Newfoundland Labrador

ATIPPA, 2015 Statutory Review:

Executive Council Submission

Overview

On July 27, 2020, the Minister of Justice and Public Safety announced that former Chief Justice David B. Orsborn will conduct a statutory review of the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015). On September 29, 2020, Justice Orsborn requested submissions from Provincial Government departments. This submission outlines the recommendations of the Office of the Executive Council related to the statutory review.

The Office of the Executive Council is responsible for the overall operations of Government of Newfoundland and Labrador, decision-making, planning, formulation of policy, and the general development of Government of Newfoundland and Labrador and all its resources. Please find below the joint submission of the following offices:

- Office of the Premier,
- Cabinet Secretariat,
- Communications and Public Engagement Branch (CPEB),
- Treasury Board Secretariat,
- Office of Indigenous Affairs and Reconciliation (IAR),
- Intergovernmental Affairs Secretariat,
- Labrador Affairs Secretariat, and,
- Office for the Status of Women.

Statistics

Fiscal Year Statistics – The below table shows fiscal year statistics of requests for information processed by each entity.

Entity	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	Total
Office of the Premier	46	120	56	54	96	37	**406**
Cabinet Secretariat and the Communications and Public Engagement Branch	27	46	49	36	32	39	**229**
Treasury Board Secretariat (formerly Human Resource Secretariat)	21	39	38	38	57	20	**213**
Intergovernmental Affairs Secretariat	2	7	n/a	n/a	n/a	3	**12**
Intergovernmental and Indigenous Affairs Secretariat	n/a	n/a	11	16	86	6	**119**
Office of Indigenous Affairs and Reconciliation (formerly Indigenous Affairs Secretariat)	n/a	n/a	n/a	n/a	n/a	6	**6**
Labrador Affairs Secretariat (formerly Labrador Affairs Secretariat and Labrador and Aboriginal Affairs Office)	9	14	5	8	9	4	**49**
Office for the Status of Women (formerly Women's Policy Office)	3	12	1	10	11	6	**43**

Recommendations

1. **Definitions (s. 2)**

    1. **The Definition of Business Day (s. 2(b))**

In the 2014 statutory review, the Review Committee provided a definition for "business day", but did not provide a definition for "holiday". Subsection 2(b) provides the following:

2. In this Act

(b) "business day" means a day that is not a Saturday, Sunday or a holiday;

To interpret the meaning of "holiday", current Government of Newfoundland and Labrador policy is to rely on paragraph 27(1)(l) of the **Interpretation Act**, which states:

(l) "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;

The **Interpretation Act** does not recognize all Provincial Government holidays (i.e., those days on which Provincial Government offices are generally closed for business). This has a negative effect on timelines and on the public servants with primary responsibility for processing access to information requests (often referred to as "ATIPP Coordinators"). Recognized holidays under ATIPPA, 2015 can be found on the ATIPP office website: https://www.gov.nl.ca/atipp/files/info-pdf-handout3-timelines-businessdays.pdf

Suggestion:
Expand the definition of business day **or** include a definition of holiday that clearly supports all Provincial Government holidays and remove the reliance on the **Interpretation Act**.

2. Auditor General Working Papers

Section 22 of the **Auditor General Act** protects audit working papers of the Auditor General (AG) from being laid before the House of Assembly or one of its committees. However, this section does not protect the AG's working papers from an access to information request received by a department. When finalizing a report, the AG will send draft reports, supporting information, and related correspondence to departments for validation purposes. This process is necessary to ensure the accuracy of the AG's findings. There is currently a risk that such information, once received by departments/agencies from the AG, may be subject to an access to information request from that department/agency.

In the 2014 statutory review, the Office of the Information and Privacy Commissioner (OIPC) offered the following in relation to disclosure of House of Assembly service and statutory office records:

> [Section 30.1 deals with the powers of the Speaker of the House of Assembly, or an officer of a statutory office, to refuse to disclose certain records as described in the section. The Commissioner notes that because of correspondence between an officer of a statutory office and heads of public bodies, there are occasions when heads of public bodies may receive information that section 30.1 requires not be disclosed. He suggests this concern be addressed by adding "or the head of a public body" to the list of parties who are required to refuse to disclose.]

The Review Committee agreed with the OIPC and stated:

> [87. The Committee agrees with the Commissioner that where the head of a public body is in possession of records of a statutory office, section 30.1 of the Act should apply and recommends that section 30.1 be so amended.]

Suggestion:

It is proposed that a provision be added to ATIPPA, 2015 to exclude all AG working papers from disclosure under the legislation. This could be done by:

- Amending section 41 of ATIPPA, 2015; or
- Modifying subsection 5(1) of ATIPPA, 2015 to include a provision that states the right of access does not apply to records provided to the Auditor General and their office specific to an examination or inquiry by the Auditor General and their office; or
- Modifying Schedule A to include Section 22 of the **Auditor General Act**.

2. Purpose (s.3)

Subsection 3(3) of ATIPPA, 2015 states:

> **3(3) This 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.**

Clarification of what "other procedures" this section applies to is required. The **Access to Information: Policy and Procedures Manual** at **Section 1.2.1**, page 16, deals with requests submitted that ask questions. It states:

> [In circumstances where an individual has made a formal ATIPP request where they are asking a question rather than asking for records, the ATIPP Coordinator, as part of their duty to assist, should contact the applicant and advise them that their question can be handled informally without the need for an ATIPP request."]

There does not seem to be an interpretation on the use of the ATIPP process for other purposes (e.g., for discovery purposes by law firms, either in ongoing litigation or potential litigation). Indigenous Affairs and Reconciliation (IAR) provided an example whereby the current ATIPP process could interfere with the legal processes of court. In one particular ATIPP request, IAR was asked for documents of Indigenous Governments and Organizations (IGOs) that were in the custody of IAR. Access was refused in accordance with section 39 of ATIPPA, 2015. The Applicant (legal counsel for another IGO) complained to the OIPC. This resulted in report **A-2020-020**, which ordered IAR to provide said documentation to the

Applicant. In this case, the Applicant is currently representing an IGO in litigation with the federal government, the outcome of which could directly impact another IGO (the Third Party) and its land claim, and it is likely the noted documents are being sought by the Applicant in relation to that litigation. In this case, if during the discovery process, the court deems the documents as confidential or exempt from disclosure to the Applicant, the outcome of the process under ATIPPA, 2015 could have undermined the courts should IAR have provided same. The OIPC decision is under appeal to the Supreme Court.

Suggestion:
Amend section 3 (or potentially section 5) to provide that the ATIPP process does not apply to situations where another process (e.g., ongoing litigation or Crown Lands information requests) is established or has been engaged. Alternatively, amend section 21 to permit the public body to disregard such requests.

3. **Application (s.5)**

Subsection 5(1) provides that ATIPPA, 2015 applies to "all records in the custody of or under the control of a public body", with the exception of certain listed records. This provision provides that a number of Royal Newfoundland Constabulary (RNC) records fall outside the scope of the Act. However, records of the Royal Canadian Mounted Police (RCMP) that are in the custody of the Government of Newfoundland and Labrador are not included, meaning that similar records from the RCMP are not exempt.

Suggestion:
Add the RCMP to the three paragraphs in section 5 referring to the RNC (ongoing investigations, confidential sources, etc.). This would then exempt the similar RCMP records from the Act as well.

4. **Transferring a Request (s.14)**

Subsection 14(1) of ATIPPA, 2015 states:

> **14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it, where it appears that**
>
> **(a) the record was produced by or for the other public body; or**

(b) the record or personal information is in the custody of or under the control of the other public body.

A review of other jurisdictions within Canada reflects varying timelines. In British Columbia, Section 11 of the **Freedom of Information and Protection of Privacy Act** provides a public body 20 days to transfer a request to another public body. In Alberta, section 15 of the **Freedom of Information and Protection of Privacy Act** provides a public body 15 days after a request is received to transfer it to another public body. Prior to ATIPPA, 2015, Newfoundland and Labrador's **Access to Information and Protection of Privacy Act** provided a public body a mandatory time frame of seven days to transfer a request. The receiving public body would then restart the 30 day time period to respond to the request.

Suggestion:

Modify wording to require transferring without delay, but no later than day 15. Similar to discussions related to section 21, five days is not always enough time to determine if a transfer is required.

5. **Duty to Assist Applicant (s.13) and Time Limit for Final Response (s.16)**

Section 13 of ATIPPA, 2015 provides a public body shall make every reasonable effort to assist an applicant in making a request and respond without delay. Section 16 of ATIPPA, 2015 provides the legislative time frame for a public body to respond to a request. A public body has no more than 20 business days after receiving a request, unless the time limit is extended, to respond to a request. However, ATIPPA, 2015 does not give consideration to issues a public body may encounter with a request, such as the amount of information requested or a lack of clarity as to what an applicant may be seeking. There is no obligation for an applicant to work with an ATIPP Coordinator to complete a request. This has been a concern and issue for ATIPP Coordinators since ATIPPA, 2015 was introduced. The only avenue available to ATIPP Coordinators to deal with large or incomprehensible requests is to request a disregard from the OIPC or a lengthy extension. This could be avoided if the ATIPP Coordinator could get clarification from the applicant. An applicant who is uncooperative or is not prompt in replying may cause delays to timelines that are outside the control of the ATIPP Coordinator.

Suggestion:

Consideration should be given to modify these sections. Potentially, amend section 16 to indicate the 20 day processing time should not start until an applicant has clarified the request, where such clarification is sought. Alternatively, amend the section to include a

provision similar to subsections 8(1) and 8(2) of Alberta's **Freedom of Information and Protection of Privacy Act**, which states:

> **8 (1) 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 after being contacted, the head of the public body may, by notice in writing to the applicant, declare the request abandoned.**
>
> **(2) A notice under subsection (1) must state that the applicant may ask for a review under Part 5.**

6. Third Party Notification (s.19) and Disclosure Harmful to Business Interests of a Third Party (s.39)

During the 2014 statutory review, the Review Committee considered the requirement to notify a third party regarding the release of their information and concluded that it is appropriate for a public body to notify a third party when it has formed the intention to release the information, and to provide formal notice to that third party when the actual decision to release is made.

The OIPC has stated in numerous reports, based on its interpretation of s.19, that a public body should decide if there is harm to releasing a third party's information and should only provide notification to the third party if there is potential harm. In Report A-2019-029, paragraph 36 stated:

> [[36] This Office discussed the notification procedure under section 19 in depth in Report A-2016-007 and in subsequent reports, such as A-2017-014, and highlighted this again more recently in Reports A-2019-026 and A-2019-027. Report A-2017-007 stated as follows:

> [22] A recently updated version of this guidance document further emphasizes the importance of this latter point and adds the following sentence: If a Public Body is satisfied that section 39 is not applicable (i.e. one or more parts of the three part test cannot be met) it must release the information and notification to or consultation with the Third Party is not necessary.
> [Emphasis in Original]
>
> [23] It has been made abundantly clear by this Office to this Public Body in guidance documents as well in a previous Report, that where a public body determines that section 39 clearly does not apply, it is not required by the Act to notify any third parties. To do so is a needless and unwarranted frustration of timely access to applicants who have their access to information delayed while the notices to and responses of the third parties are dealt with.]

The OIPC notes that where a public body determines that section 39 does not apply, there is no need to notify the third party. The OIPC also recommended that notification should only occur where the ATIPP Coordinator is genuinely uncertain whether section 39 applies.

Section 39 of ATIPPA, 2015 protects information which, if disclosed, would harm a third party's business interests. There is a three-part test applied – information must meet all three parts of the test for section 39 to apply. In practice, ATIPP Coordinators must often make the determination of whether or not disclosure of information related to a third party business could reasonably be expected to harm the financial position of the third party. For example, a request for information is received in relation to a meeting between a public body and a third party company. The ATIPP Coordinator is often not in an ideal position to identify whether disclosure of some of the information supplied by the third party in confidence could reasonably be expected to result in one of the harms or other consequences set out in paragraph 39(c) of ATIPPA, 2015.

Information that may seem insignificant to an ATIPP Coordinator might cause significant financial harm to an organization, if released. It is hard to know what certain businesses or organizations would not want to be released and, in practice, the determination generally falls upon the ATIPP Coordinator to evaluate. This can put the third party business at risk and also opens up potential liabilities to the Provincial Government. We anticipate that other departments may be advancing suggestions regarding section 39 to provide clarity to the application of that section.

ATIPP Coordinators are not subject matter experts in all the third party business dealings for which they have to process access to information requests. In addition, the mosaic effect of

each of various third party business details being released has the collective potential to cause significant financial harm to third parties. Accordingly, some requests may need further consideration and/or legal advice.

With the OIPC determining that section 19 notices must be limited, this puts the ATIPP Coordinator in a position of often having to decide whether advise the head of the public body to release information without third party input, possibly causing tension between the public body and the third party and increasing the risk that information could be released that would cause the harm that section 39 is intended to prevent.

In **Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance), 2019 NLSC 222**, the Supreme Court, at paragraphs 42 to 44, referenced the significant responsibility placed upon the head of a public body to determine who should be informed of the intention to grant access. There is a low threshold for notification under section 19, and a high threshold for disclosure without notice. When there is any doubt on whether there is reason to believe section 39 applies, public bodies should err on the side of caution and give notice.

Suggestion:
Amend section 19 to clearly express the low threshold for third party notification. Consider the recommendations of other departments related to section 39.

7. Disregarding a Request (s.21)

In accordance with ATIPPA, 2015, a public body has to submit a request to disregard to the OIPC within five business days. This deadline can be impractical depending on the scope of the request and ability to communicate with the applicant; it is often difficult to know by day five whether a request should be disregarded. Upon receipt of a request, the ATIPP Coordinator is tasked with attempting to clarify and/or narrow the request with the applicant. Delays can occur if there are communication issues. Additionally the ATIPP Coordinator is required to speak with subject matter experts at the public body, gain access to email accounts (via the Office of the Chief Information Officer, if required) and get access to a list of potential employees who may have records. Additionally, the request may require legal advice prior to moving forward with processing. All of these factors can contribute to significant time and administrative work by the ATIPP Coordinator. ATIPP Coordinators at times are unable to determine the volume of records responsive to a request by day five.

Suggestion:

The deadline for submitting a request to disregard to the OIPC should be extended to no later than day 15.

8. Extensions (s.23)

Some requests for access to information may take longer to process than others for a variety of reasons (e.g., the volume of records involved, the nature and complexity of the records, etc.). Where an extension of time is required to respond to an access request, the legislation requires public bodies to submit an extension request to the OIPC no later than 15 business days after receiving the access request. Section 23 provides that only the OIPC can approve an extension. The process of preparing and submitting requests for extension adds to the administrative work of ATIPP Coordinators. In cases where an extension is approved, it can appear as though the length of the extension is arbitrary. The OIPC does not provide justification or reasoning when responding to a request for extension. In some cases, a request for an extension may be denied or partially approved (e.g., a request for an extension of 20 days is approved as an extension for 10 days). This often does not provide any learning opportunity to understand why the request was not accepted as submitted or whether providing any additional information would have produced a different result. ATIPP Coordinators are in the best position to make a determination if additional time is required, and if so how much. To be clear, the below suggestion does not aim to delay access. Public bodies should have the autonomy to apply their own modest time extensions, within appropriate limits. As actual holders of the records, the public body can make a realistic judgment as to how long it would reasonably take to find information and process a given access request. Prior to ATIPPA, 2015, the head of a public body could extend the timeline without OIPC approval, under limited circumstances.

Suggestion:

Reverting back to a similar process prior to ATIPPA, 2015, in relation to extensions is suggested. A public body should be able to extend the time up to an additional 20 business days on their own without engaging the OIPC.

However, if the requirement for public bodies to apply to the OIPC for extensions is retained, the time in which to do so should be up to and including day 20, rather than day 15. As always, consideration should be given to balance the applicant's rights to a timely response, the logistics of actually processing ATIPP requests, and oversight by the OIPC.

9. Non-responsive information

ATIPPA, 2015 does not explicitly state that information non-responsive to a request can be removed from a record when access is granted. For example, a meeting note may cover five unrelated topics and only one is responsive to a request for access to information. The practice of identifying information as non-responsive and not releasing such information was not an issue until recent years, when the OIPC released guidance for best practices related to "non-responsive" information when processing an access to information request. (The guidance can be found here: https://www.oipc.nl.ca/pdfs/RedactingNon-ResponsiveInformationinaResponsiveDocument.pdf). This guidance material was released without consultation with ATIPP Coordinators, providing no opportunity for input on the proposed treatment of non-responsive information or the impact such guidance would have on the processing of requests or the workloads of ATIPP Coordinators. Of note, the OIPC previously approved the exclusion of non-responsive materials and issued reports to support that position.

OIPC Report 2006-005, paragraph 43, states:

> [After reviewing the responsive records and carefully considering the submissions of the Applicant, the Department and Third Party 3, I have concluded that it is appropriate to release the material within the records which the Third Party had sought to protect under section 27. I have also determined that the majority of the information which Third Party 3 had sought to withhold on the basis that it was not responsive to the Applicant's request should be withheld by the Department on that basis.]

In some cases, responding to a request within the legislative timeframes can be very challenging for an ATIPP Coordinator. To be required to process information that is not responsive to a request adds additional, unnecessary work to a request (e.g., considering exceptions to use, consulting with various people/public bodies, etc.).

Suggestion:
Amend ATIPPA, 2015 to include a section that provides for the exclusion of non-responsive information.

10. Fees

Prior to 2015, the legislation included a provision to authorize public bodies to require an applicant to pay a fee to make a request under the Act and for public bodies to waive those

fees in appropriate circumstances. While a modest fee (e.g., $5.00) for a general access to information request would only provide for limited cost recovery, it may serve as a deterrent for business or organizations that submit multiple ATIPP requests to multiple departments seeking the same information or those that may regularly file frivolous or vexatious requests. A number of other jurisdictions in Canada charge a modest application fee of between $5.00 and $25.00. Some of those that do charge an application fee for general requests do not charge a fee for requests related to a person's own personal information.

Suggestion:
Consider amending ATIPPA, 2015 to reinstate authority for a public body to charge a fee for applications under the legislation, except those related to a person's own personal information, and authority to waive fees in appropriate circumstances.

11. Information from a Workplace Investigation (s.33)

ATIPPA, 2015 provides applicants the ability to request, and potentially receive, records related to a workplace investigation. Subsection 33(3) states:

> **33 (3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).**

A jurisdictional scan (please see the Annex) shows other jurisdictions require applicants go through other avenues (e.g., legal, grievance, etc.) in order to access records from a workplace investigation. This has proved to be an extremely problematic section when an access request is received while an investigation is ongoing. Information is often required to be provided out of context and the documents provided may be draft working documents. This often does not allow the employer, the Government of Newfoundland and Labrador, an opportunity to conduct due diligence.

A workplace investigation is an arduous undertaking involving a multitude of resources and tasks (e.g., investigators; time; interviews; transcribing; follow-up; reports; and recommendations). An ATIPP request regarding a workplace investigation while that investigation is ongoing defeats the purpose of the investigation, and may in fact hinder that ongoing process. Disclosure of such information in some cases may hinder the ability for the employer to obtain remedies through judicial or grievance processes.

Draft documents may include incomplete information or conclusions as it relates to witnesses/respondents or the incident as they working documents. The material would be out of context, potentially causing undue harm to all involved in an investigation. The applicant may draw incorrect conclusions from the incomplete draft(s) as the applicant would not have a final report when records are provided before an investigation is complete. Additionally, lawyers are also often using the ATIPP process to request information on behalf of their clients, or recommending their clients do same.

Suggestion:

Remove subsection 33(3) from legislation. Alternatively, modify the section to indicate draft documents related to an investigation are protected from disclosure. Requests pertaining to a Harassment-Free Workplace Investigation should not be permitted as the current Harassment-Free Workplace Policy (effective June 2018) has a prescriptive process, allowing for transparency and release of information throughout the process to the parties involved. Section 33 should make the distinction between harassment-free workplace investigations and other workplace investigations.

12. Disclosure harmful to Individual or Public Safety (s. 37)

There is interplay between section 33 and section 37 of ATIPPA, 2015, which was not addressed in the Act. For the most part, witnesses will come forward on their own to participate in a workplace investigation. If a work environment is tense/stressful and already causing issues due to an incident, section 33 does not protect witnesses from backlash or future incidents. Witnesses who come forward have to work with those responsible for the incident. This may cause unnecessary stress and anxiety in the workplace for the witnesses, especially knowing their identity may be revealed in an ATIPP Request. The OIPC has noted in paragraphs 13-14 of **Report A-2020-24** the interplay between sections 33 and 37 should be considered as part of this review:

> [[13] HRS's argument that section 37 can be applied to records required to be disclosed in accordance with section 33 is incorrect. However, even if it could be applied, HRS has not provided sufficient evidence to prove that the test for section 37 has been met. The evidence provided would support the notion that some of the witnesses may be experiencing stress as a result of the circumstances, but beyond that it amounts to little more than supposition and allegations.

[14] As noted above, sufficient evidence is lacking to support the application of section 37, notwithstanding the fact that section 33 takes precedence over other exceptions in ATIPPA, 2015 and the information is required to be disclosed in any case. It is conceivable, however, that a circumstance could arise in the future where there is clear and convincing evidence that section 37 applies to certain records, yet section 33 may apply to require disclosure. 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.]

Suggestion:
Subject to the preceding suggestion regarding section 33 and should section 33 be retained in the legislation, review sections 33 and 37 to provide clear guidance regarding the interplay between these sections and situations in which it is appropriate for section 37 to override section 33.

13. Disclosure Harmful to Intergovernmental Relations or Negotiations (s. 34)

Currently ATIPPA, 2015 allows for redactions for only one IGO under section 34, which addresses disclosure that may be harmful to intergovernmental relations or negotiations. Subparagraph 34(1)(a)(v) states:

> **34. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to**
>
> **(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:**
>
> **(v) the Nunatsiavut Government;**

This creates an unfair advantage for maintaining relations with other IGOs, as the above section captures the Nunatsiavut Government but excludes other IGOs. On a number of occasions, Indigenous Affairs and Reconciliation (IAR) has received requests from IGOs to redact information from documents but has no means to do so under the Act. IAR works to develop and strengthen relationships with all IGOs within the province, including the Nunatsiavut Government, Innu Nation, Sheshatshiu Innu First Nation, Mushuau Innu First Nation, Miawpukek First Nation, Qalipu First Nation and the NunatuKavut Community Council.

It is important to maintain friendly, trustworthy and cooperative relationships with all IGOs. This includes the sharing of information that assists IAR in working with all IGOs in fulfilling its mandate. Releasing certain documents would create mistrust between the IGOs and the Provincial Government and would harm its relationship with the IGOs as they may feel they can no longer communicate with the Provincial Government in confidence and with candour.

Moreover, the relationship between the federal and provincial Crowns and Indigenous peoples with accepted, proven or asserted Indigenous land claims rights is one of Honour. Failing to have the ability to redact information shared in confidence would harm this Honour. Other jurisdictions have language that provides an exemption allowing refusal to disclose records where the disclosure could reasonably be expected to prejudice the conduct of relations between an Indigenous community and the government or reveal information received in confidence from an Indigenous community by a government or an institution (please see the Annex).

For example, Section 2 of Ontario's **Freedom of Information and Protection of Privacy Act**, defines an "Aboriginal Community" as:

> **(a) a band within the meaning of the Indian Act (Canada),**
>
> **(b) an Aboriginal organization or community that is negotiating or has negotiated with the Government of Canada or the Government of Ontario on matters relating to,**
>
> **(i) Aboriginal or treaty rights under section 35 of the Constitution Act, 1982, or**
>
> **(ii) a treaty, land claim or self-government agreement, and**
>
> **(c) any other Aboriginal organization or community prescribed by the regulations. 2017, c. 8, Sched. 13, s. 1.**

Section 15.1 of Ontario's **Freedom of Information and Protection of Privacy Act** provides the following:

> **Relations with Aboriginal communities**
>
> **15.1 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,**

(a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or

(b) reveal information received in confidence from an Aboriginal community by an institution. 2017, c. 8, Sched. 13, s. 1.

Suggestion:
As noted above, other jurisdictions have language that provides an exemption allowing refusal to disclose a record where the disclosure could reasonably be expected to prejudice the conduct of relations between an Indigenous community and the Government or an institution or reveal information received in confidence from an Indigenous community by the Government or an institution. A revised section should be created specific to IGOs similar to Ontario's legislation to reflect and acknowledge all Indigenous groups. Additionally, section 34 could then be amended to remove reference to Nunatsiavut Government.

14. Disclosure Harmful to Labour Relations Interests of a Public Body as an Employer (s. 38)

Subsection 38(1) of ATIPPA, 2015 states:

38. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or

(b) labour relations information the disclosure of which could reasonably be expected to

(i) harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer,

(ii) result in significant financial loss or gain to the public body as an employer, or

(iii) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including

information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.

This section provides for discretionary refusal to disclose a record rather than prohibiting such disclosure. Collective bargaining is a confidential process built on good faith between the employer, the Provincial Government, and the union(s). When both parties have accepted an agreement, it is publically available for review. How both parties arrived at the agreement, the content of declined offers, and other issues arising from negotiations should be confidential. Any release of such information would jeopardize the negotiation process and outcome(s). A jurisdictional scan reveals the Ontario **Freedom of Information and Privacy Protection Act** does not permit the release of labour relations information under subsection 65(6). It does permit exceptions under subsection 65(7) which is when information would be considered public. British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, and Prince Edward Island do not have this section in their respective Freedom of Information legislation.

Suggestion:
Amend section 38 to make refusal to disclose mandatory rather than discretionary. As a consequence, also amend section 9 of the Act to remove the reference to section 38.

15. Order of Newfoundland and Labrador Act (s.13(3))

Subsection 117(2) of ATIPPA, 2015 reads:

The committee shall review the list of provisions in Schedule A to determine the necessity for their continued inclusion in Schedule A.

Subsection 13(3) is currently included in Schedule A. The rationale for including this section in Schedule A has not changed.

Suggestion:
Continue to include subsection 13(3) of the Order of Newfoundland and Labrador Act in Schedule A of ATIPPA, 2015.

ANNEX

Workplace Investigations

#	Jurisdiction	Section
1.	Alberta	N/A
2.	British Columbia	**How personal information is to be collected** **27** (4) A public body must notify an employee, other than a service provider, that it will be collecting personal information under subsection (1) (f) unless it is reasonable to expect that the notification would compromise (a)the availability or the accuracy of the information, or (b) an investigation or a proceeding related to the employment of the employee.
3.	Manitoba	**Confidential evaluations about the applicant** 30(1) The head of a public body may refuse to disclose to an applicant personal information that has been provided in confidence, explicitly or implicitly, for purposes of determining the applicant's suitability, eligibility or qualifications for employment, or for the purpose of awarding a contract. **Exception** 30(2) Subsection (1) does not apply to information that the public body is required to provide to the applicant under **The Personal Investigations Act.**
4.	New Brunswick	**Confidential evaluations 32** The head of a public body may refuse to disclose to an applicant personal information that has been provided in confidence, explicitly or implicitly, for purposes of determining the applicant's suitability, eligibility or qualifications for: (a) employment or for the purpose of awarding a contract, (b) an honour or award, including an honorary degree, scholarship, prize or bursary.
5.	Northwest Territories	N/A
6.	Nova Scotia	N/A
7.	Nunavut	Employee relations 25.1.

		The head of a public body may refuse to disclose to an applicant (a) information relating to an ongoing workplace investigation; (b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party; and (c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.
8.	Ontario	N/A
9.	Prince Edward Island	N/A
10.	Quebec	N/A
11.	Saskatchewan	N/A
12.	Yukon	Harassment 19.1(1) In this section "workplace harassment record" means a record created in the course of, or in contemplation of, an investigation about whether there has been, or what to do about, a violation of (a) a workplace harassment policy approved by the Executive Council or the Commissioner in Executive Council to govern the conduct of a public body's employees in the course of their employment for a public body; or (b) a provision of a collective agreement under which the Government of Yukon is the employer defining, and providing a process for dealing with, workplace harassment of a public body's employees by a public body's employees. (2) A public body may refuse to disclose a workplace harassment record and any information in it or about it if the disclosure of the record or any information in it or about it could reasonably be expected to (a) deter an employee from making a complaint under a policy or provision referred to in subsection (1) or impede resolution of the complaint; (b) be harmful to relations between employees in the workplace of a public body; (c) be harmful to the implementation of a policy or provision referred to in subsection (1); (d) interfere with the investigation of a complaint under a policy or provision referred to in subsection (1); (e) reveal information relating to proceedings taken or to be taken for resolution or adjudication of a complaint under a policy or provision referred to in subsection (1) or impede resolution of the complaint; (f) reveal a record that has been supplied in confidence in the investigation of a complaint under a policy or provision referred to in subsection (1); (g) unfairly damage the reputation of a person referred to in the record; or

		(h) prejudice the legal rights of a person involved in the conduct of existing or reasonably expected proceedings in court or before an adjudicative body arising out of the investigation of a complaint under a policy or provision referred to in subsection (1) (3) In subsection (1) 'employee' means a person employed in a public body under the **Public Service Act** or the **Education Act.**

Disclosure harmful to individual or public safety

#	Jurisdiction	Section
1.	Alberta	**Disclosure harmful to individual or public safety 18(1)** The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health, or (b) interfere with public safety. (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a physician, a regulated member of the College of Alberta Psychologists or a psychiatrist or any other appropriate expert depending on the circumstances of the case, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety. (3) The head of a public body may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to the public body in confidence about a threat to an individual's safety or mental or physical health.
2.	British Columbia	**Disclosure harmful to individual or public safety** **19** (1)The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a)threaten anyone else's safety or mental or physical health, or (b)interfere with public safety. (2)The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.
3.	Manitoba	**Disclosure harmful to individual or public safety** 24 The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to (a) threaten or harm the mental or physical health or the safety of another person; (b) result, in the opinion of a duly qualified physician, psychologist, or other appropriate expert, in serious harm to the applicant's mental or physical health or safety; or (c) threaten public safety.

4.	New Brunswick	**Disclosure harmful to an individual or to public safety or in the public 28(1)** The head of a public body may refuse to disclose to an applicant information, including personal information about that person, if disclosure could reasonably be expected to (a) threaten or harm the mental or physical health or the safety of another person, a (b) result, in the opinion of a duly qualified physician, psychologist or other appropriate expert, in serious harm to the applicant's mental or physical health or safety, or (c) threaten public safety. C 28(2) Repealed: 2017, c.31, s.27 2828(3) Repealed: 2017, c.31, s. 27 28(4) Repealed: 2017, c.31, s.27
5.	Northwest Territories	**Disclosure harmful to another individual's safety 21. (1)** The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual other than the applicant. **Disclosure harmful to applicant's safety (2)** The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a medical or other expert, the disclosure could reasonably be expected to result in immediate and grave danger to the applicant's mental or physical health or safety.
6.	Nova Scotia	**Health and safety** 18 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health; or (b) interfere with public safety. (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health. 1993, c. 5, s. 18.
7.	Nunavut	**Disclosure harmful to another individual's safety** 21. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual other than the applicant.

		Disclosure harmful to applicant's safety (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a medical or other expert, the disclosure could reasonably be expected to result in immediate and grave danger to the applicant's mental or physical health or safety.
8.	Ontario	**Danger to safety or health** **20** A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. R.S.O. 1990, c. F.31, s. 20; 2002, c. 18, Sched. K, s. 8.
9.	Prince Edward Island	**16. Disclosure harmful to individual or public safety** (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health; or (b) interfere with public safety. **Disclosure harmful to applicant's health or safety** (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a physician, psychologist, psychiatrist or any other appropriate expert depending on the circumstances of the case, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety. **Confidential informant** (3) The head of a public body may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to the public body in confidence about a threat to an individual's safety or mental or physical health. 2001,c.37,s.16.
10.	Quebec	N/A
11.	Saskatchewan	**Danger to health or safety** 21 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual. 1990-91, c.F-22.01, s.21.
12.	Yukon	**Disclosure harmful to individual or public safety 22(1)** A public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a) threaten anyone else's health or

			safety, or (b) interfere with public safety. (2) A public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of an expert, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health. S.Y. 2002, c.1, s.22

Intergovernmental Relations

#	Jurisdiction	Section
1.	Alberta	**Disclosure harmful to intergovernmental relations** 21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to (a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies: (i) the Government of Canada or a province or territory of Canada, (ii) a local government body, (iii) an aboriginal organization that exercises government functions, including (A) the council of a band as defined in the Indian Act (Canada), and (B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada, (iv) the government of a foreign state, or (v) an international organization of states, Or (b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.
2.	British Columbia	**Disclosure harmful to intergovernmental relations or negotiations** **16** (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies: ... (iii) an aboriginal government ... (c) harm the conduct of negotiations relating to aboriginal self government or treaties. (2) Moreover, the head of a public body must not disclose information referred to in subsection (1) without the consent of (a) the Attorney General, for law enforcement information, or (b) the Executive Council, for any other type of information.

		Disclosure harmful to personal privacy **22** (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether ... (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people
3.	Manitoba	**Information provided by another government** 20(1) The head of a department or government agency shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by any of the following or their agencies: (a) the Government of Canada; (b) the government of another province or territory of Canada; (c) a local public body; (c.1) the council of a band as defined in the **Indian Act** (Canada), or an organization performing government functions on behalf of one or more bands; (d) the government of a foreign country, or of a state, province or territory of a foreign country; (e) an organization representing one or more governments; or (f) an international organization of states. **Information provided by another government to a local public body** 20(2)The head of a local public body shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by (a) a government, local public body, organization or agency described in subsection (1); or (b) the Government of Manitoba or a government agency. **Exceptions** 20(3) Subsections (1) and (2) do not apply if the government, local public body, organization or agency that provided the information

		(a) consents to the disclosure; or (b) makes the information public.
4.	Nova Scotia	Intergovernmental affairs 12 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to (a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies: (i) the Government of Canada or a province of Canada, (ii) a municipal unit or the Conseil scolaire acadien provincial, (iii) an aboriginal government, (iv) the government of a foreign state, or (v) an international organization of states; (b) reveal information received in confidence from a government, body or organization listed in clause (a) or their agencies unless the government, body, organization or its agency consents to the disclosure or makes the information public. (2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of the Governor in Council. (3) Subsections (1) and (2) do not apply to information in a record that has been in existence for fifteen or more years. 1993, c. 5, s. 12; 1999 (2nd Sess.), c. 11, s. 8; 2018, c. 1, Sch. A, s. 114.

6.	Ontario	**Relations with Aboriginal communities** **15.1** (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to, (a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or (b) reveal information received in confidence from an Aboriginal community by an institution. 2017, c. 8, Sched. 13, s. 1. **Definition** (2) In this section, "Aboriginal community" means, (a) a band within the meaning of the **Indian Act** (Canada), (b) an Aboriginal organization or community that is negotiating or has negotiated with the Government of Canada or the Government of Ontario on matters relating to, (i) Aboriginal or treaty rights under section 35 of the **Constitution Act, 1982**, or (ii) a treaty, land claim or self-government agreement, and (c) any other Aboriginal organization or community prescribed by the regulations. 2017, c. 8, Sched. 13, s. 1.