City of St. John's ATIPPA, 2015 Review Submission

1. **Public and public body experience in using and administering the ATIPPA, 2015 to access information in the custody or control of public bodies in Newfoundland and Labrador and opportunities for improvement;**

The City's main concerns are addressed below as the terms of reference of this review have (very encouragingly) already acknowledged them. However, there are some other opportunities for improvement and additional considerations:

- Generally, the City is encouraged to publish completed request responses and was commended by the OIPC for same. However, per the Act, we only have a duty to respond to the applicant and it is our understanding that there are no official protections against liability from "oversharing" a response. Is the OIPC correct in finding that records made public to one allows for the information to be made public to all? If that is the case, an absolute limit on liability should be in place. What if the information is posted too quickly and then it is determined that it should not have been disclosed? A limit on liability should also be considered for these situations.
- Section 21(1)(c), the grounds under which a request would amount to an abuse of the right to make a request, would very much benefit from expansion as these are left entirely up to interpretation. For instance, the Act should include mechanisms that allow public bodies to evaluate frivolous or vexatious requests. Additional clarity regarding this section would not only assist public bodies as they consider applying for a disregard but would also help applicants as they prepare to file a request.
- Without deterring from its purpose, the Act should include language discouraging individuals from using it to obtain records that should otherwise be obtained through other means (e.g. litigants already in litigation). Perhaps this could be included as another ground for a disregard.
- Consideration should be given to the current practice of mandatory breach reporting as, it appears, we are the only jurisdiction required to do the same. Public bodies should certainly track their own breaches and perhaps provide annual statistics to the ATIPP Office and OIPC, but unless the breach is material, warranting notification under section 64(3), notifying the OIPC and ATIPP Office of every breach can be onerous, even for public bodies with small numbers of breaches each year.
- Section 39 (disclosure harmful to the business interests of a third party) should include a procedure in which the deadline is suspended while the necessary consultations can occur to determine if the three-part test outlined in section 39 is met.

2. **Whether there are any categories or types of information (personal information or otherwise) that require greater protection than the ATIPPA, 2015 currently provides;**

The matter of draft reports should be addressed in this review. Section 29 essentially allows public bodies to withhold draft reports if they are not finalized, while requiring the release of completed ones. Reading this, one could reasonably conclude that drafts are therefore protected. However, the OIPC has broadly interpreted section 29 as protecting a report while it is still in draft stages but once the report is published, draft material should be released assuming no other sections apply. This is challenging because drafts are transitory records - working documents - they may contain errors, inaccuracies, and any number of inconsistencies or misrepresentations that could mislead the reader. Public bodies/consultants should be able to freely work on drafts and then release reports once finalized. This is especially so given that in most cases the information used in compiling the report may be released if requested (subject to exceptions).

While solicitor client privilege and litigation privilege are noted in the Act, there have been recent decisions by the OIPC that have potentially eroded those protections. The City strongly recommends that the Act explicitly enshrine the paramountcy of these privileges.

Section 37 (disclosure harmful to individual or public safety) is generally interpreted too narrowly and would benefit from additional clarity and mechanisms in which to access harm to individual or public safety (for instance, the identities of public body employees should be able to be protected from aggressive or disrespectful members of the public). Also, please see item #4 regarding section 37 and how it is diminished by section 33.

3. **Public body response times for access requests and whether the current ATIPPA, 2015 requirements for response and administrative times are effective;**

The timeline for responding to a request, 20 business days, is generally reasonable and effective. It is also in line with most other jurisdictions which typically have timelines of 30 calendar days. However, the prescribed timelines become problematic when there arises the need to apply for a disregard or extension, neither of which suspends the timeline (please see relevant discussion under item #7 below).

Additionally, the 10-day update notification letter, which reiterates a file's deadline, is redundant. An acknowledgment letter is sent to the applicant upon receipt of their request which outlines the process, timeline, and other relevant information. If a change in the timeline/deadline is needed (as is in the case of an extension, cost estimate, etc.), applicants are notified as part of those processes. The 10-day update letter offers no new information and can, in fact, be confusing to the applicant if the timeline changes after they receive the same.

4. An examination of exceptions to access as set out in Part II, Division 2 of the Act;

Section 33 – Workplace Investigations

This section is notoriously challenging, and the following issues should be addressed:

- The relationship between sections 33 and 37 as section 33 potentially negates the protections to individual or public safety offered by section 37.
- The absence of considerations regarding whistleblower protections.
- A recent Commissioner's report (A-2019-004) found that MHAs are not "employees" as defined by the Act and therefore section 33 did not apply. This is troubling considering, per section 3(1)(b), one of the purposes of the Act is "to facilitate democracy through increasing transparency in government and public bodies so that *elected officials*, officers and employees of public bodies remain accountable" (*emphasis added*). As an elected official could be party to an investigation into their conduct in the workplace, the Act's definition of workplace investigation should be adjusted accordingly to reflect that possibility and its own purpose.

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

- Section 38 would benefit from additional clarity. This section has been narrowly interpreted by the OIPC as pertaining to labour relations in a *unionized environment only*. This is interpretation is problematic for two reasons. First, labour relations is not defined in the Act, and in the absence of such, its ordinary meaning should be relied upon (i.e. the relationship between the management of a company or organization and its workforce). Second, section 38 is broken into two subsections. 38(1)(a) deals with labour relations generally, and section 38(1)(b) deals with labour relations as they apply to interactions with the bargaining unit. If the definition of labour relations was meant to include only those involving unions, it would render subsection 1(b) redundant. and legislators would not have intended on legislating redundant clauses.

Section 39 - Disclosure harmful to business interests of a third party

- This section would generally benefit from broadening and additional clarity as well as a built-in suspension of the timeline to allow public bodies to adequately consult with third parties without having to apply for an extension (as referenced in item #1).

5. Whether there are any additional uses or disclosures of personal information that should be permitted under the Act;

Those permitted under the Act are sufficient.

6. **An examination of the complaints process to the Office of the Information and Privacy Commissioner;**

The complaints process to the OIPC is fair and reasonable. However, this review should consider removing the provisions for a direct appeal to the Supreme Court under sections 52(1) and 53(1). Requiring the Commissioner review complaints first before they can proceed to the Trial Division allows for the possibility of resolving these cases at the OIPC level before ever reaching the Supreme Court and needlessly using Court resources.

7. **An examination of the request for extensions/disregards process to the Office of the Information and Privacy Commissioner;**

Regarding the request for extension process, the timeline associated with the same (15 business days) is fair and reasonable. Previously, compiling all relevant information and providing an argument for an extension was very difficult while at the same time processing multiple other requests, but the OIPC have streamlined the process with a form which greatly reduces the time required to prepare a request for extension.

However, it is worth noting that a recent jurisdictional scan indicates that Newfoundland and Labrador is the only province/territory that requires an application be made for an extension. All others allow the public body to extend without first seeking permission. The majority allow the public body to extend 30 days with written notice given to the applicant. If a longer extension is needed, then permission from the Commissioner is required. With the proper guidance, oversight, and auditing from the OIPC and ATIPP Office (to prevent any abuse of the extension process), public bodies in this jurisdiction could effectively and more efficiently manage their own extensions as needed.

Regarding the request for disregard process, again, the OIPC have streamlined the process by introducing a form, but the legislated timeline in which to submit a request for disregard is 5 business days. This contrasts sharply with the 15-day deadline for extension requests. Very often, the same work is required to prepare for both applications.

Five business days is not sufficient to properly complete an application request for a disregard. Disregard requests most commonly stem from a request for a large amount of records. Within this 5 days, ATIPP Coordinators must work with the applicant to attempt to narrow the request, often requiring some back and forth with the applicant. Concurrently, and most often before the request may be and/or is narrowed, consultations with staff and other relevant parties must occur to ascertain the location of the records and estimate the time it will take to process the request. Preliminary searches must be done in most cases to provide valid estimates of the amount of records and the time involved to locate and retrieve them. Once all of this is completed, ATIPP Coordinators must also prepare their argument/application within that same

5 business days. The lack of sufficient time is further complicated by the fact that the clock does not stop while the application is being prepared or while the OIPC is reviewing the same (over the course of 3 business days). If an application is rejected, the ATIPP Coordinator has effectively "wasted" 8 business days. If a disregard is granted, the ATIPP Coordinator has "wasted" 3 business days working on the file while the OIPC conducts their review.

The jurisdictional scan referenced previously revealed that no other jurisdiction sets a time limit in which to apply for a disregard and, in most jurisdictions, disregard applications *do* affect the timelines in which to process the request. Privacy legislation in the majority of other jurisdictions suspends the deadline when an application to disregard is submitted until the Commissioner advises of their decision regarding the application. This is a much more reasonable approach and would allow ATIPP Coordinators sufficient time to assess the need for and to apply for a disregard. Proper oversight, guidance, and auditing could be implemented to prevent abuses and public bodies needlessly pausing the timeline.

8. **Whether the current Cost Schedule set in accordance with subsection 25(6) of ATIPPA, 2015 is effective;**

Access to information should not be cost-restrictive, and reasonable requests for information should not have associated costs. The current cost schedule is effective for most requests. That being said, there are requests that are exceedingly large and require a significant amount of resources to complete. Those requests should have a cost associated with providing the records. Currently, section 25(2) only permits a public body to charge a modest fee in relation to locating, copying, printing, and/or shipping records and not for identifying, retrieving, reviewing, or severing them. Considering that most records are now electronic, locating electronic records takes a relatively short amount of time compared with the actual retrieval and review process; information can be located with greater ease, but it is stored in significantly greater quantities. In allowing a modest fee for only the *locating* of records, the Act has failed to recognize the realities of the electronic age and the digital information management practices of today.

9. **Whether there are any entities which would not appear to meet the definition of "public body" but which should be subject to the ATIPPA, 2015;**

Those included in the Act are sufficient.

10. **Whether the provisions of the ATIPPA, 2015 are effective for local government bodies;**

The provisions of the ATIPPA are vital to our liberal democracy and must be carried out by local government bodies. That said, the question posed should not be whether the provisions of the Act are effective for local government bodies, but instead: do local government bodies have the

provisions they need to be able to effectively administer the Act? The demands of the Act, especially those around access to information, can be very difficult for local government bodies to meet. This is especially true for smaller municipalities. It is not the Act's objective to set out human resources requirements, but it is important that this review carefully consider the well-known fact that the position of ATIPP Coordinator is a very demanding one. Hopefully, this review can highlight the challenges faced by ATIPP Coordinators and bring about an access and privacy sector-wide corporate culture change.

11. **Consideration of Recommendations 3,4, and 16 arising from the Report issued by the Honourable Richard D. LeBlanc, Commissioner of the Commission of Inquiry Respecting the Muskrat Falls Project, dated March 5, 2020, and report on conclusions with respect to those recommendations.**

The City has nothing to add regarding the recommendations of the Report.