harassment, there can be a public interest in a certain amount of transparency in order to facilitate appropriate accountability.

2) Limit Temporal Application:

There is concern that section 33 is being used by respondents to hinder the investigation process. Section 33 can also be used to intimidate or retaliate against complainants or witnesses. We recommend to limit the temporal aspect of section 33 so that the workplace investigator can decide, while the investigation is ongoing, what information to release to whom and when.

One of the points we made in proposing this type of amendment was that if a temporal limitation was placed on the right of access as proposed, it would also allow for the appropriate and legally authorized destruction of any transitory records prior to an access request being allowed, such as investigators notes or audio recordings. This only works if public bodies put good policies in place and follow them. One of the issues to date has been that public bodies have not understood the impact of section 33 on workplace investigations. The OIPC would have to play a role, and work with others such as the ATIPP Office and Municipalities Newfoundland and Labrador to make sure this is well-understood.

3) Consider Extending to Public Sector Contexts Other Than Employment Relationship

During its oral submissions, the City of St. John's expressed concern that OIPC decisions have found that elected officials are not employees, and are therefore not subject to section 33. They would like elected officials to be captured within the scope of an amended exception.

The City's recommendation should be implemented for elected officials except MHAs who are subject to a separate policy and statutory regime.

Other Related Issues

The Commissioner for Legislative Standards wants to remove his Office from the scope of *ATIPPA* completely. As an alternative, he proposes that "notwithstanding section 33 be inserted in s. 41(c) (the Office of the Child and Youth Advocate also made the latter recommendation). We would of course oppose removing the Commission for Legislative Standards from the *ATIPPA*, and given that we have agreed that exceptions including section 41(c) take precedence over section 33, we see no need for such a drastic step. Furthermore, contrary to the submissions of those parties, we believe that the best place to indicate which exceptions are intended to be paramount over section 33 would be in section 33, not in an amendment to section 41.

Settlement Privilege

In its submission, JPS has raised a new issue with settlement privilege. The Department correctly notes that we have addressed this issue in great detail in our Report A-2018-022, so we would refer the Chair to that Report which should stand as our primary statement on the status of settlement privilege as an exception to the right of access.

We believe that the BC case cited by JPS was wrongly decided, and look forward to the opportunity to clarify the issue when JPS or another public body wishes to bring an appeal to court. In summary, our view is that settlement privilege should not and need not be "read in" to a statutory regime which has been recognized by courts as a complete code, particularly when it is unnecessary to do so in light of the other exceptions that already exist in the statute which allow public bodies to withhold settlement privileged information in appropriate circumstances. Nothing in *ATIPPA, 2015* affects the admissibility of evidence in Court, however we appreciate that disclosure of information can impact future settlement negotiations in similar matters, and we believe the Act already provides for such circumstances.

We are also of the view that JPS has erroneously adopted the same language in its submission for both solicitor-client privilege and settlement privilege, by saying that settlement privilege can only be abrogated with clear, explicit legislative language. First of all, the legislature is presumed to have made a choice to include two well established privileges as exceptions to the right of access – solicitor-client privilege (legal advice privilege) and litigation privilege, and to exclude settlement privilege. If such privileges could be read into or override a statute such as *ATIPPA, 2015*, that is a complete code, there would be no need to include any of them.

Secondly, the notion that a privilege which is not enumerated as an exception to the right of access within *ATIPPA, 2015* can only be abrogated with clear, explicit legislative language appears to be an effort to place settlement privilege on the same footing as solicitor-client

privilege, however only the latter has been recognized as a substantive right, which does indeed require such a threshold for abrogation. Settlement privilege, however, has not received such recognition by Canadian courts. It remains a privilege, and it is up to the legislature whether it should be included as an exception in a statute such as *ATIPPA, 2015*.

It is also necessary to note that there is a critical omission in the Department's submission on this subject. The OIPC has issued other Commissioner's Reports which also address the issue of settlement privilege, however JPS only cited the Report in which we recommended disclosure. We have in fact issued others in which information relating to legal settlements was recommended to be withheld using existing exceptions within the statute.

Report A-2018-021 recommended that information about a lawsuit arising from the cancellation of school bus contracts be withheld under several different exceptions, including sections 28, 29, 30, and 35. Report A-2019-017 recommended that information involving the settlement of abuse claims be withheld. In that case, the Department of Justice and Public Safety (JPS) initially relied solely on the common law settlement privilege to deny access, and belatedly added a claim of sections 31 and 35, but failed to provide convincing argument or evidence to support its claims. The Commissioner therefore rejected those claims, but recommended that the information be withheld under section 40 (personal information). Although section 40 was not claimed by the public body, section 40 is a mandatory exception, and if the Commissioner concludes that it applies, he or she cannot recommend disclosure as this would conflict with the Commissioner's mandate to uphold the protection of personal information in accordance with the statute.

These reports demonstrate that the OIPC is very much alive to the issues relating to settlement privilege, and furthermore that the statute already contains all of the tools necessary for public bodies to withhold information appropriately. The OIPC supports a more nuanced position on settlement privilege within the statute than the submission from JPS indicates, one which we believe allows for an appropriate balance between competing interests of transparency and confidentiality.

Section 38 – Labour Relations

Executive Council has proposed making section 38 mandatory and removing it from section 9 (Public interest). Other Canadian jurisdictions do not have the same kind of comprehensive labour relations exceptions to the right of access, although many of the individual provisions of our section 38 exist in modified form elsewhere in those statutes. Even within *ATIPPA, 2015*, section 38(b)(iii) is very close to language that already exists in section 39(1). In our jurisdictional scan it appears that, other than the Ontario provision referenced by Executive Council in its submission, only Nova Scotia has a detailed, and in fact quite broad labour relations exception in its *Freedom of Information and Protection of Privacy Act* which is different from section 38:

> *19E the head of a public body may refuse to disclose*

(a) any information of any kind obtained by a conciliation board, conciliation officer or mediator appointed pursuant to the Civil Service Collective Bargaining Act, the Corrections Act, the Highway Workers Collective Bargaining Act, the Teachers' Collective Bargaining Act or the Trade Union Act or by an employee of the Department of Labour or an employee, appointee or member of the Civil Service Employee Relations Board, the Correctional Facilities Employee Relations Board, the Highway Workers Employee Relations Board or the Labour Relations Board for the purpose of any of those Acts or in the course of carrying out duties under any of those Acts;

(b) any report of a conciliation board or conciliation officer appointed pursuant to any of those Acts;

(c) any testimony or proceedings before a conciliation board appointed pursuant to any of those Acts.

It is possible that other provisions commonly found in access to information statutes may serve to protect labour relations interests, such as those provisions which allow information to be withheld that would prejudice negotiations, or the economic interests or competitive position of a public body, or interfere with contractual negotiations of a public body, etc. It may be that the existence of such provisions, in combination with the labour relations aspect of section 39(1) (which is fairly common across jurisdictions) means that others have not found it necessary to develop a version of our section 38.

Section 38 originated with the Bill 29 amendments. At page 73 of his Review of the Access to Information and Protection of Privacy Act, Mr. Cummings briefly referenced concerns regarding *ATIPPA* that had been raised by those involved in labour relations, and in recommendation 33 he proposed that government consider the issue, and "if necessary, put a more detailed review in place which would include appropriate stakeholders and experts…" to study the labour relations issue as well as a few others that he did not address in his review. We are left to assume that further consideration must have occurred within government at the time, resulting in the addition of what is now section 38, as we are not aware of any broader consultation having occurred.

Section 38 has rarely arisen during the course of our complaint investigations and only twice has it been considered in one of our Commissioner's Reports: Report A-2017-024 and Report A-2018-012. In neither case was the exception found to be applicable.

It appears that section 38(2) means that if a record is never placed in an archive, that the exception never expires, which seems unnecessary. 50 years is an exceedingly long time to protect such information, whether or not it is archived. Arguably such information may have some value beyond the term of one or two collective agreements, however harm that might occur from disclosure of information about an old collective agreement would be expected to decline much more rapidly than a 50 year time frame could justify.

Furthermore, section 38(2) contains the ambiguous phrase "archives of a public body." While disclosure to the Provincial Archives is clear, a "public body archive" is not a well-understood phrase. To our knowledge, there are no formal processes in place to designate such an archive, nor have we encountered one in our work. The 15 year time period in sections 29 and 34 may be more appropriate, unless compelling reasons can be presented as to why a longer period is necessary.

Given how rarely it appears to arise, we would not place this among the highest priorities for attention in this review, however given the position put forward by Executive Council we have addressed it here. In light of the foregoing, in addition to the proposal of Executive Council the Chair may wish to consider these options:

1. Consider whether section 38 is necessary as a standalone exception in light of other provisions such as sections 35 and 39(1), and potentially sections 27, 28, 29 or 30 depending on the type of information and the context in which it was created or provided to a public body.
2. Reduce the time period in section 38(2) after which section 38 no longer applies; consider eliminating the reference to archives from 38(2).

Section 5.4 of the *Energy Corporation Act*

We were very pleased to hear in the May 10th presentation from JPS that 5.4 of the *Energy Corporation* Act (*ECA*) does not need to apply to its hydro line of business, as it was intended to protect the private business relationships in the oil and gas industry. We hope to see such an amendment to the *Energy Corporation Act*.

On page seven of its submission, Nalcor has proposed a five point plan to amend the Commissioner's oversight role regarding section 5.4 of *ECA*. The proposal would see Nalcor providing a submission to the Commissioner as an alternative that would be preliminary to the court process, which it says could result in informal resolution of complaints. One issue is that under the proposal the Commissioner does not get to see the records, but rather, "an information package" developed by Nalcor in support of its decision to deny access. This is not ideal from an oversight perspective, and it could place the Commissioner in an awkward position of being asked to agree that, based on the information package, Nalcor's decision appears sound, however it may be that had we viewed the responsive records themselves the Commissioner might arrive at a different conclusion.

On page ten of the Oil and Gas Corporation's submission (OGC), it indicates that Nalcor has only availed of section 5.4 of the *ECA* on one occasion. Nalcor itself says that it has applied it in relation to approximately 10% of requests, and in the case of complaints to the OIPC, the Board has agreed with its application. Our records indicate that we have received 38 complaints pertaining to Nalcor since at least 2013. Some were resolved informally and some withdrawn or discontinued for other reasons. We have not assessed whether all of these

specifically invoked section 5.4, but a number of Reports were issued in relation to the complaints: Report A-2016-003, Report A-2017-012, Report A-2017-003, Report A-2017-26, and Report A-2019-005, each of which involved the provision of a certificate as described in section 5.4.

One of the challenges with the *ECA* is that the definition of "commercially sensitive" is quite broad. For example, it includes "financial information" (meaning simply relating to finance). The decision to withhold financial information, as an example, lies with the CEO using a threshold of "reasonable belief" that it *may* cause any one of the enumerated harms. On a complaint to the OIPC, the Board is called upon to certify the CEO's belief. If it does so (we are not aware of the Board ever declining to do so), we are required by the statute to uphold the decision as long as the certification is in place and we are satisfied that the information meets the definition, which as indicated, is extremely broad. The language in section 5.4 does not explicitly contemplate the Commissioner inquiring into whether the CEO's belief was in fact reasonable.

Ultimately, the threshold is so low that the proposal put forward by Nalcor could result in the OIPC being essentially co-opted, or appearing to be co-opted, in a way that could undermine the credibility of the Office.

The issue with section 5.4 is that our only oversight role relates to a definitional threshold that is so low it is almost a rubber stamp. It is close to meaningless. When a matter comes to the OIPC for review involving section 5.4 and the Commissioner "agrees" with Nalcor's application of the exception, the impression among the public may be that the information really is, in layman's terms, commercially sensitive, when in fact that may or may not be true. We would prefer to have no role or have a meaningful role. In order to achieve this the threshold question must be changed to include an assessment of the alleged harm from release of the information.

During its oral presentation, Nalcor was asked about the Manitoba Hydro comparison – a Crown Corporation that is involved in hydroelectric development just as Nalcor is. Nalcor pointed out that the third party business exception in Manitoba is a one-part test, but indicated that even if this Province had a one-part test, it would still need section 5.4.

Setting aside for the moment whether or not the third parties dealing with Nalcor could operate using section 39 without 5.4 (we think this should be considered), one potential step towards greater transparency for Nalcor would be to see 5.4(1)(a) deleted. This would place Nalcor in a position to rely on section 35 of *ATIPPA, 2015*. Nalcor has not adequately explained what kinds of information it holds, the disclosure of which could cause harm, which would not be protected by section 35.

Also we note that the *Innovation and Business Investment Corporation Act* (*IBIC Act*) in section 21 contains a similar provision. Our view is that this provision cannot be justified. The former *Research Development Corporation Act* object was being engaged in "promoting, stimulating

and supporting the effective utilization of science and technology" by undertaking "singly or in conjunction with others, the research, development, surveys, investigations and operations" that the Council deems appropriate. In contrast, the *IBIC Act* which succeeded the *RDC Act*, establishes a corporation whose object is "making strategic funding investments in innovation and business growth in the province to advance economic development in accordance with the priorities of the government of the province". Despite the change in object, this high level of protection against disclosure remains.

The *ATIPPA, 2015*, at section 35, already contains a provision to protect from disclosure certain information the disclosure of which may be harmful to the financial or economic interests of a public body, while section 39 protects from disclosure information the disclosure of which would be harmful to the business interests of a third party. It is also worth noting that successive governments have been making strategic funding investments for economic development purposes since the first *ATIPPA* came into force in 2005, and based on the news releases and announcements of Ministers and Premiers past and present, this has continued unhindered, even in the absence of special protection.

As noted above, both section 35 and section 39 of *ATIPPA, 2015* are provisions which are commonly found in access to information statutes across Canada, however to my knowledge the special "commercially sensitive" provision in the *IBIC Act* and the *ECA* are unique to this Province.

Section 36 – Disclosure Harmful to Conservation

Fisheries, Forestry and Agriculture (FFA) has indicated that section 36 should be broadened to reflect circumstances where a species has experienced a rapid drop in population but has not yet been formally designated as endangered, threatened, or vulnerable. FFA suggests being able to withhold information "upon a recommendation to the Department by the Director of Wildlife." In 15 years, the OIPC has not yet had the opportunity to consider section 36 in a formal Report. While we respect and understand the rationale for broadening this exception, we typically do not support a model which relies entirely on the recommendation of one individual.

The exception itself is already designed as a "harms-based" exception, rather than a categorical one. It's not clear whether FFA believes that its proposed amendment would introduce a categorical aspect. Is it FFA's belief that if such a recommendation were made that the exception would apply? Based on the present language in section 36, the threshold would remain a disclosure which "could reasonably be expected to result in damage to, or interfere with the conservation of," which we believe should remain as the appropriate threshold. Conservation issues can become politicized, so perhaps rather than the recommendation of the Director of Wildlife, any additional language could reflect something to the effect of "or another species for which there exists an urgent and significant conservation risk."

Veterinary and Aquaculture Records

FFA made a submission recommending that an exception be created for veterinary records. FFA has not addressed the applicability of current exceptions in *ATIPPA, 2015* to such records or whether there may be a public interest in disclosure for certain kinds of veterinary records. Furthermore, while FFA has referenced a couple of other jurisdictions where there are statutes that appear to preclude the disclosure of such records, FFA has not indicated whether those statutes take precedence over provincial access to information laws, nor has FFA indicated whether any provisions in any other access to information laws in Canada or elsewhere exist for this purpose. Before the Committee undertakes consideration of such a request, further research is required.

The Veterinary Medical Association also provided a submission on this topic. We refer the Chair to the discussion on this issue which is featured in the 2014 Statutory Review of ATIPPA at pages 293-299, which also reflects the views of this Office.

We also note that during the presentation of Dr. Dawe on May 10th you raised an interesting question about whether a distinction could be made between the public and private roles of provincial vets. The work of vets and farms that are publically regulated should be accessible. Regarding personal information of users of this system, this should be protected by section 40, while administrative and financial information about provincial vet services offered to private citizens should be accessible.

The Newfoundland and Labrador Aquaculture Industry Association (NAIA) has proposed that provisions of the *Aquaculture Regulations* and *Aquaculture Act* be added to Schedule A such that they would take precedence over *ATIPPA, 2015*. The Aquaculture Act pre-dates the earliest version of *ATIPPA*, so the aquaculture industry has grown to its current extent over the past fifteen-plus years without special protection in Schedule A. During that time, the industry has expanded remarkably, and continues to do so, as evidenced by new releases on the FFA website as well as statistics on the NAIA website, with significant new anticipated development in Placentia Bay. NAIA has not demonstrated how the industry or its members of been impacted significantly by the current state of access to information law, and therefore we do not agree that additional protections are warranted.

Modifications to Schedule A

In their presentation on May 10th JPS made the comment that section 8.1 of the *Evidence Act* does not need to be in Schedule A. We would refer you back to our original submission at page 74 where we said the reference in section 101 to section 8.1 of the *Evidence Act* is somewhat obscure and does not arise in day-to-day application of *ATIPPA, 2015*. The entire matter is not a pressing issue. When *ATIPPA* first came into force in 2005 it may have been more relevant, because *PHIA* had not yet come into existence. That *Act* was passed in 2008 and proclaimed in 2011, at which point personal health information that had formerly been subject to *ATIPPA, 2015* was now subject to *PHIA*. It is our understanding that records intended to be covered

by the reference to section 8.1 would typically be records of personal health information, which is covered by *PHIA*. Because we are not experts in the processes that lead to the generation of those records, we cannot attest that *PHIA* would necessarily cover all of the information in every case. We therefore see no urgency to remove section 8.1 of the *Evidence Act* from Schedule A, however we do not take a strong position either way.

JPS also spoke on adding sections 16 and 18 of the *Pension Benefits Act, 1997* to schedule A. We reiterate our opening statement that any additions to Schedule A should be done purely on the basis of necessity, and if exceptions to access exist in *ATIPPA, 2015* which attain a comparable public policy goal then additions to the Schedule are not warranted. In this instance all personal information would be protected under section 40. Also, there has been a reduction in the transparency of public service pensions since Provident 10 was created by statute to manage public sector pensions, and our calls for an information management agreement between Provident 10 and the government remain outstanding. Therefore we do not support the addition of the *Pension Benefits Act, 1997* to Schedule A.

Independence of the OIPC

It has been suggested by some presenters during this review that the OIPC is not impartial or independent, and that this impedes the ability of the Office to conduct reviews involving section 30. That assertion is presumably based on a misunderstanding of section 3(2)(f)(i) which says that the OIPC "is an advocate for access to information and protection of privacy." The oral and written components of our participation in this review are examples of our advocacy in this regard. When we review a draft bill and provide our comments, that is another example of our advocacy for access and privacy. When the Commissioner speaks in the media about evolving access to information and privacy issues by reference to well-established principles that underpin those rights, this is can also be a form of advocacy.

Section 3(2)(f)(ii) requires the OIPC to "facilitate timely and user friendly application" of the *Act*. Much of our communication with the public, public bodies and other stakeholders has this goal at its heart. One of the primary ways do this facilitation is during informal resolution. The informal resolution process is a fundamental element of our oversight role, one that is often overlooked by courts and others who have attempted to plumb the limits of the Commissioner's powers and authorities. That facilitation necessarily involves adopting a position of maximizing the rights available under the Act, without going beyond them. This may appear to public bodies as the OIPC attempting to take the side of the complainant, when in fact it is the OIPC interpreting the statute and attempting to ensure that the rights granted under it are as fully realized as they can be, without going beyond that statutory framework or impacting the limitations on those rights that are a necessary part of it. As much of our work at the informal investigation stage involves explaining to complainants that public bodies have interpreted the law correctly, we expect that many complainants would believe the opposite, that we are biased in favour of public bodies. Furthermore, it is important to understand that informal resolution efforts do not impact the rights of any parties because informal resolution does not occur unless the parties freely agree to it.

Section 3(2)(f)(iii) requires that the OIPC provide an "independent review of decisions made by public bodies under this Act." That purpose provides a very distinct role for the OIPC beyond the advocacy role in section 3(2)(f)(i). In an access to information review, the formal process which occurs when informal resolution has failed is a quasi-judicial process. There is a statutory requirement for the public body (or the third party as may be the case) to discharge its burden of proof. In this process the submissions presented by the parties are considered, the available evidence is reviewed (which is generally the unredacted records), relevant case law is researched and considered, and a formal report is drafted and issued by the Commissioner containing recommendations. The independent review process set out in section 3(2)(f)(iii) is therefore very much separate from any advocacy role that may be played by the Commissioner in a different context. In fact, the apparent conflict between the two purposes simply means that such a separation is indeed necessary. The advocacy role, as noted by the examples above, is not engaged in the quasi-judicial formal complaint process, while the mandate to provide an independent review of decisions by public bodies is very much a statutory interpretation exercise based on the evidence, argument, case law, and ultimately a determination as to whether the burden of proof has been discharged.

For those who are still not convinced regarding the Commissioner's independence and impartiality, the statistics speak for themselves. If the OIPC was somehow setting aside its role of impartial adjudicator in favour of simply advocating for access to information applicants, it is unlikely we would have seen these kind of results from Commissioner's Reports resulting from access to information complaints agreeing or partially agreeing with the public body 75% of the time from 2015 to 2020:

Outcomes of Commissioner's Reports	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Agree with Public Body	8	30	11	14	19
Partially Agree with Public Body	3	3	4	4	6
Disagree with Public Body	3	4	9	11	3
Number of Reports Issued	**14**	**37**	**24**	**29**	**28**

When the OIPC intervenes in a court matter, our purpose, which we generally make quite clear to the parties, is to share with the court our views on statutory interpretation regarding the matter before the court. If the matter has proceeded to court subsequent to the issuance of a Commissioner's Report, we will generally share with the court the reasoning we used to arrive at the Report's recommendations. Over the years, this has meant that we have supported interpretations that go both ways. Sometimes our interpretation of the statute would see the applicant receiving more access to information, but in our interventions we have equally supported interpretations which align with the public body's application of an

exception to the right of access. We are agnostic as to the outcome – our goal is correct statutory interpretation.

We would be remiss if we did not also reference how accusations of bias and partiality levelled at the OIPC have impacted our staff by impugning their professional ethics. The staff of the OIPC take the mandate of the Office extremely seriously, and without exception they have discharged their roles in the formal investigation of access to information complaints with professionalism and impartiality. All of our Analysts sign a Code of Conduct annually, committing that we will carry out our duties impartially. Most of our Access and Privacy Analysts practiced law prior to joining our Office, while others brought deep professional experience and qualifications in the application of access to information and protection of privacy statutes. The staff and Commissioner takes it as an extremely serious and wholly unfounded accusation that we have failed to act with independence and impartiality in the discharge of our duties regarding the independent review of public body decisions.

Direct Appeals

One of the questions raised by Chair Orsborn in our initial presentation was whether the right of direct appeal is necessary. Certainly some complainants that may have had past experiences with our Office and who have disagreed with the outcomes of their complaints have chosen subsequently to go directly to Court the next time they had a new complaint to make. It is possible that these parties believe they have a good sense of what the likely outcome of a complaint to our Office might be, and they are already determined that their matter must go to Court eventually anyway. In such circumstances, it is arguably a waste of time and OIPC resources to require the complainant to go through our process as a preliminary step if ultimately they want to bring the matter before a Judge.

Since 2015, we are aware of 17 matters involving direct appeals to the Supreme Court, Trial Division. Seven of them were discontinued when the Supreme Court of Canada denied leave to appeal from *Newfoundland and Labrador v Newfoundland and Labrador Teachers' Association, 2018 NLCA 54,* referred to as the “sunshine list” cases. Most of the parties went through appeals at our office, but four of these seven went directly to court, where the matter was dealt with by inviting all of the parties to intervene in the single case that went forward. Three of those seven involved Nalcor contractors, however their appeals were filed later and they were not part of the consolidation.

Of the remaining ten, six involve telecommunications companies that were notified as third parties about a request. Five of these were discontinued but one is recent and is still ongoing. Three other recent matters involve a complainant who has been to our Office many times in the past, and his many ongoing court matters are now part of a case management process. Again, it is assumed that the complainant’s ultimate goal was to bring the matter before the Court, and based on his past experience with our Office he may have felt it more efficient to take his concerns directly there.

The one remaining matter involves the Beverage Industry Association (BIA). The BIA was not notified as a third party of an access request under section 19, but filed an injunction to prevent the release of records followed by an application under section 53. That matter was heard at the Trial Division and is now before the Court of Appeal. The foundational issue for that matter is whether the BIA's members have any claim of ownership over the information in the records at issue, which we believe is a precondition for a potential claim of section 39 and notification under section 19.

In contrast to the 17 matters that were direct appeals to court, during the same period the OIPC received and processed several hundred access to information complaints, most being resolved informally, but some resulting in Commissioner's Reports. Essentially, direct appeals are exceptions to the normal process, however we see no pressing need to remove that option from applicants who wish to choose it, because it is very likely that these matters would eventually go to court anyway, even if they were forced to go through the OIPC process first. The Commissioner will usually intervene to provide our perspective on statutory interpretation to the court in such matters.

Authority of OIPC to Review Records where Solicitor-Client Privilege Claimed

The Law Society, the City of Corner Brook, the Canadian Bar Association (CBA-NL) and JPS made submissions regarding the authority of the Commissioner to review claims of solicitor-client privilege in the course of investigating a complaint about a refusal to provide access to information. While the OIPC's initial written submission adequately addresses the issue for the most part, a few additional comments are warranted.

Memorial University has indicated that it wishes *ATIPPA, 2015* to be amended so that the Commissioner cannot require the production of records where there is a claim of solicitor-client privilege. Memorial specifically recommends:

> *... that a revision or clarification of s.100 of the legislation reflect the current unofficial process in which the OIPC accepts a listing of solicitor-client and/or litigation privileged information and/or records with submission, in lieu of the privileged records themselves and, therefore, is unable to compel production of solicitor-client and litigation privileged information and/or records.*

Unfortunately Memorial has made an assumption about what is occurring. Subsequent to JPS's refusal to provide records to this Office for review where there is a claim of solicitor-client privilege, and the matter becoming subject to an application for a declaration by JPS, Memorial has also refused to provide the OIPC with records in the same circumstance. In each file where Memorial has refused to provide the records to the OIPC, it has provided information about the records that, in the circumstances of the specific cases at hand, we have deemed to be sufficient for Memorial to discharge its burden of proof. These assessments are being made on a case by case basis, and it could easily be the case that the next description of records provided to the OIPC by Memorial will not sufficiently discharge its burden of proof. It

is our view that the Commissioner has the authority to compel production of those records, but given the specific facts of these cases we have chosen not to exercise that option. With the issue already heading to court with JPS and a legislative review under way, we hope not to have to engage in further court processes with Memorial or any other public body if the matter can be addressed through one of those means. We certainly do not support a revision of section 100 as proposed by Memorial.

That being said, in its submission Memorial has raised an extraordinary circumstance which could justify some limitation on the Commissioner in relation to the review of claims of solicitor-client privilege. Memorial references the fact that records containing legal advice provided by its counsel regarding court appeals to which the Commissioner is a party could themselves be subject to an access to information request, which could then be subject to complaints to the OIPC.

In its fifteen-year history, the Commissioner has not yet reviewed any records of this nature. In fact very few records that pertain to the OIPC in any way have come to us in the course of a complaint or review. Memorial has had the experience of dealing with a persistent and determined access to information applicant, and as a result such a circumstance is perhaps more conceivable for it than for other public bodies we have dealt with. Despite the rarity of this circumstance in our experience, we acknowledge the basis for such a concern. Because of its rarity, however, such a concern does not justify a blanket prohibition against review of records by the Commissioner where there has been a claim of solicitor-client privilege. It may, however, justify inclusion of a very specific exception and alternate procedure in this unlikely event.

We would propose that such an exception to the Commissioner's authority to compel production of and to review claims of solicitor-client privilege should be limited to circumstances where the records at issue in the complaint relate directly to a matter in which the Commissioner is or has been a party in a proceeding, as well as a public body's legal advice about responding to complaints that are or have been before the Commissioner. In such circumstances, a statutory provision could establish that the public body may attempt to discharge its burden of proof by way of a detailed affidavit satisfactory to the Commissioner. If the Commissioner is not satisfied that the burden has been discharged as a result of the affidavit, the public body would be required to apply to court to demonstrate that the records relate directly to a proceeding in which the Commissioner is or has been a party, and if this is established, to require the Court to review the records and make a determination whether or not the records are protected by section 30. While this approach would drastically extend the time and expense of the process, negatively impact the likelihood of informal resolution, and delay a decision on access to information for the applicant, the circumstance warranting it is sufficiently rare that it can be justified.

Before addressing the other aspects of this issue, it must be said that we respect the principle that solicitor-client privilege is a substantive right that must be protected. In our view, and as recognized by section 100(2), disclosure to the Commissioner does not affect solicitor-client

privilege. Furthermore, the proportion of solicitor-client privileged records created or gathered by public bodies that at some point become responsive to an access to information request is very small. The subset of those records that have or could be subject to review by the Commissioner is, as a practical consideration, that much smaller. In terms of any alleged impact on solicitor-client privilege, then, we are talking about a tiny fraction of public body records that may ultimately by reviewed by the Commissioner.

In the positions that have been put forward which differ from our view, there has been a failure to appreciate the context within which access to information law operates. Even some of the case law that has been cited focuses on the principle of solicitor-client privilege without fully considering the context. Access to information does not occur in a courtroom scenario, where two opposing parties represented by officers of the Court are litigating a dispute. In that context, if a party wishes to dispute a claim of solicitor-client privilege, it is the party asserting the challenge to the claim of privilege who must bear the burden of proof. That is as it should be.

In an access to information request scenario, we have an applicant, who has a statutory right of access to information, with exceptions. However, that applicant is not equal in status to the public body. In most cases, a public body wields power over citizens, including the applicant, through statutory or regulatory authority, and the public body has administrative expertise that is not always available to applicants. The relationship between citizens and their government is addressed by the *Canadian Charter of Rights and Freedoms*. It has been recognized by courts, and by former Chief Justice of the Supreme Court, Beverly McLaughlin, that access to information laws enjoy "quasi-constitutional" status. In many contexts, solicitor-client privilege is necessary to protect the powerless from the powerful through this important legal right. In access to information, it is the public body who now wishes to wield that right over the citizen who is an access to information requester. For most access to information applicants, the Commissioner's oversight is the only timely, practical means available to ensure that they are being dealt with fairly when there is a refusal based on a claim of solicitor-client privilege.

The applicant is generally never going to be in a position to discharge a burden of proof regarding records in the control or custody of a public body because the playing field is not an equal one. That is why the Act says that the burden of proof for all denials of access to information (except in third party complaints) lies with the public body.

The parties who oppose the Commissioner's ability to review claims of solicitor-client privilege do not typically acknowledge that most complaints to the OIPC are resolved informally. Informal resolution helps safeguard a meaningful right of access, by ensuring that the review process can have a speedy and efficient result. If we do not have access to the records, it is often impossible to fulfill this aspect of our role. Unless we can say to the applicant that we have reviewed the record and confirmed that it is privileged, it is difficult to tell the applicant to take our word for it, when we don't have the evidence ourselves. Even if we have an affidavit from the public body, to many applicants that is just another way of saying no, in a context within which very little trust may exist between the applicant and public body. Their confidence

in us, and agreeability to informal resolution, stems from our ability to assure them that we have actually seen the records and conducted an independent assessment of the claim.

Prior to the Court of Appeal ruling under the original *ATIPPA* that confirmed the Commissioner's ability to review claims of solicitor-client privilege, we held a number of matters involving claims of solicitor-client privilege in abeyance, pending that ruling. Once the ruling came down, we were able to obtain and review the records in those cases. In the majority of those outstanding cases, in the face of basic questions from this Office about why the exception applied, several public bodies simply withdrew their claims and released additional records to applicants, often months or years after the original requests were filed. In these instances, the claims of solicitor-client privilege could not withstand even a basic amount of scrutiny and were soon abandoned. In some cases, public bodies may have received legal advice when making these claims, and in some cases perhaps not – we do not know that for sure. We do know, however, that these claims were firmly asserted, and we have no reason to believe that they would not have been backed up by affidavits if there had been a legal requirement to do so at that time. It would have been very difficult for us to challenge such affidavits, and that is the kind of scenario that will certainly undermine access to information rights.

When the Commissioner's oversight is removed, there can be impacts on applicants dealing with the full spectrum of public bodies. During the period leading up to the Court of Appeal ruling, one Town Manager told us he claimed solicitor-client privilege because he knew that meant we couldn't review the records. While that individual failed to be discreet about his deception, how many others will take the same course of action without "saying the quiet part out loud" if the law is changed as requested by some public bodies? It is also worth noting that in the matter that led to the Court of Appeal ruling, in response to questions put forward by one of the Judges on the panel, the Department's lawyer was forced to admit that to his knowledge, no one had actually reviewed the records document by document. This is discussed in our Report A-2013-004 at paragraph 37.

The positions of JPS and the Law Society are bringing us down the exact same path we were forced to follow with Bill 29. Matters that could have been resolved informally in a matter of weeks could take a year or two, or more. Timely access to information is one of the purposes of the *Act* as outlined in section 3(2)(f)(ii).

The other thing that has not been acknowledged about context is that, despite efforts to remove access to information decisions from the political realm, there is no way to ensure that those decisions are completely free from political considerations. During the Bill 29 era, which also occurred during the development of Muskrat Falls, we don't know how many times applicants may have been refused access on the basis of a claim of solicitor-client privilege, and simply walked away, because of the requirement for all such appeals to bypass the Commissioner and go to what is typically a lengthy court process.

Something else that has not been fully appreciated is the purpose of the *ATIPPA, 2015*. It has a very specific purpose, which differs from other contexts in which solicitor-client privilege is at issue. It is about transparency and accountability of public bodies – the entities that taxpayers fund, and that the public elects its representatives to serve. It is again a very different context from courtroom litigation and other legal processes. There is no way for the Commissioner under the *ATIPPA, 2015* to be a speedy, cost-effective first level of review for access to information complaints if the Commissioner cannot access records to conduct that review. These are, after all, public body records, largely created by public body officials, and from the point of view of the public we are serving, the OIPC is simply another public body, whose officials are bound by professional oaths as well as by the statute itself to maintain confidentiality, who may be called upon, in the exceptional circumstances of an access to information complaint, review them.

There has never been an incident, or even an accusation that we have misused that authority. The only harm that has ever been alleged is to the principle of the sanctity of the privilege. Review by the Commissioner is, in reality, such a tiny exception to that principle, and for a well-justified purpose, that an argument grounded entirely on the principle cannot stand up to scrutiny. There is no actual, or practical harm, however we know that real harm will be caused if the Commissioner cannot conduct a review. We know that informal resolution is unlikely to occur. We know that this means that cases that could otherwise be resolved will have to go to court (or be abandoned by requesters). It would also be a mistake to assume that all public bodies have the expertise to engage in a process of discharging their burden without providing the records to the Commissioner for review, or the budgetary means to hire lawyers to assist them in doing so. Most do not. There is an Occam's razor aspect to this. There is a simple and elegant solution to the problem. Creating an expensive and time-consuming add-on to send routine matters to court unnecessarily is not it.

We would not object if the statute were amended to allow public bodies to attempt to discharge the burden of proof involving a claim of solicitor-client privilege through production of a detailed affidavit, and we have accepted such affidavits in the past when they have proven adequate. The Commissioner must be in a position, however, to demand production of the records if the affidavit is insufficient to discharge the burden of proof, and the decision to do so must be at the sole discretion of the Commissioner. Any procedure that simply requires the Commissioner to accept the word of a public body through an insufficient affidavit will, based on our past experience, undermine the purpose of the statute and the rights of applicants. Any process whereby applicants or the Commissioner are required to bring such matters before a judge in order to do what has under *ATIPPA, 2015* been part of the Commissioner's mandate, also represents a material delay of access and an unnecessary expense of time and resources that will also certainly undermine the right of access and the purpose of the statute. Clearly, the federal government recognized this, which is why the *Access to Information Act* was recently amended to clarify the federal Commissioner's power to review claims of solicitor-client privilege, ensure that the statute can continue to function, and that the federal Access to Information Commissioner can discharge their mandate effectively.

OIPC Review Process

It has been suggested by TCAR that 10 business days to provide submissions and records to the OIPC when a complaint has been received about an access request is a difficult time frame within which to work. We understand that it is a short period of time, however we are also of the view that the 65 business day time frame from receipt of a complaint to issuance of a report (if informal resolution is not successful) has been a very positive aspect of the establishment of an efficient, effective first level review of complaints, as envisioned by the 2014 *ATIPPA* review, and keeping those time frames as short as they are is very much in the public interest. That being said, we have been amenable to granting short extensions to the 10 business day deadline where extenuating circumstances exist, and we think it would be better to continue to proceed on that basis.

IET recommends a change to OIPC interpretation of the term "non-responsive" in the context of an access request, and subsequent review by OIPC. The ATIPP Office has also suggested an amendment to the statute to address its concerns on this subject. OIPC guidance on the issue may be found here, and we believe it strikes the appropriate balance. Ultimately, our view is that communication with the applicant can always resolve any confusion around whether an entire record, or simply a section of it, is being requested by an applicant. The duty to assist requires an open, accurate and complete response, and we believe that if there is any lack of clarity in a request, the Coordinator should reach out to the applicant to ensure that the request is understood, including what is intended to be inside or outside the scope of the request. Where there is doubt, bear in mind that courts have said statutes should receive a liberal interpretation in line with their purposes.

The RNC, in its submission, stated the following regarding its concerns about a perceived lack of accountability at the OIPC itself:

> *However, it is felt by the RNC that ATIPPA, 2015 does not hold the OIPC accountable to the general public or public bodies the same way that it holds the aforementioned accountable. Throughout the administering of an access request and a potential applicant complaint to a response the public body is held to strict timelines in responding to the applicant and to the OIPC during the course of their investigation. The applicant too is limited to a 15 business day timeframe to make a complaint regarding an access request. However, there does not seem to be any requirements on timelines within the Act for the OIPC to respond or to conduct their investigations. Currently the RNC is aware of one investigation involving the RNC ongoing by the OIPC that has been ongoing since 2017.*

This characterization is categorically incorrect. Section 46(1) requires the Commissioner to complete an investigation and make a report on complaints about access to or correction of information within 65 business days. Section 46(2) allows the Commissioner to extend that time limit in extraordinary circumstances if the Court approves an application to do so. To date, we have availed of this option three times: at the outset of the COVID public health

emergency; during the 2020 “snowmageddon” state of emergency when our Office was closed and we could not issue reports that were due during that period; and also in relation to some files the outcome of which hinged on awaiting a decision of the Supreme Court of Canada as to whether it would hear an appeal of a Court of Appeal ruling that directly impacted the outcome of the file.

Section 74(3) requires the Commissioner to complete a privacy investigation as expeditiously as possible under the circumstances. We believe we have done so. In 2019-2020, other than those complaints which were withdrawn by the complainant or for which we determined that we had no jurisdiction, privacy complaints were closed in an average of 60 business days, with the longest being 106 business days. When it comes to timely completion of investigations of access to information or privacy complaints, we believe no other access and privacy oversight body in Canada is likely to have a better record.

We also do our best to accommodate public bodies during difficult times. As public bodies would be aware, the Commissioner adopted a very flexible standard to approve ample time extensions for public bodies who faced difficulty during the state of emergency and the initial months of the COVID pandemic.

The 2017 matter referred to by the RNC likely refers to a privacy complaint that was filed with this Office that resulted in a prosecution. All matters in relation to the prosecution have not yet concluded, and therefore our complaint file has not formally been closed, although our investigation is not currently active. This is a rare and exceptional circumstance, but as the matter is with the Crown, it is not within the control of the OIPC to address it in a more timely manner.

Interim Commissioner/Commissioner Appointments Process

JPS on May 10th spoke on the submissions of the Speaker and noted that they preferred that the Lieutenant General in Council should appoint an interim OIPC commissioner if one is needed rather than delegation of authority. We submit this appointment should remain with the House as this process is more neutral and does not permit any perception that the appointment is political in nature. We recognize that the permanent appointment of the commissioner is completed by an independent process, but there is an unfair advantage gained by someone appointed on an interim basis should they later seek permanent status. This is why all elements of the process should remain apolitical.

We reiterate our recommendation (12.1) that a procedure to immediately fill a vacant Commissioner position be inserted into the Act and clarify that the appointment of an interim Commissioner should remain a responsibility of the legislative branch of the House of Assembly. Two options that we offered for consideration were (i) the designation of a specific position within the OIPC authorized by statute to perform the duties of the Commissioner in case of incapacitation of the Commissioner or vacancy of the office; and (ii) providing a

Commissioner with the responsibility of designating an individual employee who would have such responsibilities.

During the May 12 session there was also a discussion about the Speaker's recommendations regarding the appointment of the Commissioner. The Chair characterized the Speaker's recommendation as to make the appointment of the statutory officers consistent. In our review, this is not how we would characterize that recommendation. Instead, the Speaker identified concerns about what should be done if the persons named in section 85 are not in agreement on the candidate to be brought before the House and the mechanism by which the Speaker is to cause a resolution to be placed before the House when he or she cannot do that him/herself. This, to us, seems short of a recommendation to create a single, consistent appointments process for statutory officers, which currently vary considerably. Some involve the Independent Appointments Commission. Some involve Cabinet in a significant way. While we agree that the problems that the Speaker has identified need to be addressed, these are specific mechanistic problems about the interface between the selection committee and the House. We believe that the current composition of the selection committee remains sound.

Prosecutions

JPS has proposed to eliminate section 99 or amend it to require staff of the OIPC to testify in prosecutions. Removing section 99 altogether could have the effect of creating reluctance on the part of Coordinators to be forthcoming with OIPC staff, particularly during informal resolution and other professional interactions. The ability to build that rapport could be hampered, and we may find that Coordinators and other public body officials believe they need to "lawyer up" before talking to us, and to be more guarded in what they say. We think this would hinder the work of the Office, the vast majority of which occurs in an informal process, which is not widely understood.

It was noted by JPS that they had done a jurisdictional scan and only 2 jurisdictions restricted OIPC staff from testifying in Court. It is unclear whether JPS also did a jurisdictional scan to determine how many other jurisdictions' Commissioners' offices have actually initiated a prosecution. To our knowledge, only two prosecutions have occurred under a public sector access and privacy statute like *ATIPPA, 2015*. The first was in Nova Scotia in 1988, *R.* v. *Morris*, [1988] N.S.J. No. 383. In that case, the Attorney General declined to bring a prosecution against a Minister who had disclosed personal information about a single mother after she publicly criticized the Department. The mother herself then proceeded to bring the prosecution. He was convicted and fined $700. It does not appear that the Privacy Commissioner (then known as the Review Officer) played a role in the prosecution.

The other prosecution we are aware of relates to what is often referred to in British Columbia as the "triple delete" scandal. In that case, the Information and Privacy Commissioner issued a report which disclosed that there could be a basis to charge an individual. The individual was ultimately charged for lying to the Commissioner under oath, however this prosecution resulted from an RCMP investigation that was triggered by the Commissioner's report. The

Alberta OIPC however, under its health information statute, has initiated numerous prosecutions.

Many jurisdictions in Canada face barriers that prevent prosecution from occurring. Some have old legislation where the offence provision is limited in scope. Others may face unrealistically short time periods within which to bring a charge. Other offices do not have sufficient staff resources available to bring a charge. In a Special Report to Parliament released in July 2020, Federal Access to Information Commissioner Caroline Maynard indicated that she had reason to believe an offence had been committed, but in her report, she indicated: "Since I do not have the authority to investigate such offences, I disclosed this information to the Attorney General of Canada in February 2019." According to media reports, the matter is under investigation by the Ontario Provincial Police, with prosecution-related advice being provided by the Alberta Prosecution Service.

In this Province, we have brought charges under both *PHIA* and *ATIPPA, 2015*. In only one case involving *ATIPPA, 2015* have we been unsuccessful in obtaining a conviction, and that matter is currently under appeal by the Crown. The typical scenario under both statutes is that a rogue employee has abused their position to obtain or disclose another person's personal information (sometimes a large number of individuals' personal information). Evidence presented at these trials is evidence from the public body managers and IT professionals about their systems, policies and procedures, including audits of access to IT systems. In our view, OIPC staff have only second hand knowledge of these, and it is far better for Courts to hear testimony directly from the managers and IT staff of public bodies. The OIPC track record does not appear, at least at this juncture, to cry out for a change in process.

As a final consideration, it should be borne in mind that it is difficult to compare the role of an OIPC Analyst with that of, say, a Wildlife Enforcement Officer. It is one of the primary duties of Wildlife Enforcement Officers to investigate and gather first hand evidence of violations of provincial statutes, and to lay charges where appropriate. The evidence of such offences is not available to the Courts unless the Wildlife Enforcement Officer brings it, and it is often his or her first hand witness testimony, their photographs of illegal nets or traps, and their testimony about their interactions with the accused, which make convictions possible.

In the case of the OIPC, involvement by one of our Analysts with an investigation that leads to a prosecution is not something they do on a frequent basis, and certainly testifying in Court is not part of their job duties at present. Unlike Wildlife Enforcement Officers, our Analysts are not first-hand witnesses of any of the activities under investigation. In every case, as noted above, the information that has led to successful prosecutions and guilty pleas has come directly from managers and IT staff of public institutions, as well as the records of computer access audits conducted by public body IT staff, and other public body documents such as computer access or HR policies. Our Analysts are not experts in the IT systems or management practices of public bodies. This information is best made available to the Court by the experts who can answer questions to allow the evidence to be probed and considered. The only statutory role for the OIPC at present regarding prosecutions is found in section 102(4), which

provides that the Commissioner may disclose information about the commission of an offence to the Attorney General.

In fact, the vast majority of the work of Analysts involves informal contact with public body coordinators and other officials, access to information applicants, etc. This informal contact occurs during the informal resolution of complaints, but also in phone calls and emails seeking guidance on privacy impact assessments, privacy breach responses, new public body initiatives that could impact privacy, potential complaints that might be filed – the list is endless. The reality is that the major portion of the OIPC oversight role comes not from Commissioner's Reports, but from these day to day interactions which supports public body compliance and informs other stakeholders about requirements and expectations under *ATIPPA, 2015*. If the statute were amended such that OIPC staff could be called as witnesses in Court, it could put a chill on the willingness, particularly on the part of public body officials, to disclose their concerns about privacy or access to information, and thus impair our ability to carry out the many informal interventions that occur to support compliance with the statute. As a final point, we believe section 99(2) can be waived by the Commissioner in appropriate circumstances. This is a discussion that can be had with the Crown.

Appeal Process

Memorial has proposed some amendments to the statute in relation to the appeal process at Court. The specific proposals are as follows, accompanied by our comments on each:

i. That the legislation be amended to clarify that a de novo hearing shall proceed as an expedited hearing on the basis of affidavit evidence subject to further application to the Court for additional steps under Rule 17A.09.
    - The OIPC does not object.

ii. That the first appearance date shall proceed as a case management meeting at which the parties are to discuss any applications contemplated under Rule 17A.09 and scheduling deadlines.
    - The OIPC disagrees – some appeals are relatively straightforward and a case management approach is unnecessary. First appearances on ATIPPA, 2015 appeals typically consist of establishing filing deadlines, obtaining a hearing date, and a sealing application for the records. In our view the use of case management should be at the discretion of the Court in circumstances deemed appropriate by the presiding Judge.

iii. That further recourse to the Rules of the Supreme Court, 1986 be prohibited absent an order of the Court under Rule 17A.09 (as contemplated by the application provision of the Rules of the Supreme Court, 1986 in Rule 1.02).
    - The OIPC agrees.

iv. That all *ATIPPA, 2015* appeals be case managed, with the first date serving as the first case management meeting.

- The OIPC disagrees. As noted above, some appeals are relatively straightforward and case management should be at the discretion of the Court in circumstances deemed appropriate by the presiding Judge.

v. That a public body be required to file an audit copy of the records under seal with the Court without the necessity of a sealing application.

- The OIPC does not agree that such an amendment is required. A sealing application is an important step to obtain certainty regarding the understanding of the Court and all parties before the Court about the status of the records. Not all lawyers who appear on ATIPP matters are familiar with the statute, and a statutory requirement to file records could be missed. The OIPC is required to be notified of appeals, and will continue to ensure that parties are aware of that step if there is any uncertainty.

Extension and Disregard Approval Requests to OIPC

Extensions

An important fact to remember when it comes to the current 20 business day timeline is that in the vast majority of cases, public bodies successfully respond to access requests within that period. The most recent statistics published by the ATIPP Office for 2018-2019 indicate that for all public bodies receiving requests that year, 93% responded without needing an extension, an additional 4% responded within the approved extension period, and only 3% failed to respond within either the original or extended deadline. Essentially, the system is working as it should.

The ATIPP Office has also suggested amending the statute to provide a period longer than 20 business days for small municipalities to respond to access requests. Some access requests are quite straightforward, others may be more difficult. While the context means that this spectrum of simple to complex is different for small public bodies, it remains true. Any public body, including a small municipality, can apply to the OIPC for an extension, and the capacity of the public body to respond will certainly be considered.

It has been proposed (by the OCIO) that the 20 business day clock should be paused for 2-3 days during the preparation of an application to extend the time limit for response to an access request. OCIO expressed that it takes 2-3 days to prepare such a request. This does not align with typical time extension requests we receive. IET is closer to the mark, saying that making an extension request "can take over an hour." For lengthy, complex requests, that might be correct, however based on the many forms we have reviewed we believe the process would typically take less time.

The form we use is straightforward, and an ATIPP Coordinator responding to a request requiring a short extension in the range of 5 to 20 business days should be able to complete the application in minutes with the information that would normally be at his or her fingertips. We have appended a copy of the form to this report for illustration and if you would like to see a redacted version of completed forms, we can provide them. The longer an extension requested, the more detailed the rationale would tend to be required to justify it. Much of the work to prepare such an extension request involves work that needs to be done in any case, such as communicating with third parties, conducting searches, reviewing records, communicating with other public bodies who may need to be consulted etc. Such investments in time are not lost to the Coordinator, as they are necessary in order to respond to the request. We do not support this recommendation.

It has also been proposed by IET that the 15 day deadline for submitting an extension request to the OIPC be eliminated. The extension request process is not onerous, and it involves providing basic information about the status of the request that Coordinators should have at hand. For the vast majority of access requests, Coordinators can readily determine at day 15 whether they are likely to need an extension. In those few circumstances where it is difficult to assess, Coordinators can submit an extension request at day 15 and avail of any extension granted if needed. Section 24 is also available should extraordinary circumstances arise past day 15 to warrant an extension.

The ATIPP Office has suggested amending section 23 to explicitly allow the Commissioner to extend the time for a response if the public body has had difficulty getting in touch with the applicant to clarify the request. Section 23 already allows the Commissioner to approve extensions where it is necessary and reasonable to do so – there is no need to prescribe specific considerations in the statute.

Several public bodies have called for a return of public bodies being able to extend their own deadlines. In its submission, the Department of Environment, Climate Change and Municipalities also supported the idea of allowing public bodies to extend their own deadlines, and it cited the ability of public bodies subject to the Federal *Access to Information Act* to extend their own deadlines as a guiding example. While the statutory language may look appealing, the Department may not realize that the federal access to information regime is infamous for the length of time it takes public bodies to respond to access to information requests, and the ability of federal public bodies to extend their own deadlines is certainly a major contributing factor. Information Commissioner Maynard recently issued a special report on the failings of the RCMP in this regard, however other reports and statements by past Commissioners underscore that this is hardly unique to the RCMP. While applying for an extension may be an inconvenience for public bodies, in this province it has provided a touchpoint for effective oversight and helped to ensure that deadlines are being adhered to, which ultimately protects the rights of citizens who use the *Act*.

The ATIPP Office also proposes that public bodies be able to assign themselves a short extension of 10 business days. It acknowledges past abuse of this by public bodies and

asserts that great strides were made to improve this prior to the 2014 statutory review. Some of the improvement which may have been noticed in the lead-up to that review may be the result of a 2014 news release issued by former Commissioner Ring in which it was noted that "deemed refusals" had become common, whereby public bodies were simply blowing by their statutory deadline to respond to requests for access. That news release followed from an earlier one in 2013 in which the issue was identified as a significant concern as well. The 2014 release was followed up by high level meetings, and any positive impact from that effort may be attributed at least in part to the specific political climate at the time.

The Department of Digital Government and Service NL also proposes that public bodies be able to grant time extensions to themselves of up to 30 business days.

In the earliest version of *ATIPPA*, public bodies were able to extend their own time limits at their own discretion. In our view, this was the subject of substantial abuse which significantly impacted the rights of applicants. This remains the case in some other jurisdictions where public bodies have this discretion. For example, the Manitoba Ombudsman's Office released an audit in June of this year into timeliness of access to information responses. In our experience, and as demonstrated most recently in Manitoba, jurisdictions lacking clear time limits, and jurisdictions where public bodies can extend their own time limits, tend to see the development of a lax culture around timeliness of access to information requests. Despite the inconvenience to Coordinators of having to apply for approval to extend the time limit, we believe this best supports and protects the right of timely access to information. It is our view that where there is a time limit that can easily be extended, the extended time invariably becomes the new time limit.

The ATIPP Office has proposed that if public bodies are allowed to grant short extensions to themselves, the OIPC could conduct "spot checks". If such a process were to be instituted, it is possible that we may gain some insight into whether those extensions are being applied unnecessarily, but that will be a retrospective view, and it will not assist the applicants who would have already experienced the delay. Given that the extensions would be permitted by the proposed statutory amendment, it is also unclear what leverage would exist for the Commissioner to rectify any concerns.

The ATIPP Office has also proposed that the *Act* be amended to require the OIPC to give a "detailed overview" of how it arrived at its conclusions in a decision on an extension application. They raised this issue again in their presentation on May 10th claiming that the OIPC does not provide enough detail when we deny or only partially grant an extension. We must note that we do only have 3 business days to respond and that we disagree that we do not provide adequate detail in our response.

When declining an extension, we typically provide a brief explanation noting the key factors in our decision. We will review the level of detail in our responses and consider how we could provide additional detail that could be beneficial, but do not believe a statutory amendment would be necessary or helpful.

It was proposed by the City of Corner Brook that the OIPC should issue guidelines regarding its interpretation of section 21 "that apply to all these requests to make their responses consistent to all public bodies and requests." The reason section 21 is written as it is, is that different public bodies have different capacities. Furthermore, different circumstances may be in play at different times, such that a public body may be able to handle a large request within 20 business days without a problem, but a similar request 6 months later might arrive at the same time as 5 other requests with a similar workload, or they could arrive at the busiest time of year for that public body, etc. While the OIPC does have guidelines for requesting a time extension, it is not feasible or advisable to make this an overly prescriptive statutory provision, because that would remove the ability of the Commissioner to allow for differences in public body capacity and changing circumstances.

Disregards

Memorial has suggested in its submissions a return to the Bill 29 era when public bodies were empowered to disregard a request for access on their own initiative, without approval by the Commissioner. This was the subject of significant public discussion at the time, and it is arguably one of the key features that resulted in broad condemnation of the Bill. Memorial's view is that the applicant should be able to complain to the OIPC or the court about a disregarded request, which would again put the onus on the applicant.

While Memorial may see itself as a victim of abuse of the legislation at times by a minority of applicants, we have the benefit of a broader perspective on the *Act*. Sometimes the requests that public bodies wish to disregard may be challenging but do not deserve the extreme solution of being disregarded. Furthermore, on a number of occasions we have found circumstances where some items in an applicant's request may qualify to be disregarded, but others are legitimate, and we are able to customize our response in that way, even though the public body sought a disregard of the entire request. If we return to the Bill 29 process, it is feared that public bodies wishing to delay access or spurn a requester with whom they are engaged in a disagreement of some sort could easily disregard a request, thus delaying or deterring the applicant.

It will typically take longer to prepare a submission for approval to disregard a request. OCIO has proposed that the 20 business day clock should stop for the time during which a public body is preparing a request to disregard. The result of a request to disregard is usually either approval (in which case the clock being stopped to support preparation of the application is moot) or it is rejected, in which case public bodies would typically then move to apply for a long extension, and the OIPC will consider all of the reasons that support additional time.

OCIO has also proposed that an expedited application process be required to disregard requests from applicants "who abuse the ATIPP process." Any time we are asked to consider abrogating a statutory right, the evidence must be able to justify such a significant step. We do not support an expedited application process. That being said, applicants who abuse the

right of access typically have a track record, and our experience is that ATIPP Coordinators who are dealing with such an applicant are able to retain and simply add new evidence to former applications for approval to disregard. In that sense, some applications of this nature are able to be expedited, but not in a formal way.

Memorial has proposed that public bodies be able to deny access to information when there is evidence that the applicant already has the records. This circumstance has come up rarely over the years in the context of our reviews, however based on Memorial's submission it must be a more common occurrence for them. Although Memorial has not suggested that this amendment be established in the context of an application to the OIPC to disregard a request, that would seem to be the appropriate place for it if it were to be included in the statute.

While Memorial appears to have had some frustrating experiences, the proposed amendment is not as clear cut as it seems. There are several considerations. The Applicant may have "had" the record at one point, but it may have been lost, damaged, or they may no longer be able to access it. This is typical where emails have been deleted, or where the applicant is a former employee of a public body, who received the records in that capacity but no longer has access to them. Also, there is the possibility that different versions or drafts of a record may exist, and the difference could be a material one. Sometimes a record that has been distributed to different people may be annotated by one of the receiving parties, and the annotation could be the information of interest. Even if the applicant definitely had the records at one point, say five or ten years ago, but lost them, can they never obtain them again? There may be other reasons why such a provision as proposed by Memorial is not commonly found in access to information statutes, but unless a public body has received an access to information request and disclosed the records through that process, it can be difficult to establish that an applicant already has the records.

Section 21 of *ATIPPA, 2015*, however, could already potentially apply to certain circumstances, particularly where a public body has received more than one request under *ATIPPA, 2015* for the same information. Requests beyond the initial one that are clearly for the exact same records could be disregarded on the basis that they are repetitive. They could also be vexatious or made in bad faith depending on other contextual factors. We have also granted approval to partially disregard requests where multiple requests are received by public bodies with the same records being requested multiple times, while other parts of the request are for new records. These circumstances are best handled through the existing process. Once a disregard has been approved by this Office, that typically resolves the matter. Extending the *Act* beyond its current bounds for the circumstances described by Memorial, which are not particularly common across public bodies as a whole, is unwarranted and unnecessary.

Memorial has also asserted that the current disregard process features a lack of procedural fairness, because the applicant does not receive a copy of the Commissioner's response to the public body's application for approval to disregard. This misunderstands that it is the public body's decision to disregard a request. It is the public body that must establish the case

for such a significant step. The Commissioner reviews the evidence and argument presented by the public body, and if the application is approved, the public body is required under section 21(6) to provide the applicant with reasons for the refusal. These reasons should reflect the case presented by the public body to the Commissioner, less any information that would reveal any information the public body would be entitled to withhold under an exception, and the factors outlined by the Commissioner in approving the application. As noted in section 21(6)(c) it is the decision of the head of the public body that is to be appealed to the Trial Division, not the decision of the Commissioner. Therefore it is the public body which owes a duty of procedural fairness to provide reasons to the applicant. Contrary to Memorial's assertion that the current statutory regime results in "an increased propensity of disregard decisions to be appealed to court," there is certainly no stampede to contest public body decisions to disregard a request – perhaps one or two such appeals have been filed to our knowledge.

Pausing the Twenty-Day Time Limit for Making a Request

The 2018-2019 Annual Report of the ATIPP Office indicates that public bodies responded to access requests within statutory time frames 97% of the time. To add a statutory provision pausing (in effect, extending) the 20 business day time frame would not appear to be justified. In those small minority of circumstances where an extension is required, the current process to seek an extension is available and is working well.

It has been proposed by OCIO, TCAR and Children, Seniors and Social Development (CSSD) that the clock not run on a request where the public body needs to work with the applicant in order to clarify the request before responding. In our experience, many requests are able to be responded to within the established time period regardless of this need to clarify the request. For requests that cannot be responded to within the twenty day time period, for a variety of reasons, the process of filing a request for extension to the OIPC is available. It is not unusual to see extension applications cite difficulty in reaching an applicant to discuss and clarify a request as one of the factors to be considered. A stop-the-clock provision could also be subject to abuse, whereby a public body wishing to delay a response could continue to send further clarifying questions in order to postpone the deadline for a response. We therefore do not support this recommendation.

OCIO has suggested that any public body that receives a request for access in which the subject matter of the request is the same as the subject matter of an ongoing public inquiry may put "on hold" any such requests until the inquiry is complete. JPS indicated in the presentation on May 10th that they were withdrawing this suggestion but we felt it still required comment. While the inquiry itself could be listed in Schedule B, as the Muskrat Falls Inquiry was, it must be observed that any matter that is subject to such in inquiry would be one of great public interest. It would be contrary to the purpose of *ATIPPA, 2015* to enact a provision as proposed. While such topics tend to attract a high volume of requests, that is to be expected, and such a result is simply a fulfillment of the purpose of the *Act*.

Other submissions have also proposed pausing the 20 business day period for various reasons, such as filing for an extension or to request a disregard. We are of the view that this would represent a regressive step for *ATIPPA, 2015*. Such amendments could result in an increased number of extension and disregard requests for the purpose of obtaining an automatic extension, and other more subjective reasons for stopping the clock also open the process to abuse or unnecessary delay.

It has been proposed by IET that non-workdays that are not recognized as holidays in the *Interpretation Act* be subtracted from the 20 business day time period. In our view, this could lead to confusion and unintended consequences. There are a few times a year when such holidays occur, however there are variances among public bodies as to which ones are observed. IET also references storm closures. It is acknowledged that these events can shave a day or two off the 20 business day period on occasion. It should also be acknowledged that many requests are responded to in less than the full 20 business day time period. Holidays are not unknown occasions, so public bodies should be able to plan within a 19 day period for the few occasions that this occurs each year. If circumstances arise where the full 20 business days are required and there has been an emergency closure for a storm or other valid reasons for one or more days, the OIPC is very responsive to such concerns in granting time extensions, and furthermore if the event occurs after the 15 business day deadline to apply for a time extension, public bodies can support extension requests by referencing the extraordinary circumstances provision in section 24.

IET also proposed that public bodies be able to "park" or "bank" requests if the number of requests from a particular applicant exceeded a specified level. It was suggested that the particular number of requests that would trigger this would vary by public body. In our view, that would be difficult to administer across public bodies. An alternative that might be considered would be an amendment to section 21 allowing the Commissioner to approve a public body's decision to disregard a request or requests because of the number of other requests that have already been filed by the same applicant. Our current interpretation of section 21 is that we can approve a disregard of "a" request based on the facts of that one request. Allowing the public body to bank requests would not be without its challenges. In our experience, some requesters list a number of different items on a single access to information request, or file a broad request, while others make a number of separate requests. The latter group may simply adopt the practice of the former group in order to avoid being "parked." Furthermore, applicants may learn over time to ask a friend or colleague to file a request on their behalf. While we acknowledge the challenges, we do not support the particular solution proposed by IET, and even though there are other potential approaches, none of them are foolproof.

Duty to Cooperate

IET has proposed a duty to cooperate on the part of applicants, which would be rare if not unique in Canada. CSSD proposed something similar, and the ATIPP Office has put it forth as a suggestion. While we have sympathy for Coordinators in circumstances where applicants,

as laypersons, do not understand the pressures faced by Coordinators in carrying out their roles, it is unreasonable and unfair to expect that applicants can be expected to take on a statutory duty of the nature described. CNA has also proposed that the *Act* be amended to allow public bodies to declare a request abandoned if an applicant fails to respond to the Coordinator.

Section 11(2)(b) outlines a basic threshold for requests, so a duty on applicants already exists to the extent appropriate. Furthermore, if applicants fail to make their requests clear, the option to apply for approval to disregard a request because it is incomprehensible exists in section 21(1)(c)(iii). The OIPC's formal submission acknowledges that the 5 business day deadline to apply for approval to disregard should be extended to 10 business days, so that situations like this can be addressed. If these provisions do not effectively address a particular circumstance, delays caused by time spent communicating or attempting to communicate with an applicant to clarify a request can be the basis for a request for a time extension to the Commissioner. For most routine requests however, 20 business days is sufficient time to absorb minor communication delays caused by the Applicant.

Reintroduction of an Application Fee

The Department of Education and TCAR have proposed the reintroduction of an access to information application fee. Prior to *ATIPPA, 2015*, a $5 fee existed. In our experience, a nominal fee of five or ten dollars is simply another administrative burden for Coordinators. We believe it is unlikely to deter the most determined, frequent requesters – the very people it is supposed that such a fee is intended to target. The means to accept such a fee would also need to be established. Fewer and fewer people maintain chequing accounts, fewer people carry cash. Establishing such a requirement could also interfere with the ability to file requests electronically, meaning applicants who live in rural areas would be disadvantaged because they may need to travel to the public body, while applicants in the St. John's area where more public bodies are located would be minimally impacted. While core government has an online process for receiving requests, and a fee payment could be added to that process, most public bodies would be burdened with either establishing a new process with scarce resources, handling cheques or cash when they rarely do so, and simply inconveniencing users of the ATIPP process.

Re-instating the application fee to encourage applicants to "assign value to the request" (as suggested by JPS in the presentation on May 10) also risks leading public bodies to assess the motivation behind the request. The motivation of the applicant has no relevance to the processing of an access request, and the few purported casual requests that might be deterred are not a sufficient reason to place an additional administrative burden on the entire system.

One of the goals of the 2014 ATIPPA review was to make the Act more user-friendly, which it has done. We are opposed to this recommendation as it would represent a regression away from user-friendliness.

Increase the Ability of Public Bodies to Charge Costs to Applicants

Some public bodies have requested that the scope of costs they can charge an applicant should be broadened. CNA, in particular, referenced the fact that it cannot charge for conducting a line-by-line review of the records, consulting about the content of the records, and preparing the records for release. CNA's assessment based on five specific requests it received in late 2019 is that on average, each request it processed cost the College $1225, based on the amount of staff time spent and an estimated hourly wage. It is not clear whether the College is of the view that it could eliminate a position and thus save those costs if applicants were deterred by high fees, or whether it could fund the existing position through imposition of increased fees. In our view, high fees generally would be a deterrent to individuals attempting to use the right of access to information. Certainly it must be noted that the number of requests, particularly from individuals, has increased substantially since fees were reduced under *ATIPPA, 2015*.

It is a given that the use of *ATIPPA, 2015* by news media, opposition parties and public advocacy organizations contributes to transparency and accountability of public bodies, but even when the information is requested by individuals, public bodies know that the information could, once in the hands of the applicant, be distributed more broadly, whether shared with the news media or through social media, or to pursue individual advocacy activities.

On that basis, it is our view that *ATIPPA, 2015* should continue to make access to information as accessible as possible. Public bodies have often shared the view with us that they would like to see fees reintroduced so as to discourage larger requests, or requests that they consider to be of a nuisance character. There may be room for discussion about charging further costs where a request is very large, but not quite so large as to warrant approval to disregard being granted. Another suggestion worth considering would be to reduce the number of free hours spent locating the records for municipalities. In our view, however, a reintroduction of costs across the board would be a mistake.

Access to information cannot thrive when costs act as a deterrent. It is an expense that broadly benefits the public interest, and a small proportion of what public bodies consider to be nuisance requests should not drive this particular debate and impact access across the board. The 2014 Statutory Review of ATIPPA contains a detailed analysis of this issue which still very much applies. That report noted that in 2013-2014, a total of 450 requests were filed, and the total amount of fees levied beyond the $5 application fee, was $4518. Of course this is under the fee structure that existed prior to *ATIPPA, 2015*. While there are more requests being filed today, clearly the budgetary impact on public bodies is negligible.

Deadline to Transfer a Request

The Department of Education has proposed that the five day deadline to transfer a request to another public body be extended to ten business days. Executive Council has proposed extending it to 15 business days. In accordance with section 14, the receiving public body is then able to start the clock again at day one. Our understanding is that transfers do not impact a high proportion of requests, however the ATIPP Office may be able to provide further information on that. We have seen no evidence in terms of the number of requests where a transfer would have been appropriate, except it was prevented by the five day deadline. Without further evidence we would not see this as a high priority for amendment.

Using Access to Information in Lieu of or in Addition to Discovery or Another Process

The submission by JPS states that the *ATIPPA, 2015* ought to be amended to allow disregard of and/or to allow processing fees to be charged for access requests for information which may be obtained through other processes, such as the discovery process or other processes of public bodies. The Department's position is that "the fact that another process may take longer than an ATIPP request or requires a fee, should not negate the fact that it is wholly unnecessary to place such a burden on the ATIPP process, which is already untenable for many public bodies." The Department further notes that fulfilling access requests which may be processed through other procedures is not in keeping with the spirit of the *Act* as it does not provide information required to meaningfully participate in the democratic process: "In these cases, applicants already have a right of access to the records – through another process."

The Department's position is contrary to the purpose of the *Act* as making these amendments would diminish the number of avenues for access to information by limiting applicants to time-consuming and potentially costly procedures, which in no way upholds the aims of transparency and accountability of public bodies.

The Department's position is also contradictory to jurisprudence from other jurisdictions, many of which have issued reports, orders, and decisions stating that the discovery process and the access-to-information processes are distinct and separate. Furthermore, it is a widely-held view that just because a requestor theoretically or legally has access to records through another process, such as the discovery process, is not a reason why that they cannot avail of the access-to-information processes as set out in legislation.

The Ontario Adjudicator in Order PO-2282 focused on *FIPPA* section 64(1) which specifically states "this *Act* does not impose any limitation on the information otherwise available by law to a party to litigation." He then referenced Order 48 from a former Commissioner which held that:

> *…the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair… Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect.* [And, relying on American case law] *the issues in discovery proceedings and the issues in the context of a freedom of information action are quite different.*

Adjudicator Goodis then went on to state:

> *The above authorities make it clear that the access provisions under the Act, and other non-Act processes such as the discovery procedures under the Rules, operate independently, and disclosure or non-disclosure under one scheme generally does not affect whether or not the same record may be disclosed under the other scheme. Further, disclosure under the Act may have different implications for the recipient. Here, it appears that the appellants are bound by the Rules not to use or disclose the copy of the videotape they received pursuant to the discovery process in the litigation. By contrast, if a record is disclosed under the Act, the Act does not itself impose any limitations on subsequent use or disclosure.*

The wording of *ATIPPA,* 2015 section 3(2)(a) states that rights of access under our *Act* are "in addition to existing procedures for access to records or information normally available to the public, including a requirement to pay fees."

From Saskatchewan's Commissioner, Review Report 149-2017 says that "the Statement of Claim is a separate process from FOIP. The right of access under *FOIP* is not hindered because there may be a court proceeding in place." Continuing:

> *[20] The Court discovery and disclosure process can include conditions that prevent the documents from being shared outside of the solicitor-client relationship. These conditions can prevent individuals from retaining copies of the information or disseminating the information. That may be the reason an individual who is in a court process chooses to also use the FOIP process to obtain as much of the record as possible. FOIP places no limits on what individuals do with a record once they receive it.*

Very similar findings have been made by the Alberta OIPC, Southern Alberta Institute of Technology (Re), 2003 CanLII 89043 (AB OIPC) (File Reference 2603); the BC OIPC in Order 325-1999; and the Saskatchewan OIPC in Report H-2008–001.

Further, the motive of the requestor is not a consideration when responding to an access request. Alberta OIPC F2015-22 held:

> [72] *I agree with the Applicant that Canada (Information Commissioner) v. Canada (Commissioner of the RCMP) 2003 SCC 8, states the law regarding the extent to which a public body may consider the motives of a requestor; that is, the motive of a requestor is irrelevant. There is no reason why a litigant cannot make a request for access to a public body as may any other citizen. Indeed, the Alberta Court of Appeal appears to acknowledge that this is so, as it recognized that the FOIP Act contains a process "independent of the litigation process". In University of Calgary, cited above, the Court of Appeal did not go so far as to say that an individual cannot be involved in litigation and make an access request at the same time.*

Alberta OIPC in P2011-D-003 wrote: "that the fact that a person's motive for an access request is related to litigation, and that access is or may be available through the litigation process, does not detract from the an applicant's right to take advantage of the access rights in the FOIP Act." And in Order 97-009:

> *In my view, the Freedom of Information and Protection of Privacy Act, which is a substantive body of legislation, operates independently of the Rules of Court, which is a regulation. The Rules of Court do not prevent an applicant from making an application for information under the Act, nor does the Act prevent an applicant from making an application for information when the applicant has used the discovery process under the Rules of Court to get that same information. Furthermore, the Rules of Court do not affect my jurisdiction to apply the Act where there is an issue of whether information in the custody or control of a public body is subject to a privilege to which the Rules of Court may also apply.*

In our view, the *ATIPPA, 2015* should not be amended to limit the right of access to information where the legal discovery process, or another process, is also available.

Accuracy of Information

The RNC at section 7(a) of its submission proposes that public bodies be allowed to refuse disclosure of information deemed to be inaccurate. A record that is inaccurate may reflect the knowledge or assessment at the time a record was created. The state of that knowledge at the time may be important information for a requester. If a public body is concerned that inaccurate information exists in a record which is being disclosed to an applicant, the public body can provide that explanation in its letter of response.

Section 12(4) – Limitation on Disclosure

The ATIPP Office has proposed that section 12(4) be amended to clarify that the privacy provision of the *Act* continue to apply after the final response has been issued. We agree.

Section 64 – Notifying Affected Individuals of a Privacy Breach

The ATIPP Office has proposed that section 64 be amended to reflect the notion that there may be circumstances where notifying someone about a breach could cause harm to the individual or another individual or group of individuals. We agree that such a provision is necessary, however in our view it is of sufficient substance and potentially prone to abuse by public bodies for avoidance of accountability and embarrassment, that such a decision should only be made with approval of the Commissioner.

Section 72 – Privacy Impact Assessments/Common or Integrated Programs

In its supplementary submission dated February 12, 2021, Memorial University proposed some additional statutory language customized for its unique position. We appreciate and support the suggestion that Memorial subject itself to a similar requirement which now exists under section 72(1) and (2). Instead of the role set down for the minister responsible for the *Act*, as is found in 72(1) and (2), it is proposed that Memorial's own head play that role, which makes sense given the independence of the University.

We also appreciate and support the recommendation that the Commissioner be informed of a common or integrated program or service, which is an adaptation of section 72(3) and (4) that reflects Memorial's unique position. Memorial also notes that it wishes to carve out academic programs from this arrangement. In its discussion of the rationale for this section it explains that there are numerous arrangements both within the University and with external entities that it fears would be considered common or integrated programs or services. Our view is that most collections, uses and disclosures or personal information, whether internally or externally, are not common or integrated programs or services, so a number of the examples provided may not in fact meet the definition. For example, we would not consider a job fair to be a common or integrated program or service. In terms of the academic aspect, it must also be borne in mind that section 5(1)(g) excludes records containing teaching or research information of an employee of a post-secondary institution from the scope of the *Act*, which might allay some concerns in that context.

On May 10th in its presentation JPS indicated that it did not support adding the British Columbia definition of common or integrated programs to our *Act* as this would catch projects where the OCIO or Communications etc. are merely supporting a single department. They went on to state that if the BC definition was incorporated there should be a specific exception for service-provider departments like the OICO.

The BC definition of a "common or integrated program or activity" is:

> a program or activity that provides one or more services through
>
> (i) a public body and one or more other public bodies or agencies working collaboratively, or

(ii) one public body working on behalf of one or more other public bodies or agencies.

Alberta's policy defines it as a "single program or service that is provided or delivered by two or more public bodies".

We agree with JPS's position, but feel the BC definition can still apply. We have in our previous guidance been clear that "the involvement of the Office of the Chief Information Officer (OCIO) does not automatically make a project a common or integrated program or service." If the OCIO is the lead, then the service-provider exception would not apply.

Political Parties

In its written submission, the Progressive Conservative Party argues, among other things, that their information management systems and practices lack the institutional capacity necessary to ensure compliance with statutory provisions. When a public body lacks that capacity, we would recommend that they not collect the personal information of residents until they can ensure they have the basic tools necessary to protect that information and ensure that it is only used for appropriate purposes.

We have no information regarding the relative sophistication of the information management practices or capacity the various political parties, so this is not a comment on the PC Party, whose submission on this topic we appreciate, however in our view the position that parties may not have the necessary capacity to manage and protect personal information is in itself a strong indication that a legislative framework with statutory oversight is called for. Certainly, over the course of the election campaign our office received several inquiries from individuals who are concerned about how their personal information is collected, used or disclosed by political parties, and there has been a sense of frustration and helplessness that those entities are beyond statutory regulation when most other organizations in society are covered by either provincial or federal privacy statutes.

As we indicated in our presentation on May 12th, we are less concerned about who is charged with the authority to oversee privacy concerns involving political parties' use of personal information, as long as someone is. Currently political parties are outside the *Act* and they are not covered elsewhere. The federal Privacy Commissioner has recently issued a ruling that political parties do not fall under *PIPEDA* as they are not commercial in character and repeated thier call that privacy statutes be amended to ensure the protection of personal information. We second that call.

Personal Information

Memorial has proposed some changes to the definition of personal information in order to address workplace investigations and related issues. In particular, Memorial suggests adoption of a specific provision of the definition found in Ontario's *FIPPA*:

> *2(1)(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,*

Memorial cites a specific case in which a matter came before the OIPC from a complaint as a rationale for proposing this approach. Memorial has not necessarily captured all of the nuances of that case in this type of process, and we do not intend to play the entire case out in this forum, particularly given that an application for a declaration has been filed, and the matter will be heard in its proper forum, which is the Supreme Court Trial Division.

We do not discount that Memorial's position is grounded in the best of intentions, however we do note that Ontario is alone in its inclusion of this provision across Canadian jurisdictions. Saskatchewan has a similar provision at 24(1)(g) of its *FIPPA* but it adds an important caveat at the end: "*… except where the correspondence contains the views or opinions of the individual with respect to another individual*."

Ontario is an outlier then, and we have not had an opportunity to compare how its definition may have impacted cases before Ontario's Commissioner. It is also one of the oldest such statutes in Canada, and one which is not subject to a regular statutory review, so it is unknown whether Ontario considers this provision to be an asset or a liability. It is also worth noting that this appears to be a justification that is grounded in a fairly specific set of facts, and before proceeding in this direction one must consider other kinds of fact scenarios and how an amended provision might apply to them. If Memorial's recommendation were to be adopted, the result would be that individuals could write letters or emails about you to a public body with all kinds of incorrect statements about you, and if public body officials accepted that information as true and began to act on it, you would have no way of knowing what was being said about you in order to respond or defend yourself. The risks cut both ways, and any amendment contemplated here must consider why most jurisdictions have taken a different approach.

Furthermore, if such a change were made to the definition, depending on whether changes are also made to section 40, it would not automatically mean that the information must be withheld if the information is subject to the balancing provision in section 40(5).

Section 111 – Publication Scheme

On May 10th when pressed by you about why the publication scheme has not been dealt with, JPS asserted that the OIPC should create a standard template. We have in fact met this requirement in January of 2016.

Whistleblower Legislation

JPS indicated they would consider your recommendations regarding gaps in the current whistleblower legislative regime but that they felt no oversight needed to be added to this Office's duties. We do not specifically request this authority, in fact, our original recommendation 4.4 was that this review "provide whistleblower protection to employees of public bodies to protect them from reprisals for taking actions to prevent contravention of the *Act*." We reiterate this now and ask that you ensure this important protection is not lost in the discussion of who should bear the responsibility for oversight.

Conclusion

Had we addressed every single suggestion or recommendation put forward in written submissions this document would have become so lengthy as to become unwieldy, however it must be stated that a concerning number of such recommendations and proposals are grounded in a lack of awareness of the statute and the body of case law that exists in relation to much of the current language in the Act.

To just choose a couple of examples to illustrate, the City of St. John's expressed concern about possible liability if they post access to information responses online which have already been issued to the applicant, so they proposed the addition of a liability provision which already exists in the Act at section 114.

The City of Corner Brook expressed concern about difficulty interpreting certain words in the statute, and recommended that they be defined, or that guidance be developed by this Office to assist in applying provisions involving time extensions, disregards, costs, etc. These guidelines were created by this Office in 2015 and have been available on our website ever since. If Corner Brook or any public body has questions, our contact information is widely available and we are only too glad to help.

Many other such examples can be found in the submissions put forward. This is not to criticize these public bodies, because we recognize that many officials tasked with ATIPPA matters also have many other duties, and they cannot be expected to know the statute as well as those whose only job involves interpreting and applying *ATIPPA, 2015* and *PHIA*. It does, however, warrant pointing out that some of the suggestions and recommendations that have been put forth are already addressed in the statute. It has been our experience in working with *ATIPPA, 2015* that, regardless of how novel the circumstances that arise, in a surprisingly high proportion of cases the answer in terms of how to handle them is in the statute. This is partly because *ATIPPA, 2015* is an iteration of decades of public sector access and privacy statutes. It takes the best of what is already available and builds on it, with important yet incremental improvements.

While there are other interests at stake that must be accounted for, the ultimate purpose of public sector access and privacy laws is to address the power imbalance between the public

(the governed) and public bodies (the governors), the latter party having the authority to impact our lives in profound ways. *ATIPPA, 2015* gives citizens a stake, and a means to demand transparency and accountability. The organizations from whom that transparency and accountability are demanded are, by and large, the very public bodies who have proposed that the statute be amended in ways that will make it easier for them. With a few exceptions, moving the needle one way or the other is generally a zero sum game, and no matter where the needle is at present, our experience with past reviews, and in observing statutory review processes in other jurisdictions, is that public bodies usually want more limits on access to information, fewer powers for the Commissioner, and more ability to collect, use and disclose personal information. While we were surprised with the sheer volume of recommendations from public bodies to shift the statute in ways that are beneficial to them, it is not surprising that most public bodies would do so. We were disappointed, however, to see so many recommendations from JPS, which is the Ministry responsible for the *Act*, that would downgrade and reduce the strength of the statute and reduce the scope of access to information and protection of privacy rights of the people of the Province.

We also note that the time is ripe for greater public service accountability as the Premier's Economic Recovery Team in their recent report mentioned that they had "heard repeated calls for better accountability and transparency in decision-making across all types of governance — in politics, the public service, unions, public and private corporations, and in agencies, boards and commissions." And they wrote at page 58 that:

> *Provincial Government leaders must ensure they are making decisions with the long-term interest of this province at heart. The Leblanc inquiry into Muskrat Falls confirmed that aspects of Provincial Government decision-making aren't working well. Many government decisions leave members of the public shaking their heads. When the decision-making process isn't open and transparent, those outside of it tend to conclude that decisions were not made in the general interest. Transparency is the best way to regain public trust.*

We therefore urge the Chair to bear in mind that while we at the Office of the Information and Privacy Commissioner will continue to function in our statutory roles under *ATIPPA, 2015* and *PHIA*, whether or not those roles change in some way, the true impact of any changes will be felt by the public who use and rely on the statute to uphold what is often an uneven relationship with the public bodies that impact all of our lives so significantly.

Appendix A
Request for Time Extension Application Form

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Request for Time Extension
Access to Information and Protection of Privacy Act, 2015

This form is intended to assist public bodies when applying for approval from the Commissioner to extend the time for responding to an access request, as set out in section 23 of the *ATIPPA, 2015*.

> *A public body may apply for an extension of time to respond to an access request no later than 15 business days after receiving the request. The Commissioner must respond to an application for extension within three business days.*

For details on completing this form, refer to the Requesting a Time Extension guidance document available on the OIPC website.

This form can be completed and sent to the OIPC email account, commissioner@oipc.nl.ca,
by clicking on the "Submit Form" button on page 4.

Date Extension Application Submitted to OIPC: _____

Section 1: Public Body Information	
Public Body Name:	
Public Body File Number:	
Contact Person:	
Contact Phone Number:	
Contact Email:	

Section 2: Summary and Background	
Date access request received:	
Original due date of request:	
Length of time extension requested (business days):	
Proposed new due date:	

Please provide the wording of the applicant's original request for records (without including names of individuals) or attach a copy of the anonymized access request received. If the request was changed or modified by the applicant after it was received, please provide the modified request.

Section 3: Extensions Previously Requested from the OIPC Related to this Access Request (if applicable)

Was a previous time extension approved regarding this access request?		Yes		No ***If no, proceed to section 4***

	Previous Extension Request #1	**Previous Extension Request #2**
Date previous extension requested:		
Number of days requested:		
Number of days approved:		
Revised response due date:		

Section 4: Status of Access Request

Is the search for records complete:		Yes		No	
Approximate number of pages of records searched thus far:					
Approximate number of pages anticipated to be searched:					
Approximate number of pages of responsive records:					
Date review of responsive records began:			Not yet begun		
Have any third parties been notified at this time?		Yes		No	

Has any other public body(ies) been consulted at this time?		Yes		No

Provide information on the work that remains, including a list of each outstanding task and an estimate of time needed for each.

Section 5: Reason for Extension Request (check all that apply)

	Large volume of records
	Meeting deadline would unreasonably interfere with operations of the public body/workload
	Worked with applicant to clarify the request/insufficient detail
	Third party consultation
	Consultation with another public body
	Executive consultation
	Difficulty gathering records
	Unforeseen circumstances
	Sensitivity/complexity of material

Explain why an extension is required in relation to the reason(s) you have selected above and provide clear and convincing evidence to demonstrate the need for the number of days being requested for the time extension. If there is another reason for why an extension is being sought, please indicate below. For information on what kind of information to include, please refer to the OIPC guidance piece Requesting a Time Extension.

Section 6: Other Information

Please provide any additional comments or information that will assist in the decision of the request for time extension.