December 30, 2020

Access to Information and Protection of Privacy Statutory Review 2020
3rd Floor, Beothuck Building
20 Crosbie Place St. John's
NL A1B 3Y8

Attn.: The Honourable David B. Orsborn

Re: written submissions made to the ATIPPA Statutory Review Committee 2020

Dear Mr. Orsborn,

First of all, I would like to thank you for granting leave to make these submissions beyond the deadline. Being an academic staff member of Memorial University of Newfoundland and Labrador ('**MUN**') – MUN made two sets of submissions on November 27 and December 18, 2020 – I have learned about the call for input on the *Access to Information and Protection of Privacy Act*, SNL 2015, Chapter A-1.2 ('**ATIPPA**') by chance only.

My interest in the access to information legislation started about 13 years ago and was initially driven by some issues related to my professional activities. I brought an ATIPP-related matter before the Court in 2010.[1] Although I did not succeed in the Court at that time, my judicial review application triggered the establishment of a statutory time limit for investigating complaints by the Office of the Information and Privacy Commissioner ('**OIPC**'). The ATIPPA Statutory Review Committee 2014 acknowledged the importance of the precedent set by my judicial review application and discussed its outcomes at length:[2]

> 'The OIPC appears to assume that it has the right to ignore the specific direction of the legislature that "the commissioner shall review the decision" if it has not been resolved within 60 days. The quoted paragraph indicates that the OIPC believes the decision of the court in *Oleynik v Information and Privacy Commissioner* somehow confirms the right of the OIPC to ignore the strict direction of the legislature. While this is not intended to be a legal opinion, it is appropriate for the Committee to make two comments: (i) the Committee can find nothing in that decision that would appear to confirm such a right in the OIPC, and (ii) that case arose because a requester had, after waiting more than 18 months, commenced court proceedings to compel the Commissioner to complete his review and file a report. It is necessary to look a little closer at the case to appreciate the full impact of the position being taken by the OIPC.'

That experience fuelled my further interest in the ATIPP legislation and the operation of the system of justice as a whole. I have subsequently been a party in several other ATIPP-related proceedings. Since they are ongoing, instead of discussing specific details, it is more appropriate to highlight

[1] The Honourable Justice Orsborn, as he then was, rendered an interlocutory order in that matter on October 6, 2010 (*Anton Oleynik vs. The Information and Privacy Commissioner of Newfoundland and Labrador*, docket 2010 01T 2230).
[2] *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Volume II, pp. 251-252 (available at https://www.parcnl.ca/documents/full_report.pdf).

some gaps and omissions in the ATIPPA that were identified with the help of those proceedings. The gaps and omissions could be bridged in the next version of the ATIPPA. In the alternative, their existence and consequences are brought to public attention.

I also published a number of Op-Ed commentaries and opinion pieces on the matters of access to information in the local, national and international media, including *The Telegram*.[3]

My submissions include two parts. In the first part, I will discuss gaps and omissions in the current version of the ATIPPA as I see them. In the second part, I will comment on the submissions made by MUN on November 27 and December 18, 2020. Members of the university community were not invited to contribute to those submissions, unfortunately. The pattern brought to the attention of the ATIPPA Statutory Review Committee 2014 by Dr. Thomas Baird of MUN's Department of Mathematics and Statistics persists in 2020. Dr. Baird wrote in 2014 that[4]

> '• Only administration officials were represented on the university committee that prepared the submissions.
> • There was "no representation from the faculty, students or any other group."
> • The document was not approved by the Board of Regents or the Senate, so the submission does not legitimately represent the views of the university community.'

Six years later, MUN's executive chose neither to inform the university community of the proposed changes that have a direct impact on the state of the University nor to solicit any input from stakeholders when preparing its written submissions to the ATIPPA Statutory Review Committee 2020 in this respect. For instance, MUN's submissions quote Article **2** of the *Collective Agreement* and interpret matters having direct bearing on Article **19** (information from a workplace investigation) without engaging Memorial University of Newfoundland Faculty Association ('**MUNFA**').

Gaps and omissions in the current version of the ATIPPA

Duty to document

The legislator views the ATIPPA and the *Management of Information Act*, SNL2005, Chapter M-1.01 as interconnected and mutually complementing statutes. The outcomes of the 2014 Statutory Review leave no doubt in this respect:[5]

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[3] 'The politics behind how governments control coronavirus data' // *The Conversation*, June 4, 2020, available at https://theconversation.com/the-politics-behind-how-governments-control-coronavirus-data-139263; 'Time for leniency? Access to information in extraordinary circumstances' // *The Telegram*, April 4, 2020, page B6, available at https://www.thetelegram.com/opinion/local-perspectives/letter-time-for-leniency-access-to-information-in-extraordinary-circumstances-433565/; 'Conflict Of Interest A Blind Spot For Some Provincial Governments' // *The Telegram* on January 10, 2018 on p. B6, available at http://www.thetelegram.com/opinion/letter-to-the-editor/letter-government-must-be-free-of-conflict-of-interest-184126/; 'The privacy commissioner's "top-down" approach and disappearing citizen participation' // *Rabble.Ca*, December 20, 2011, available at http://rabble.ca/news/2011/12/privacy-commissioners-top-down-approach-and-disappearing-citizen-participation.

[4] *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Volume II, p. 267.

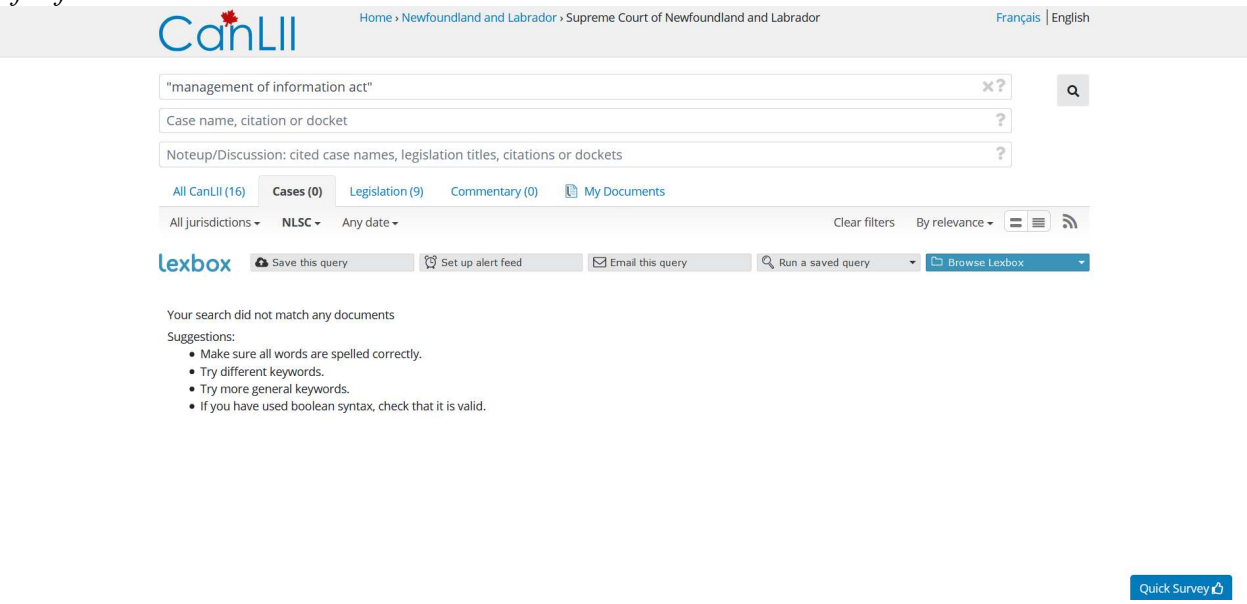
[5] *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Volume I, pp. 51-52 (available at https://www.parcnl.ca/documents/executive_summary.pdf).

> 'Strong information management policies and practices are the foundation for access to information. Without those policies and practices, there is no certainty that the information being requested exists, or that it is usable even if it does exist… The legislated duty to document should be expressed in the *Management of Information Act*'.

The *Management of Information Act* includes a clause that can be broadly interpreted as a duty to document indeed. Section **6(1)** stipulates that

> 'A permanent head of a public body shall develop, implement and maintain a record management system for the creation, classification, retention, storage, maintenance, retrieval, preservation, protection, disposal and transfer of government records'.

However, the duty to document remains moot, unfortunately. The Supreme Court of Newfoundland and Labrador, or any other Court in this Province, does not cite the *Management of Information Act*:[6]



A plausible reason can be found in the fact that the legislator has not created yet a mechanism for enforcing the duty to document. In the Province of Ontario, for instance, the duty to document is mentioned in Section **10.1** of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31

> 'Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution',

which brings the matter in the purview of the Information and Privacy Commissioner of Ontario.

The submissions made to the ATIPPA Statutory Review Committee 2020 by the OIPC suggest another solution. The OIPC recommends amendments to the *Management of Information Act*

[6] The search in the CanLII database was carried out on December 23, 2020.

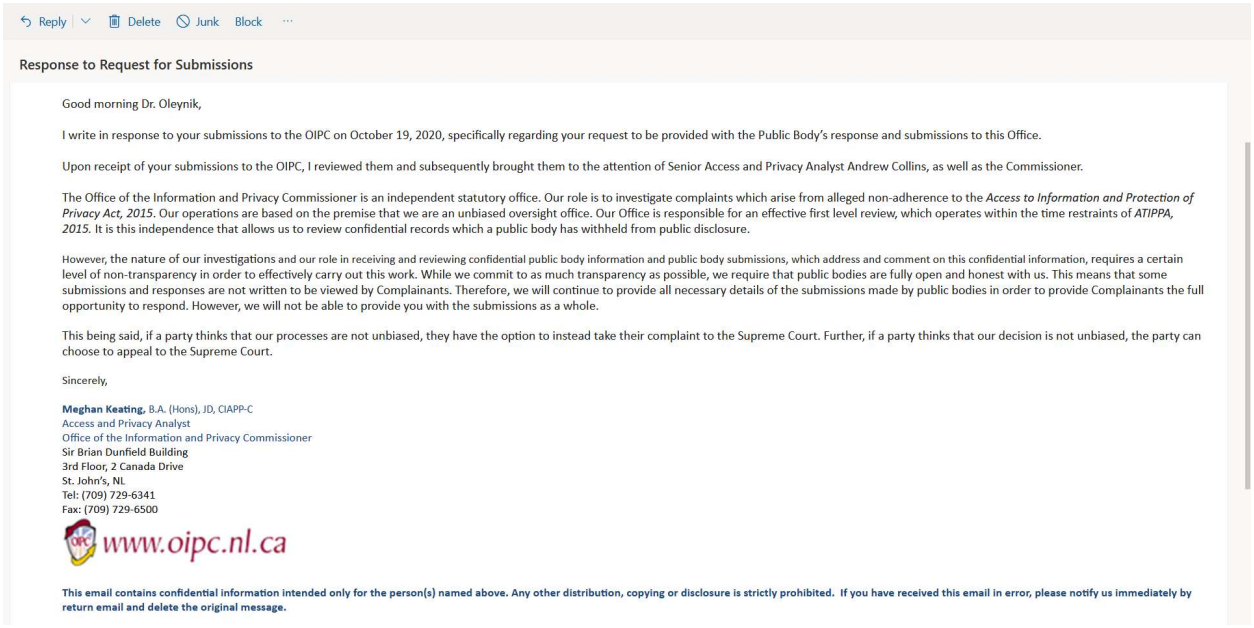
providing for OIPC oversight.[7] I would support this solution with one important caveat. As it stands, the OIPC's operation in general and investigations in particular lack transparency and competitiveness. If Section **96** of the ATIPPA ('Representation during an investigation') is simultaneously amended along the lines discussed below, then Recommendation **3.1** of the OIPC could and should be implemented, I submit.

Conduct of an investigation

Section **96** of the ATIPPA sets a general framework for investigations conducted by the OIPC:

> '(1) During an investigation, the commissioner may give a person an opportunity to make a representation.
> (2) An investigation may be conducted by the commissioner in private and a person who makes representations during an investigation is not, except to the extent invited by the commissioner to do so, entitled to be present during an investigation or to comment on representations made to the commissioner by another person'.

While the legislator uses 'may' throughout, the OIPC interprets the option of conducting investigation in private as a mandatory requirement and a standard, as opposed to exceptional, procedure. The OIPC's response to my request to conduct investigations in a more transparent and competitive manner, i.e. by disclosing the parties' submissions and inviting their comments, serves as a confirmation. The response reproduced below was provided as recently as on November 12, 2020.



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Response to Request for Submissions

Good morning Dr. Oleynik,

I write in response to your submissions to the OIPC on October 19, 2020, specifically regarding your request to be provided with the Public Body's response and submissions to this Office.

Upon receipt of your submissions to the OIPC, I reviewed them and subsequently brought them to the attention of Senior Access and Privacy Analyst Andrew Collins, as well as the Commissioner.

The Office of the Information and Privacy Commissioner is an independent statutory office. Our role is to investigate complaints which arise from alleged non-adherence to the *Access to Information and Protection of Privacy Act, 2015*. Our operations are based on the premise that we are an unbiased oversight office. Our Office is responsible for an effective first level review, which operates within the time restraints of *ATIPPA, 2015*. It is this independence that allows us to review confidential records which a public body has withheld from public disclosure.

However, the nature of our investigations and our role in receiving and reviewing confidential public body information and public body submissions, which address and comment on this confidential information, requires a certain level of non-transparency in order to effectively carry out this work. While we commit to as much transparency as possible, we require that public bodies are fully open and honest with us. This means that some submissions and responses are not written to be viewed by Complainants. Therefore, we will continue to provide all necessary details of the submissions made by public bodies in order to provide Complainants the full opportunity to respond. However, we will not be able to provide you with the submissions as a whole.

This being said, if a party thinks that our processes are not unbiased, they have the option to instead take their complaint to the Supreme Court. Further, if a party thinks that our decision is not unbiased, the party can choose to appeal to the Supreme Court.

Sincerely,

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The invitation to bring disputes to the Supreme Court shall be highlighted. If the basic principles of due procedure, transparency and competitiveness being ones of them, were followed during the OIPC's investigation, the burden on the legal system would have been lessened, I believe. In most

[7] Submissions of the Information and Privacy Commissioner dated November 25, 2020 at pp. 21-22 (available at https://www.nlatippareview.ca/files/11252020-Office-of-the-Information-and-Privacy-Commissioner-Submission.pdf).

other jurisdictions in Canada[8] the Information and Privacy Commissioners accept submissions made *in camera* in exceptional cases only and a party needs to secure leave for making them beforehand. As it stands, it is impossible to challenge the evidence supplied to the OIPC by the Public Bodies, which leaves the applicants with no other recourse than to bring the ATIPP-related matters before the Court instead of arguing their cases before the Commissioner. This undermines not only the principles of transparency and competitiveness, but also that of judicial economy increasing the cost of accessing information.

To the best of my knowledge, the only other jurisdiction in Canada in which the Information Commissioner conducts investigations without disclosing the parties' submissions to them refers to the scope of the *Access to Information Act*, RSC, 1985, C.A-1 at the federal level. Section **35(1)** stipulates that

> 'Every investigation of a complaint under this Part by the Information Commissioner shall be conducted in private' (emphasis added).

However, the *Access to Information Act* neither gives the Public Bodies a right to disregard access to information requests, nor limits the number of active investigations per requestor, in contrast to the ATIPPA. The Public Bodies in this province should not simultaneously enjoy restrictions placed on requestors and 'privacy' during the investigations since this arrangement clearly restricts the scope of public oversight. Accordingly, I suggest that

Section 96 of the ATIPPA requires that investigations are conducted in a transparent and competitive manner and, if a party wishes to make submissions *in camera*, this party needs first to make an *inter partes* application for leave.

Prosecution of offences under the ATIPPA

Not only the duty to document is currently moot, but also the clause outlining offences related to the management of and access to information. Section **8(1)** of the *Management of Information Act* states that

> 'A person who unlawfully damages, mutilates or destroys a government record or removes or withholds a government record from the possession of a public body or otherwise violates this Act is guilty of an offence and is liable on summary conviction to a fine of not less than $1,000 and not more than $50,000 and in default of payment to imprisonment for a term of not less than 3 months and not more than 18 months or to both a fine and imprisonment'.

Section **115** of the ATIPPA contains a longer list of offenses

> '(1) A person who wilfully collects, uses or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.
>
> (2) A person who wilfully

[8] The OIPC chose not to respond to a request to indicate other jurisdictions in Canada in which the Information and Privacy Commissioners conduct investigations in private only.

> (a) attempts to gain or gains access to personal information in contravention of this Act or the regulations;
> (b) makes a false statement to, or misleads or attempts to mislead the commissioner or another person performing duties or exercising powers under this Act;
> (c) obstructs the commissioner or another person performing duties or exercising powers under this Act;
> (d) destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records; or
> (e) alters, falsifies or conceals a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records,
> is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both'.

None of those clauses are currently enforced by the OIPC or the Courts nevertheless. The only precedent citing and interpreting Section **115** of the ATIPPA was Report *P-2015-002* issued in November 2015. The Commissioner limited himself to emphasize the importance of physical safeguards preventing the destruction of personal information:[9]

> 'The destruction of personal information is not to be taken lightly. It is to be done properly, securely and by authorized persons. The RNC does not appear to have sufficient preventative measures in place to protect personal information from being removed from its premises. Nor does it appear to have any policies which discuss the removal of information from its premises and the proper methods of destroying personal information. Each of these safeguards must be developed and implemented by the RNC'.

The fact that no one has ever been prosecuted in this Province for damaging, destroying or altering records shall not be interpreted as an indication of the Public Bodies and their representatives' full compliance with the access to information legislation. The particularities of the OIPC's investigations should be borne in mind here: no one is expected to witness against him/herself, especially knowing that submissions cannot be challenged or contradicted. Accordingly, I propose that

Either the Section 115 is included in the *Provincial Offences Act*, SNL1995, Chapter P-31.1, which will enable the Royal Newfoundland Constabulary to prosecute the relevant offences, or Section 96 of the ATIPPA is amended along the lines proposed above.

I also concur with the OIPC's proposal to provide whistleblower protection to employees of Public Bodies to protect them from reprisals for taking actions to prevent contravention of the ATIPPA.[10]

Access to records

The foundational clause of the ATIPPA enables the requestor to access the <u>original</u> of a record in the custody or under control of a Public Body. Section **8(1)** reads:

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[9] *Royal Newfoundland Constabulary (Re)*, 2015 CanLII 78657 (NL IPC) at paragraph **33**, available at http://canlii.ca/t/gmbfl.
[10] Submissions of the Information and Privacy Commissioner dated November 25, 2020 at pp. 24-25.

> 'A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant' (emphasis added).

There is no mention of a copy of a record, in other words. The legislator speaks of a 'record' instead offering the following definition in Section **2(y)** of the ATIPPA:

> '"record" means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium'.

The *Management of Information Act* explicitly prohibits any change in the format of a record that materially changes the information that was originally created, sent or received. When producing a copy of a record, one needs to retain the information contained in the original. Electronic records – they progressively take place of paper records – need particular care in this respect. Section **4.1** of the *Management of Information Act* specifically addresses the issue of the retention of and access to electronic information (emails, word files, etc.):

> '(1) A requirement under this Act to retain a record is satisfied by the retention of electronic information where
> (a) the electronic information is retained in the format in which it was made, sent or received or in a format that does not materially change the electronic information that was originally created, sent or received; and
> (b) the electronic information will be accessible, and capable of being retained for subsequent reference, if required, by a person who is entitled to have access to the information or who is authorized to require its production.
> (2) Where the electronic information was sent or received, the requirement in subsection (1) is only met where information that identifies the origin and destination of the electronic information and the date and time when it was sent or received is also retained'.

The conversion of emails as a particular type of digital records into PDF or other format involves loss of information. On the one hand, their metadata (internet headers) become inaccessible. The Sedona Canada Conference, an authority on uses of digital records in legal proceedings, defines metadata and explains its importance for the interpretation of other data in the context of judicial proceedings:[11]

> 'Nearly all electronic documents contain information known as metadata, which presents unique issues for the preservation and production of documents in litigation. Metadata is electronic information stored within or linked to an electronic file that is not normally seen by the creator or viewer of the file… Metadata can be used to objectively code documents or to properly interpret the meaning of other data… E-mail metadata… is often accurate and extremely useful for litigation purposes. Unlike the metadata associated with loose electronic files, e-mail metadata (if collected properly) does accurately identify the e-mail's signatory ("From"), the recipients ("To" and "CC"), and the precise date and time sent ("DateTime"). These fields can be extracted and loaded into a review platform for efficient searching and review' (emphasis added).

[11] *The Sedona Canada Principles Addressing Electronic Discovery* at pages 242-243 (available at https://thesedonaconference.org/publication/The_Sedona_Canada_Principles).

On the other hand, in a converted format, digital records cannot be properly searched. The conversion of digital records into paper records excludes their reuse. Even if PDF copies of the records are provided, the format must be 'searchable PDF', which is rarely the case. The legislator explicitly expressed her wish that the information be provided in an electronic form so it can be reused, for instance, searched.[12] Section **20(3)** of the ATIPPA echoes the requirement that the electronic information shall be provided to 'the applicant in an electronic form that is capable of re-use'.

Section **20(2)** of the ATIPPA is consistent with the requirement that records are retained in the format in which they were made, sent or received:

> 'Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where
> (a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and
> (b) producing it would not interfere unreasonably with the operations of the public body'.

However, some ambiguity as to the format of records produced in response to an ATIPP request remains. For instance, Form **1** enables the requestor to specify the format in which she wishes to receive records.[13] The choice of the format is expected to be driven by the requestor. The Government of Newfoundland and Labrador suggests that the Public Bodies use the following two-step procedure when responding to access to information requests:[14]

> '- ask the applicant the format in which they would like to receive any responsive records (electronic, paper, Excel, PDF, etc.) and provide in that format whenever possible
> -if unable to provide records in the requested format, discuss with formats are available with the applicant'.

The Public Bodies in this Province, however, routinely respond that they are not required to produce records in the requested format under the ATIPPA. Indeed, in contrast to Section **4(2.1)** of the federal *Access to Information Act*, the ATIPPA does not require to 'provide timely access to the record in the format requested' (emphasis added). However, as argued before, it requires that access to the record, as opposed to its copy, is provided. This ambiguity can be clarified by introducing the concept of 'native format' (the format in which it was made, sent or received or in a format that does not materially change the electronic information that was originally created, sent or received) in Section **20** of the ATIPPA.

Section 20(2) then should read: 'the head of the public body shall produce a record in native format for the applicant where…' and the definition of 'native format' added to Section 2: 'the format in which it was made, sent or received or in a format that does not materially change the electronic information that was originally created, sent or received'.

[12] *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Volume I, p. 53.
[13] Retrievable from https://www.gov.nl.ca/atipp/files/forms-pdf-form1-access-to-information-request.pdf.
[14] Government of Newfoundland and Labrador, *Access to Information: Policy and Procedures Manual* at page 36 (available at https://www.gov.nl.ca/atipp/files/info-pdf-access-to-information-manual.pdf).

It must be specifically emphasized that the retention and production of records in native format requires nothing but 'the normal computer hardware and software and technical expertise of the public body'. Special computer hardware and software as well as technical expertise are needed precisely to change the format in which the electronic information was made, sent or received. Furthermore, native format enables re-uses.

Comments on MUN's submissions

MUN made a first set of submission on November 27,[15] and a second set – on December 18, 2020.[16] There are two reasons for opposing several recommendations made by the University. One is purely procedural: the submissions convey the opinion of undisclosed members of the administration only. Members of the university community were not consulted one more time. Based on the publicly available information, MUN's submissions were not approved by the Senate or the Board of Regents either. This undermines MUN's stated commitment to 'openness, accountability and transparency in all its activities'.[17]

MUN highlights particularities of collegial decision-making in higher education. One reads, for instance, that 'University governance can be described as collaborative governance in which power is shared and balanced between governing bodies'.[18] Since MUN's submissions were neither discussed with the university community nor approved by the Senate or the Board of Regents, they convey an opinion of a self-appointed decision-maker or group of decision-makers. Accordingly, they should be treated as such – as an anonymously expressed peculiar opinion whose credibility and reliability cannot be properly assessed for this reason.

The other reason for opposing the recommendations is substantial. The implementation of most of them will further restrict access to information in this Province and make it more costly and time-consuming for citizens. By my count, MUN made 12 recommendations. However, the last recommendation has number 15 assigned to it.[19] Either submissions 12 through 14 were made *in camera*, or an incorrect number was attributed to the last recommendation. However it may be, the specific reasons for being critical about those recommendation are outlined below.

Recommendation 1: Definition of Personal Information

During the 2014 Statutory Review, MUN already recommended to re-define personal information in way that would have made it at odds with definitions adapted in the other jurisdictions in Canada. MUN's arguments were rejected by the Committee in 2014. Now MUN attempts to rehear the case advancing essentially the same arguments.

MUN argues that the requestor's personal information is also personal information of the individual expressing views or opinions about the requestor: 'Person A's personal opinion about

[15] available at https://www.nlatippareview.ca/files/11272020-Memorial-University-Submission.pdf
[16] available at https://www.nlatippareview.ca/files/12222020-Supplemental-Submission-Memorial-University.pdf
[17] Submissions of Memorial University dated November 27, 2020 at p. 5.
[18] Submissions of Memorial University dated November 27, 2020 at p. 7.
[19] Supplemental Submission of Memorial University dated December 18, 2020 at p. 8.

Person B was the personal information of both Person A and Person B'.[20] The ATIPPA Statutory Review Committee 2014 clearly rejected this outdated approach:[21]

> 'Memorial University wished to have opinions of individuals about others revert to the pre-Bill 29 status, where personal opinions should be considered the personal information of both the person who holds the opinion and the person the opinion is about… The Committee does not agree with the recommendation by Memorial University to amend the definition of personal information' (emphasis added).

MUN makes a questionable attempt to represent the individual's right to know the others' opinion about him or her as an attack on 'dignity, integrity and autonomy' without citing any authority or research that would support such claim.[22] The cited case law speaks of privacy in general, as opposed to the individual's right to know the others' opinion about him or her as an alleged invasion into those others' privacy. The privacy legislation in the other jurisdiction clearly includes in the scope of one's personal information the views or opinions about him or her. For instance, Section **2** of the *Freedom of Information and Protection of Privacy Act* of the Province of Ontario (cited by MUN) includes 'the views or opinions of another individual about the individual' in the scope of the individual's personal information. Section **3** of the federal *Privacy Act*, R.S.C. 1985, c. P-21 also includes in the scope of 'personal information' 'the views or opinions of another individual about the individual'. Section **7(2)(m)(ii)** of the Act stipulates that 'personal information under the control of a government institution may be disclosed… where… disclosure would clearly benefit the individual to whom the information relates'.

This reasoning brings us to the interplay between personal information so defined and workplace investigations. It is in the context of workplace investigations that 'disclosure would clearly benefit the individual to whom the information relates'. MUN considers the case of a harassment complaint. A conjecture of rumors and hearsay may eventually trigger a harassment complaint, especially in academic environment where all relationships tend to be highly personalized, and professional mobility is limited (once a university professor gets a tenure). As a colleague from the Department of Sociology once observed, it is easier to get a divorce than to discontinue interactions with a fellow. The right of the individual to whom a conjecture of rumors and hearsay relates to know the case to be met is clearly indicative of the expected benefit of the disclosure. S/he should be able to refute false rumors or a bad rap prior to the submission of a formal complaint. Without knowing the views or opinions about him or her, it may be too late to attempt to repair broken relationships or to remedy the climate in an academic unit. The right to know the case to be met will be discussed in more detail when commenting on Recommendation 3.

Article **19** of the *Collective Agreement* between MUN and MUNFA provides an additional reason for objecting to the amendments proposed by MUN. One needs to bear in mind that MUNFA had no input into preparing MUN's submission. Article **19** requires that[23]

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[20] Submissions of Memorial University dated November 27, 2020 at p. 11.

[21] *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Volume I, p. 47.

[22] Some elements of a theoretical discussion of concepts of human dignity, integrity and autonomy can be found in Oleinik, Anton (2016). 'Introduction: Between Universal and Culture-specific Interpretation of Human Dignity', *Comparative Sociology*, Vol. 15, No. 6, pp. 625-638.

[23] Available at http://munfa.ca/wp/wp-content/uploads/2016/07/Article-19_CA-19-20.pdf

> 'when the University decides that an investigation is required that might lead to the imposition of discipline, the ASM[24] shall be notified in writing of the alleged infraction within twenty (20) days of the date the University knew, or ought reasonably to have known, of the occurrence of the matter which might give rise to the discipline'.

The amendment proposed by MUN includes the following disclaimer: 'except where relevant to a workplace investigation'. A Catch 22 is created as a result. Personal views and opinions about another person are exempted from the scope of that other person's personal information prior to the initiation of a formal investigation. Accordingly, it becomes impossible to verify if the University notified this person in writing of the alleged infraction within twenty days of the date the University knew, or ought reasonably to have known, of the occurrence of the matter. ASMs and MUNFA will not be able to properly enforce the 20-day mandatory deadline in the circumstances. MUN's administration simply wants to have an additional lever and an additional degree of freedom at the expense of ASMs subject to the discipline. If accepted, the amendment would go against the letter and spirit of the ATIPPA, I believe.

Recommendation 2: Legal advice

References to *Alberta (Information and Privacy Commissioner) v. University of Calgary* are provided in a selective manner. For instance, a following caveat discussed by the Supreme Court of Canada at length in the cited decision is not even mentioned in MUN's submissions:[25]

> 'The modern approach to statutory interpretation requires legislative texts to be read in their entire context. And resort to other texts from different jurisdictions may be helpful in determining what that entire context is. But resort to parallel legislation does not trump other principles of statutory interpretation.'

In light of the modern approach to statutory interpretation, the key question is whether the wording of Section **100(2)** of the ATIPPA is indicative of a clear legislative intention to abrogate solicitor-client privilege:

> 'The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner'.

The wording is plain and clear, I submit. The claim that 'section **100(2)** does not demonstrate a clear legislative intention to abrogate solicitor-client privilege'[26] is without merit. The modern reading simply suggests that the Commissioner can review the solicitor-privileged records *in camera*. Under this scenario, the solicitor and client privilege will not be affected by production to the Commissioner. A party can apply for leave to produce the privileged records *in camera* relying on Section **100(2)** indeed.

It looks like MUN simply wants to have a privilege to claim the privilege without having the burden to provide any demonstration. 'A description or listing of solicitor-client privileged

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[24] Academic Staff Member.

[25] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 at paragraph 63 (available at http://canlii.ca/t/gvskr).

[26] Submissions of Memorial University dated November 27, 2020 at p. 14.

information'[27] cannot be verified if the Commissioner has no power to compel their production. The Supreme Court of Canada guards against such scenario evoking the possibility of the 'falsely claimed privilege'.[28] The falsely claimed privilege calls for a review by the Commissioner. This is exactly what happened in *University of Calgary v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 950.[29] The Court declined

> 'to make any direction to the University to provide the records for review to the Court. The Adjudicator erred in holding that the University could not rely on the presumptive privilege with respect to solicitor client accounts to discharge its evidentiary onus under s. 71(1). The matter should be sent back to be considered within the lawful analytical framework before the Court considers exercising its supervisory jurisdiction to review the documents as established in *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114'.[30]

The *University of Calgary v Alberta (Information and Privacy Commissioner)* case also serves as a reminder that when the task of review of the privileged records is shifted from the Commissioner to the Court, it creates an additional and otherwise unnecessary burden for the latter. The Court of Queen's Bench chose not to review the records directing the Commissioner to perform this task. This undermines the principles of judicial economy and also increases the costs of access to information and, speaking more broadly, justice.

Recommendation 3: Section 33 (workplace investigations)

MUN writes, with disapproval, that 'a party to a workplace investigation can request all records relating to the investigation, including from the other party and the investigator, before the investigator has even concluded their investigation and produced their report'.[31] This reasoning seems to suggest that the right to know the case to be met could be acknowledged only after the case was met.

The right to know the case to be met constitutes a foundational rule of procedural justice. It is also known as *audi alteram partem* ('let the other side be heard as well').[32] In an early application of the *audi alteram pertem* rule in modern law, a Court of Appeal in Britain made a useful suggestion:[33]

> 'the best guidance is… to be found by reference to the cases of immigrants. They have no right to come in, but they have a right to be heard'. The Court was satisfied that the Gaming Board whose decision was appealed from 'acted with complete fairness. They put before the applicants all the information which led them to doubt their suitability. They kept the

[27] Submissions of Memorial University dated November 27, 2020 at p. 15.
[28] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 at paragraph 70.
[29] Available at http://canlii.ca/t/j3z74
[30] *University of Calgary v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 950 (CanLII) at paragraph 53.
[31] Submissions of Memorial University dated November 27, 2020 at p. 16.
[32] *Iwa v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, 1990 CanLII 132 (SCC), pages 292 & 322 (available at http://canlii.ca/t/1fsz2).
[33] *R. v. Gaming Board of Great Britain, ex. P. Benaim*, 1970 APP.L.R. 03/23, paragraphs 20 & 26.

> sources secret, but disclosed all the information… The Board gave the applicants full opportunity to deal with the information' (emphasis added).

The Supreme Court of Canada held that 'on factual matters the parties must be given a fair opportunity for correcting or contradicting any relevant statement prejudicial to their view' (emphasis added).[34] This is precisely what is needed to be known prior or in the process of the investigation, not after its conclusion.

Appellate Justice Derek J. Green, as he then was, also acknowledged that 'the defendant is entitled to know what is specifically being alleged… so that the case to meet will be known'.[35]

As per test originally established by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, the scope of the duty to act fairly in the circumstances of the case is large. The Supreme Court of Newfoundland and Labrador applied this test when addressing a similar question as to whether the principles of procedural fairness and natural justice were respected during an investigation conducted in the framework of a labor dispute:[36]

> 'As noted by L'Heureux-Dubé, J. in *Knight* at para. 50, 'the concept of procedural fairness is variable and its content is to be decided in the specific context of each case.' In determining the content, the *Baker* decision (at paragraphs 21 to 28) directs courts to look at the following non-exhaustive list of factors:
> • nature of the decision;
> • nature of the statutory scheme;
> • significance of the interests;
> • legitimate expectations of the person challenging the decision; and
> • previous procedural choices of the administrative decision maker.'

The higher the prospect of the discipline, the more information is needed to be accessed during the investigation. If the employment is at risk, a full disclosure is expected:[37]

> '[55] At paragraph 25 of *Baker* L'Heureux-Dubé, J. stated:
> 25 … The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:
> A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

---

[34] *Iwa v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, 1990 CanLII 132 (SCC), pages 284-285 & 335.
[35] *Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42, paragraphs 57 & 60 (available at http://canlii.ca/t/4vcs).
[36] *Stamp v. Newfoundland and Labrador English School District*, 2015 CanLII 57207 (NL SC), paragraph 46 (available at http://canlii.ca/t/gl4rj).
[37] *Stamp v. Newfoundland and Labrador English School District*, 2015 CanLII 57207 (NL SC), paragraphs 55-56.

> [56] The employment interest of Ms. Stamp was not at risk. As complainant, she was not facing any risk of discipline. The employment interests of the teachers responding to the complaints were at risk. They were the parties being investigated and they were facing potential disciplinary consequences that could include dismissal. These employment interests indicate a high standard of justice is required for the teachers responding to the complaints. The appropriate level of procedural fairness owed to Ms. Stamp, as a complainant, is much lower by comparison. This reasoning is consistent with *Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68 (CanLII) at para. 34 where the court considered the level of procedural fairness being owed to a complainant who made allegations of misconduct by a lawyer' (emphasis added).

The amendment recommended by MUN has no merit for a simple reason: if 'records pertaining to workplace investigation are withheld until after the investigator's report has been issued',[38] then the parties to an investigation will not have 'an opportunity to respond to an investigation report upon receiving it', contrary to MUN's claims. According to Paragraph **9** of MUN's *Procedure for resolution of a formal respectful workplace complaint*, the parties have 5 days to respond only:[39]

> 'Upon receipt of the investigative report, both the Complainant and the Respondent may choose to respond. Any response must be in writing and submitted within five (5) Days'.

It takes 20 or more days (if the statutory deadline for responding to an access request is extended under Section **23** of the ATIPPA) to access records under the ATIPPA. In other words, the information that may help an ASM to defend him or herself would be released after the expiration of all relevant deadlines. To conclude, MUN's administration is prepared to acknowledge the right to know the case to be met only retrospectively.

On a relevant note, the OIPC errs assuming that 'harassment typically involves a power relationship between the perpetrator or abuser and the subordinate victim'.[40] This assumption leads the OIPC to recommend that information disclosure 'would commence after a workplace investigation has been completed, [but] before any resulting discipline is imposed or corrective action is taken'.[41]

As per definition offered by Canadian Centre for Occupational Health and Safety[42]

> 'Harassment can be thought of as any behaviour that demeans, embarrasses, humiliates, annoys, alarms or verbally abuses a person and that is known or would be expected to be unwelcome. These behaviours include words, gestures, intimidation, bullying, or other inappropriate activities'.

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[38] Submissions of Memorial University dated November 27, 2020 at p. 16.
[39] Available at https://www.mun.ca/policy/browse/procedures/view.php?procedure=573.
[40] Submissions of the Information and Privacy Commissioner dated November 25, 2020 at p. 16.
[41] Submissions of the Information and Privacy Commissioner dated November 25, 2020 at p. 18; emphasis in the original. An important difference in the recommendations made by the OIPC and MUN should be highlighted: the OIPC acknowledges that a party to a workplace investigation is entitled to full disclosure before any resulting discipline is imposed, which in MUN's case necessitates suspension of the deadlines for responding to the investigation report.
[42] Available at https://www.ccohs.ca/oshanswers/psychosocial/violence.html.

Power differential may or may not be involved. An employee may be harassed by a peer (or a group of peers who form a clique), including by way of making meritless complaints against her or him. Meritless complaints cause embarrassment and amount to intimidation. For instance, Section **5** of MUN's *Respectful Workplace Policy* specifically mentions 'frivolous or vexatious complaints'.[43] It follows that no assumption as to the merits of the allegations could be made prior to the conclusion of an independent investigation and all parties involved should have the equal right to know the case and enjoy equal protection against intimidation. The issue of protection of a party to a workplace investigation against intimidation exceeds the scope of the ATIPPA.

An important aspect seems to be overlooked in submissions on Section **33** of the ATIPPA made by both MUN and the OIPC. A preliminary review usually precedes a workplace investigation. MUN's *Procedure for resolution of a formal respectful workplace complaint* requires that a review of the complaint is conducted prior to the start of a formal investigation. Paragraph **2** of this Procedure reads:

> 'Upon receipt of the Complaint, the Reviewer shall initially review the Complaint'.

It is reasonable to assume that the other Public Bodies also have a similar step in workplace investigations, an initial review. For instance, under Subsections **44(3)** and **44(4)** of the ATIPPA the OIPC reviews a complaint prior to conducting a formal investigation. It would help achieve greater clarity in those circumstances if the legislator explicitly included the information created or gathered when reviewing workplace complaints in the scope of the ATIPPA. The wording of Subsections **33(2)** and **33(3)** could be then changed from 'information created or gathered for the purpose of a workplace investigation' to '**information pertaining to the initiation and conduct of a workplace investigation**'.

Recommendation 4: Limit on the number of ATIPP requests from the same applicant

When assessing MUN's recommendation to limit the number of access requests made by the same applicant, one needs to bear in mind than such restriction exists in no other Canadian jurisdiction. MUN relies on Subsections **44(7)** and **74(4)** of the ATIPPA in support of this proposal. The option of placing sixth and subsequent complaints from the same applicant in abeyance until five active complaints are resolved was likely inspired by the McBreairty precedent set in 2008. Mr. and Ms. Breairty made in total 56 complaints to the OIPC in 2005-2007, which led the then Commissioner to suspend their right to make further requests. The Supreme Court of Newfoundland and Labrador (Justice Alan Seaborn) found this decision as unreasonable and quashed the Commissioner's decision.[44] The 2014 Statutory Review Report curiously does not explicitly cite Justice Seaborn's final ruling. It contains a mention of the interlocutory ruling in the same matter only.[45]

The OIPC's discretion to place complaints in obeyance when their number exceeds five does not restrict the applicant's right to access information, nevertheless. If records responsive to an access

[43] Available at https://www.mun.ca/policy/browse/policies/view.php?policy=336.
[44] *McBreairty v. Information & Privacy Commissioner*, 2008 NLTD 65 (CanLII) (available at http://canlii.ca/t/1wmgq).
[45] A reference to *McBreairty v Information and Privacy Commissioner*, 2008 NLTD 19 (CanLII) (available at http://canlii.ca/t/fsx80) can be found at p. 222 of *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Volume II.

to an ATIPP request are destroyed, this constitutes an offence within the meaning of Section **115(2)(d)** of the ATIPPA:

> 'A person who wilfully… destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records… is guilty of an offence'.

In other words, the Public Body must conduct the search for responsive records and preserve them until the OIPC deals with the complaint anyway.

Furthermore, the applicant can initiate a direct appeal to the Trial Division under Section **52** of the ATIPPA if s/he prefers not to wait and rely on safeguards – they are rather inefficient, as discussed above – offered by Section **115**.

If the Public Body was empowered to restrict the number of requests made by the same applicant, the effect would be radically different. On the one hand, by placing an ATIPP request in obeyance the Public Body avoids the need to conduct a search and to preserve the records. The responsive records could be destroyed with impunity by the time when the Public Body actually processes the request. On the other hand, the applicant simply has no alternative course of action. S/he cannot bring the matter before the Trial Division hoping that the Court's intervention would assist in accessing the records sought. All in all, MUN's recommendation is nothing else than a covert proposal to restrict the citizen's right to access to information.

Recommendation 5: Fee considerations

MUN claims that the ATIPPA 'is unique in Canada in connection with fees for ATIPP requests'.[46] This claim is simply without merit. Public Bodies in several jurisdictions in Canada are prevented from charging the fees for providing access to information. The Province of Québec is one of them. Section **11** of *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, Chapitre A-2.1 clearly states that the citizen has the right to access to information free of charge:

> 'L'accès à un document est gratuit'.

Section **68** of the previous version of the ATIPPA enabled the head of a Public Body to require an applicant to pay a fee to make an access request. As acknowledged by the ATIPPA Statutory Review Committee 2014, the Public Bodies often abused the right to charge the fees for accessing information, which ultimately led the Committee to recommend the abolishment of fees:[47]

> 'The current system for assessing charges under the *ATIPPA* lacks credibility with many users, a point that was made several times in submissions and during the hearings. There has been an especially strong reaction against the policy of counting as processing time, the effort public bodies make to determine what exemptions might apply to an access request.
>
> …
>
> The Committee concludes the best approach is to eliminate the application fee altogether and to institute a longer "free search" period of 10 hours for municipalities and 15 hours for all other public bodies'.

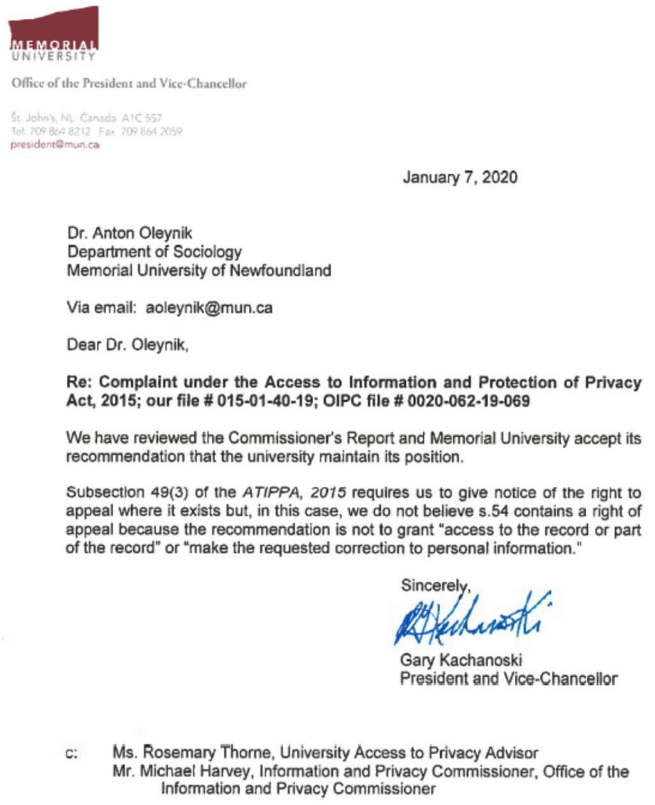
[46] Submissions of Memorial University dated November 27, 2020 at p. 17.

[47] *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Volume II, pp. 11-12.

It looks like that MUN attempts to rehear the issue of fees without demonstrating what exactly has changed since the 2014 Statutory Review and why charging fees can be now deemed as an appropriate practice. As a matter of fact, MUN recommends returning to the policy of counting as processing time the time spent by Public Bodies on applying exemptions. 'We submit that a public body should have the opportunity to charge fees not only for locating a record but also for the services of identifying, retrieving and compiling records'.[48] This policy was criticized both by the contributors to the 2014 Statutory Review and the ATIPPA Statutory Review Committee 2014, as the quote above clearly demonstrates.

MUN also refers to the findings conveyed by the OIPC in Report *A-2019-032* considering those findings as contradictory and ambiguous. MUN accepted the recommendations made in this report alleging at the same time that the complainant cannot appeal the relevant decision of MUN's President and Vice-Chancellor. The issue of the scope of appeal under Section **54** of the ATIPPA will be discussed separately below. At this point, it suffices to note that MUN attempts to rehear a matter after it was dealt with one more time.

By accepting the OIPC's recommendations, MUN also agreed that the Commissioner can review a cost estimate after the applicant paid the fees charged in full. The circumstances of that dispute are telling indeed. MUN decided to charge the fees two days (sic) prior to the deadline for responding to the access to information request. In those circumstances it is reasonable to assume that, on the one hand, the decision to charge the fees was an improper attempt to delay the response by circumventing due procedure and, on the other hand, the fees were charged not for locating records but for the other allegedly provided 'services'. The timeline for charging the fees clearly suggests that the prohibited costs of <u>processing</u> a record were charged, as opposed to the allowed costs of reproduction, shipping and locating a record. As per advisory letter sent by the Public Body pursuant to Section **15** of the ATIPPA, the search for responsive records was completed eight days prior to the issuance of the cost estimate. It does <u>not</u> mention that costs may be charged, as required by Subsection **15(2)(c)**:



MEMORIAL UNIVERSITY

Office of the President and Vice-Chancellor

St. John's, NL Canada A1C 5S7
Tel: 709 864 8212 Fax: 709 864 2059
president@mun.ca

January 7, 2020

Dr. Anton Oleynik
Department of Sociology
Memorial University of Newfoundland

Via email: aoleynik@mun.ca

Dear Dr. Oleynik,

Re: Complaint under the Access to Information and Protection of Privacy Act, 2015; our file # 015-01-40-19; OIPC file # 0020-062-19-069

We have reviewed the Commissioner's Report and Memorial University accept its recommendation that the university maintain its position.

Subsection 49(3) of the *ATIPPA, 2015* requires us to give notice of the right to appeal where it exists but, in this case, we do not believe s.54 contains a right of appeal because the recommendation is not to grant "access to the record or part of the record" or "make the requested correction to personal information."

Sincerely,

Gary Kachanoski
President and Vice-Chancellor

c: Ms. Rosemary Thorne, University Access to Privacy Advisor
Mr. Michael Harvey, Information and Privacy Commissioner, Office of the Information and Privacy Commissioner

[48] Submissions of Memorial University dated November 27, 2020 at p. 17.

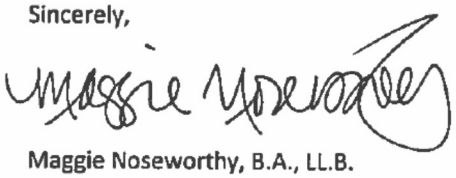
Section 15 of the *Access to Information and Protection of Privacy Act* ("the *Act*") requires that we provide you with an advisory response regarding your request in writing no later than 10 business days after we receive your request.

Please be advised that we are currently collecting records from the relevant offices, to be processed. A thorough analysis of all records will be required to determine whether exception to disclosure provisions will apply. Accordingly, there is a possibility of some information being redacted from the records provided to you.

At this time, we anticipate providing the university's response to your request by 9 September 2019. However, if necessary, we may seek an extension of time from the Office of the Information and Privacy Commissioner to process the request.

If you have any questions, please feel free to contact me by telephone at 864-7949 or by e-mail at maggie.noseworthy@mun.ca.

Sincerely,



Maggie Noseworthy, B.A., LL.B.
Access and Privacy Analyst

In those circumstances the decision to charge the fees is amendable to review by the OIPC and/or appeal, I submit.

Recommendation 6: Records already possessed

The OIPC has developed and consistently applied a test for establishing a reasonable suspicion that a public body withheld a record or failed to conduct an adequate search:[49]

> 'Complainants must establish the existence of a reasonable suspicion that a public body is withholding a record, or has not undertaken an adequate search for a record. Sometimes this takes the form of having possession of or having previously seen a document that was not included with other responsive records, or media reports regarding the record. The Complainant is expected to provide something more than a mere assertion that a document should exist' (emphasis added).

The possession of some responsive records by the applicant enables him and the OIPC to assess whether the Public Body met its statutory duty to assist under Section **13** of the ATIPPA by conducting a reasonable search. A three-part test is used for this purpose:[50]

> 'The duty to assist… may be understood as having three separate components.
> • First, the public body must assist an applicant in the early stages of making a request.

[49] OIPC's Practice Bulleting 'Reasonable Search' at p. 2 (available at https://www.oipc.nl.ca/pdfs/Practice_Bulletin_Reasonable_Search.pdf).
[50] Ibid, at p. 1.

> • Second, it must conduct a reasonable search for the requested records.
> • Third, it must respond to the applicant in an open, accurate and complete manner' (emphasis added).

By permitting 'a Public Body to refuse to provide records where there is evidence that the applicant already has them in their (sic) possession', as recommended by MUN,[51] the legislator will deprive the applicant and the OIPC of an opportunity to apply a reliable and objective test. Knowing that the applicant is unable to establish a reasonable suspicion that the Public Body is withholding a record, the Public Body will likely claim that no responsive record has ever existed.

Furthermore, it is a common situation that the applicant possesses a copy of a record that is expected to trigger subsequent actions by the Public Body executive, yet s/he does not possess the reminder of the paper trail. By permitting the Public Body to refuse to provide records whose copies are allegedly possessed by the applicant, the legislator would preclude an assessment of the exercise of administrative discretion by the executive. MUN is a case in point. Article **1.11** of the *Collective Agreement* between MUN and MUNFA sets limits on managerial discretion:[52]

> 'The Association recognizes that all rights, powers and authority which are not specifically abridged, delegated, or modified by this Collective Agreement are vested in the University. The University shall exercise such rights, powers and authority in a fair, equitable and reasonable manner' (emphasis added).

Let us assume that an ASM submits a memorandum to MUN's administration. Being its author, s/he possesses a copy of the memorandum. The ASM would like to know how the administration reacted to the memorandum and whether any actions, if any, are being undertaken and, if so, by whom (who were copied on the subsequent exchanges, for instance). In other words, the ASM wishes to find out if his or her concerns were addressed in a fair, equitable and reasonable manner. By refusing to release the entire paper trail (or email thread) started by the memorandum, the executive may always create an impression that the requirement set in Article **1.11** is always met and the executive is fully accountable to ASMs and the public at large.

Last but not least, who decides that the applicant already possesses a copy of the requested record? MUN writes: 'there have been many instances where the individuals conducting the search know for certain the applicant already possesses the records'.[53] The reliance on allegations (MUN does not acknowledges that the applicant should be contacted beforehand) paves the way to all kinds of speculations, hearsay and rumors: one thinks that the other should possess a particular record or, even worst, one hears that the other possesses it. The integrity of the ATIPP-process is put in jeopardy as a result.

Recommendation 7: Disregarding a request

Based on MUN's submissions, the ATIPP coordinator has a leading role and a large amount of discretion in deciding whether a particular request should be disregarded. It is enough to quote a few passages from MUN's submissions: 'the ATIPP coordinator must contact the department(s)

[51] Submissions of Memorial University dated November 27, 2020 at p. 21.
[52] Available at http://munfa.ca/wp/wp-content/uploads/2016/07/Article-1_CA-19-20.pdf.
[53] Submissions of Memorial University dated November 27, 2020 at p. 20.

and/or individual(s) who would need to conduct the search', 'it is not until the ATIPP coordinator reviews the records that it becomes evident that a disregard submission should have occurred', 'the University Access and Privacy Advisor must first analyze the request in light of statutory grounds to request a disregard' and so forth.[54] The problem is that in the case of MUN, neither the role of the ATIPP coordinator nor that of the 'University Access and Privacy Advisor' are spelled out in detail and explicitly regulated.

Neither the ATIPPA nor MUN's internal regulations and procedures mention 'Access and Privacy Advisor', in contrast to the ATIPP coordinator whose role is spelled out in Sections **2(f)**, **13(2)**, **19(9)**, **110(1)**, and **111(2)(c)** of the ATIPPA. The issues with the ATIPP coordinator derive from the fact that the delegation of authority implied in Section **110(2)** of the ATIPPA does not work properly in MUN's case. Section **8** of MUN's *Information Request Policy* stipulates:[55]

> 'decision-making under the ATIPP Act is set out in the current Delegation of Authority Instrument and approved by the Head'.

As MUN's ATIPP coordinator acknowledged on March 28, 2018, 'unfortunately, it is out of date considerably and has not yet been updated'. To begin with, this document was drafted and approved under the previous version of the ATIPPA that had <u>not</u> enabled the Public Body to disregard ATIPP requests. The situation has not changed since then, to the best of my knowledge.

There is no mechanism for the continuing oversight of MUN's Information Access and Privacy (IAP) Office either. The IAP Office has an advisory committee,[56] but it is currently composed of members of the executive only, which leaves all other stakeholders, including the unions and members of the University community, not to speak of the public at large, with no voice in the process. In those circumstances the fact that MUN's submissions to Access to Information and Protection of Privacy Statutory Review 2020 were neither publicly discussed nor even duly approved comes as no surprise.

In those circumstances to implement MUN's recommendations is to increase the scope of the discretion of the <u>individual</u> who *de facto* decides if a particular request should be disregarded. The scope of this discretion is already very broad, as argued above.

One proposal made by MUN seems reasonable, nevertheless. It relates to procedural fairness as far as the role of the applicant in decisions to disregard is concerned. Simply put, the applicant has absolutely no role in this process. 'There is no opportunity for an access to information applicant to make submissions on the application' for a disregard.[57] S/he is informed of the Commissioner's approval *ex post* only whereas when the Commissioner does not approve the Public Body's application for a disregard, the applicant remains simply ignorant of what is going on with his or her ATIPP request. The OIPC assesses requests for a disregard on a *prima facie* basis without giving the applicant an opportunity to refute the allegations made in the Public Body's submissions as confirmed by the OIPC:

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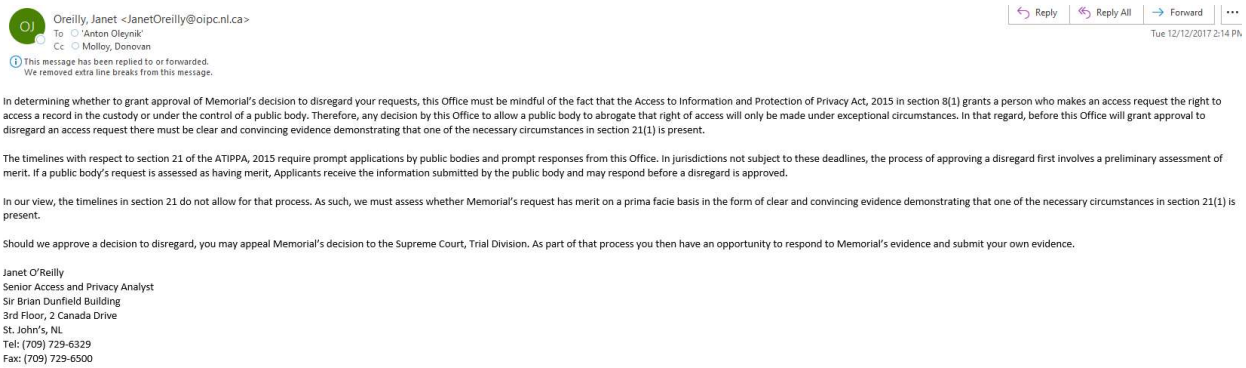
[54] Submissions of Memorial University dated November 27, 2020 at p. 23.
[55] Available at https://www.mun.ca/policy/browse/policies/view.php?policy=227.
[56] Available at https://www.mun.ca/iap/committee/index.php.
[57] Submissions of Memorial University dated November 27, 2020 at p. 24.



Oreilly, Janet <JanetOreilly@oipc.nl.ca>
To 'Anton Oleynik'
Cc Molloy, Donovan

Reply | Reply All | Forward
Tue 12/12/2017 2:14 PM

This message has been replied to or forwarded.
We removed extra line breaks from this message.

In determining whether to grant approval of Memorial's decision to disregard your requests, this Office must be mindful of the fact that the Access to Information and Protection of Privacy Act, 2015 in section 8(1) grants a person who makes an access request the right to access a record in the custody or under the control of a public body. Therefore, any decision by this Office to allow a public body to abrogate that right of access will only be made under exceptional circumstances. In that regard, before this Office will grant approval to disregard an access request there must be clear and convincing evidence demonstrating that one of the necessary circumstances in section 21(1) is present.

The timelines with respect to section 21 of the ATIPPA, 2015 require prompt applications by public bodies and prompt responses from this Office. In jurisdictions not subject to these deadlines, the process of approving a disregard first involves a preliminary assessment of merit. If a public body's request is assessed as having merit, Applicants receive the information submitted by the public body and may respond before a disregard is approved.

In our view, the timelines in section 21 do not allow for that process. As such, we must assess whether Memorial's request has merit on a prima facie basis in the form of clear and convincing evidence demonstrating that one of the necessary circumstances in section 21(1) is present.

Should we approve a decision to disregard, you may appeal Memorial's decision to the Supreme Court, Trial Division. As part of that process you then have an opportunity to respond to Memorial's evidence and submit your own evidence.

Janet O'Reilly
Senior Access and Privacy Analyst
Sir Brian Dunfield Building
3rd Floor, 2 Canada Drive
St. John's, NL
Tel: (709) 729-6329
Fax: (709) 729-6500

The rationale offered by the OIPC – the timelines set in Section **21** – should be taken with a grain of salt though. The 3-day time period allowed for reviewing the Public Body's application for a disregard may be sufficient for giving a voice to the applicant in the process provided that s/he is properly informed of the Public Body's submissions and invited to respond to them. To summarize, Section **21(1)** of the ATIPPA could be amended in the following manner: '**The head of a public body may, not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard the request copying the application on the applicant. The Applicant has two business days to respond, if s/he chooses to do so**'. Both the Public Body and the applicant will find themselves on an equal footing acting under very tight timelines.

Recommendation 8: Soft versus Hard recommendations

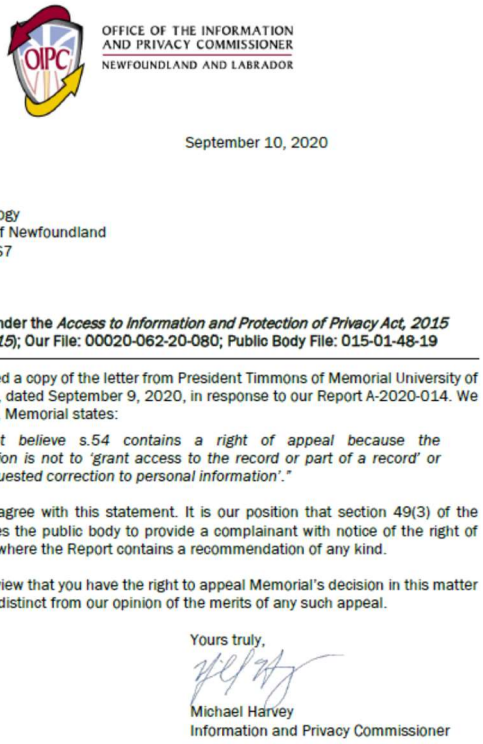
MUN's position that 'there is a practical distinction between "soft" and "hard" recommendations that is not adequately addressed in the legislation'[58] is not based on any precedent, authority or even common practice. The OIPC explicitly disagreed with MUN's unilateral decision to differentiate between the Commissioner's 'hard' and 'soft' recommendations. The OIPC even saw fit in providing clarifications in this respect. After MUN's decided to accept recommendations made in Report *A-2020-014*,[59] the OIPC specifically explained that 'the Public Body [must] provide a complainant with the notice of the right to appeal in every case where the Report contains a recommendation of any kind' (emphasis added).

A closer look at the OPIC's recommendations made in Report *A-2020-014* sheds more light on the issue. The OIPC found that MUN met its duty to assist the applicant under Section **13** of the ATIPPA by conducting a reasonable search and releasing some records, but not in their native format (the issue of the format of a record provided in response to an ATIPP request was discussed previously). The Commissioner 'recommend[ed] that for Memorial University take no further action with regards to this complaint'.[60]

[58] Submissions of Memorial University dated November 27, 2020 at p. 26.
[59] Available at https://www.oipc.nl.ca/pdfs/A-2020-014.pdf.
[60] Report *A-2020-014* at paragraph 21.

Since no further action was recommended, MUN considered the matter to be closed denying the applicant the right of appeal. The OIPC disagreed. Indeed, the issues whether a Public Body met its duty to assist by conducting a reasonable search, which means that all responsive records are located and processed, and whether the Public Body can change the format of a responsive record are subject to judicial control by the way of either appeal or a judicial review application. The duty to assist will be addressed separately in what follows.

In a nutshell, MUN attempts to improperly restricts the scope of judicial control and, by doing so, to extend the scope of the executive's discretion. The legislator will hardly agree with the anonymous opinion that actions, inactions and other decisions of the executive with respect to access to information should be excluded from the scope of judicial control, I believe.



OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

September 10, 2020

BY E-mail

Anton Oleynik
Department of Sociology
Memorial University of Newfoundland
St. John's, NL A1C 5S7

Dear Dr. Oleynik:

Subject: Complaint under the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*); Our File: 0020-062-20-080; Public Body File: 015-01-48-19

Our Office has received a copy of the letter from President Timmons of Memorial University of Newfoundland to you, dated September 9, 2020, in response to our Report A-2020-014. We note that in the letter, Memorial states:

> *"...we do not believe s.54 contains a right of appeal because the recommendation is not to 'grant access to the record or part of a record' or 'make the requested correction to personal information'."*

Our Office does not agree with this statement. It is our position that section 49(3) of the *ATIPPA, 2015* requires the public body to provide a complainant with notice of the right of appeal in every case where the Report contains a recommendation of any kind.

Please note that our view that you have the right to appeal Memorial's decision in this matter is, of course, entirely distinct from our opinion of the merits of any such appeal.

Yours truly,

Michael Harvey
Information and Privacy Commissioner

cc: Dr. Vianne Timmons, President and Vice-Chancellor,
Memorial University of Newfoundland

Recommendation 9: A deadline for complying with the Commissioner's recommendations

MUN submits that the requirement to comply with the recommendations 'is not clearly delineated as a deadline, with the potential for applicants to receive additional disclosure after its deadline for a further appeal has passed'.[61] Indeed, the situation when a Public Body chooses to accept the OIPC's recommendation and then wait until the deadline for initiating an appeal passes to make additional disclosure creates uncertainty and undermines the applicant's procedural rights. If the applicant received additional disclosure prior to the statutory deadline for initiating an appeal from the Public Body's decision, then s/he would be able to make more informed decisions.

MUN's recommendation to extend the number of business days for complying with the OIPC's recommendations without simultaneously extending the deadline for commencing an appeal is hardly tenable, however. Under Section **54** of the ATIPPA, the applicant currently has ten business days after being informed of the Public Body's decision. One more time, MUN is promoting the interests of its executive at the expense of the applicant's rights. If a deadline for complying with the OIPC's recommendation is set, then **the deadline for commencing an appeal under Section 54 of the ATIPPA should be extended and the applicant should have at least ten business days after receiving additional disclosure to decide if s/he will bring the matter before the Court**, I think.

[61] Submissions of Memorial University dated November 27, 2020 at p. 28.

Recommendation 10: Appeal process

MUN recommends to circumvent due procedure when proposing to abrogate the *Rules of the Supreme Court*, SNL 1986, Chapter c42, Schedule D governing the appeal process.[62] To begin with, MUN proposes changes that go well beyond the scope of the mandate for reviewing the ATIPPA. MUN's recommendations *de facto* amount to changing the Rules for conducting an appeal as they are set in the *Rules of the Supreme Court*. Already for this reason MUN's proposal should be considered with a great restraint and ultimately dismissed, I believe.

Turning to the substance of MUN's recommendations, this Public Body essentially proposes to sacrifice due process and the integrity of judicial control to expeditiousness. The compliance with the requirements of due procedure, according to MUN, 'has… unnecessarily complicated proceedings that are meant to be expeditious'.[63]

The trade-off between expeditiousness and the respect of due process is a false one, I submit. In support of its recommendations, MUN mentions 'notice of inspection, interrogatories, interlocutory applications, requests for lists of documents'.[64] These procedural steps are necessary safeguards against attempts to undermine the integrity of judicial process and to bring it by doing so into disrepute. MUN seems to take for granted that a Public Body's submissions to the Court should be uncontested and sheltered against any challenges. With due respect, the assumption that a Public Body's submissions should be taken uncritically and at face value is meritless.[65] If MUN's assumption is uncritically accepted, then there would be no need for judicial control and there is a risk of transforming the Trial Division into a 'rubber stamp' for the Public Body's decisions, however frivolous they may be.

Let us consider just one example. Without inspecting records produced by the Public Body for the Court and conducting, if necessary, interrogatories, it would simply be impossible to verify the credibility and reliability of the information supplied as well as to verify if all records are authentic. Section **4.1** of the *Management of Information Act* was cited previously. This Section explicitly requires that the information is retained 'the format in which it was made, sent or received or in a format that does not materially change' it. Rule **32.05** of the *Rules of the Supreme Court* allows to check if the format of a record has not been improperly changed indeed:

> 'Subject to rule 32.01(4), a party may at any time serve a notice in Form 32.05A on any other party in whose pleading, affidavit or list of documents reference is made to any document, requiring the other party to produce the document for inspection or further inspection and to permit that party to make a copy thereof' (emphasis added).

As to the sealing applications also mentioned by MUN it its submissions, the truth is that MUN at times attempts to file under seal records that should have been released in response to the initial

[62] Submissions of Memorial University dated November 27, 2020 at p. 31.
[63] Submissions of Memorial University dated November 27, 2020 at p. 29.
[64] Submissions of Memorial University dated November 27, 2020 at p. 29.
[65] The OIPC's recommendation that an application by a Public Body for a declaration under Sections **50** and **79** of the ATIPPA is an *ex parte* application (Submissions of the Information and Privacy Commissioner dated November 25, 2020 at p. 53) should be rejected for the same reason.

ATIPP request beforehand. In at least one case[66] MUN chose not to release in response to an ATIPP request a record that is highly relevant to a workplace investigation. It was included in an 'audit' copy[67] of the records to be filed under seal. The record was accessed after the applicant brought the matter before the Court, contested an interlocutory application for sealing records and made a follow-up ATIPP request. Was the response to the initial ATIPP request complete, there would have been no need for additional procedural steps indeed. To summarize, a best way to expedite and streamline the ATIPP process is to comply with the requirements set in the ATIPPA instead of changing the appeal process.

Your Case Officers provided an overview of the grievance. They noted that results from an ATIPP request demonstrated that Sean Cadigan was made aware of the complainant's first allegation on September 28, 2018 but that you were not notified of the investigation within the required timelines of Clause 19.04(b).

The University argued that the timelines were triggered when the University received the official written complaint from [redacted] in October. Your Case Officers noted that this is not in line with the language in Clause 19.04(b), and that the University was made aware of the first alleged event in September. Your Case Officers stressed the importance of adhering to the timelines in the Collective Agreement when it comes to allegations and investigations that might lead to discipline.

The University advised that it will consider the matter and provide a formal Step 1 response in the coming days. We will share it with you once received.

Thanks,

Amy

Amy Wadden
Labour Relations Officer
(709) 864-4197

MUNFA
unite • advocate • advance

Recommendation 11: Duty to assist

When discussing the duty to assist, MUN chose to ignore the three-part test established by the OIPC and consistently applied by this Office when investigating access complaints (see above on page **18**). One part of this test is particularly important: the Public Body 'must conduct a reasonable search for the requested records'. It follows that if the Public Body fails to conduct a reasonable search, its also fails to meet its statutory duty to assist. The failure to conduct a reasonable search amounts to the Public Body's refusal of access to a record.

Accordingly, the decision of the head of a Public Body not to conduct a reasonable search is reviewable by the OIPC. If the OIPC finds that a reasonable search was not conducted, further searches can be requested. This is exactly what the OIPC recommended in Report *A-2019-018* cited by MUN.[68] Contrary to MUN's claims, such recommendations are not 'soft'. They are as 'hard' as any other recommendations made by the OIPC, as also argued previously referring to the OIPC's clarifications (see above on pages **20-21**).

[66] Individual grievance *I-19-07* initiated by MUNFA.
[67] The concept of 'audit copy' is defined nowhere in the law and case law. Its introduction will create more confusion than it would solve problems.
[68] Supplemental Submission of Memorial University dated December 18, 2020 at p. 4.

The Public Body's refusal of access to a record or a part of it is also subject to appeal under Sections **52** and **54** of the ATIPPA. At the end of the day, the Public Body might choose to refuse access to the record even after receiving the OIPC's recommendation to conduct further searches. The Trial Division has power to order an additional search under Section **60(1)(c)** of the ATIPPA by ordering 'the head of the public body to give the applicant access to all or part of the record' and 'making an order the Court considers appropriate'. The latter remedy is indicative of the legislator's intention not to restrict the range of remedies available to the Court.

With due respect, MUN's submissions on the statutory duty to assist seem to be misguided. Instead of offering an interpretation that would be consistent with the 'entire context' of a provision, as required by the modern approach to statutory interpretation, MUN chooses an interpretation that does not even follow the plain meaning rule.[69] MUN's interpretation of the duty to assist necessitates that the ATIPPA is significantly amended, as acknowledged by this Public Body.[70] The interpretation of the duty to assist advanced here is in line with the case law in general and the three-part test established by the OIPC in particular. The latter interpretation does not require any radical change in the ATIPPA, which is indicative of its compatibility with the modern approach to statutory interpretation.

Recommendation 12 (15?): IT security arrangements

MUN's recommendation to restrict the information on IT security arrangements that can be released in response to an ATIPP request is an example of conspiracy theories. MUN links ATIPP requestors (who are expected to have addresses in Canada and identifiable personalities) and unknown hackers from 'China, Russia, the Netherlands, and other overseas entities'.[71] MUN prefers to ignore that if the information released in response to an ATIPP request was indeed used by hackers, it would be far easier to establish their identity and to track the entire network of alleged conspirators.

In support of the proposed amendments of Subsection **31(1)(l)**, MUN refers to the submissions on this point made by the Government of Newfoundland and Labrador's Office of the Chief Information Officer.[72] As on many other occasions, MUN prefers 'cherry-picking' to a careful analysis of a document in its entirety. For instance, the Office of the Chief Information Officer explicitly acknowledges interconnections between the ATIPPA and the *Management of Information Act* citing Section **6** of the latter (see also a discussion of the duty to document and to protect records on page **3** above). MUN says no word about the latter Act.

As to the substance of the Office of the Chief Information Officer's submissions, MUN extends the scope of IT security arrangements proposed to be exempted from release beyond the scope of the reasonable. Let us consider one example only. The Office of the Chief Information Officer mentions 'user identifiers (user ID's)'. In MUN's version, this transforms into names of system

[69] The Supreme Court of Canada compared the two approaches using solicitor-client privilege as an example in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555; see also p. **11** above.
[70] Supplemental Submission of Memorial University dated December 18, 2020 at p. 6.
[71] Supplemental Submission of Memorial University dated December 18, 2020 at p. 7.
[72] Available at https://www.nlatippareview.ca/files/12102020-OCIO-Submission.pdf.

administrators. According to MUN, should the names of IT specialists be revealed, they may become targets of 'social engineering'.

The Supreme Court of Canada established that information relating to the position or functions of public employees is accessible by way of access to information requests.[73] It must be noted that in that case the highest Court in this country dealt with information relating to position and functions of the RCMP. The RCMP, a law enforcement service, did not claim that the disclosure of information relating to the position or functions of RCMP officers would be harmful to law enforcement, let alone would make them vulnerable to 'social engineering'.

The Information and Privacy Commissioner of British Columbia did not find merit in attempts of a municipality to advance a 'social engineering' argument either. The Commissioner's representative found that 'the City does not explain what it means by social engineering attacks or how knowing the identity of employees at these facilities would enable those attacks.'[74] Neither did MUN in the circumstances of the case. Knowing the names of IT specialists in no way allows guessing their identifiers (user ID's) provided that the Public Body has proper password management policies and standards, as in the case of the Office of the Chief Information Officer.

One can then wonder why the names of IT specialists, as well as some other information about the IT infrastructure, may be sought by way of ATIPP requests if not for malicious purposes. Without accessing this information, it is simply impossible to properly investigate privacy breaches when they are an 'insider's job', i.e. committed by the IT staff with explicit or implicit approval of the Public Body's executive.

As a general conclusion to the discussion of MUN's submissions, they look like an attempt to change the law – the ATIPPA and probably the *Rules of the Supreme Court* – in order to solve particular issues that this Public Body have been apparently unable to address through a competitive process in the open Court.

I am prepared to participate in public debates with MUN's representatives, if the Access to Information and Protection of Privacy Statutory Review 2020 sees fit in continuing the discussion in this format.

[73] *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII), [2003] 1 SCR 66 (available at http://canlii.ca/t/1g2hw).
[74] *Vancouver (City) (Re)*, 2017 BCIPC 59 (CanLII), paragraph 22 (available at http://canlii.ca/t/hp4jx).

Summary of the recommendations:

1. The duty to document should be legislated in a more explicit manner, as proposed by the OIPC in its submissions (at pages **3-4** above).
2. Section **96** of the ATIPPA requires that investigations are conducted in a transparent and competitive manner and, if a party wishes to make submissions *in camera*, this party needs first to make an *inter partes* application for leave (at page **5**).
3. Either the Section **115** is included in the *Provincial Offences Act*, SNL1995, Chapter P-31.1, which will enable the Royal Newfoundland Constabulary to prosecute the relevant offences, or Section **96** of the ATIPPA is amended along the lines proposed above (at page **6**).
4. Section **20(2)** be amended as: 'the head of the public body shall produce a record in native format for the applicant where…' and the definition of 'native format' added to Section **2**: 'the format in which it was made, sent or received or in a format that does not materially change the electronic information that was originally created, sent or received' (at page **8**).
5. The wording of Section **33** should be changed to 'information pertaining to the initiation and conduct of a workplace investigation' (at page **15**).
6. Section **21(1)** of the ATIPPA could be amended in the following manner: 'The head of a public body may, not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard the request copying the application on the applicant. The Applicant has two business days to respond, if s/he chooses to do so' (at page **21**).
7. If a deadline for complying with the OIPC's recommendation is set, then the deadline for commencing an appeal under Section **54** of the ATIPPA should be extended and the applicant should have at least ten business days after receiving additional disclosure to decide if s/he will bring the matter before the Court (at page **22**).

All of which is respectfully submitted by

Dr. Anton Oleynik, Professor, Department of Sociology,
Memorial University of Newfoundland and Labrador