Digital Government and Service Newfoundland & Labrador

Access to Information and Privacy Protection Act, 2015 (the Act) Review 2020

In 2009, during the start of the review of the Federal **Access to Information Act**, former Information Commissioner of Canada, Robert Marleau stated that Canadians expect a common set of access rights across jurisdictions.

Administrative Concerns

1. Fees

The **Act** allows a public body to charge an applicant a modest cost for reproduction, shipping and locating a record (only after the first 15 hours of locating) for general access request only. Digital Government and Service NL (DGSNL) does not make it a practice to charge applicants, as most requests are sent electronically and few requests require more than 15 hours of locating.

Access to information requests are submitted to request access to an individual's own records or are requests for general information. Requests come from media, outside public bodies, legal firms, business, interest groups, political parties, academics/ researchers and individuals. It is recommended the **Act** be amended to introduce a nominal $5.00-$25.00 fee for an access to information request, exemptions to the fee could be provided to individuals where deemed it would interfere with an individual's ability to access to information. This would apply to general access requests only and not requests for personal information. This small fee may reduce frivolous requests to the department and help offset the cost of Access to Information and Privacy Protection (ATIPP).

Jurisdiction	Fees
Federal	$5
ON	$5
MB	After 2 hours of processing
NS	$5
AB	$25
NB	$5
NWT	$25
PEI	$5
NU	$25

2. Advisory Response

Section 15(1) of the **Act** requires an Advisory Response (see attached) to be sent to the applicant within 10 business days. These letters are not automatically generated by a system, rather the form letter requires the addition of personal information, including name, address, the file number and the wording of the request. The Advisory Response

letter is then attached to an email or sent by mail. This adds no value to the applicant, it is additional administrative work for coordinators and it takes time away from processing the request.

It is recommended the **Act** be amended to remove the requirement to send an Advisory Letter.

3. Acknowledgment Letter

When a new request is submitted through the ATIPP portal, the coordinator clicks the "Confirm Receipt" button, completes an Acknowledgment Letter containing personal information and details of the request and sends the letter by email to the applicant. The letter references specific sections of the **Act**, provides a link to the Access to Information Policy and Procedures Manual, and contact information for ATIPP coordinator.

While not a legislative change, it is recommended this process be automated, so when a coordinator clicks the "Confirm Receipt" button, an email response is generated requiring the coordinator to simply hit send on the email. This would reduce administrative work for the coordinator and reduce the potential for a privacy breach.

If a request is received by mail or telephone, the current protocol would apply, and an Acknowledgement Letter would be mailed or read to the applicant.

Time Limit and Extensions

4. Self-approve Time Limit Extension

The **Act** establishes a 20 business day time limit to respond to an access request and most requests are completed within this time limit. However, there are a limited number of requests where these time limits are not sufficient. Time limits may be impacted for a number of reasons including:

- numerous staff including former staff are required to search for records;
- records are in storage and difficult to retrieve;
- consultations are required with internal and external public bodies (some of which have longer time limits to respond);
- notice to a third party is required;
- there are a large number of responsive records; and
- subject matter experts may not be readily available to assist the coordinator (due to vacations or sick leave for example).

In addition, the records themselves may be more difficult to read and understand to ensure the necessary redactions are applied. For example, records related to an occupational health and safety accident investigation can be thousands of pages and include disturbing information. Ensuring that appropriate and consistent redactions are made throughout the file can be difficult and time consuming. Ensuring personal privacy

is protected while providing access to the information is particularly challenging with these files.

Furthermore, many coordinators would have multiple ATIPP requests opened at the same time and some coordinators have other responsibilities in addition to ATIPP.

Section 23 of the **Act** requires a coordinator to submit an application to the OIPC to request an extension within 15 business days. The OIPC application is four to five pages requiring details including the wording of the request, the records searched, the number of records, the work completed, the work left to be done and reasons additional time is required. The coordinator may not know within 15 days if an extension is required, it is time consuming and in some cases a coordinator may only need an extra day or two. The administrative work required to apply to the OIPC and update various systems takes time away from processing the request and adds no value.

The **Act** should be amended to provide 30 business days to complete a request and allow the public body to self-approve an additional 30 business day time limit extension, similar to other jurisdictions. Allowing public bodies the ability to self-approve an initial time extension would ease the pressure on coordinators as well as the OIPC, allow coordinators to better manage their workloads and remove unnecessary administrative work. If an additional time extension is needed, OIPC approval would be required.

Jurisdiction	Initial time limit for processing a request	Self-approving first time extension	Length of self-approving first time extension
Federal Government	30 days	Yes	30 days
ON	30 calendar days	Yes	90 days
BC	30 business days	Yes	30 days
AB	30 calendar days	Yes	30 days
NS	30 days	Yes	30 days
PEI	30 days	Yes	30 days
NB	30 business days	Yes	30 days
SK	30 days	Yes	30 days
MB	30 calendar days	Yes	30 days+
NWT	30 days	Yes	Reasonable period determined by territory
NU	30 days	No	
QC	20 days	No	
YK	30 days	No	
NL	20 business days	No	

5. Increase Disregard Time Limit

Section 21(1) of the **Act** requires an application for a disregard to be submitted to the OIPC within five days. The five day time limit is problematic where all records are not provided by day five making an argument for a disregard difficult for the coordinator. Often in the ATIPP process, the search for records can take several days as employees may have to search their P drives, HPRM (TRIM), physical office and emails, or request records from off-site storage, and once the records are retrieved they need to be reviewed by the coordinator. For simple, routine requests this is not an issue but for complex requests that can have hundreds of pages of responsive records that need to be reviewed, five days is not enough time. It is recommended the **Act** be amended to increase the time limit to request a disregard from five days to 15 days.

6. Time Stop for Disregard

Currently when a coordinator submits a request to the OIPC for a disregard, the time limit to respond does not change. This either results in the coordinator continuing to work on the request that may be disregarded or the coordinator loses days if the disregard is not approved. The **Act** should be amended to allow for the suspension of the time limit while waiting on a reply from the OIPC. This would remove the pressure for a coordinator to continue to work on a request that may be disregarded.

7. Time Stop to Clarify a Request

Section 13 of the **Act** requires the coordinator to make every reasonable effort to assist an applicant in making a request and obtaining records. An applicant may make a broad or vague request, not understanding the large volume of records captured because of the wording of the request. DGSNL has almost 400 employees and responsibility for numerous programs and over 175 pieces of legislation. When a request is submitted that is broad or vague, the coordinator would reach out to the applicant to help determine the actual records the applicant is requesting. Often identifying key phrases, a particular program, responsible staff positions and a date range helps to focus the search for records. This ensures the applicant receives the actual records they want in a timely manner.

While a coordinator is working with the applicant to clarify a request, the time limit to respond to the request does not change. It is recommended the **Act** be amended to allow for the suspension of the time limit where clarification is needed on the scope of the request. The suspension would start one day after coordinator notifies the applicant that further clarification in needed and end when the applicant replies. This would encourage applicants to assist coordinators with the request.

8. Time Stop for Consult

Responsive records may contain records that also belong to another public body, either internal or external and these public bodies may have different time limits to respond. Once a record is send to another public body for consult, the coordinator has no control

over when that public body provides a response. It is recommended the **Act** be amended to allow for the suspension of the time limit for the time period a record has been sent for consult until a response is provided.

Miscellaneous

9. Holidays

The **Act** does not identify the specific holidays to be considered when determining the definition of "business day" and instead the **Interpretation Act** is used to define acceptable holidays under the **Act**. This results in four to five government holidays that are not recognized under the **Act**: St. Patrick's Day, St. Georges Day, Discovery Day, Orangeman's Day and Boxing Day. The use of the **Interpretation Act** means a coordinator will either lose those processing days if they take the time off, or alternatively report to work on what is a paid government holiday. It is recommended the **Act** be amended to align ATIPP holidays with government approved holidays.

Exemption Concerns

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

DGSNL has responsibility for regulation of a number of financial industries, including securities, insurance, pensions, real estate, credit unions and prepaid funerals. Legislation is also responsible for oversight of consumer protection funds established under the Credit Union Act, Real Estate Act, 2019 and Prepaid Funeral Services Act.

Sections 74-77 of the **Insurance Companies Act**, Section 12 of the **Prepaid Funeral Services Act**, Sections 166 of the **Credit Union Act, 2009**, as an example provide supervisors the authority to request detailed information and to conduct reviews, examinations and audits (collectively known as examinations). Examinations, in part, provide supervisors the opportunity to investigate and address small issues and concerns before they potentially become larger risks. Providing a space that ensures a reasonable level of privacy encourages more disclosure, not less.

The goal of regulation is to develop and maintain fair, safe and stable markets for the benefit and protection of consumers and to contribute to financial stability through effective and consistent supervision of the industry. Regulators protect consumer interests by focusing on the financial soundness and market conduct supervisory systems designed to protect consumers from unfair or abusive business practices.

Section 39 of the **Act** requires that a record must meet all three parts of the test in order for the redaction exemption to apply. The interpretation and application of this section makes it difficult to ensure the privacy of records DGSNL receives and collects under its various legislations. There are seven jurisdictions, including the federal legislation for Canada, where business records only need to meet one part of the three part test in order to apply the redaction exemption, this includes Quebec which requires consent from the third party prior to releasing information. The Canadian Department of Justice

completed a review "Strengthening the **Access to Information Act**". Under Section 4.2 d. Section 20 – Third Party Information it states the importance of protecting third party confidentiality:

> "In many areas, the Government of Canada depends on the willingness of third parties to voluntarily provide it with confidential, commercial information. If paragraph 20(1)(b) were repealed, third parties might be less willing to deal with the Government, because they would fear that their sensitive commercial information may be released under the Act if they could not meet the injury tests set out in the other paragraphs. The uncertainty of the protection of such information could have a negative impact on the operations of the Government.
>
> In certain circumstances, a third party may be required to provide its information to the Government. For example, a company in the health sector that wishes to market a new drug that it has developed must have the drug approved by Health Canada. This necessitates the provision of confidential, commercial information about the new drug. Currently, this information would be protected by paragraph 20(1)(b). If the provision were repealed, it could be more difficult to protect this type of information. The company may not be able to demonstrate that the release of this information would cause a *material* financial loss, given that the drug has not even been approved yet or tested on the market. Similarly, the company might not be able to demonstrate that the release of the information could reasonably be expected to prejudice its competitive position."

There are eight jurisdictions that include a specific exemption for records related to testing, or auditing procedures or techniques - see section 24 from Prince Edward Island's **Freedom of Information and Protection of Privacy Act**:

> 24. Testing procedures, tests and audits

The head of a public body may refuse to disclose to an applicant information relating to (a) testing or auditing procedures or techniques; (b) details of specific tests to be given or audits to be conducted; or (c) standardized tests used by a public body, including intelligence tests, if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

When both measures are reviewed together, nine out of 14 jurisdictions provide greater protections for business interests than Newfoundland and Labrador.

Jurisdiction	Business Interest Test	Exemption for audits
AB	3 Parts (under s.16)	Yes (under s.26)
BC	3 Parts (under s.21)	No
MB	1 Part (under s.18)	Yes (under s.29)
NB	1 Part (under s.22)	Yes (under s.31)
NWT	1 Part (under s.24)	Yes (under s.18)
NS	3 Parts (under s.21)	No
NU	1 Part (under s.24)	Yes (under s.18)

ON	3 Part (under s.17)	No
PEI	3 Parts (under s.14)	Yes (under s.24)
QC	Not without consent (under s.23 & 24)	No
SK	1 Parts (under s.19)	Yes (under s.20)
YK	3 Parts (under s.24)	No
NL	3 Parts (under s.39)	No
Canada	1 Part (under s.20)	Yes (under s.22)

It is recommended that Section 39 of the **Act** be amended to no longer require a record to meet all three parts of the exemption test in order to apply a redaction exemption. The **Act** should also be amended to include an exemption for records captured under testing procedures, tests and audits as is done in other jurisdictions. In addition, it is difficult for a coordinator to determine if the release of information belonging to a third party would cause harm; ATIPP coordinators are not subject matter experts of the records belonging to a third party. Section 19 of the **Act** should be amended to require disclosure to a third party and provide them with 15 days to respond prior to the release of their information.

11. Pensions Benefits Act

Section 16 and 18 of the **Pension Benefits Act** requires the administrator of a pension plan to file specific documents with the superintendent of pensions. In subsection 25(7) it requires the administrator to provide access to persons eligible, the right to examine those documents and the right to request a copy of those documents directly from the administrator of the pension plan.

The intent of the legislation is that information filed with superintendent should be kept confidential by the superintendent and should not be disclosed except to persons referred to in section 25 and in accordance with section 25(7). As the superintendent does not have access to individual pension plan data, the legislation directs individuals to the record keeper (the plan administrator) who can validate an individual's eligibility before releasing information about the pension plan. The **Pensions Benefits Act** should be amended to protect the confidentially of this information and require information be released as set out in Section 25(7). Nova Scotia, under Section 15(3), amended their Pensions Benefits Act in 2019 to require the Superintendent to keep this information confidential and require plan administrators to release the information as set out in the Act.

Alternatively, Schedule A of the **Access to Information and Privacy Protection Act, 2015** could be amended to include an exemption respecting this information.

12. Occupational Health and Safety (OHS)

Under section 26 of the **Occupational Health and Safety Act (OHS Act)**, OHS Officers have the power to investigate reports of violations of the **OHS Act** and Regulations. The

powers of investigation include the right for officers to enter and inspect a workplace, require the production of records, conduct tests, take photos, make examinations, compel the attendance of witnesses and conduct investigations. OSH investigation files may include records from other law enforcement bodies. Investigations may result in issuance of orders and/or the filing of criminal charges.

Interviews are generally open-ended questions designed to elicit as much information as possible. The information gathered would reflect the recollection, opinion and perspective of the individual and may not reflect the facts. OHS staff gather all the information and compile executive reports based on all the information reviewed. Where there are charges filed, it includes a summary of the information to support the charge. Once a file is completed, the executive reports and the details of the charges would generally be able to be released in their entirety, with the exception of personal information.

Section 40 of the **Act**, requires all personal information to be redacted from interview transcripts. This includes any information that may identify the individual, and opinions provided in respect of another individual. Inaccurate or unreliable information and information that may unfairly damage the reputation of a person referred to in the record must be redacted. Given the redactions that must be applied to interviews and the information revealed through executive summaries and details provided to support any charges it is recommended the **Act** be amended to exclude personal interviews from access requests. Individuals being interviewed should be able to speak openly and honestly, and with the expectation of their privacy from access to information requests.

It is my understanding, that court records are public and the courts have their own process for releasing records. If courts records, such as agreed statement of facts, are captured under an ATIPP request, ATIPP coordinators are required to apply redactions as set out in the **Act**. Where court records are publicly available it is recommended the **Act** be amended under section 5(2) to confirm the **Act** does not apply to records available from the courts.

Where criminal charges are filed, records relating to the prosecution should fall outside the Act until all matters in respect of the prosecution have been completed. Section 5(1) of the Act should be amended to specifically identify and include OHS prosecutions.

ATIPP Coordinator Role

13. The ATIPP Coordinator

The 2014 review said coordinators should be viewed as the access and privacy experts. The ATIPP coordinator role requires knowledge of the **Act**, in depth knowledge of the department and its various functions and programs. The coordinator has access to all records within a department. The person requires strong working relationships with all staff and the ability to interact effectively at the executive level.

Amendments to the **Act** to reduce administrative burden and provide coordinators with more control to manage their workloads would help relieve some of the pressures on coordinators. Consideration should be given to splitting the duties of a coordinator between two or more roles, to provide flexibility and help alleviate the stress one individual. Benefits of this work model include: when the ATIPP work load increases, it is shared between coordinators; coordinators can cover each other for annual leave; and it provides seasoned coordinators the ability to mentor people new to the role. More favourable work environments for coordinators may help prevent burnout and encourage people to move into ATIPP roles. When staff are cross trained for multiple roles it increases flexibility for the department and the loss of a coordinator is more easily managed.

Review of access to information provisions in legislation as listed in Schedule A of the Act

Highway Traffic Act (ss. 173, 174, 174.1)

Sections 173 and 174 under the **Highway Traffic Act** protects information collected as a result of an automobile accident and provide specifics on what information may be released and to whom it may be released.

Section 174.1 protects information provided to the registrar from medical practitioners regarding a condition a patient may have that may make it dangerous for the person to operate a vehicle. This information is not open for public inspection.

Sections 173, 174 and 174.1 under the **Highway Traffic Act** are required and should be continued.

Securities Act (ss. 19 and 20)

Section 19 and 20 under the **Securities Act** protect information collected as a result of an investigation or examination authorized by the Superintendent of Securities and provides specifics on what information may be released and to whom it may be released.

Section 19 and 20 under the **Securities Act** are required and should be continued.

Digital Government and Service Newfoundland & Labrador

Advisory Letter

[Date]

[Address]

Dear [Applicant's name],

Re: Your request for access to information under Part II of the Access to Information and Protection of Privacy Act [Our File #]

On [date}, Digital Government and Service NL received your request for access to the following records/information:

[insert request]

Section 15 of the **Access to Information and Protection of Privacy Act** ("the **Act**") requires that we provide you with an advisory response regarding your request in writing no later than 10 business days after we receive your request. Please be advised that the information you have requested may be available and Digital Government and Service NL is processing your request.

If you have any further questions, please feel free to contact me by telephone at [phone number] or by e-mail at [coordinator email address]

Sincerely,

[name of coordinator]
ATIPP Coordinator
Digital Government and Service NL