2020

Orders-in-Council

SUBMISSION TO THE 2020 ATIPPA REVIEW COMMISSION

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27 November 2020

The Issue

Changes to the *Access to Information and Protection of Privacy Act* made through Bill 29, which have survived through the 2015 revision of ATIPPA, require that government officials must keep secret a form of legislation known as Orders-in-Council.

The result has been that officials have adopted various administrative measures to deal with the contradiction in the conflicting legal status of Orders-in-Council. This situation undermines two of the three purposes of the *Access to Information and Protection of Privacy Act, 2015*.

Background

Since 1981, legislation in Newfoundland and Labrador has provided the public with access to government information under some limitations.

Both the 1981 *Freedom of Information Act* (FOIA)[1] and its successor legislation - the *Access to Information and Protection of Privacy Act* in several versions [ATIPPA (YEAR)][2] – establish the premise of the legislation as well as both mandatory exemptions from disclosure and discretionary exemptions. This submission deals with the mandatory exemptions from disclosure for information elated to Cabinet deliberations and Cabinet confidences.

The purpose of FOIA, stated in s.3 was "to provide a right of access by the public to information in records of departments and to subject that right only to specific and limited exceptions necessary for the operation of the departments and for the protection of personal privacy."

The purpose as given, for each of the versions of ATIPPA are:

2002 –

> 3. (1) … to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

[1] RSN 1990 c. 25.
[2] ATIPPA 2002 (SNL 2002, c. A-1.1); ATIPPA (2015), SNL 2015, c. A-1.2

(c) specifying limited exceptions to the right of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made by public bodies under this Act.

2015 –

3. (1) … to facilitate democracy through

(a) ensuring that citizens have the information required to participate meaningfully in the democratic process,

(b) increasing transparency in government and public bodies so that elected officials, officers, and employees of public bodies remain accountable, and

(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

(2) The purpose is to be achieved by

(a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c) specifying the limited exceptions to the rights of access and correction that are necessary to

(i) preserve the ability of government to function efficiently as a Cabinet government in a parliamentary democracy,

(ii) accommodate established and accepted rights and privileges of others, and

(iii) protect from harm the confidential proprietary and other rights of third parties,

(d) providing that some discretionary exceptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception, [and]

> (e) preventing the unauthorized collection, use or disclosure of personal information by public bodies….

One of the mandatory exemptions under both forms of the access to information laws concerns information about what Cabinet discusses.

FOIA describes the mandatory exemptions from disclosure related to Cabinet as being documents:

> (b) that contain proposals or recommendations submitted, or prepared for submission, by a minister of the Crown to the Executive Council,
>
> (c) that contain agendas of the Executive Council or recordings of deliberations or decisions of the Executive Council,
>
> (d) used for or reflecting consultations among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy,
>
> (e) that contain briefings to ministers of the Crown in relation to matters that are before, or are proposed to be brought before, the Executive Council or that are the subject of consultations referred to in paragraph (d),
>
> (f) that contain background explanations, analyses of problems or policy options submitted, or prepared for submission, by a minister of the Crown to the Executive Council for consideration by the Executive Council in making decisions, before those decisions are made, ….

ATIPPA (2002) dealt with the matter differently:

> 17. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet.[3]

Although there was no mention of this aspect of the legislation during debate on second reading (03 December 2002), there is implicitly in this construction a more narrow definition of what must be kept secret than that contained in the earlier FOIA. This description of the exemption refers to deliberations of Cabinet, not the information

[3] As the result of an amendment before ATIPPA (2002) came into force, the section was renumbered as s. 18.

prepared for those deliberations. That could be interpreted as being a meeting of the Executive Council - its formal deliberations – or that of a subcommittee of the Council.[4]

Bill 29[5] made significant amendments to ATIPPA (2002) one of which was to the sections on Cabinet confidences.

The revised ATIPPA now exempted from disclosure what the amendment called "Cabinet records" and provided description of what constituted a Cabinet record in a new set of definitions.

The definition of "Cabinet record" included at the new s. 18 (1) a document that was "(v) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet…." This is a very broad re-interpretation since it includes documents that involved the deliberations of Cabinet but also a decision taken by it.

Note that the definition of Cabinet record in Bill 29 is identical in almost every respect to the definition of the term used in the *Management of Information Act*[6]*:* following a 2008 amendment. A "Cabinet record" under that Act includes a document that "(iii) is an agenda, minute or other record of Cabinet recording deliberations or decisions of Cabinet…".

This is not accidental. As the Minister of Justice, then Felix Collins, explained to the House of Assembly on second reading of Bill 29 (11 June 2012), as "recommended by Mr. Cummings, for consistency, the definition of Cabinet records will reflect the list found in the Province's Management Of Information Act."

In the lengthy filibuster on Bill 29, members discussed the exemptions of documents used to make Cabinet decisions but none of them, including former Cabinet ministers noted or drew attention to definition that encompassed a document that included the decision itself. No one else appears to have noticed at the time the impact this change would have.

Bill 29 became law owing to the government majority and its impact took immediate effect.

[4] Formally, a meeting of the Council in the absence of the Governor is deemed a meeting of the committee. This may be seen in the title of an Order-in-Council. This would make a formal grouping of fewer ministers a subcommittee. In usual practice, Cabinet is the term used, as in ATIPPA (2002) to mean the Premier and Ministers with any smaller grouping being a committee.
[5] SNL 2012, c. 29.
[6] SNL 2005, c. M-1.01

Cabinet Secretariat (CabSec) is the body within the provincial government that provides administrative support to the Executive Council. It is subject to ATIPPA. The following examples show the impact of changes to ATIPPA (2002) in 2012 related to disclosure of documents that contain decisions of Cabinet.

Orders-in-Council are, as the name implies, documents that contain decisions of Cabinet. This reflected in definitions used by the Government of Canada

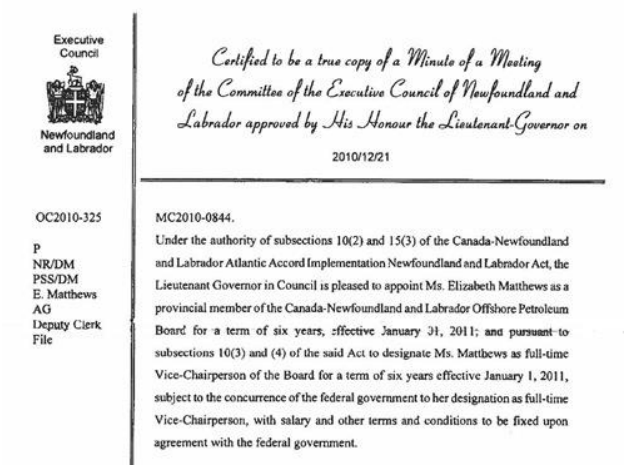
The Privy Council Office provides administrative support to the federal Cabinet. It defines an Order-in-Council as "a legal instrument made by the Governor in Council pursuant to a statutory authority or, less frequently, the royal prerogative. All OICs are made on the recommendation of the responsible Minister of the Crown and take legal effect only when signed by the Governor General."[7]

Library and Archives Canada is the Government of Canada's custodian of federal government records. It defines Orders-in-Council similarly and notes that they are "a formal recommendation of Cabinet that is approved and signed by the governor general."

Figure 1 shows a copy of an Order-in-Council released by CabSec in Newfoundland and Labrador prior to Bill 29.

There are no deletions or redactions. The Order-in-Council includes:

- the general title identifying this as a copy of a minute a meeting of a committee of the Executive Council,
- the date on which the meeting took place and the minute recording the decision as issued,
- the number of the document supporting the decision, in this case MC2010-0844,
- the decision itself, citing the authority under which Cabinet took tis decision,
- the seal of the Executive Council in the top left, underneath it, the number of the Order-in-Council, and beneath that, the list of individuals and offices to which the Order-in-Council will be delivered by CabSec officials.



Executive Council

Newfoundland and Labrador

Certified to be a true copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland and Labrador approved by His Honour the Lieutenant-Governor on

2010/12/21

OC2010-325

P
NR/DM
PSS/DM
E. Matthews
AG
Deputy Clerk
File

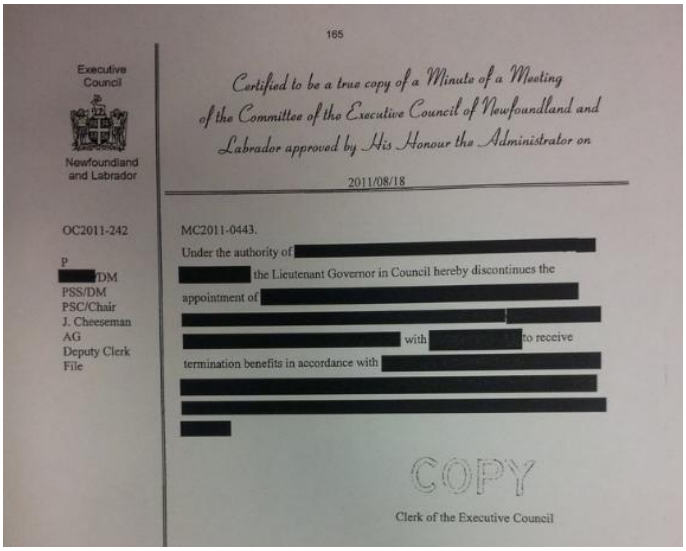
MC2010-0844.

Under the authority of subsections 10(2) and 15(3) of the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, the Lieutenant Governor in Council is pleased to appoint Ms. Elizabeth Matthews as a provincial member of the Canada-Newfoundland and Labrador Offshore Petroleum Board for a term of six years, effective January 31, 2011; and pursuant to subsections 10(3) and (4) of the said Act to designate Ms. Matthews as full-time Vice-Chairperson of the Board for a term of six years effective January 1, 2011, subject to the concurrence of the federal government to her designation as full-time Vice-Chairperson, with salary and other terms and conditions to be fixed upon agreement with the federal government.

Figure 1 - OC2010-325

[7] https://www.canada.ca/en/privy-council/services/Orders-in-Council.html

Typically, the copy included the signature of the Clerk of the Executive Council, although, this photocopy omitted it. This copy omitted it. Alternately, as in Figure 2, there is a space for the


165

Executive Council

Newfoundland and Labrador

Certified to be a true copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland and Labrador approved by His Honour the Administrator on

2011/08/18

OC2011-242

P
[redacted]/DM
PSS/DM
PSC/Chair
J. Cheeseman
AG
Deputy Clerk
File

MC2011-0443.

Under the authority of [redacted] the Lieutenant Governor in Council hereby discontinues the appointment of [redacted] with [redacted] to receive termination benefits in accordance with [redacted]

COPY

Clerk of the Executive Council

Figure 2 OC2011-242

Figure 2 is a photograph of OC2011-242, disclosed by CabSec to James McLeod, then a reporter for the Telegram, in response to an Access to Information request in 2013.

Note that portions of the body of the order and one part of the distribution list are deleted. None of the deletions is accompanied by a reference to a section of ATIPPA (2012), the heavily amended version of the 2002 access law.

They do, however, appear to conform to some recognized exemptions such as ones related to individual privacy (name, remuneration, causes for termination, and so on.

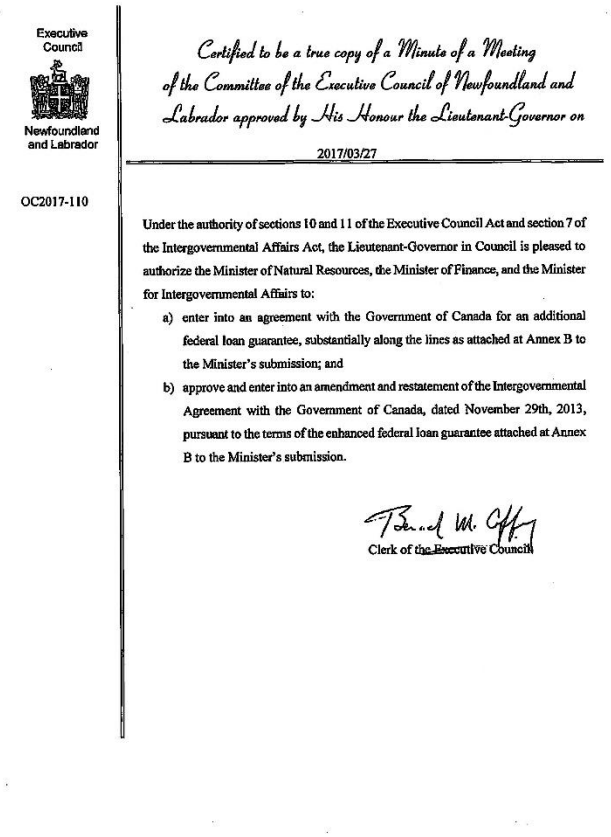
ATIPPA (2015) came out of the recommendations of the review commission appointed in 2014 to respond to public complaints about the impact of Bill 29 on public access to government information. It made significant changes to many parts of the access law but left intact the approach to and definition of cabinet documents established in Bill 29.

In its final report, the review commission dealt at length with the issue of cabinet confidences and what ought to be protected from disclosure. The commission conducted a survey of practices in other Canadian jurisdictions and some international jurisdictions. The definition of cabinet records and associated exemptions from disclosure matches word-for-word the list of records contained in the federal *Access to Information Act*.[8]

None of the discussion either in the hearings or in the report by the 2014 review commission focussed on Orders-in-Council. The only particular issue that drew widespread attention from intervenors was public access to briefing materials. In general, all agreed that cabinet confidences and the deliberations of cabinet as well as supporting documentation (generally called cabinet paper) ought to be exempt from disclosure.

[8] R.S.C., 1985, c. A-1

CabSec did adjust its practices, however. It no longer censored cabinet orders to the extent shown in the example of OC2011-242, but it did continue to delete certain portions of orders. CabSec also made available some details of orders, in addition to the main body of the decision, on the Internet in a practice similar to that of the Government of Canada and other Canadian jurisdictions.



Executive Council

Newfoundland and Labrador

OC2017-110

Certified to be a true copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland and Labrador approved by His Honour the Lieutenant-Governor on

2017/03/27

Under the authority of sections 10 and 11 of the Executive Council Act and section 7 of the Intergovernmental Affairs Act, the Lieutenant-Governor in Council is pleased to authorize the Minister of Natural Resources, the Minister of Finance, and the Minister for Intergovernmental Affairs to:

a) enter into an agreement with the Government of Canada for an additional federal loan guarantee, substantially along the lines as attached at Annex B to the Minister's submission; and

b) approve and enter into an amendment and restatement of the Intergovernmental Agreement with the Government of Canada, dated November 29th, 2013, pursuant to the terms of the enhanced federal loan guarantee attached at Annex B to the Minister's submission.

Clerk of the Executive Council

Figure 3 - OC2017-110

Figure 3 is an Order-in-Council issued in 2017. There are only two deletions compared to the example from 2010. One is the number for the supporting document. The other is the distribution list from the left-hand margin.

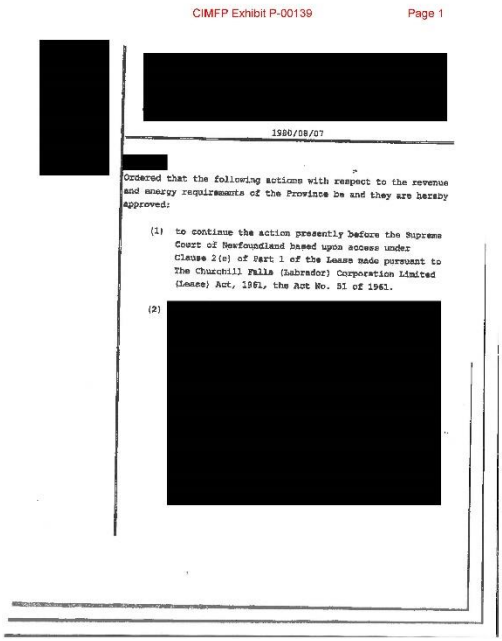
Note that neither is marked as a deletion. One would only know something had been deleted if one know what an Order-in-Council looked like.

In response to a question as to why this information was deleted, the Clerk of the Executive Council replied: "I have checked with staff in my office who advise that the copies of the OC's forwarded to you yesterday have indeed deleted the information you note as such information falls under the category of 'Cabinet confidences' and is not released publically [sic]."[9]

This notion that the two deletions are Cabinet confidences clearly does not align with past practice as demonstrated in the examples cited here, nor does it conform to CabSec's handling of these documents currently.

[9] Anne Marie Hann to Edward Hollett, email, 15 March 2018

The Commission of Inquiry into Muskrat Falls entered a number of Cabinet orders (either Orders-in-Council or Minutes of Council) as exhibits during its hearings. While it was no subject to ATIPPA (2015), the Commission did follow a curious practice of deleting information from these documents.


CIMFP Exhibit P-00139 Page 1

[redacted]

1980/08/07

[redacted]

Ordered that the following actions with respect to the revenue and energy requirements of the Province be and they are hereby approved:

(1) to continue the action presently before the Supreme Court of Newfoundland based upon access under Clause 2(e) of Part 1 of the Lease made pursuant to The Churchill Falls (Labrador) Corporation Limited (Lease) Act, 1961, the Act No. 51 of 1961.

(2) [redacted]

Figure4 – P-00139

An example is one called Exhibit P-00139, the first page of which is shown at left, which the Commission described as a "Government of Newfoundland and Labrador paper dated August 7, 1980 re revenue and energy requirements of the Province".

The paper is related to the testimony of an expert in the history of hydro-electricity development in Labrador. In the transcript of that testimony, Commission counsel Barry Learmonth refers to the exhibit as a Minute of Council.

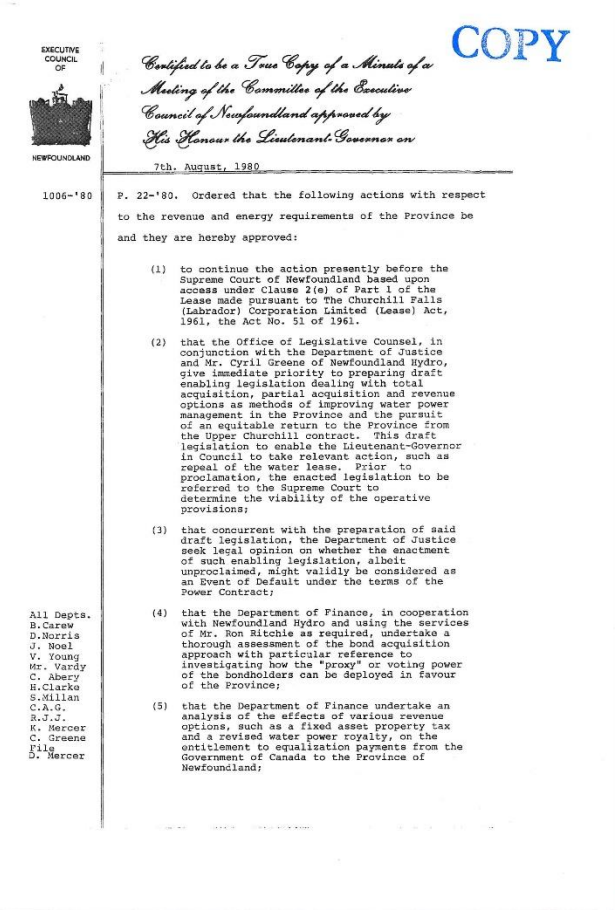
The exhibit, as accepted by the Commission, contains numerous and erratic deletions that do not appear to have any purpose.

Having viewed the earlier copies of provincial Orders-in-Council, though, one can readily identify the format. The deletions at the top appear to be the Coat of Arms as well as the heading, the OC number as well as the supporting cabinet paper numbers. Given that the document is identified in the context of a general discussion of government's hydro-electric policy, the deletion of the second and some of the subsequent paragraphs on the documents five pages are mysterious and unexplained. The last page, which includes a signature block for the Clerk of the Executive Council confirms that this is an Order-in-Council.

A request to CabSec for this document under ATIPPA (2015) produced the full document, unredacted, the first page of which is shown at right. It is MC1006-80. In the current numbering system, this would be rendered as MC1980-1006.

The difference in the typescript between the two documents suggests the Commission document might be the earlier version that included a typing error or some similar minor defect. The two are identical in every part that is undeleted in the exhibit.

What is most relevant for this discussion, is that CabSec did not delete the two items identified by Hann as cabinet confidences. Nor did CabSec delete all the information deleted by the Commission, even though it is relevant to the exhibit and the testimony and could be covered by discretionary exemptions to disclosure detailed in ATIPPA (2015).



EXECUTIVE COUNCIL OF NEWFOUNDLAND

COPY

Certified to be a True Copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland approved by His Honour the Lieutenant-Governor on

7th. August, 1980

1006-'80

P. 22-'80. Ordered that the following actions with respect to the revenue and energy requirements of the Province be and they are hereby approved:

(1) to continue the action presently before the Supreme Court of Newfoundland based upon access under Clause 2(e) of Part 1 of the Lease made pursuant to The Churchill Falls (Labrador) Corporation Limited (Lease) Act, 1961, the Act No. 51 of 1961.

(2) that the Office of Legislative Counsel, in conjunction with the Department of Justice and Mr. Cyril Greene of Newfoundland Hydro, give immediate priority to preparing draft enabling legislation dealing with total acquisition, partial acquisition and revenue options as methods of improving water power management in the Province and the pursuit of an equitable return to the Province from the Upper Churchill contract. This draft legislation to enable the Lieutenant-Governor in Council to take relevant action, such as repeal of the water lease. Prior to proclamation, the enacted legislation to be referred to the Supreme Court to determine the viability of the operative provisions;

(3) that concurrent with the preparation of said draft legislation, the Department of Justice seek legal opinion on whether the enactment of such enabling legislation, albeit unproclaimed, might validly be considered as an Event of Default under the terms of the Power Contract;

(4) that the Department of Finance, in cooperation with Newfoundland Hydro and using the services of Mr. Ron Ritchie as required, undertake a thorough assessment of the bond acquisition approach with particular reference to investigating how the "proxy" or voting power of the bondholders can be deployed in favour of the Province;

(5) that the Department of Finance undertake an analysis of the effects of various revenue options, such as a fixed asset property tax and a revised water power royalty, on the entitlement to equalization payments from the Government of Canada to the Province of Newfoundland;

All Depts.
B.Carew
D.Norris
J. Noel
V. Young
Mr. Vardy
C. Abery
H.Clarke
S.Millan
C.A.G.
R.J.J.
K. Mercer
C. Greene
File
D. Mercer

Figure 5 – MC1006-80

Discussion

CabSec in Newfoundland and Labrador censors Orders-in-Council.

Canadian governments are organized and follow what is often called the Westminster form of government administration. Its constitutional and legal practices in the common law parts of the country derive from those of the United Kingdom.

Orders-in-Council are identified clearly by the Privy Council: "Decisions of the Privy Council are recorded in Orders which have the force of law." Under the *Statutory Instruments Act 1946*, Orders-in-Council are a form of subordinate legislation, derived from power granted either by statute or by the prerogative of the Crown in areas not explicitly covered by statute. This is similar to the view in Canada that views Orders-in-Council as a form of subordinate legislation[10].

An essential element of Canada's legal system is that the rules by which Canadians are governed are public. Thus, it is the practice in Canada dating to Confederation in 1867 or, arguably, to the grant of Responsible Government in its constituent parts before that, that Acts of the legislature, regulations under statutory authority, and orders issued by the Executive Council are public documents. It would be absurd to censor the law in any form, including the legal order of Cabinet on any subject.

There is no doubt, however, that a plain reading of ATIPPA (2015) prohibits the disclosure of a document that contains a Cabinet order. This left government officials in 2012 with a conundrum which they resolved by disclosing portions of any Order but censoring some parts of it using sections of ATIPPA (2012).

After 2015, officials revised the practice by disclosing the contents of the Order but by deleting two innocuous pieces of information that are not covered by any mandatory or discretionary exemption in ATIPPA (2015). What is more, officials do not indicate that they have deleted two pieces of information, thus compounding the problem for individuals who may not be aware that the information they are receiving is incomplete compared to other versions that have been made public until very recently.

This is not an innocuous practice. Among the central premises of access to information is, in the words of the 2015 Act, "ensuring that citizens have the information required to participate meaningfully in the democratic process," and "increasing transparency in

[10] Elmer A. Driedger, "Subordinate legislation", Canadian Bar Review, v. 38, no. 1 (1960), pp 1-34.

government and public bodies so that elected officials, officers, and employees of public bodies remain accountable" to the public.

The 2010 Order cited above was part of a public controversy over the appointment of a political staff member in the Premier's Office under Danny Williams to an important position in a government agency. In the course of the public discussion, the staff member denied any knowledge of the appointment.

The Order-in-Council, disclosed in response to an access to information request, disproved the claim of ignorance. Subsequent disclosure showed that the staff member was aware of the plan to appoint her to the position of vice-chair of the Canada-Newfoundland and Labrador Offshore Petroleum Board.

In a similar situation today, a person requesting a copy of the Order would never know who received it because the distribution is routinely deleted. What's worse, the requesting individual would never know they had been denied access to information since the deletion is not noted.

The censorship of Orders-in-Council is an example of how officials may adopt administrative practices that frustrate the intent of the access to information laws. There is no reason to believe there was any malice involved. It may be that officials stopped the practice that existed between 2012 and 2015, itself applied honestly to address the conundrum between the plain English meaning of the ATIPPA (2012) references to cabinet orders and the need under the rule of law for orders to be public. In its place, they adopted the policy of disclosing under ATIPPA (2015) only what was public on tis website.

Neither is satisfactory, however, when measured against ATIPPA (2015). The Act does not contain a provision that allows for the deletion of this type of administrative information. The numbers do not reveal anything material to a confidence. The distribution list contains a list of recipients of the Order. They are individuals affected by the order either by virtue of their position or by virtue of their being named in the Order. As such, they have no reasonable expectation of privacy, as established in s. 40(2) of ATIPPA (2015).[11]

[11] See, also, the decision in *The Queen v. Newfoundland and Labrador Teachers Association et al.*, 2018 NLCA 54: "The public has a legitimate and significant interest in the identities of the people who receive public money."

Remedy

This may seem to some like a minor issue but we see within its short history the extent to which public servants, regardless of intent, may produce a bad result while trying to administer an Act that may be imperfect in its language and in a political climate where the governing party may be inclined to secrecy or disinclined to it. The ability of the public to know what its government is doing ought not to be subject to such easy shifts as we have seen in less than decade. In Newfoundland and Labrador.

The 2014 ATIPPA review commission final reported noted that the language used in Bill 29 is identical to language used in similar access to information legislation across Canada including the federal access law. In Canada these days, governments like to conduct such a scan. The scan may then be used to justify a course of action as being identical to or somewhere in the middle of a range of actions taken by every other jurisdiction in Canada.

Such an approach assumes, however, that everything is the same everywhere. Such is not the case. Ontario may well have disclosed less information in its definition of an Order-in-Council, for example, than Newfoundland and Labrador did before 2015. The 2014 review did not conduct its review as an equal or even equitable comparison of legislation in such an administrative and historical context.

The result is that on the details of how the access law is applied in practice in Newfoundland and Labrador, we may find the result at variance with the intention. That is the case here. By the same token the current administrative practice means that the people of Newfoundland and Labrador have less access to government information than they did before 2015. This frustrates the intention of the 2015 Act to enable both transparency and democratic participation. Less access is not more.

The same situation would have obtained, incidentally, if the Court of Appeal had not overturned the decision of Justice Butler as it did in the so-called sunshine list case cited earlier. The decision in the General Division, in that case, had reversed the practice of disclosing the names and remuneration of public servants in Newfoundland and Labrador that dated back more than a century before her decision.

The remedy to the current situation with respect to Orders-in-Council would be in two parts, should the current Commissioner agree with the argument presented here. The first is to amend ATIPPA (2015) to delete the reference to an Order of cabinet in the definition of what constitutes a cabinet record. This would remove the conundrum discussed here.

The second would be to admonish the Executive Council to restore the pre-2012 practice of disclosing Orders-in-Council as shown in the 2010 example cited here.