



**THE CANADIAN
BAR ASSOCIATION**
Newfoundland & Labrador Branch

**Submission to the Statutory Review of the Access to Information and Protection
of Privacy Act, 2015**

Submitted to Keri-Lynn Power, LLB (Hons), LLM

Koren Thomson & Derrick White

Canadian Bar Association Newfoundland and Labrador

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In consultation with our membership, CBA-NL makes five recommendations regarding the *Access to Information and Protection of Privacy Act, 2015* [the “ATIPPA”]. The recommendations are as follows:

1. The Information and Privacy Commissioner should not have the authority to review documents over which a public body claims solicitor-client or litigation privilege;
2. The public interest override in section 9 of the ATIPPA should not apply to solicitor-client or litigation privileged records;
3. The exception for legal privilege in section 30 of the ATIPPA should be amended to include settlement privilege;
4. The exception for third party business records ought to be amended; and,
5. Amendments ought to be made to reduce the strain of the ATIPPA on public resources.

Recommendation One: The Commissioner should not have the Authority to Review Documents over which a public body claims solicitor-client or litigation privilege

The issue of whether the Information and Privacy Commissioner of Newfoundland and Labrador ought to have the power to review solicitor-client and litigation privileged records to determine if a claim of privilege applies, is an issue that has arisen during the past several statutory reviews of the legislation. Until 2023, the Commissioner took the position that the ATIPPA provided the Commissioner such power. However, the Court of Appeal rejected the Commissioner’s position in [*Newfoundland and Labrador \(Information and Privacy Commissioner\) v Newfoundland and Labrador \(Justice and Public Safety\)*](#), noting that clear, explicit and unequivocal language is needed to abrogate a claim of solicitor-client privilege, and is not present in the ATIPPA.

The members of the CBA-NL maintain that this limitation on the Commissioner’s power should not be disturbed in a subsequent iteration of the legislation. In this regard CBA-NL makes two points.

First, the Commissioner is not an independent adjudicator like a Court. Under section 3 of the legislation, the Commissioner is tasked with advocating on behalf of access. Furthermore, the Commissioner has an automatic right of intervention **as a party** to applications to the Supreme Court for declarations by public bodies (section 50(4)), and appeals to the Supreme Court by access to information applicants and third parties (section 56(3)). And this right of intervention **as a party** applies even when there has been a complaint to the Commissioner, an investigation by the Commissioner, and a report issued by the Commissioner. In short, the legislation mandates a role for the Commissioner that may be – and often is – adverse in interest to the public body. Requiring disclosure to the Commissioner in those circumstances, amounts to an infringement of solicitor-client and litigation privilege – regardless of whether the Commissioner is prohibited from disclosing the content of the records. The scenario is not dissimilar to that described by the Supreme Court of Canada in *Alberta (Access and Privacy Commissioner) v University of Calgary*, when it stated the following:

[35] Further, solicitor-client privilege belongs to the client, not to the lawyer (*Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, at para. 48; *Blood Tribe*, at para. 9). Seen through the eyes

of the client, compelled disclosure to an administrative officer alone constitutes an infringement of the privilege (*Blood Tribe*, at para. 21). Therefore, compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege, regardless of whether or not the Commissioner may disclose the information onward to the applicant.

[36] In this regard, it is noteworthy that the Commissioner is not an impartial adjudicator of the same nature as a court. FOIPP empowers the Commissioner to exercise both adjudicative and investigatory functions. Unlike a court, the Commissioner can become adverse in interest to a public body. The Commissioner may take a public body to court and become a party in litigation against a public body that refuses to disclose information. These features of the Commissioner's powers further indicate that disclosure to the Commissioner is itself an infringement of solicitor-client privilege. (emphasis added)

In order to guard against this fundamental unfairness, and the damage it causes to the effective administration of justice, CBA-NL respectfully requests that the power to review records over which solicitor-client and litigation privilege is claimed, continue to be reserved solely for the Supreme Court of Newfoundland and Labrador – a court of inherent jurisdiction and the only impartial decision-maker under the legislation.

Second, limiting the Commissioner's ability to review records over which solicitor-client or litigation privilege is claimed, does not significantly hinder the Commissioner's ability to provide oversight.

In *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)* [*Justice and Public Safety*], and *Newfoundland and Labrador (Office of Women and Gender Equality) v. Newfoundland and Labrador (Information and Privacy Commissioner)* [*Office of Women and Gender Equality*], the Court determined that a public body's burden of proof on an appeal and on an application for a declaration under the ATIPPA in relation to a claim of privilege, is satisfied by the civil standard of proof. In Newfoundland and Labrador, the civil standard is reflected [rule 32.01\(3\) of the Rules of the Supreme Court, 1986](#).

Rule 32.01 requires a party to list those records over which privilege is claimed in a list of documents with a sufficient statement of the grounds of the privilege. In *Justice and Public Safety*, that civil standard was satisfied by submission that a lawyer had reviewed the records and confirmed that they were subject to solicitor-client privilege. In *Office of Women and Gender Equality*, the civil standard was satisfied by a submission that the public body redacted the information on the basis of solicitor-client privilege on the advice of its lawyer. There is no principled reason why the Commissioner cannot apply that civil standard to its determination of a claim of privilege under the ATIPPA.

Courts have repeatedly determined that they will only review records over which privilege is claimed, where there is evidence or argument presented which questions the validity of the privilege claimed. In such instances where the Commissioner applies the civil standard but there is evidence or argument presented to question the validity of the claim, CBA-NL recommends that an application to court be required to determine whether the records must be reviewed, and if so, to enable the Court to review the records. This approach balances the need to protect solicitor-client and litigation privileged records from infringement, with the ability of the Commissioner to determine complaints under the ATIPPA.

Recommendation Two: The Public Interest Override Should Not Apply to Solicitor-Client and Litigation Privileged Information

Subsection 9(1) of the ATIPPA provides that discretionary exceptions to access, including that pertaining to privileged records, do not apply “where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.” CBA-NL submits that this section ought not apply to privileged records. Its application is redundant and adds little value to the public body’s consideration of whether disclosure ought to be granted.

In [*Ontario \(Public Safety and Security\) v. Criminal Lawyers' Association*](#), the Criminal Lawyers Association argued, amongst other things, that the failure to apply a public interest override section to solicitor-client privileged records in Ontario’s *Freedom of Information and Protection of Privacy Act*, constituted a section 2[b] infringement under the *Charter*. In rejecting this argument, the SCC emphasized the public interest that underscores privilege would render the override of little value. It stated:

[53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the Act provides that a head “may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation”. The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. 49; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 35 and 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185.

[54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word “may” would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

As the ATIPPA is currently drafted, the public interests override offers little assistance in the public body’s consideration of whether to produce solicitor-client or litigation privileged records. However, its application nonetheless creates a risk that a stranger to the records may pierce privilege through reliance on a separate public interest argument. Such a risk, while minor, is nonetheless significant. On behalf of our membership, we respectfully request that the legislation

be amended to remove the application of the public interest override section to litigation and solicitor client privileged information.

Recommendation Three: The exception for legal privilege in section 30 of the ATIPPA should be amended to include settlement privilege

The Commissioner is of the view that the legislation is a complete code, and since it does not specifically refer to settlement privilege, public bodies are not able to rely upon the privilege to refuse to disclose settlement privileged records (Report A-2018-022). Our members disagree with this interpretation and request an amendment to clarify the issue.

In [*Magnotta Winery Corporation*](#), the Ontario Court of Appeal indicated that as a fundamental common law privilege, settlement privilege ought not to be considered abrogated absent “clear and explicit statutory language.” In coming to this conclusion, the Court emphasized that the “public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation” (at para 36). The Court’s approach is consistent with the British Columbia Supreme Court’s approach to settlement privilege in [*Richmond \(City\) v Campbell*](#), and the Supreme Court’s approach to solicitor client privilege in *University of Calgary*, and its approach to litigation privilege in *Lizotte*.

There is no clear and explicit language in the ATIPPA, which indicates that settlement privilege has been abrogated. As a result, there is no basis upon which to conclude that a public body or third party has been deprived of their right to rely upon settlement privilege, a class privilege, to deny access to records. Our members request that this be confirmed, by specifically adding protection for settlement privilege to section 30 of the ATIPPA.

CBA-NL acknowledges that during the statutory review in 2020, the Honourable David B. Orsborn recommended that settlement privilege only be added to section 30(2) of the ATIPPA to protect disclosure of settlement privileged information of third parties. Respectfully, his Honour’s recommendation overlooked the fundamental principle that settlement privilege belongs to *both* parties to a settlement. In the circumstances, there is no basis to distinguish between settlement privileged information of a third party, and that of the public body, when settlement amounts are in issue.

Recommendation Four: The exception for third party business records should be revised

When it comes to third party business information, businesses are required to satisfy an onerous three-part test set out in section 39 as follows:

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

- (c) the disclosure of which could reasonably be expected to
- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

In the [Access to Information and Protection of Privacy Act, Statutory Review 2020](#), the Honourable David B. Orsborn found that section 39 of the ATIPPA is rarely satisfied, with the result that there is little protection for third party business interests under the legislation. Four distinctions between section 39 and other exceptions to disclosure were identified:

1. All other harms-based exceptions in the ATIPPA do not require additional proof of a class-based element such as confidentiality [and we note “supplied” and confidentiality under the provision each have their own tests];
2. The interests of a public body may be protected in sections 35 and 38 by proof of confidentiality alone;
3. Under section 35(1)(a), the trade secret of a public body may be protected by proof that it is a trade secret, whereas a third party business must also establish that it was supplied in confidence and that a significant specified harm will be sustained by its disclosure;
4. Third parties are required to demonstrate a significant harm through clear and cogent evidence in order to satisfy section 39(1)(c), whereas a public body only need to establish a particular, less onerous harm in subsections 35(1)(d),(e),(g) and (h).

These distinctions persist to this day, with the result that there is less protection for sensitive third party commercial information under the ATIPPA, than there is for equivalent information belonging to a public body. The CBA-NL reiterates the impression of these distinctions noted in the former Statutory Review:

...the fact that certain public body information can be protected simply on the basis of a class-based confidentiality element while private third-party information – even a trade secret – requires proof of the additional element of harm, may suggest that the structure of the third party exception could benefit from assessment.

The review of s. 39 has been the most troubling aspect of this review. The fact that the three-part test is common across Canada suggests that one should be cautious about change. But it does appear that in other reviews there has been little if any discussion of the equivalent provision. The observation will of course be – ‘it’s

obviously working well'. But in the circumstances, I do not take much comfort from silence. [page 188]

The CBA-NL recommends that the statutory review committee contemplate whether the different onus for public body and third party business records remains justifiable, and that the committee contemplate imposing a less onerous burden on third party businesses, such as the test employed under section 20(1) of the *Access to Information Act*, RSC 1985, c A-1.

Recommendation Five: Address the Strain on Public Resources

The CBA is mindful of the ongoing financial strain on public resources. The ATIPPA impacts the strain in two distinct ways: the cost of compliance imposed on public bodies; and, the cost to judicial resources of ATIPPA litigation.

As currently drafted, the ATIPPA is designed to provide users with timely access to information. It seeks to accomplish this goal by imposing strict deadlines on public bodies, and a right of access to information at little to no cost. While there are obvious public benefits to both means, there is also a price. Not all public bodies are similarly resourced. Some municipalities for instance, are only staffed part time or have very limited budgets, yet they are subject to the same statutory requirements as the province. This is troubling to some of our members, who have reported an increased reliance by public bodies on legal services to *process* access to information requests.

This concern is coupled with concern for the strain on judicial resources. The courts are currently operating with limited resources, and the ATIPPA provides a requester with a statutory right of appeal. The CBA-NL recognizes the value in promoting access to the Courts. However, as we have recently seen in the case of [*Memorial University of Newfoundland v Oleynik*](#), the process is vulnerable to abuse. In conjunction with the Court's already limited resources, such abuse can impact the public's access to justice for other matters.

It is in this context that the CBA-NL recommends that the statutory review committee contemplate imposing an application fee, and processing fees, for access to information requests. Not only would such fees help to offset the costs incurred by public bodies under the ATIPPA, they will also dissuade persons from using the ATIPPA for frivolous or abusive purposes.

CBA-NL refers the review committee to the attached Schedule, which demonstrates that the majority of access to information legislation across Canada imposes fees, as follows:

- Six provinces and one territory, impose a fee for filing an access to information request. While most charge \$5, the fees vary from \$5 to \$25 per request.
- Three provinces have separate access to information legislation for municipalities, and impose access to information fees for requests to municipalities.
- Eight provinces and three territories separately impose fees for processing access to information requests.

Respectfully yours,



Koren A. Thomson &
ATIPPA Submission Committee



Derrick White
ATIPPA Submission Committee

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Schedule: Comparison of Access to Information Fees by Jurisdiction

Jurisdiction	Legislation	Application Fee	Processing Fees	Separate Municipal Legislation
Federal	<i>Access to Information Act</i>	\$5	No processing fees (eliminated in 2019 by Bill C-58)	N/A
British Columbia	<i>Freedom of Information and Protection of Privacy Act (FOIPPA)</i>	\$10	\$30/hr after first 3 hours	No — FOIPPA covers local public bodies
Alberta	<i>Access to Information Act (ATIA)</i> (replaced FOIP Act on June 11, 2025)	\$25	Additional fees if total processing cost exceeds \$150	No — ATIA covers municipalities
Saskatchewan	<i>Freedom of Information and Protection of Privacy Act (FOIP)</i>	None (provincial FOIP requests)	\$15 per half-hour after 2 hours	Yes — LA FOIP; application fee of \$20
Manitoba	<i>Freedom of Information and Protection of Privacy Act (FIPPA)</i>	None	\$15 per half-hour after 2 hours	No — FIPPA covers local public bodies
Ontario	<i>Freedom of Information and Protection of Privacy Act (FIPPA)</i>	\$5	\$7.50 per 15 min of search/preparation, plus \$0.20/page	Yes — MFIPPA; same \$5 application fee
Quebec	<i>Act respecting Access to documents held by public bodies and the Protection of personal information</i>	None	Fees limited to cost of transcription, reproduction, or transmission	No — the Act covers municipal bodies
New Brunswick	<i>Right to Information and Protection of Privacy Act (RTIPPA)</i>	None	None — fees have never been implemented by regulation	No — RTIPPA covers local public bodies
Nova Scotia	<i>Freedom of Information and Protection of Privacy Act (FOIPOP)</i>	\$5	\$15 per half-hour of staff time, plus \$0.20/page for photocopies	Yes — Part XX of MGA; same \$5 application fee
Prince Edward Island	<i>Freedom of Information and Protection of Privacy Act (FOIPP)</i>	\$5	\$15 per half-hour after 3 hours	No — FOIPP extended to municipal/educational bodies in 2019
Newfoundland and Labrador	<i>Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)</i>	None	\$25/hr after 10 hrs (local gov.) or 15 hrs (other public bodies)	No — ATIPPA covers local public bodies
Yukon	<i>Access to Information and Protection of Privacy Act (ATIPP)</i>	None	\$30/hr; 3–10 hours free depending on body and request type	N/A (territory)

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Northwest Territories	<i>Access to Information and Protection of Privacy Act (ATIPP)</i>	None (removed in 2021)	\$6.25 per 15 min; generally no fee if total under \$250	N/A (territory)
Nunavut	<i>Access to Information and Protection of Privacy Act (ATIPP)</i>	\$25	\$6.75 per 15 min; generally no fee if total under \$150	N/A (territory)