ATIPP Office submission to the ATIPPA, 2015 Review Committee (on behalf of Minister responsible for the administration of the Act)

November 2020

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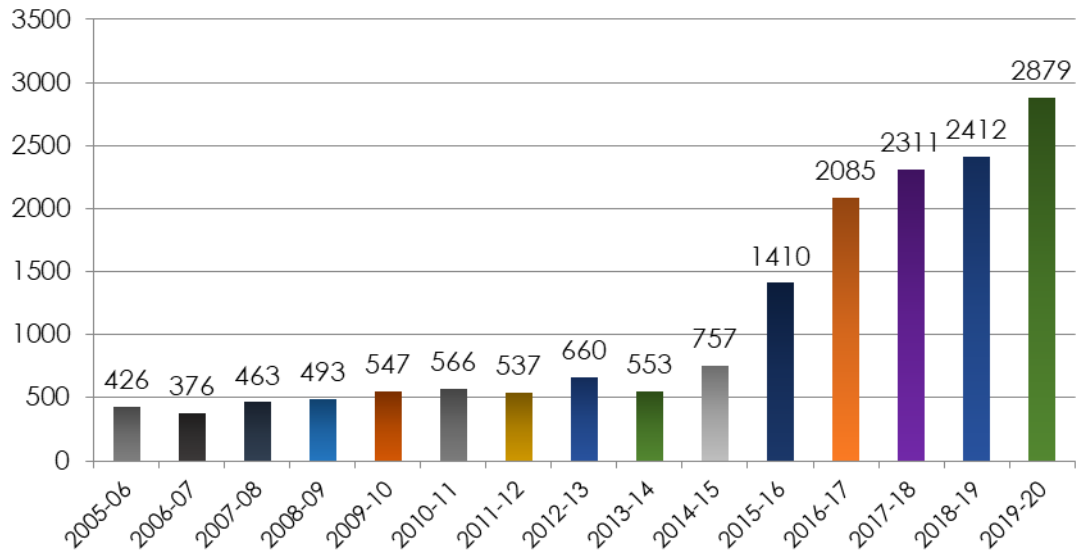
Introduction

The Minister of the Department of Justice and Public Safety is the Minister responsible for the administration of the **Access to Information and Protection of Privacy Act, 2015** (the Act). The ATIPP Office assists with this mandate by providing guidance and assistance to public bodies that are subject to the Act. This includes developing policies, procedures, guidance documents, providing training and other support when needed.

In this capacity, the Office has heard from many public bodies since the Act came into force in 2015. While many coordinators and public bodies find that the Act works well overall, there are some administrative and procedural constraints caused by the Act that affect their ability to ensure compliance with the legislation.

In terms of the access provisions, public bodies are further constrained by the significant increase in the number of requests received annually since 2015. Prior to 2015, the total number of requests received varied slightly between fiscal years, however, remained below 800 requests. Since the new Act came into force in June, 2015, the number of requests received has increased by 280% (a 350% increase for government departments and 185% increase for all other public bodies):



This increase in the number of requests received, as well as the breadth and complexity of many, has exacerbated a system that has finite resources, which are unlikely to increase in the near future given current fiscal constraints most public bodies are experiencing.

The Office recognizes that limited resources cannot be a determining factor in whether the Act should be amended, however, it provides some additional context to the

suggestions that the Office is putting forward for your consideration. It is the Office's opinion that these suggestions will improve both the access to information process and the privacy provisions of the Act. Additionally, they will have limited impact on the primary purposes of the Act, which are to ensure transparency, accountability, participation by the public, and protecting the privacy of individuals in relation to the personal information held and used by public bodies.

PART I – Interpretation

1. Definitions (s.2)

1.1 Business day (ss.2(b))

Issue

The Act defines business day as "a day that is not a Saturday, Sunday or a holiday." For most public bodies this does not pose an issue in terms of administering the Act (other than the odd snow day that counts as a business day). However, for some smaller municipalities that are not open five days a week, this can become problematic. A number of smaller municipalities only have a clerk that works 2-3 days per week.

Suggestion

Consider whether the definition of a business day should be amended to account for public bodies that are not open five days a week.

1.2 Holiday

Issue

As noted above, the Act states that a business day "means a day that is not a Saturday, Sunday or a holiday." However, the Act does not define "holiday". Therefore, public bodies are required to rely on the definition found in paragraph 27(1)(l) and subsection 27(1.1) of **Interpretation Act:**

"holiday" means

(i) every Sunday,

(ii) New Year's Day, Good Friday, Victoria Day, Memorial Day or Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day,

(iii) the birthday or the day fixed by proclamation for the celebration of the birth of the reigning Sovereign,

(iv) a day appointed by an Act of the Parliament of Canada or by proclamation of the Governor General or of the Lieutenant-Governor for day of a general prayer or mourning or day of public rejoicing or thanksgiving or a public holiday,
(v) in a particular municipality, other than the City of St. John's and the Town of Harbour Grace, 1 day in each year, which the council of that municipality may fix as a public holiday,
(vi) in the City of St. John's, the day in each year ultimately determined, in the manner prescribed by custom, for the St. John's Annual Regatta, and
(vii) in the Town of Harbour Grace, the day in each year ultimately determined, in the manner prescribed by custom, for the Harbour Grace Annual Regatta;

27(1.1) notwithstanding paragraph (1)(l), where a holiday, other than a holiday referenced in subparagraph (1)(l)(i), falls on a Sunday the term "holiday" includes the following day.

This definition was amended in April, 2019, which included some additional holidays that apply under the Act (including Thanksgiving and Boxing Day), however, there are still holidays recognized by the Provincial Government that are business days for the purposes of the Act. These include:

- St. Patrick's Day;
- St. George's Day;
- Discovery day; and
- Orangeman's Day.

Furthermore, depending on which day of the week a holiday occurs in a particular year, the holiday observed by the public body may not be considered a holiday under the **Interpretation Act**. For example, Christmas Day, Boxing Day and Remembrance Day are each observed on the specific date, rather than a particular day of the week. If any of these holidays fall on a Saturday, public body employees receive the following Monday off. However, based on the **Interpretation Act**, the Monday on which the holiday is observed would not be a "holiday" and therefore would be a business day. Additionally, some public bodies, such as educational bodies, have further holidays that are observed by administrative divisions along with students (e.g. Christmas break, etc.).

As a result, the 20-day timeframe for responding to a request does not account for the holidays that are observed by public bodies. In many cases this will not affect a public body's ability to respond to a request within the legislated timeframes. However, with larger, more complex requests, or requests to the Office of the Information and Privacy Commissioner (OIPC) for extensions or disregards, this will require staff to work overtime to ensure timelines are met. While most employees look forward to these holidays, ATIPP coordinators with deadlines that correspond to the holiday cannot, as it often means either working on the holiday or working overtime prior to the holiday to ensure timelines are met.

Suggestion
Consider amending the Act to include a definition of "holiday" that will account for all public body holidays.

1.3 Personal information (ss.2(u))

Issue
Paragraph 2(u)(i) of the Act defines personal information as "recorded information about an identifiable individual, including the individual's name, address or telephone number."

Additionally, paragraph 40(4)(g) states that:

> (4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
> (g) the personal information consists of the third party's name where
> (i) it appears with other personal information about the third party, or
> (ii) the disclosure of the name itself would reveal personal information about the third party;

In report A-2016-019, the OIPC noted:

> …this Office has often made a distinction between personal and business information. Information which might be considered to be personal information in one context may be considered to be business or professional information in another. For example, when information appears on a business card, on company or office letterhead, in a professional directory, or on a website, and whether it consists of the names of individuals, their business titles, their business addresses and phone numbers, or their business e-mail addresses, it is generally all considered business information, not personal information. This is so even where an individual operates a business from a home address, without separate business contact information. This kind of distinction is made not only in this province, but in all other Canadian jurisdictions.

While this decision generally supports the disclosure of business contact information, based on subsection 2(u) and paragraph 40(4)(g), business contact information would be considered an unreasonable invasion of privacy, and therefore, must be withheld. The only circumstances under which it could be disclosed would be under subsection 40(5), which states that public bodies must consider relevant circumstances when determining "whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy." One such circumstance is whether it is readily publicly available (e.g. company websites, etc.). However, the process of determining whether this information is readily publicly available is extremely time consuming and can result

in what appears to be inconsistent redactions (e.g. redacting the contact information for some third parties and releasing it for others).

As noted, the above OIPC decision supports the disclosure of such information. However, a public body must still consider whether the disclosure of this information is considered an unreasonable invasion of privacy under the Act, given that section 40 is a mandatory exception to disclosure, and notification requirements under section 19 of the Act require that a public body notify an individual when it intends to release information that may be excepted from disclosure under section 40.

Suggestion
Consider amending the Act to exclude business contact information from the definition of personal information (other than cell phone numbers not readily publicly available or in the third party "signature").

Schedule one of British Columbia's **Freedom of Information and Protection of Privacy Act (FIPPA)** defines personal information as "recorded information about an identifiable individual other than contact information."

They define **"contact information"** as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

1.4 Service or Program

Issue
Section 72 of the Act requires departments to complete either a preliminary privacy impact assessment (PPIA) or privacy impact assessment (PIA) during the development of a program or service. As this term is undefined, it is unclear what constitutes a program or service. For example, if a paper application form is converted to an online form, would this be considered a new service?

Suggestion
Consider amending the Act to provide a definition of program or service.

2. Purpose/application of the Act (s.3 and s.5)

2.1 Requests for records available through other processes

Issue

Often, applicants make requests for information they can access through a process other than an ATIPP request. For example, records they can get through the discovery process, or a service otherwise offered by a public body (e.g. title search through Registry of Deeds, etc.). Being required to process requests for information that is available through another process puts an unnecessary burden on the ATIPP process, and can delay responses to other requests for information that cannot be obtained through other means.

In the case of litigation, pursuant to the **Rules of the Supreme Court, 1986,** parties to the litigation are, generally speaking, obligated to provide to the other parties all documents relevant to the matter unless those documents are privileged. This obligation applies to government just as it applies to all parties to a proceeding. It has been our Office's experience that in some cases a party to an ongoing civil litigation proceeding, to whom the Department of Justice and Public Safety is obligated and will provide relevant documents, also makes an access to information request for those same documents. In addition to placing an unnecessary burden on coordinators and the ATIPP process, this often results in solicitors having to review the records in relation to two separate processes – in relation to discovery, and in consulting with departments in relation to ATIPP requests where a solicitor is required to review the records to advise whether litigation privilege may apply.

Subsection 3(3) of the Act states that the Act "does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public." Similar sections in other Canadian jurisdictions have been interpreted not to preclude or limit an applicant's ability to submit an ATIPP request for records that can be obtained through another process. For example, in Order 2016-024, Alberta's Information and Privacy Commissioner found, in relation to their equivalent subsection, "not only that FOIP does not displace other procedures, but also that other procedures do not vitiate access rights under the Act."

Additionally, in Order 01-27, British Columbia's Information and Privacy Commissioner found:

> Section 2(2) of the Act provides that the Act does not replace other procedures for access to information. By the same token, the existence of other procedures for access to information does not oust, or circumscribe, the rights of access afforded

under the Act unless the Act is explicitly overridden or ousted, including through s. 3(1).

As noted in the introduction to this submission, since 2015 there has been a 280% increase in the number of requests received by public bodies. 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.

Furthermore, processing these requests does not support the primary purposes of the Act which are to ensure transparency and accountability, as well as ensuring citizens have the information required to participate meaningfully in the democratic process" as this information is available to the applicants through other processes which allow this to occur. Paragraph 3(2)(a) of the Act states that the purpose of the Act (e.g. ensuring transparency, accountability and participation by the public) are achieved by "giving the public a right of access to records." In these cases, applicants already have a right of access to the records – through another process.

Suggestion

Consider amending section 5 of the Act to preclude applicants from submitting requests for records that can be obtained through other processes.

Alternatively, if it is determined that this is inappropriate, consider amending:

- Section 21 of the Act to allow a public body to disregard such requests with the approval of the OIPC; and/or
- Section 25 of the Act and the cost schedule so that public bodies can charge applicants for processing these requests (including those personal in nature) with no free hours and in addition to whatever cost would be associated with accessing these records through the other process (if applicable).

PART II – Access and Correction

3. Applicants

Issue

Subsection 13(1) of the Act requires public bodies to "make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner."

In cases where applicants are unfamiliar with the process or have submitted overly broad requests (e.g. no timeframe listed, subject, etc.) communication is essential. In

most instances, applicants are responsive and communicative with coordinators when they are asked for additional details that are needed to process their requests.

However, there are some applicants who do not assist coordinators when additional information is required, and ultimately delay and impede the process. In some cases they may not respond to questions, or even expand the request. In one case the Office is aware of, a coordinator called the applicant and once they realized whom it was they hung up. While this example is not the norm, it does illustrate some of the difficulty that coordinators can face when trying to communicate with applicants. The more common issue is applicants not responding to calls or emails when additional details are required.

There should be some onus on the applicant to communicate with the coordinator in a timely manner when required, or at the very least, the time spent waiting for clarification required to process a request should be taken into consideration in the time limits for processing a request.

Suggestions

- Consider whether it would be appropriate/feasible to amend section 13 to include a requirement for the applicant to assist the public body when needed. While this would not be enforceable it would indicate to applicants that their role in communicating with the public body is important as well.

- Consider amending section 11 of the Act to include similar language to subsection 7(4) of Prince Edward Island's **Freedom of Information and Protection of Privacy Act (FIPPA)** and subsection 8(1) of Alberta's **Freedom of Information and Protection of Privacy Act (FIPPA):**

  Where the head of a public body contacts an applicant in writing respecting the applicant's request including

  (a) seeking further information from the applicant that is necessary to process the request, or

  (b) requesting the applicant to pay a fee or to agree to pay a fee,

  and the applicant fails to respond to the head of the public body, as requested by the head, within 30 days of being contacted, the head of the public body may, by notice in writing to the applicant, declare the request abandoned.

- Consider amending section 23 of the Act to allow extensions when there are delays caused by the lack of response from the applicant. Most jurisdictions in Canada have similar language to section 12 of Prince Edward Island's **FIPPA,** which outlines the circumstances under which a public body can extend the time for responding to a request. This includes if "the applicant does not give enough detail to enable the public body to identify the requested record."

4. Non-responsive information

Issue

Requests are generally made in relation to specific information/subjects. However, responsive records often include information unrelated to the request (i.e. non-responsive). For example, meeting notes, agendas or emails may contain information relating to the subject matter of the request, but also contain information relating to other, non-responsive information. It has been the practice of many public bodies to remove the information unrelated to the topic of the request as non-responsive.

However, a number of years ago this became an issue when the OIPC stated that the Act does not allow for this; therefore, public bodies could not remove information from responsive records that was non-responsive. Shortly after, they modified their opinion, and issued an updated practice bulletin – Redacting Non-Responsive Information in a Responsive Document outlining under what circumstances information can be removed as non-responsive. While public bodies are now able to remove non-responsive information in limited circumstances, the process outlined in the OIPC guidance document is time consuming and unnecessary given the information in question is unrelated to an applicant's request.

In Stevens v. Nova Scotia (Labour), 2012 NSSC 367 (CanLII), the judge discusses the issue of non-responsive information (referred to as non-applicable) within the decision. While both non-applicable documents and non-applicable information contained within documents were discussed, the following is in reference to both:

> It appears the initial review officer may have taken the position that the Respondent could not withhold documents on the basis that they were irrelevant. The Respondent referred to those materials as "not applicable". According to the Respondent the Review Officer suggested there was no recognized exemption under **FOIPOP** legislation for "non applicable" materials. Any such ruling would defy common sense. What possible relevance would it be to the Appellant if someone commented in a document that their grandmother had a wart removed from her nose. (Not that any such comment was made in the redacted materials). With e-mail communications the author on a number of occasions mixed personal or non relevant communications with information which was properly disclosed. The personal, non relevant, information is not something to which the Appellant is entitled to access. There are some things in records, such as e-mail, which are clearly irrelevant and should not be disclosed.

Given the finite resources available for processing ATIPP requests, it seems altogether unnecessary to require public bodies to review and process information contained within a record unrelated to the applicant's request. In addition to requiring additional time, it can be misleading if exceptions to disclosure are applied to non-responsive information, as it appears that the public body is withholding information related to the request, when in fact they are removing information unrelated to the request.

Suggestion
Consider amending section 8 of the Act to allow for non-responsive information within a responsive record to be withheld from disclosure as non-responsive.

Section 16(1.1) of New Brunswick's **Right to Information and Protection of Privacy Act (RTIPPA)** allows the head of a public body to remove information contained within a responsive records "if, in the opinion of the head, the information is not relevant to the request for information."

5. Anonymity (s.12)

5.1 Disclosure of identity for general request with consent (p.12(2)(b))

Issue
Subsection 12(1) of the Act requires that the identity and type of applicant remain anonymous while processing a request. Subsection (2) outlines the circumstances under which subsection (1) does not apply. This includes paragraph 12(2)(b) which states that subsection (1) does not apply "where the name of the applicant is necessary to respond to the request and the applicant has consented to its disclosure."

The requirement to have the applicant consent is not practical in the instances where there would be a legitimate need to provide this information to someone other than the coordinator or coordinator's assistant during the processing of a request. For example, in some cases an applicant may make a general request and the responsive records include correspondence to/from them, which often includes personal information that would be withheld under subsection 40(1) if any other applicant had made the request. Without providing the name of the applicant to the head of the public body when they review the final response, it is unclear why the coordinator is suggesting the disclosure of such information. The head may identify this information and ask the coordinator why it is being released. Based on paragraph 12(2)(b), the coordinator would not be able to advise the head of the public body of this without first contacting the applicant and asking for their consent even though this information is required in order for the head of the public body to make the final decision regarding the response to the applicant.

Suggestion
Consider amending paragraph 12(2)(b) to remove the requirement for consent and replace with "where the name of the applicant is necessary to respond to the request." If there is any particular concern with this suggestion, consideration could be given to amend paragraph 12(2)(b) to "where the name of the applicant is necessary to respond to the request and is authorized under s.66 of the Act."

5.2 Limitation on disclosure (ss.12(4))

Issue

Subsection 12(4) states that the limitation on anonymity applies until the final response has been sent to the applicant. For smaller public bodies or those with limited experience regarding the Act, this has caused confusion in relation to the identity of the applicant. They interpret this subsection to mean that once a request is closed they can reveal the identity of the applicant without consideration for the privacy provisions of the Act, which outline under what circumstances personal information can be used or disclosed.

Suggestion

In relation to the identity of the applicant, consider amending the Act to clarify that the privacy provisions of the Act continue to apply once a final response has been sent to the applicant.

6. Third party notifications (s.19)

6.1 Third party representations

Issue

Under both prior versions of the Act, the process for third party notification was similar. In the 2005 version, public bodies were required to send an initial notification to a third party if they were "intending" to disclose the information, while the 2012 version required notification when the public body was "considering" whether the information fell under the mandatory exception to disclosure. In both versions, the third party could either consent to the disclosure or "make representations to the public body explaining why the information should not be disclosed." In addition, third parties had 20 calendar days to review and either provide consent to disclose the information or make said representations. While the language varied, the process was essentially the same – the third party was consulted. The 2014 ATIPPA Review Committee found this process to be unnecessary. In chapter 3.6 of the Report of the 2014 Statutory Review, the Committee summarized their reasoning:

> It is the Committee's view that the notification required by section 28 amounts to a doubling of the consideration that third parties receive under the ATIPPA, since they have a 20-day period to consider whether to object to a disclosure once they receive a written notice. It might also be argued that the requirement to provide notice in the consideration stage provides the third party with the opportunity to influence the public body in its initial determination on whether records should be

> disclosed. The Committee concludes that it is appropriate for the public body to notify the third party when it has formed the intention to release the information, and to provide formal notice to the third party when the actual decision to release is made.

Part of their reasoning was that the third party may unduly influence the public body. However, in many cases, consultations with third parties are essential as public bodies are not the owners or subject matter experts of a third party's business information. What the Committee saw as an opportunity for a third party to "influence" a public body, was in fact, the opportunity for a public body to receive input from the owners of the information who would be in the best position to advise whether the release of information in question may or may not be harmful to their business. The public body could then determine whether the harm that the third party had articulated would meet the threshold of the exception to disclosure under the Act.

This consultation did not displace the burden of proving that the applicant has no right to the information from public bodies under the Act; it provided them with necessary insight that would assist in their assessment of whether section 39 (formerly section 27) applied.

Additionally, while the previous Committee took issue with the change in language from "intending" to "considering", this Office would argue that the language under the 2012 Act was clearer than the 2005 and current version of the Act. It is often unclear at what point a public body is "intending" versus "deciding" to disclose information. The clearest way to differentiate the two is to interpret "intending" to mean that you have essentially decided to release the information but have not made the final determination; you are still in the process of deciding (i.e. considering).

Furthermore, the Committee found that this initial notification could occur within the regular 20-day timeframe for responding to a request. It should be noted that contacting third party companies in regards to section 39 can be time consuming. In many cases, coordinators are required to not only compile the records in question and draft a notification letter; they are required to try and explain to third parties what section 39 means and the threshold that must be met for it to apply. Notified companies can be either large or small, depending on the nature of the request and the records involved, with each bringing different challenges. For instance, small companies with limited resources may not have a clear understanding of the Act or what is being asked of them, requiring coordinators to spend additional time answering phone calls and responding to emails in order to help companies understand the process.

Moreover, without a legislated timeframe in which they are required to reply, companies may take longer than required to respond or not respond at all; companies may be difficult to contact or require notice through the mail; or companies may be difficult to work with. Given the considerable time it can take to conduct third party notices, as well as the practical challenges that may occur, there is often not enough time for public bodies to complete an initial third party notification as required under subsection 19(1) as the time does not suspend for this process.

Time should therefore be either suspended or added when conducting third party notices under this section of the Act, prior to formal notification. If section 23 of the Act was modified to allow public bodies to grant their own initial time extensions, changing this subsection of the Act may not be as necessary.

Suggestions

- Consider amending subsection 19(4) to allow a third party to provide representations as to why either section 39 or 40 applies to the information in question if they do not consent to the disclosure.
- Consider amending subsections 19(1)-19(4) to include additional time during the processing of a request to consult with a third party (this suggestion may not be necessary if suggestions under section eight of this submission are considered).
- Consider amending the Act to replace the word “intending” with “considering”
- If it is determined that the current wording of the Act should remain, consider clarifying what is meant by “intending”.

6.2 Are subsections 19(1) – 19(4) necessary?

Issue

If the Committee determines that subsections 19(1)-19(4) should remain as currently worded, the Office questions whether they are necessary. Under the old versions of the Act, the equivalent subsections allowed a third party to provide the public body with representations as to whether the disclosure of information would be harmful. If, after that process, the third party had not consented and the public body decided to release the information, a formal notification affording the third party the opportunity to file a complaint or appeal the decision.

While some public bodies continue to seek input from third parties, this is done outside the parameters of section 19. Under the current Act, subsection 19(4) only affords a third party the opportunity to consent to the disclosure. If notification under subsection 19(1) is done without also consulting with the third party, in many cases, the third party may simply not consent to the disclosure. If they do not

consent to the disclosure the public body is then required to send a notification under subsection 19(5).

If the notification process under subsections 19(1)-19(4) is repealed, a public body could still choose to consult with the third party and would still be required to notify under subsection 19(5) if they decide to release information that may be protected by sections 39 or 40. The removal of subsections 19(1)-19(4) would simply remove a process that appears to be superfluous.

Suggestions
Consider repealing subsections 19(1)-19(4) of the Act.

6.3 Is notification under ss.19(1) required prior to notification under ss.19(5)?

Issue
Subsection 19(5) is worded in such a way that it assumes a notification has occurred under subsection 19(1), however, public bodies often send notification under subsection 19(5) without notifying under this subsection.

The reasons for bypassing notification under subsection 19(1) may vary, but some include:

- Ambiguity of the term "intending" – it is unclear at what point you are "intending" to disclose business information versus have decided to disclose the information. Often times it is not until a public body has "decided" that they should release business information that they would contemplate sending a notification.
- Timelines – there often is insufficient time to notify a third party within the legislated 20-day timeframe.
- Inconsistent with Act – if a public body has made the decision to disclose information, it provides no purpose to notify under subsection 19(1), and appears to be unwarranted based on the wording of this subsection.

Suggestion
If subsection 19(1)-19(4) remain, consider amending the Act to disjoin notification requirements under subsection 19(5) from subsection 19(1). This would allow public bodies to bypass the notification under subsection 19(1) where it is deemed unwarranted.

6.4 The term "notification"

Issue

If it is determined that the process outlined in subsection 19(1) – 19(4) should remain, amended or otherwise, the confusion concerning two different notification processes should be considered.

As discussed above, there are two separate processes for notifying a third party under the Act. Under subsection 19(1) a public body must notify a third party when it is "intending" to disclose information, while under subsection 19(5) they must notify when "deciding" to disclose information. Under 19(1) the third party has the right to consent to the disclosure while under 19(5) they have the right to file a complaint or appeal the decision. Despite varying requirements outlined in both subsections and different rights afforded to a third party, both are termed notifications. This can sometimes cause confusion for third parties who are unfamiliar with the process and they may assume they have certain rights under a notification that they do not have (e.g. think they can appeal the decision when notification has been sent under subsection 19(1), etc.).

Suggestions

- Consider amending subsection 19(1) of the Act to allow a public body to "consult" with a third party where they are considering whether section 39 applies rather than "notify".
- Consider amending subsection 19(1) to be discretionary rather than mandatory.

6.5 What is meant by "might be excepted from…" (ss.19(1))

Issue

By the very nature of section 19, the only time notice can occur is if a public body believes section 39 or subsection 40(1) does not apply. If it believes either applies, it is required to withhold the information as both are mandatory exceptions to disclosure. However, there is a disparity of opinion regarding notification requirements under section 19 of the Act. In their guidance document, Business Interests of a Third Party, the OIPC states that:

> Public Bodies sometimes notify Third Parties despite determining that the records in question clearly fall outside of section 39. The most commonly cited reasons for these gratuitous notices is the desire to preserve long standing business relationships or perceived ethical issues associated with 'blind siding' business partners. While business relationships may be important, these reasons are clearly irrelevant in the ATIPPA, 2015 context, and such notices unacceptably deny timely access to information.

Report A-2020-022 further summarized the Commissioners views in relation to section 19:

> if a public body concludes that all three parts of section 39 apply, then it must withhold the information, and there is no need for a notification to the Third Party. If it concludes that any one part of the three-part test cannot be met, then it must disclose the information, and in this case as well there is no need for notification. It is only when, after a thorough review, the public body is unable to decide whether the test might be met, that it should notify the Third Party under section 19(5) of its intention to disclose the information.

This view is further supported by numerous decisions in which they have questioned a public body's decision to notify in the first place. In report A-2019-029 the public body was of the view that two parts of the three-part harms test outlined in section 39 were not met. However, in consultation with a third party "a degree of uncertainty" was raised. Based on this, the public body provided the third party a notification under section 19. The OIPC found:

> initial notification was unnecessary and sending it was a misapplication of section 19 of ATIPPA, 2015. Notice to third parties must comply with ATIPPA, 2015. If, and only if, a public body is genuinely uncertain whether the section 39 test applies, then notice should be given. If the public body has determined that section 39 clearly does not apply then notice should not be provided, as third party complaints arising from these situations delay the applicant's right to timely access to information…

However, recent court decisions, which appear to be contrary to this view, have caused confusion for public bodies. In Atlantic Lottery Corporation Inc. v. Newfoundland and Labrador (Finance), the Judge noted the following in relation to third party notifications:

> The institutional head cannot repent after the fact from an ill-advised decision to disclose. Disclosure without notice and any harm that might follow are irreversible. Giving notice in all but clear cases reduces the risk of irremediable harm to the third party through inappropriate disclosure.
>
> Moreover, the institutional head may not have enough information to make a correct judgment about whether the information is exempt; the input of the third party may be required in order for the institutional head's decision to be properly informed. It is, therefore, both prudent and consistent with the text of the Act for the institutional head to disclose without notice only where the exemptions clearly cannot apply.
>
> The obligation on the head is clear. Fulfilling it will not be easy, and I read 2018 NLSC 133 (CanLII) Page 17 into Merck the admonition that, when in doubt on the issue of 'reason to believe,' the head should err on the side of caution and give notice.

Furthermore, in Beverage Industry Association v. NL (Finance), NL SC 2019, Justice Marshall found that there is a "low threshold for notification under s. 19, and a high threshold for disclosure without notice. When there is any doubt on whether there is reason to believe 39 applies, public bodies should err on the side of caution and give notice."

In regards to the above, the OIPC may argue that cases in which a public body does not believe part of the three-part harms test is met, notification should not occur. However, as the Judge above noted, the public body "may not have enough information to make a correct judgement without notice."

Suggestion

Consider amending the Act to clarify when notification under section 19 is required and what is meant by "might be excepted from disclosure."

6.6 Burden of Proof and representations during an investigation (s.43 and s.96)

Issue

While neither section 43 nor section 96 falls under section 19 (to which this section of this submission relates) it is possible that they contribute to issues resulting from notifications under section 19 (i.e. the OIPC' view that public bodies are unnecessarily notifying third parties).

Section 43 of the Act outlines the burden of proof in relation to an investigation of a complaint. If a public body chooses to withhold information under section 39 rather than send a notification under subsection 19(5), the third party has no standing in relation to the complaint or appeal. Therefore, the burden is on the public body to defend its use of section 39. Given the OIPC's position on the threshold for the use of section 39, public bodies are weary of this as a third party is in a better position to enumerate how the disclosure of information could harm their business.

In Beverage Industry Association v. NL (Finance), NL SC 2019, Justice Marshall found:

> A third party's statutory right of appeal emanates from sections 53 and 54 of the *Act*. The section 53 right of appeal rests only with a third party who was given notice under section 19(1) of the *Act*. The section 54 right of appeal rests with a third party who received the Department's second decision under section 49 of the *Act*. As suggested above, the third party receiving the Department's second decision was earlier notified by the Department under section 19(1) of the *Act;*

Section 96 relates to representations made during an investigation by the OIPC. Under subsection 96(1) the Commissioner "may give a person an opportunity to

make a representation" during an investigation. However, this is discretionary. In her decision referenced above, Justice Marshall noted:

> Section 96 of the *Act* refers to a "person" rather than the "parties to the complaint"; therefore, the Commissioner may go beyond the "parties to the complaint" when conducting an investigation, or receiving submissions…In my view, the Commissioner's ability to invite submissions under section 96 is consistent with a truth-seeking function.

If the public body decides to notify the third party that they plan to release the records, and the third party files a complaint, the burden is on the third party to prove that the applicant has no right of access rather than the public body. This process allows the third party the opportunity to be engaged and provide representations. As the subject matter experts it is essential that they be engaged as they are in the best position to explain how each of the three parts of the test outlined in section 39 may apply.

Suggestions

- Consider amending section 96 to require the OIPC to give a third party the opportunity to make representations where a public body has refused disclosure under s.39, or when a third party files a complaint and the records relate to another third party that has not been notified.
- Consider amending section 44 of the Act to identify third parties as a party to the complaint if it is a complaint where the public body has used s.39 to withhold information.

7. Disregarding requests (s.21)

7.1 Deadline for submitting request to disregard

Issue

Under subsection 21(1) a public body may, "not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard a request…"

In some instances it may be obvious from the wording of the request that it is excessively broad or will interfere with operations. However, in many circumstances it is not until records are received (or the process of gathering records begins) and discussions have been had with subject matter experts that a coordinator is able to determine that an application to disregard a request may be warranted. In addition to requiring time to determine whether to submit a request to disregard, the public body must then prepare a submission for the OIPC to review. Given the gravity of approving a public body to disregard a request, the OIPC requires a significant

amount of information, which it has outlined in its guidance document – Applying to the Commissioner for Approval to Disregard and Access to Information Request. The process of gathering the required information and developing a submission for the OIPC is time-consuming.

Suggestion
Consider amending the Act to provide additional time for a public body to apply to the OIPC for approval to disregard a request (perhaps day 15 similar to extension timelines).

7.2 Vexatious applicants

Issue
Section 21 of the Act allows public bodies to apply to the OIPC to disregard a request, which may be approved if:

- the request will unreasonably interfere with operations of a public body;
- the request is for information already provided to an applicant; or
- the request would amount to an abuse of the right to make a request, including requests that are frivolous, repetitive, excessively broad, incomprehensible, or made in bad faith.

As noted above, the OIPC guidance outlining their expectations for public bodies when applying to disregard a request is extensive. It includes a large number of questions to be answered as well as additional information that must be provided. While the Act provides the OIPC the authority to allow a public body to disregard a request, it does not provide it the authority to put limits on an applicant's rights to submit similar requests.

For some public bodies this has resulted in the same applicant continuing to make the same requests or substantially similar requests. In these cases, the public bodies have been required to continue to submit requests to the OIPC for approval to disregard each subsequent request, regardless of whether it is for the same information, equally vexatious, or broad. In some of these instances, the applicant has received all records that the public body has relating to the matter (in some cases this amounts to thousands of pages of records). Despite this, and despite the OIPC continuing to authorize the public body to disregard these requests, the applicants continue to submit new requests.

While this is not the norm, it occurs frequently enough that it is cause for concern. This small number of applicants put a significant strain on a public body's resources and ability to process requests by repeatedly making large or vexatious requests. In some cases such applicants will refuse to discuss ways to better get the information they are looking for or refuse to communicate with the coordinator at all. We also

know of a number of cases where public bodies have spent considerable time working on a request, only to have the applicant never access the records.[1]

As noted above, section 21 provides the OIPC the ability to authorize a public body to disregard a request. Specifically, subsection 21(1) states that "the head of a public body may, not later than 5 days after receiving a request, apply to the commissioner for approval to disregard a request…" The provision is set out as singular. Therefore, the OIPC has determined that they are limited to approving the disregard of one request at a time.

Other Canadian jurisdictions with similar legislation, have allowed a public body to limit particular applicants in the number or content of their requests:

- British Columbia Order F13-18: The applicant made a number of requests relating to his late mother's care in a nursing home. The applicant had made a number of previous requests, some of which went to IPC review. The ones that went to review found that health authority had responded openly, accurately and completely. The Commissioner found that all requests related to the same "records, communications, people and events." Therefore, the Commissioner allowed the health authority to disregard any future requests from this applicant about his late mother's care.

- British Columbia Order F13-16: The applicants were the parents of a child who used to attend the school district. The parents had a number of disagreements with the school and submitted 36 requests for information about their child's time at the school. The Commissioner found that the applicants were making requests not to gain information but to antagonize the school district. The Commissioner allowed the school district to limit the applicants' requests to one at a time, and to not spend more than 3 hours per request.

It appears that the Commissioner was able to make such decisions based on the wording of section 43 of British Columbia's **FIPPA,** which states that if "the head of a public body asks, the commissioner may authorize the public body to disregard requests…" While the wording is similar to section 21 of NL's Act, section 43 of **FIPPA** uses the term "requests" rather than "request".

As noted in Order F13-18, responding to such requests would expend scarce resources when a public body has previously responded to similar requests and would take resources away from other applicants' requests or other public body activities. Furthermore, limiting "future requests relating to specified subjects avoids waste of public resources and interference with the rights and needs of others."

[1] Large files are sometimes sent to applicants through a program called Secure File Transfer which notifies the sender when the individual opens the documents sent through the program.

Suggestion
Consider amending section 21 of the Act to allow the OIPC to limit future requests.

8. Extensions (s.23)

8.1 Requirement to seek approval from OIPC for all extensions

Issue
Section 16 of the Act allows a public body 20 business days to respond to a request, unless the time limit is extended under section 23. Section 23 requires that all extensions be approved by the OIPC.

Under the 2005 and 2012 versions of the Act, public bodies were able to claim extensions for up to 30 calendar days under specific circumstances without approval from the OIPC. In 2012, additional authority was provided to extend beyond 30 days with OIPC approval. In chapter seven of the Report of the 2014 Statutory Review of the Act, the ATIPPA Review Committee determined it had:

> all of the evidence it needs to support its conclusions that the basic time limit for response should not be increased beyond the existing 30 days, there is no need for public bodies to have a unilateral right to extend that basic time limit, and extensions shown by public bodies to be necessary can be approved by the Commissioner.

Further in the Report, the Committee quotes part of their discussions with the OIPC, at which point one of the committee member surmised of a public body's ability to extend the 30 day timeline: "if you got 60 days to think about it and sit and do nothing, doesn't that invite delay?"

The Office acknowledges that response times to requests were problematic in the past (which is confirmed through our Annual Reports as well as the statistics provided to the 2014 Committee by the former Office of Public Engagement). However, great strides were being made by public bodies prior to the 2014 review to ensure timely responses. This has continued over the past five years despite the significant increase in the number of requests, their size and complexity.

While the Office cannot speak to how prevalent the use of extensions for purposefully delaying a response was in the past, it has been our experience in assisting public bodies that it would be rare for any public body to "sit and do nothing" in relation to a request. If anything, most public bodies try to respond to

requests as soon as possible as they never know when or how many requests they will receive in the imminent future.

For the most part, the process of submitting a request for approval from the OIPC for an extension is workable. However, one consequence of this process that may not have been considered, was the additional administrative burden it places on public bodies. The OIPC has released Guidelines for Requesting Time Extensions, which outlines the information they require when considering whether to approve an extension.

While it is understandable that such details are required when considering larger extension requests, it is quite cumbersome in circumstances where a public body requires a short extension (10 days or less). It is also limiting in that a submission must be made no later than day 15, except under extraordinary circumstances.

Suggestion

Consider amending the Act to allow public bodies to apply short extensions (up to 10 days), under specific circumstances, without the requirement for approval from the OIPC. Any additional extensions will continue to require OIPC approval. This should balance the overall desire to ensure public bodies are responding without delay, and the practical reality of processing requests.

If there is concern for potential abuse by public bodies, perhaps there could be an auditing function specific to extensions added to the OIPC's powers, where they can do "spot-checks" periodically to ensure extensions are being used appropriately. However, any such amendment regarding the latter should take into consideration what type of administrative work it would require. The purpose of our suggestion is to reduce the administrative workload, not add to it or replace the current process with an equally burdensome one.

8.2 Requirement to submit request for extension by day 15

Issue

Section 16 of the Act allows a public body 20 business days to respond to a request, unless the time limit is extended under section 23. Section 23 requires that all extensions be approved by the OIPC. Additionally, extensions must be applied for no later than day 15, except under extraordinary circumstances.

This appears to be a reasonable timeframe given that the OIPC is provided three days to respond to the request. However, it has been our experience that it is not always known by day 15 whether an extension is required. While not the norm, small, unexpected issues can arise after day 15 that could affect the timeframe required to process a request (e.g. missing or additional records located, etc.).

Without flexibility within the legislation, the OIPC is unable to consider such requests unless they meet the high threshold of an extraordinary circumstance. This can result in situations where a public body requires an extension that otherwise would have been approved by the OIPC if not for being submitted after day 15.

Suggestion

Consider amending section 23 of the Act to require a public body to submit a request for extension not later than day 15 unless the OIPC deems it reasonable for it to be submitted at a later date. What is "reasonable" would be at the discretion of the OIPC. While there may be cases where they do not deem it reasonable to submit a request after day 15 it would provide the OIPC with flexibility on the matter, which the Act currently does not allow.

Note: The Office felt it would be more appropriate to amend this section rather than section 24 (extraordinary circumstances), however, it is possible that an amendment to that section would be more suitable.

8.3 Response from OIPC when extension not approved/partially approved

Issue

In their Annual reports for 2017-18 and 2018-19, the OIPC reported on the number of requests for extensions that it received and the number approved or partially approved:

Fiscal Year	# requested	# approved	# partially approved
2017-18 (2,331 requests)	173	72%	17%
2018-19 (2,437 requests)	181	70%	22%

In terms of requests where the OIPC partially approves an extension (i.e. approves less time than the public body requested), it is not always clear how the OIPC came to its determination. In some cases it may be caused by lack of detail provided by the public body. However, in other cases, the public body appears to have provided a detailed explanation outlining the reasoning for the need for an extension. While it is likely based on detailed analysis, without said details of how they came to their decisions, it can often seem arbitrary to the public body.

This can further be exacerbated by some of the time that the OIPC does not appear to agree is necessary when requesting an extension. For example, our Office has heard of cases where the OIPC has questioned a public body for including time for the head of the public body to review the records prior to responding, even though the Act clearly requires the final decision to be made by the head of the public body or their delegate.

Some requests involve hundreds or thousands of pages of documents, or require complex discussions and analysis. The process of applying for an extension takes time and thought – it can be a challenge to articulate to the OIPC the complexity of records or why it may take additional time to respond to the request. Without additional details outlining why a request for extension was not approved or partially approved, the public body cannot learn from this experience and improve their submissions for future requests.

Suggestion

Consider amending the Act to require that the OIPC response to the public body when they either deny a request for extension or partially approve one, include a detailed overview of how they came to this determination.

9. Cost estimates (s.25)

Issue

As mentioned throughout this submission, most public bodies are beyond their capacity when it comes to processing ATIPP requests. Given the current fiscal reality that the Province is facing, it is unrealistic to expect public bodies to add any new resources or expand their capacity for meeting their legislative obligations under the access provisions of the Act.

Previous iterations of the Act allowed public bodies to charge for the time required to process a request and provided less free time per request (two hours in the 2005 version and four hours in the 2012 version). Under the current Act, public bodies are only able to charge applicants for the time it takes to locate responsive records after the first 15 hours (10 for local government bodies). This can be problematic for larger requests where locating the records takes little time, however, processing them can take a significant amount of time.

Suggestion

Consider amending the Act to allow public bodies to charge for the time it takes to process a request, in addition to the time it takes to locate the records. The purpose of this suggestion is not to create barriers to access to information by requiring applicants to incur unreasonable costs. In order to ensure this affects as few applicants as possible, consideration could be made to increase the number of free hours for public bodies other than local government bodies. With these changes, these costs would continue to be some of the lowest within Canada.

10. Cabinet confidences (s.27)

Issue

It has been this Office's experience that the current listing of definitions of Cabinet confidences under section 27 can be confusing for departments, as they have to determine which definition under subsection 27(1) the records they have fall under to ensure they are properly applying paragraph 27(2)(a).

Section 27 is a mandatory exception to disclosure for Cabinet confidences. All provinces and territories recognize the requirement for this exception, with some variation in how the records are described. Nova Scotia, Prince Edward Island, Alberta, and British Columbia have one definition of 'cabinet record' that encompasses all cabinet confidences similar to the following from Prince Edward Island's **FIPPA**:

> The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

The remaining provinces include a list of different types of cabinet records. These range from four to nine different definitions. This Act has nine different definitions for Cabinet records that fall under paragraph 27(2)(a), in additional to substance of deliberations which falls under paragraph 27(2)(b).

In trying to assist departments, our Office has developed and provided training on Cabinet confidences. Much of the training is focused on understanding the differences between the substance of deliberations and paragraph 27(1)(i), which refers to references to Cabinet confidences in non-Cabinet records. As well, we focus on the eight other types of Cabinet records defined in subsection 27(1).

While the definitions may be straightforward in and of themselves, confusion can be caused by the significant overlap in various definitions contained within this subsection. These definitions originated from the **Management of Information Act**. This act relates to how to manage government records and gives Cabinet Secretariat the authority to manage Cabinet records. In that context, the overlap of definitions is not problematic – if a record meets the definition then it falls under Cabinet Secretariat's authority.

However, in the context of this Act, the overlap makes paragraph 27(2)(a) difficult to apply, as a department must identify which definition under subsection 27(1) the records falls under to ensure the record meets the definition. One record can easily fit into several definitions contained in subsection 27(1), but the department must select only one. As noted above, our training has centered on explaining which definition to use for which kind of document. This has worked somewhat, however, some

departments continue to struggle with this process as our guidance does not reflect a plain reading of the Act. The following definitions contain significant overlap:

27(1)(a), 27(1)(c) and 27(1)(d)
The definition of "cabinet record" contains the following three definitions:

- 27(1)(a) – advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;
- 27(1)(c) – a memorandum, the purpose of which is to present proposals or recommendations to the cabinet; and
- 27(1)(d) – a discussion paper, policy analysis, proposal, advice or briefing material prepared for cabinet, excluding the sections of these records that are factual or background material.

On a plain reading, a document for Cabinet containing policy advice could easily fit under any of these three definitions. The words "advice", "proposals", "recommendations" and "policy" all overlap. It is also notable that paragraph 27(1)(d), which was modified by the 2014 ATIPPA Review Committee, requires public bodies to release the factual component of a record; the other two do not. As section 27 is a mandatory exception, it is not possible to release factual material currently. If a policy paper to Cabinet contained factual material and was disclosed under paragraph 27(1)(d), this would be a violation of paragraphs 27(1)(a) and (c).

27(1)(e) and (f)
The definition of "cabinet record" contains the following definitions:

- 27(1)(e) – an agenda, minute or other record of a Cabinet recording deliberations and decisions of the Cabinet; and
- 27(1)(f) – A record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy.

A minute of a Cabinet meeting could easily fit under 27(1)(e) or (f).

27(1)(i) and 27(2)(b)
The definition of "cabinet record" contains the following definitions:

- 27(1)(i) – that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h); and
- 27(2)(b) – information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.

If a record stated:

- "MC2020-0133 directed that more potholes need to be fixed", it would be redacted under 27(1)(i).

- "Cabinet direction included that more potholes need to be fixed", it would be redacted as 27(2)(b).

Complexity and transparency

Access to information is a complex subject and in some cases confusion is unavoidable. Section 40, for example, has a significant number of factors that can contribute to a contextual analysis of "unreasonable invasion of privacy." However, the complexity is section 27 does not appear to contribute significantly to the purposes of the Act, such as increasing transparency. All records that fall under section 27 are withheld as it is a mandatory exception to disclosure – having so many overlapping definitions results in confusion which appears to have limited purpose.

It may contribute to transparency for a member of the public to know whether the withheld information was "draft legislation" or an "agenda"; the difference in the two types of documents will means something tangible to the general public. However, it does not contribute to transparency to know whether a record was "advice recommendations or policy considerations" vs. "a memorandum to present recommendations" vs. a "discussion paper."

Suggestion

Consider amending subsection 27(1) to reduce the number of definitions for Cabinet records.

11. Workplace investigations (s.33)

Issue

Workplace investigations include investigations about the conduct of employees that could lead to discipline or other corrective action. What will be disclosed depends on who the applicant is:

- Where the applicant is not a party or a witness, all information is withheld;
- Where the applicant is a witness, only witness statements are disclosed; and
- Where the applicant is a party, subsection 33(3) creates a positive obligation to disclose 'all relevant information'.

Section 33 is a mandatory provision, both in terms of the information to be disclosed and the information to be withheld. It is unique in Canada; there are no provisions in other provinces that create a positive obligation to disclose, as in this Act. Nunavut, Yukon, and New Brunswick all have provisions dealing with workplace investigations or harassment complaints, however, in the case of Nunavut and Yukon, these are discretionary exceptions. In New Brunswick, the exception to withhold is mandatory, while the provision for disclosure is discretionary. Each would allow public bodies to take into account the safety of employees.

The OIPC has stated, in decisions, informal investigations and in its guidance document Section 33 – Information from a Workplace Investigation, the mandatory disclosure provision override all other exceptions:

> It is essential to determine the status of the applicant with respect to the investigation, as section [33(3)] provides for a mandatory disclosure of relevant information to complainants and respondents, and other exceptions (including section 40 – disclosure harmful to personal privacy) should not be applied when releasing information to parties under this section.

Section 33 is unique in this way – there is no other exception that makes disclosure mandatory to the extent that no other section can apply. In our view, this is problematic because there are times when information in a workplace investigation contains information that should be withheld for other reasons. Some examples include:

- Section 37 – disclosure harmful to individual or public safety: In rare cases, workplace investigations can involve employees who are violent or threatening to other employees. Public bodies should have some discretion to withhold relevant information for the purpose of keeping an employee safe. In A-2020-024, the OIPC noted that the "legislature may wish to consider the interplay between sections 33 and 37 of the Act in order to ensure that the serious harm contemplated by section 37 will not result from a good faith effort to comply with the disclosure requirements of section 33."

- Section 40 – information that would be an unreasonable invasion of privacy: Employees reporting workplace harassment or other issues may sometimes give investigators sensitive details about what occurred. Public bodies should have some discretion to withhold personal information where appropriate.

- Section 30 - solicitor client privilege is fundamental to our legal system. If solicitor-client privileged information appears in documents about a workplace investigation, public bodies should be able to withhold it.

- Section 31 - workplace investigations can include information that could have an impact on the security of a building, or the security of a person. This is particularly the case where a workplace investigation involves someone working in corrections. Public bodies should have the discretion to withhold this information.

An additional issue with disclosure under subsection 33(3) is that the information cannot be controlled once provided to a party. When information is provided as part of an ATIPP request, the applicant who receives the information is free to do anything they want with the documents and can freely share it with a wide range of people. This can become a problem, for example, where complainants share sensitive personal details

about issues such as harassment. This could further harm the complainant and could even constitute further harassment. In contrast, if information is provided within the workplace investigation process, a public body can place limitations on the involved parties in terms of keeping the information confidential or to limit its distribution.

We recognize that administrative fairness requires that a person accused of harassment or other behavior have a right to know the case against them, and that if a party is an applicant they have a right to know some of the details. However, the workplace investigation generally has a process under which disclosure of relevant information can be disclosed for this purpose. In many cases, it appears that applicants are using the ATIPP process to circumvent the workplace investigation process. It is our understanding that the Treasury Board Secretariat will be making more detailed submissions on disclosure and this aspect of section 33.

Suggestion

Consider amending subsection 33(3) of the Act, to remove the requirement for disclosure. It could be amended to not allow the exception to be used if the applicant is a party to the investigation; however, a public body can continue to use other exceptions to disclosure.

Alternatively, perhaps subsection 33(3) could have similar provisions to section 9 of the Act (the public interest override). This section lists the exceptions to disclosure which it overrides (i.e. public bodies cannot withhold information under these exceptions if the public interest outweighs their purpose). If an exception is not listed, the public body can continue to use it. If this alternative was chosen, the Office would suggest that consideration be given to allow mandatory exceptions to disclosure, along with sections 30, 31 and 37 to continue to be applicable in the case of records relating to a workplace investigation where the applicant is a party to the investigation.

When considering alternatives, you may wish to consider provisions regarding harassment in both New Brunswick and the Yukon. Subsection 20(2) of New Brunswick's **RTIPPA** allows a public body to provide access to a party through showing them the documents but not allowing copies. Subsection 19.1(2) of the Yukon's **Access to Information and Protection of Privacy Act** allows a public body to refuse access to a "harassment record" for a number of reasons, including that the disclosure will deter an employee from making a complaint or where it will be harmful to relations between employees.

PART III – Protection of Personal Information

12. Notification of a privacy breach (s.64)

12.1 Notification to the affected individual (ss.64(3))

Issue

Subsection 64(3) of the Act requires a public body to notify an individual if their personal information has been involved in a breach, except as otherwise provided under subsections (6) and (7). Based on a reading of these subsections, a public body is required to notify if there is a significant risk of harm. While in most circumstances this is reasonable, it is possible that some circumstances could arise where the notification of a breach could potentially adversely affect the person or another person's health or safety.

Suggestion

Consider amending section 64 to preclude public bodies from being required to notify in limited circumstances where otherwise they would be required to do so. For example, where there are compelling circumstances that could affect the person or another person's health or safety.

12.2 Variances between notification requirements (ss.64(3) and ss.64(4))

Issue

Subsections 64(3) and 64(4) outline under what circumstances a public body must either notify an individual affected by a privacy breach or the OIPC. Under subsection 64(3) a public body must notify an affected individual (except as otherwise provide in subsections (6) and (7)) when:

- Personal information that is stolen;
- Personal information that is lost;
- Personal information disposed of, except as permitted by law; or
- Personal information disclosed to or accessed by an unauthorized person.

Subsection 64(4) requires public bodies to notify the OIPC where a breach involves the unauthorized collection, use or disclosure of personal information.

The variances in these subsections can cause confusion as to when notification is required. For example, if information is lost, but there is no indication that it has

been accessed by anyone, or has been disposed of inappropriately, notification is required under subsection 64(3), but would not be required under subsection 64(4). Alternatively, if personal information is collected without authorization, a notification is required under subsection 64(4), but not under subsection 64(3).

Suggestion

Consider amending subsections 64(3) and 64(4) to include similar language in outlining the circumstances under which notification is required.

12.3 Requirement to report to ATIPP Office (64(4))

Issue

The Minister of the Department of Justice and Public Safety is responsible for the overall administration of the ATIPP Act. The ATIPP office assists with this mandate by providing guidance and assistance to public bodies that are subject to the Act, including through training and the development of policies, procedures and other guidance materials to assist public bodies with both the access and privacy provisions of the Act.

Under subsection 64(4) of the Act, public bodies are required to report any unauthorized collections, uses or disclosures of personal information to the OIPC. Under policy, government departments are required to also report privacy breaches to the ATIPP Office, and many other public bodies do as a courtesy. The Office reviews these reports to determine if there are particular trends in the type of breaches occurring and which public bodies to which the breaches are in relation. This assist our Office in the development of training materials and whether it would be appropriate to reach out to a particular public body to assist with training, etc. If public bodies were required to report breaches to the ATIPP Office it would assist the Office in fulfilling its mandate.

Suggestion

Consider amending subsection 64(4) of the Act to require public bodies to report privacy breaches to the ATIPP Office in addition to the OIPC.

13. Disclosure of personal information (s.68)

13.1 Notification to the affected individual (p.68(1)(p))

Issue

Paragraph 68(1)(p) allows for the disclosure of personal information "where the head of the public body determines that compelling circumstances exist that affect a person's health or safety and where notice of disclosure is given in the form appropriate in the circumstances to the individual the information is about."

While in most circumstances there may be no issue with providing notification of the disclosure to an individual, there could be situations where the notification could in and of itself affect the person or another person's health or safety.

Suggestion

Consider amending paragraph 68(1)(p) to include and additional clause for notification – e.g. except where the head of the public body determines that notification of disclosure could harm the health or safety of the person who is to be notified or another individual.

13.2 Disclosure to surviving spouse/next of kin (p.68(1)(v))

Issue

Paragraph 68(1)(v) allows for the disclosure of personal information "to the surviving spouse or relative of a deceased individual where, in the opinion of the head of the public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy." The second part of this paragraph seems unnecessarily limiting for two reasons:

First, paragraph 68(1)(t) already allows the disclosure of personal information "where the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40."

Second, if you review section 40, paragraph 40(4)(f) presumes the disclosure of personal information is an unreasonable invasion of privacy where "it appears with other personal information about the third party or the disclosure of the name itself would reveal personal information about the third party." Therefore, the disclosure of the deceased individual's personal information would be a presumed unreasonable invasion of privacy.

Subsection 40(5) does require that a public body consider all relevant circumstances when determining whether the disclosure would be an unreasonable invasion of privacy. This would appear to allow a public body to disclose personal information to a surviving spouse or next of kin when it deems it appropriate despite paragraph 40(4)(f). However, paragraph 40(5)(j), one of the circumstances to consider, is whether the information "is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy." If the death is recent, this would appear to preclude or make it unclear whether a public body can disclose personal information, even in cases where it would be the compassionate and appropriate thing to do.

Suggestion

Consider amending paragraph 68(1)(v) to allow a public body to disclose personal information to a surviving spouse of next of kin where the head deems it appropriate under the circumstances.

PART IV – Municipalities

The ATIPP Office works with municipalities throughout the Province providing training, guidance, and support in relation to the Act. In this regard, the Office is aware of issues common to municipalities in relation to the Act. While it would be ideal for the Committee to hear directly from municipalities, given the limited resources of many and the lack of submission provided during the 2014 review of the Act, this Office felt it would be prudent to provide some insights into the issues facing municipalities in relation to fulfilling their obligations under the Act.

Compliance with the privacy provisions of the Act can be challenging for smaller municipalities. In recent years there appear to have been an increase in the number of privacy complaints involving municipalities, the majority of which result from the actions of council rather than staff. While the Office recognizes that this is of concern, the focus of this section of our submission will be on the access provisions of the Act and how they affect municipalities. While capacity and resourcing issues are affecting municipalities' ability to meet their obligations under both the access and privacy provisions of the Act, there do not appear to be solutions in relation to the former that can easily be resolved through amendments of the Act. In regards to the privacy provisions of the Act, the primary issue appears to be a lack of awareness or understanding of what these provisions entail. This primary issue could better be resolved through training if municipalities choose to avail of it. This can also pose challenges, however, as noted above, is not the focus of this submission.

As with most other public bodies, municipalities have seen a significant increase in the number of requests received each fiscal year. In reviewing the ATIPP Office Annual Reports, the five year period prior to the amendments (fiscal years 2010-11 to 2014-15), municipalities received an average of 81 requests in total per year. For the equivalent period under the current Act, municipalities received an average of 308 requests in total per year (a 280% increase).

Some municipalities were impacted to a greater degree than others. One of the most glaring examples is Portugal Cove-St. Philips. In the five years prior to 2015, this town received an average of 10 requests annually, with 14 being the most received in a single fiscal year. Since 2015, it has averaged 53 requests annually, receiving 103 requests during the 2017-18 fiscal year.

14. Limited capacity

Issue

The primary issues faced by small and in particular, rural, municipalities in the Province with respect to Act, are capacity related, rather than legislative. Budgetary and operational issues are obstacles to fulfilling the legislative requirements laid out in the Act. There are no other jurisdictions with a comparable per-capita prevalence of incorporated municipalities, so comparisons are difficult.

There are 275 incorporated municipalities in the Province, all of which are public bodies subject to the Act. Many of these municipalities are very small. In the Population and Dwelling Count Highlights Tables from the 2016 Census completed by Statistics Canada:

- the median population of municipalities, excluding three cities, was 427;
- 41 municipalities had populations between 100 and 200;
- 17 had populations under 100, with the smallest having a population of five

In Municipalities NL 2011 Census of Municipalities in Newfoundland and Labrador 63 municipalities indicated having no full time employee. A significant number have currently only one full time, or one part time employee. In the majority of cases, the Town Clerk acts as the ATIPP coordinator.

Suggestion

Consider whether it would be appropriate to legislate a threshold based on either population (for instance less than 100 residents) or budgetary (for instance less than $50,000) for exclusion from the access provision of the Act.

Given the Act may be the only oversight mechanism in place for municipalities in the province, in may be inadvisable to exclude smaller municipalities for the access provisions of the Act.

15. Timelines (s.16)

Issue

The 20-day time limit, combined with the ability to apply for extensions, is generally adequate. However, in municipalities which only operate a few days of the week, or those with only one or no full time employees, access requests can have the effect of halting operations. While extensions may be helpful in some circumstances, for these smaller municipalities they only serve to delay an amount of work that is untenable. While municipalities may apply to the OIPC to disregard requests which represent an unreasonable interference with operations, doing so is also time consuming and complicated for these municipalities.

Suggestions

- Consider suggestions listed under part 1.1 of this submission to amend the definition of "business day" to account for public bodies that are not open five days a week;
- Consider suggestions listed under part 8 of this submission in relation to extensions; and
- Consider amending section 16 of the Act to allow a longer time period than 20 days for smaller municipalities to respond to requests.

16. Vexatious requests (s.21)

Issue

Section 7.2 of this submission outlines some of the issues faced by public bodies in relation to vexatious requests. As such, this section will not go into significant details regarding this section of the Act. However, it is important to note that these types of vexatious requests can have disproportionate impact on smaller municipalities with limited capacity to process them.

As mentioned in section 7.2 of this submission, the OIPC in this province is unable to place a limit on an applicant who makes a series of similar or vexatious requests. This forces the municipality to prepare and submit an application to disregard in each instance. In the case of frivolous and vexatious requests, this has allowed serial frivolous and vexatious requestors to frustrate operations.

In a recent case, an applicant filed 34 requests over a short period of time relating to a wide array of items. The municipality was unable to claim that the requests were excessively broad. While the cumulative effect of 34 requests was by any standard of reasonableness, excessively broad, each individual request was, by itself, not. Although most of the requests were able to be disregarded on other grounds, they were not on the grounds of excessively broad.

Additionally, requests for disregards must be made within five business days. This time limitation is insufficient for most public bodies, let alone a small municipality with one part time clerk who works two-three days a week. This timeframe is an impediment for both public bodies and applicants in situations where the applicant is willing to narrow a request which is overly broad or would unreasonably interfere with operations. The five day limit provides insufficient time for a coordinator to negotiate a mutually acceptable scope.

Suggestions

- Consider suggestions provided in section 7 of this submission; and
- Consider amending section 21 of the Act to allow a group or series of requests, which are analogous to a single request, to be treated as a single request for the purpose of determining whether a request is overly broad in the context of an application to disregard.

17. Costs (s.25)

Issue

Previous iterations of the Act allowed public bodies to charge for the time required to process a request after the first four hours (in 2012 and after the first two hours in 2005). In 2015, the Act was amended to reduce charges to the time required to locate records, and increased the amount of free time to 10 hours for municipalities. These changes to the fee structure of the Act disproportionately impact small municipalities.

It is extraordinarily rare that searching for records will take over ten hours for a small municipality (or any public body). Searching for records typically accounts for a small proportion of the work required to fulfill a request, and processing, for which time cannot be charged, is considerably more time consuming. Municipalities may charge copy fees, but only for copies provided to the applicant, not the numerous copies required to process a request, and not if the applicant requests an electronic copy (which generally must be copied multiple times in order to be processed and scanned). While these costs are negligible for large public bodies, they are not for a municipality with an annual budget of less than $50,000.

As noted previously, municipalities have seen a 280% increase in requests received in the past five years. While very few municipalities have ever charged fees for processing requests, there has been a significant decrease in the amount being charged since 2015. In the five years prior to the Act coming into force in 2015, municipalities charged an average in total of $374 per year. For the five years since 2015, municipalities have charged an average in total of $71 per years. This is a 426% decrease in charges despite a 280% increase in the number of requests received.

Suggestions

- Consider suggestions made in section nine of this submission in relation to costs;
- Consider amending section 25 of the Act to allow very small municipalities (based on either population or budget), or those which receive a significant number of requests from one applicant, to charge reasonable fees related to material resources expended processing requests on a cost recovery basis.
- Consider removing or reducing the amount of free time smaller municipalities are required to provide for each request (perhaps revert to four free hours for smaller municipalities).

18. Local public body confidences (s.28)

Issue

There is confusion as to whether this section applies to municipal committees, as defined in section 25 of the **Municipalities Act, 1999,** and if it does, under what circumstances. Paragraph 28(1)(c) of the Act notes that:

> The head of a local public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

Section 213 of the **Municipalities Act, 1999** refers to privileged meetings of council and notes that:

> (1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.
> (2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.
> (3) A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.

Based on the wording of section 28, the meetings contemplated by section 213 of that Act would be protected from disclosure. However, section 25 of the **Municipalities Act, 1999** allows council to establish committees to consider matters and make recommendations to council. It specifically notes:

> (1) A town council may establish the standing or special committees that it considers desirable to consider and make recommendations on matters referred to them by the council.
> (2) A town council may appoint persons to serve on a committee established under subsection (1) and where a council does not appoint persons to a committee, the mayor shall appoint those persons.

While these committees are created to inform council, it is unclear whether committee meetings are "meetings of council" as per section 213 of the **Municipalities Act, 1999**, and whether that Act authorize the holding of committee meetings "in the absence of the public". Therefore, it is unclear whether section 28 of the Act would apply to the substance of deliberations of privileged committee meetings.

Suggestion

Consider amending subsection 28 to clarify whether privileged meetings of a standing or special committee established under section 25 of the **Municipalities Act, 1999**, can be protected under section 28 of the Act.

19. Designation of head by a local public body (s.109)

Issue

Section 109 of the Act notes that a local public body shall designate a person or a group of persons as the head of the local public body for the purposes of the Act; however, it makes no reference to who may be appointed. Ideally, the head of the public body would be the most senior employee, however in municipalities where there is only one employee a councillor may be assigned the role. This arrangement may undermine the apolitical intentions of the legislation, whether real or perceived; however, with smaller municipalities where there is only one employee it may be unavoidable. In practice the ATIPP coordinator may serve as both the coordinator and head of the public body, however this places significant responsibility on one person. While situations as described above may require an elected official to be the head of the public body, this should only be done in unavoidable circumstances.

Further, allowing "groups" of individuals to be appointed as head of the public body is problematic. Some municipalities have appointed committees or the entire council as "head", including in municipalities where there are sufficient staff within the town to fulfil this duty under the Act. In addition to complicating the process and potentially undermining the intended apolitical process, it also has the effect of necessitating an entire council review personal information requests which are often highly sensitive. This can be particularly troublesome in municipalities where "everyone knows everyone" and there are interpersonal dynamics at play between the applicant and various councillors who make up the position of the "head".

Suggestion

Consider amending section 109 to require the head of the public body to be a member of the staff, except in exceptional circumstances, and remove the ability for the head of public body to be a group of people.

20. Designation of ATIPP coordinator (ss.110(1))

Issue

Subsection 110(1) of the Act requires that the head of a public body designate a person on the staff of the public body as the coordinator. As noted, a large number of municipalities have only one part-time or full-time employee. In other cases, medium sized municipalities receive extraordinarily high number of requests.

In these cases it would seem reasonable for municipalities to use an ATIPP coordinator who was not a member of the staff of the public body, such as a solicitor or a coordinator seconded from another municipality, with the head of public body retaining final authority. It would also allow municipalities to avoid potential for conflict of interests.

Suggestion

Consider whether it would be appropriate to amend the legislation to allow the ATIPP coordinator to be an individual not on the staff where necessary (perhaps in extraordinary circumstances or with approval of the OIPC).

Conclusion

As noted above, the Office is aware that the lack of resources cannot be a determining factor in whether the Act should be amended. However, the reality facing many public bodies is that they do not have the capacity to sustain the current level of efficiency in regards to processing requests. It is the Office's opinion that the suggestions found within this submission will improve both the access to information process and the privacy provisions of the Act. Furthermore, they will have limited impact on the primary purposes of the Act, which are to ensure transparency, accountability, participation by the public, and protecting the privacy of individuals in relation to the personal information held and used by public bodies.