Submission on Newfoundland and Labrador's Access to Information and Protection of Privacy Act

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1. Overview

The Centre for Law and Democracy (CLD) has prepared this Submission[1] in response to the call for public input into the review of the Access to Information and Protection of Privacy Act, 2015 (ATIPPA)[2] by Newfoundland and Labrador's government as part of the mandatory five-yearly review of the Act, as provided for in section 117.[3]

The ATIPPA currently scores 110 points out of 150 on the Right to Information Rating, an internationally recognised methodology for measuring the strength of legal frameworks for the right to access information held by public authorities (or the right to information, RTI).[4] This score positions the ATIPPA as by far the strongest right to information legislation in Canada. Were the province a country, it would be tied for 25th place among all the countries with national RTI laws,[5] which is a very respectable position.[6]

The strength of the law is a reflection of the major overhaul of Newfoundland and Labrador's access to information regime in 2015, at which time the province accepted many of CLD's

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[2] SNL 2015, Chapter A-1.2, https://www.assembly.nl.ca/legislation/sr/statutes/a01-2.htm.
[3] See https://www.nlatippareview.ca.
[4] See https://www.rti-rating.org/. Note that the Rating for Newfoundland and Labrador was updated as we prepared this Submission.
[5] See https://www.rti-rating.org/country-data.
[6] Far more so, for example, than Canada's 47th place position.

recommendations for improvements.[7] At the same time, there are still many ways in which the Act could be improved to bring it more fully into line with international human rights standards regarding the right to information and best practices internationally. CLD brought many of these to the attention of the province during the last statutory review in 2020.[8] However, for the most part, these have not yet been enacted into law.

CLD works internationally to promote those human rights which are foundational for democracy, including the right to information (as we call it, in light of the fact that it has been recognised as a human right under international law). As part of this, we work extensively with reform actors – including intergovernmental organisations, national or sub-national governments, parliaments, oversight bodies such as information commissions and civil society actors – to support law reform efforts, such as we hope will result from this review. As part of this, we have produced numerous analyses of adopted or draft RTI legislation.[9]

A very significant contribution CLD has made to advancing RTI globally is its RTI Rating,[10] the premier global methodology for assessing the strength of legal frameworks for RTI, which has been recognised and relied upon by actors such as UNESCO, the World Bank and the United States Millennium Challenge Corporation (MCC).[11] The RTI Rating relies on 61 discrete indicators, grouped into seven categories, to assess how strong the legal framework for RTI is in any jurisdiction. Every one of the 142 national RTI laws which has so far been adopted is assessed on the RTI Rating,[12] while CLD also maintains a separate Canadian rating where all 14 Canadian jurisdictions are assessed.[13]

This Submission sets out CLD's assessment of the strengths and weaknesses of the ATIPPA, with a focus on access to information (and not on those parts of the Act which deal with

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[7] See Centre for Law and Democracy, Submission to the Independent Review of the Newfoundland and Labrador Access to Information and Protection of Privacy Act, July 2014, http://www.lawdemocracy.org/live/wp-content/uploads/2014/07/Canada.Nfld_.RTI_.Jul14.pdf.

[8] *Newfoundland and Labrador: Analysis of Access to Information Act*, November 2020, https://www.law-democracy.org/wp-content/uploads/2025/11/Canada.Nfld_.RTI_.Nov20.pdf.

[9] All of our publicly released resources are available at: https://www.law-democracy.org/resources. These can be searched by type of document ("Legal Analyses") and topic ("Right to Information") to find 106 such analyses.

[10] See https://www.rti-rating.org.

[11] For a formal statement about how the MCC uses our RTI Rating to assess countries' eligibility for development aid, see https://www.mcc.gov/who-we-select/indicator/freedom-of-information-indicator.

[12] The results of this are available at: https://www.rti-rating.org/country-data.

[13] See https://www.law-democracy.org/rti-rating/canada.

privacy and personal data protection). The results of the ATIPPA according to the RTI Rating, as grouped by performance on each of the seven categories, are as follows:

Section	Max Points	Score	Percentage
1. Right of Access	6	4	67%
2. Scope	30	22	73%
3. Requesting Procedures	30	21	70%
4. Exceptions and Refusals	30	16	53%
5. Appeals	30	26	87%
6. Sanctions and Protections	8	6	75%
7. Promotional Measures	16	15	94%
Total score	**150**	**110**	**73%**

2. Positive Aspects

While Newfoundland and Labrador's right to information regime has several laudable aspects, as reflected in its strong score on the RTI Rating, its fee structure and robust Information and Privacy Commissioner are especially worthy of mention.

2.1 Free to Make Requests

The fact that it is free to make requests (section 25) is a particularly positive feature of the ATIPPA. Individuals should not have to pay simply to exercise the fundamental human right to make a request for information. In line with this, many countries do not charge any fees simply for making or lodging requests.[14]

It being free to lodge requests has also had clear practical benefits in Newfoundland in the form of increasing public engagement with the access regime. The removal of the $5 request fee in 2015 led to an immediate rise in the number of requests being lodged. Between 2014 and 2015, these increased by 86% (from 757 to 1,410).[15] Over the five-year period 2014-2019,

[14] This is measured by Indicator 24 of the RTI Rating, on which 106 of the 142 countries get the full two points (meaning these charges are explicitly excluded) while another 20 get one point (meaning the law is not explicit as to whether such charges may be levied). The performance of countries according to each of the 61 RTI Rating indicators can be found at: https://www.rti-rating.org/country-data/by-indicator.

[15] Newfoundland and Labrador Justice and Public Safety (ATIPP Office), *2018-2019 Annual Report on the Administration of the Access to Information and Protection of Privacy Act*, 2019, p. 8, https://www.gov.nl.ca/atipp/files/publications-atippa-annual-report-2018-19.pdf.

the number of requests rose by 218% (757 to 2,412).[16] In the most recent reporting period (2024-2025), 4330 requests were received.[17] These increases are likely due at least in part to the significant psychological, practical and even economic differences between needing to pay even a small fee and no fee at all.

Increased engagement with the right to information regime is to be celebrated. The legislation exists so that people can access information held by their government, which is public property. Governments sometimes express the fear that making it free to lodge requests will lead to an unmanageable flood of frivolous requests. To CLD's knowledge, there is little evidence that such worries have materialised in any jurisdiction where it is free to make requests. It is true that an increase in requests will increase the workload of the coordinators who manage requests under the ATIPPA. However, this does not mean that fees should be used to deter individuals from seeking to exercise a human right. As in the case of ensuring respect for other rights, options such as increasing the resources available for processing requests should be employed.

While it is good that requests are free, other fees in Newfoundland and Labrador's access procedure should be tweaked. Global best practice is not to charge for staff time to process requests and, instead, to limit by law charges for accessing information to the costs of reproducing and delivering information (such as for photocopying and postage charges in cases of requests for printed files)[18] or to waive fees entirely for obtaining information, as is done at the federal level in Canada.[19] The feasibility of removing such fees is confirmed by the fact that, in both 2025 and 2026, CLD launched requests for information in, respectively, 76 and 90 countries as part of a global assessment of RTI implementation and, in both years, found that almost no countries charged any fee for providing information.[20] However,

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[16] *Ibid*.

[17] Newfoundland and Labrador Justice and Public Safety (ATIPP Office), *2024-2025 Annual Report on the Administration of the Access to Information and Protection of Privacy Act*, 2025, p. 7, https://www.gov.nl.ca/atipp/files/ATIPPAnnualReport2024-2025.pdf.

[18] See, for example, Article 19.2 of Croatia's Right of Access to Information Act, 011-01/13-01/27, which states: "The public authority body is entitled to request from the beneficiaries to cover the actual material expenses incurred by providing information, under Article 17 of this Law, as well as to request to cover the expenses of delivering the requested information." Available in English translation at: https://www.rti-rating.org/wp-content/uploads/Croatia.pdf.

[19] See Access to Information Regulations, SOR/83-507 (as amended on 23 June 2023), section 7, https://laws-lois.justice.gc.ca/eng/Regulations/SOR-83-507/page-1.html#h-878462 (limiting fees to the application fee of $5).

[20] The 2025 assessment found that only three of the assessed countries levied fees of any kind, while in the 2026 assessment, only five countries charged a fee to lodge a request and only one to provide

section 25(2) of the ATIPPA, along with section 3 of the fee rules,[21] provide that public bodies may charge $25 per hour after 10 hours of searching to locate a record in the case of local bodies and 15 hours for other public bodies. The effect of such charges, at least in part, is to bill members of the public for poor government records management practices. Furthermore, although we are not aware of the practice in Newfoundland and Labrador, our experience in other Canadian jurisdictions suggests that the charging of these fees varies considerably among public authorities, although the number of free hours is comparatively high in Newfoundland and Labrador.[22] Providing consistent service to applicants is another reason to abolish these fees.

Furthermore, international practice is to provide a certain number of pages of photocopies for free,[23] something which is also missing from the ATIPPA. We are not aware of whether public bodies in Newfoundland and Labrador do charge for photocopying small numbers of pages, but hopefully not, given that the recovery costs would far exceed those charges, in which case it should be easy to formalise a rule along these lines. We support, in this regard, the recommendation from the 2020 review that the first 100 pages be provided for free.[24]

2.2 Robust IPC

The ATIPPA provides for oversight in the form of an independent Information and Privacy Commissioner. Such bodies play a foundational role in better practice right to information systems through such activities as adjudicating appeals, training public officials and promoting public awareness about the right to information. Some of the particularly positive features of the rules governing the Newfoundland and Labrador Commissioner include

information. See *Global Comparative Testing of Responses to Requests for Information* (September 2025, CLD), p. 11, https://www.law-democracy.org/wp-content/uploads/2026/02/IDUAI.report.25-09-26.pdf; and Second Global Comparative Testing of Responses to Requests for Information (September 2026, CLD), p. 14, https://www.law-democracy.org/wp-content/uploads/2026/10/IDUAI-Report.26-09.final_.pdf.

[21] Establishment of Costs for the *Access to Information and Protection of Privacy Act*, 1 June 2015, https://www.gov.nl.ca/atipp/files/info-costschedule-jun1-2015.pdf.

[22] In Nova Scotia, for example, only three hours of free time will be provided once the new law comes into force on 1 April 2027. See section 26(2) of the Freedom of Information and Protection of Privacy Act, Chapter 13 of the Acts of 2025, https://nslegislature.ca/legc/bills/65th_1st/3rd_read/b150.htm.

[23] See, for example, Article 25(2) of Estonia's Public Information Act, RT I 2000, 92, 597, which states: "A person making a request for information shall pay up to 0.19 Euros per page for printouts and copies on paper starting from the twenty-first page, unless a state fee for the release of information is prescribed by law." Available in English translation at: https://www.rti-rating.org/wp-content/uploads/Estonia.pdf.

[24] See *Access to Information and Protection of Privacy Act, 2015: Statutory Review 2020 Recommendations*, p. 2, https://www.gov.nl.ca/atipp/files/2020-Statutory-Review-ATIPPA-Final-Report-Summary-Recommendations.pdf.

financial independence from government (sections 90-93), and its broad mandate to initiate investigations into potential breaches of the law (section 95(1)(a)), to make recommendations to public bodies regarding access (section 47), to approve requests by public bodies to disregard requests (section 21), to vary request processing procedures (section 24), to approve extensions to the time limits for responding to requests (section 23), and to raise public awareness about the right to information (section 95(2)(b)). The Commissioner is also protected against liability for actions done in the course of duty, unless they are done in bad faith (section 104). Importantly, an innovative approach to ensuring that the Commissioner's decisions are effectively binding is reflected in sections 47-51 of the ATIPPA. Due to this robust system, the ATIPPA earns 26 out of a possible 30 points on the RTI Rating category of Appeals, or 87%, one of the strongest areas and far above the ATIPPA's overall average of 73%.

There are, however, ways in which the oversight system could be further improved. In its submission to the 2020 review, CLD suggested that while the ATIPPA already does give the Commissioner the authority to access and review information in relation to which a claim of solicitor-client privilege has been made, this power should be made explicit to remove any ambiguity.[25] Following the 2020 review, the Review Committee report by retired Supreme Court Justice David B. Orsborn essentially supported our recommendation, calling for the ATIPPA to be amended to provide explicitly for the Commissioner to be able to review records in relation to which solicitor-client privilege is claimed, with the exception of cases where the privilege relates to "advice given in respect of an ATIPP matter".[26] Subsequently, the Court of Appeal of Newfoundland and Labrador, while accepting that the ATIPPA's legislative history evinced a legislative intent to include such authority, nonetheless confirmed a first instance finding that, as currently worded, the ATIPPA does not provide this authority and that any such authority would need to be set out explicitly in law.[27] This decision makes it quite clear that the ATIPPA does need to be amended in the manner suggested so as to give effect to its original legislative intent.

There are important policy reasons for granting this kind of review power to the Commissioner. Having the power to review information which is claimed to be subject to

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[25] *Newfoundland and Labrador: Analysis of Access to Information Act*, note 8, p. 4.
[26] *Access to Information Act, 2015: Statutory Review 2020, Volume 1*, p. 123, https://www.gov.nl.ca/atipp/files/2020-Statutory-Review-ATIPPA-Final-Report.pdf.
[27] *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Justice and Public Safety)*, 2023 NLCA 27, paras. 81 and 91, https://records.court.nl.ca/public/supremecourt/decisiondownload/?decision-id=9941&mode=stream.

solicitor-client privilege is key to the Commissioner's oversight function. Otherwise, public authorities could potentially block access to information which did not fall within the scope of this exception, simply by claiming privilege, something which has happened in other jurisdictions. In this case, the only recourse left to the applicant would be to lodge a costly and lengthy judicial appeal. Other review bodies – such as the National Security Intelligence Review Agency,[28] the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police[29] and the federal Information Commissioner[30] – all have the power to review information claimed to be privileged. As such, there is no reason why Newfoundland and Labrador's Information and Privacy Commissioner should not also have this power.

Finally, since the Commissioner is a key government watchdog, it is important that the law ensure that holders of this post are competent and independent from the political process. To this end, it would be useful to require those being considered for appointment both to be free of strong political connections and to have a minimum of professional expertise or experience. Being too restrictive in this regard could unduly narrow the range of talented candidates, but the law should at least set out some minimum standards for this position and rule out individuals with direct connections to political parties from being appointed.

Recommendations

- Section 25(2) of the ATIPPA and section 3 of the fee rules should be removed.
- Consideration should be given to requiring public bodies to provide the first 100 pages of photocopies to applicants for free.
- Explicit language should be added to section 97 to grant the Commissioner the power to review information which is subject to a claim of solicitor-client privilege, with the exception of information claimed to be about legal advice relating to an ATIPPA matter.
- Language should be added to the ATIPPA on minimum qualifications for commissioners and rules prohibiting individuals with strong political connections from being appointed.

[28] National Security and Intelligence Review Act, S.C. 2019, c. 13), section 9(2), https://laws-lois.justice.gc.ca/eng/acts/N-16.62/index.html.
[29] Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, sections 45.4(1)(a) and 45.4(2), https://laws-lois.justice.gc.ca/eng/acts/R-10/index.html.
[30] Access to Information Act, R.S.C., 1985, c. A-1, section 36(2), https://laws-lois.justice.gc.ca/PDF/A-1.pdf.

3. Exceptions

Exceptions represent the category where the ATIPPA does by far the least well from among the seven categories on the RTI Rating, scoring just 16 out of a possible 30 points or just 53%, well below the ATIPPA's overall average of 73%. Many exceptions fail to meet the three-part test mandated by international standards, as reflected in the Council of Europe's Recommendation of the Committee of Ministers to member states on access to public documents. Principle IV(1) of the Recommendation indicates that exceptions must serve legitimate interests and that "disclosure may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure".[31]

The first limb of the test is that the exception should be narrowly defined to serve a legitimate interest. Legitimate interests have been clearly defined by international standards to include only: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice; legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities.[32] However, the ATIPPA includes several exclusions and exceptions which go beyond this, such as information which comprises teaching materials (section 5(g)). Other exceptions seem to have been drafted with a legitimate interest in mind but are drawn too broadly, such that they render secret information which goes beyond that legitimate interest.

Second, information should only be able to be withheld if disclosing it would result in harm to a legitimate interest. Information should not be withheld simply because it relates to an interest. In a few cases, releasing information self-evidently causes harm, such as for information (properly) subject to solicitor-client privilege. Otherwise, however, the legislation should include an explicit requirement of harm before access may be refused. Many of the exceptions in the ATIPPA are not harm tested.

Third, even if a legitimate interest would be harmed by disclosure, international standards require the information to be released if that harm is outweighed by the public interest in accessing the information, for example due to its value in exposing corruption, wrongdoing

[31] Council of Europe, Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents, 21 February 2002, Principle IV, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c6fcc.
[32] *Ibid.*, Principle IV(1).

or human rights violations. The ATIPPA does have a public interest override, but it does not apply to many exceptions, it is by nature too weak and its application is discretionary.

Another key problem is that the ATIPPA preserves exceptions which are contained in the many legal provisions which are listed in Schedule A. Several of these exceptions do not include harm tests or public interest overrides.

3.1 Exceptions Which Do Not Protect Legitimate Interests

Section 5 creates a number of complete exclusions or categories of information or records which simply do not fall within the ambit of the ATIPPA. All of these exclusions are illegitimate, whether due to failing to refer to a legitimate interest, being overbroad, or failing to incorporate a harm test or public interest override.

Some of the section 5 exclusions do refer to legitimate interests, such as sections 5(k)-(m), which pertain to records relating to prosecutions and investigations by the Royal Newfoundland Constabulary, although they still lack harm tests. Others do not refer to a legitimate interest, such as section 5(d), referring to records of a registered political party, and section 5(g), which exempts "a record containing teaching materials or research information of an employee of a post-secondary educational institution". Some of the material covered by these exclusions might legitimately be exempt via other exceptions, such as for privacy (section 40) or the commercial interests of third parties (section 39), but they themselves are not legitimate. Many of the section 5 exclusions are not harm tested. And an overriding problem with the section 5 exclusion approach is that it removes these records from the ambit of the public interest override and any sunset clause, because the records in question are simply not subject to any requirement to disclose in the first place.

Several of the 'regular' exceptions, which are set out in Division 2 of Part II of the ATIPPA, do not serve legitimate interests or, to the extent that they do, unnecessarily duplicate protection afforded by other exceptions. For example, section 32 covers confidential evaluations for purposes of education, awards for outstanding service, or the issuance of public contracts or other benefits. None of these are independent grounds for an exception although some of this information would be covered by sections 27-29, on policy making, section 35, on the financial interests of public bodies, and section 40, on privacy. Section 38 covers labour relations information, again not an independent ground for refusing to disclose information, although part of this information would again be covered by other exceptions, such as the administration of justice (section 31) or the financial and economic interests of public bodies (section 35).

Similarly, Section 41 protects House of Assembly service and statutory office records, which is again not an exception which is recognised under international law. To the extent that this includes sensitive information, it is already covered by other exceptions. Section 41(a), protecting infringements of Assembly privileges, and section 41(b), governing any advice or recommendation given to various Assembly bodies which is not required by law to be entered into the minutes of the House of Assembly Management Committee, are particularly problematic here. Any information covered by these sections which could legitimately be withheld would be covered by other exceptions, in particular the various policy making exceptions in sections 27-29.

The section 30 exception for legal advice privilege is also framed too broadly, particularly in its section 30(1)(b), covering all "legal opinions provided to a public body by a law officer of the Crown". While protecting solicitor-client privilege is key to the protection of the relationship between a lawyer and a private client, the same analysis does not apply in the government context. Protecting solicitor-client privilege is important in the private context because clients are usually discussing sensitive legal matters, such as contracts or criminal actions. However, government lawyers are often used to provide policy-type advice, including on legal matters, to public officials, much like other professional staff. Section 30(1)(b) would, in appropriately, cover this sort of advice.

There is no warrant for casting a general blanket of secrecy over this sort of advice, beyond the protections already offered by sections 27-29. Instead, legal advice should be subject to protection only when it is to be used for legally contentious matters. This is essentially captured by the idea of litigation privilege, which covers advice provided by lawyers in preparation for an upcoming or potential court case.

Several subsections of section 35, which covers information which could harm financial or economic interests of public bodies, are also overbroad. Section 35(1)(b) covers information which has or is "reasonably likely to have" monetary value, a formulation which could be deemed to apply to any information deemed to be of possible value, which is most information. Section 35(1)(d) covers any information which, if disclosed, could result in "premature disclosure of a proposal or project or in significant loss or gain to a third party". Neither of these is legitimate, of themselves (i.e. unless connected to some other interest). Some part of the first might be covered by the policy making exceptions in sections 27-29 but, outside of that, it is not legitimate. For its part, the latter would need to incorporate some sort of qualifier to limit it to illegitimate loss or gain, failing which it could stymie many innovations, such as the entire range of useful apps which have been built using Canadian

government data. Section 35(1)(g) covers information the disclosure of which could harm the "financial interests" of the province or a public body. This is too broad to be legitimate; consider, for example, the vast range of information the disclosure of which might change public behaviour so as to lower the collection of taxes. Protecting the legitimate commercial interests of a profit-making public enterprise would, however, be appropriate.

3.2 Harm Test

A significant number of the exclusions and exceptions in the ATIPPA fail to incorporate any proper harm test. For example, sections 27-29 protect cabinet records, local public body confidences and policy advice, which all broadly relate to the legitimate "policy making" exception. However, the sections are written so as to protect entire classes of information, such as a discussion paper or minute, rather than specific interests against harm. International standards suggest that the policy making exception should be limited to protecting four specific sub-interests against harm: the effective formulation or development of government policy; policies where premature disclosure would jeopardise their success; the free and frank exchange of advice or views, which is of inherent importance to the deliberative process within government; and the efficacy of testing or auditing procedures.[33] All of these categories would be massively overbroad if not subjected to a clear harm test. Despite this, the exceptions in sections 27-29 simply list types of information—advice prepared for Cabinet, for example, or draft regulations— which by definition cannot be subjected to a harm test (since these can only attach to interests). As a result, they are excessively broad because they could be relied upon to refuse the disclosure of policy-related records even where this would cause no harm. Other provisions which fail to incorporate a harm test are parts of sections 5 (as noted above), 31, 32, 33, 35, 38 and 41.

The definition of a "cabinet record" in section 27(1) is particularly egregious in its overbreadth, even covering records created to develop submissions to Cabinet (i.e. reaching back two steps) (section 27(1)(h)) and records used for discussions among ministers, which could cover almost anything they happened to have read about a matter (section 27(1)(f)). Although it is common practice across Canada to exclude cabinet records as a category of information, it would be simple and effective to craft an exception which protected against harm the interest involved here – focusing on the collective responsibility of cabinet for its decisions, along with the need to protect decisions against premature disclosure – and this

[33] Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (2008, Paris, UNESCO), p. 105, https://unesdoc.unesco.org/ark:/48223/pf0000158450.

has been done in other countries. For example, Ghana's RTI law limits the exception to information prepared for submission to Cabinet and information at Cabinet containing,

> matters the disclosure of which would reveal information concerning opinion, advice, deliberation, recommendation, minutes or consultation made and is likely to
> (i) prejudice the effective formulation of government policy;
> (ii) frustrate the success of a policy by premature disclosure of that policy;
> (iii) undermine the deliberative process in Cabinet; or
> (iv) prejudice national security.[34]

It may be noted that some provisions in the ATIPPA contain the word "harmful" in their title but go on to define exceptions which do not refer to harm. One example is section 31(1), which lists a range of law enforcement-related exceptions. Some of these exceptions are effectively harm tested, such as "deprive a person of the right to a fair trial" (section 31(1)(h)). However, others are not. Section 31(1)(l), for example, covers information which could reveal "arrangements for the security of a property or a system". This appears to be designed to prevent bad faith actors from gaining knowledge to bypass security systems. Yet, without a harm test, the provision could also block, for example, the release of information about the expenditure of public funds on a video surveillance system. Similarly, section 31(1)(m) refers to revealing "technical information about weapons used or that may be used in law enforcement". Once again, keeping all of this information secret would disable important public debate about the purchase of weapons, such as the one held in Halifax over the purchase of an armoured vehicle for the Halifax Regional Police, which involved in-depth discussions about the capabilities of the vehicle in question. If a harm test were added so that this would apply only where the release of this information would undermine law enforcement, it would be legitimate. Some exceptions, such as for solicitor-client privilege, essentially inherently include a harm test but, otherwise, such tests should be explicitly incorporated into every single exception. One approach which may be efficient, given how long Division 2 of Part II is, would be to create a general section which applied a harm test to every exception.

3.3 Public Interest Override

The ATIPPA's treatment of the public interest override falls short of international standards in several respects. International standards mandate that the override should apply to every

[34] Right to Information Act, 2019, section 6, https://www.rti-rating.org/wp-content/uploads/2020/07/Ghana.RTI-2019.pdf. Section 6(2) further clarifies: "Information which contains factual or statistical data is not exempt information".

exception. The general public interest override in section 9 does not apply to the exceptions set out in sections 27, 31, 33, 37 and 39-41 or to the exclusions in section 5. Of these, only section 27 has its own public interest override,[35] leaving many exceptions without any public interest override. Section 9 also states explicitly that it only applies to discretionary ("may refuse") exceptions, although this is already addressed through the list of the exceptions to which it applies (i.e. this list does not include any "shall refuse" exceptions).

The section 9 override is mandatory, in the sense that it must be applied when its conditions are met. In contrast, the section 27 override is discretionary in nature, contrary to international standards. Furthermore, the standard of application of the section 9 override is too weak. It applies only where it is "clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception". Given that access to information is a human right, international standards require the public interest to be weighed against the harm specifically, rather than the more general notion of the "reason for an exception". Second, the requirement that there be a "clear demonstration" that the public interest outweighs the harm unreasonably tilts the consideration in favour of secrecy whereas international standards call for an even balancing between the competing interests.

At the same time, we note that it is positive that section 9(3) provides for the proactive application of the public interest override in certain cases, namely in the context of "information about a risk of significant harm to the environment or to the health or safety of the public or a group of people".

3.4 Third Parties

Another weakness in the regime of exceptions in the ATIPPA is that third parties can excessively delay the dissemination of information to an applicant. Section 19(7) prevents public bodies from releasing information which involves a third party until the third party has "exhausted any recourse under this Act", which includes the possibility of both a complaint to the Commissioner and an appeal to the Trial Division court. Sections 42(4), 53(2) and 53(3) place time limits on when such complaints and appeals may be filed, but the time frames for the Commissioner to determine complaints are relatively long and these are much longer for court cases, although these must at least proceed on an "expedited basis" (section 57). As a result, records involving third-party interests could stay sealed for the duration of

[35] Section 40(2)(m) does refer to a "public interest", but this is the very specific and limited public interest set out in section 40(3) (i.e. where a third party requests that their own personal information not be disclosed).

protracted litigation, which is an unacceptable delay for the exercise of the human right of accessing information. It also creates a presumption against disclosure and in favour of protecting third parties. While privacy, one of the third-party interests which may be invoked, is also a human right, the main other third-party interest – namely commercial interests – is not. Furthermore, international experience demonstrates that sensitive third-party information is almost never released, because decision-makers all along the spectrum tend to be very protective of secrecy interests in general, and third-party interests in particular. As a result, better practice would be to release the information once the public body has determined that it is not covered by the relevant exception but then to allow the third party to appeal and claim compensation in the very unlikely event that the decision is eventually overturned.

3.5 Sunset Clauses

International standards require right to information laws to include sunset clauses so that exceptions protecting public interests presumptively cease to apply after a set period of time, such as 15 or 20 years. The rationale here is that the sensitivity of this information declines rapidly over time and that sunset clauses prevent information being withheld unnecessarily after its sensitivity has reached a vanishing point. Some laws provide for a special procedure to extend the period of secrecy, sometimes with the approval of the oversight body, in those highly exceptional cases where information remains sensitive beyond the sunset period.

The ATIPPA does contain some sunset clauses, in sections 27, 28, 29, 34, 38 and 39. However, better practice requires a sunset clause to apply to all exceptions which protect public interests, such as the administration of justice (which is protected by section 31). Furthermore, some of the sunset clauses in the ATIPPA are too long. For example, sections 38(2) and 39(3)(b) on, respectively, labour relations information and commercial information of third parties, in both cases when this information is in the archives, have 50-year sunset clauses. Better practice would be to provide for time limits which are more akin to the 15-year period in sections 28(2)(b), 29(3) and 34(3) or the 20-year period in section 27(4)(a).

3.6 Paramountcy Clauses

Better practice is for right to information laws to include, within their regimes of exceptions, at least in a general way, all of the interests which are protected by secrecy (such as national security, privacy and so on), and then to allow other laws to elaborate on but not expand upon those exceptions. In this way, the three parts of the test for exceptions, namely clear and

narrow definitions of protected interests, the harm test and the public interest override, can effectively be applied to all of the secrecy provisions which are found in the jurisdiction. And the overriding justification for this is that these laws implement human rights, which should override ordinary legislation.

The ATIPPA does generally take this approach, through its see section 7(1), but section 7(2) then exempts from this approach the numerous provisions listed in Schedule A (paramountcy clauses). Some of the paramountcy clauses in Schedule A do not meet international standards. Just as one example, sections 173-174 of the Highway Traffic Act[36] prevent the disclosure of accident incident reports drafted by peace officers in all circumstances. While this may sometimes be legitimate, for example in the context of ongoing litigation and where disclosure could undermine the administration of justice, these provisions do not refer to a legitimate interest or contain a harm test, public interest override or sunset clause. As a result, Schedule A imports into the ATIPPA additional exceptions which are not in line with international standards.

While our primary recommendation is for the paramountcy approach found in section 7(2) to be amended, we note that section 117(2) of the ATIPPA specifically calls on the committee conducting the five-yearly reviews of the ATIPPA to review the Schedule A list, with a view to determining whether the items on that list should remain. Therefore, as a secondary recommendation, we call on the committee to recommend the amendment of provisions listed in Schedule A which fail to refer clearly to a legitimate interest or which lack a harm test, public interest override or sunset clause (for those protecting public interests).

Recommendations

- The regime of exceptions in the ATIPPA should be reviewed carefully, including in light of the analysis presented above, and exceptions which do not protect legitimate interests, which are overbroad or which, to the extent that they are legitimate, are already covered by other exceptions should be removed.
- All exceptions, including the matters covered by section 5, should be subject to a harm test, whether this is achieved via a single overriding provision or specific harm tests for each exception.
- A mandatory public interest override should apply to all exceptions, including those in section 5, and it should apply whenever the harm to the protected interest is outweighed by the public interest in disclosure.

[36] Highway Traffic Act, RSNL 1990, Chapter H-2, https://www.assembly.nl.ca/legislation/sr/statutes/h03.htm#173.

- The ATIPPA should be amended so that public bodies can disclose information which is not covered by the regime of exceptions, regardless of any third-party claims regarding that information, while third parties should have recourse to seek compensation if it is ultimately decided that a disclosure was erroneous and caused them harm.
- Sunset clauses should apply to all exceptions which protect public interests and should be set at 15 or 20 years, with the possibility of an extension where this is approved by the Commissioner.
- The ATIPPA should provide that secrecy provisions in other laws, including those set out in Schedule A, do not apply to the extent that they conflict with its provisions. As an alternative, the provisions listed in Schedule A should be amended so that they all refer clearly to a legitimate interest and include a harm test, public interest override and sunset clause (for those protecting public interests).

4. Scope of Bodies Covered

The ATIPPA could also be improved by expanding the types of public bodies to which it applies. For example, sections 2(x)(viii) and 5(1)(a)-(b) effectively serve to fully or largely exclude the courts from the ambit of the law. Section 5(1)(b) additionally excludes notes or communications prepared by persons acting in an undefined "judicial or quasi-judicial capacity". In addition to the courts, this might be interpreted to cover administrative tribunals, which arguably undertake a quasi-judicial function.

The definition of a "public body" in section 2(x) does broadly cover the executive, but it is not clear that all bodies which are owned or controlled by public bodies are covered while, pursuant to section 2(x)(ix), the three bodies currently listed in Schedule B are also excluded from the scope of the Act.

While much of the legislative branch appears to be covered, section 2(x)(vii) excludes the constituency offices of ministers, and this exclusion is bolstered by sections 5(1)(c) and (e). Rather than excluding these offices, they should be included, subject to the regime of exceptions (like other public bodies). The ATIPPA should also cover bodies which undertake public functions or operate with significant public funding, in line with better practice.[37] In

[37] See, for example, the Danish Access to Public Administration Documents Act, Act No. 572, 19 December 1985, Chapter 1, section 3 of which states: "[T]he minister concerned may stipulate that this Act shall apply also to specified companies, institutions, associations etc. that cannot be classified as part of the public administration, provided that the operating expenses of such entities are mainly covered by central or local government funds or to the extent that they are empowered by law or provisions laid down pursuant thereto to make decisions on behalf of central or local governments", https://www.rti-rating.org/wp-content/uploads/Denmark.pdf.

addition, section 2(x)(ii) only covers corporations which are either owned by the Crown or in which the Crown holds a majority of the shares, excluding companies which the Crown effectively controls even if it does not possess a majority of the shares.

Recommendations

- The ATIPPA should be amended so as to cover all judicial bodies (courts and quasi-judicial bodies) and all of the information they hold, subject to the regime of exceptions (including to protect the administration of justice). To achieve this, a new subsection should be added to section 2(x), which defines public bodies, to include the judicial branch of government.
- The definition of "public bodies" should explicitly cover all bodies which are owned or controlled by other public bodies, and Schedule B should be removed from the ATIPPA.
- The ATIPPA should also be expanded to cover private bodies which fulfil public functions or receive public funds, while the exclusions relating to the constituency offices of ministers should be repealed.
- The ATIPPA should be amended to cover any corporation over with the Crown has effective control.

5. Proactive Publication

The ATIPPA does not currently provide for a proper system of proactive disclosure of information. Section 111, titled "Publication scheme", establishes a limited regime for the proactive publication of information so as to assist applicants in "identifying and locating records" held by public bodies. This is useful but it does not constitute a proper proactive disclosure system.

The *Access to Information and Protection of Privacy Act, 2015: Statutory Review 2020 Recommendations* suggested that the ATIPPA be amended to require most public bodies to adopt schemes setting out the categories of records they will publish, along with including a minimum list of such categories in the Act, and granting the Commissioner the power to recommend improvements to proactive disclosure.[38]

We recommend that the current "publication scheme" system be integrated with this wider notion of proactive disclosure suggested by the 2020 Statutory Review. Specifically, we

[38] Pp. 15-16, https://www.gov.nl.ca/atipp/files/2020-Statutory-Review-ATIPPA-Final-Report-Summary-Recommendations.pdf.

recommend that the ATIPPA include a minimum list of categories of records which public bodies must publish on a proactive basis, empower the Commissioner to develop a standard template for proactive publication schemes, based on but not limited to this minimum list, allow public bodies, subject to the approval of the Commissioner, to adapt and elaborate on the standard template based on the specific nature of their operations, and then require public bodies to publish information in accordance with those publication schemes.

Experience in other countries has shown that proactive publication systems do not function well in practice unless there exist means for enforcing them. We therefore recommend that the Commissioner be given the power, either in response to a complaint or *suo moto*, to review the proactive publication practices of any public body and to issue binding orders to that body where it finds that there has been a failure to comply with the legal requirements in this area. Ideally, the Commissioner should also have the power to impose penalties on public bodies which are systematically failing to meet their proactive publication obligations, or at least to apply to a court for the imposition of such penalties.

Recommendation

- Consideration should be given to incorporating a system for proactive publication, along the lines described above, including with an enforcement regime, into the ATIPPA.

6. Other Issues

Section 3(1) of the ATIPPA sets out the purposes of the Act, which are to facilitate democracy through supporting participation and accountability, and protecting privacy. This is positive but the ATIPPA does not then stipulate that those tasked with interpreting the Act should do so in the reasonable manner which best gives effect to those purposes.

Section 2(y) of the ATIPPA defines a record broadly, while section 8(1) creates a right to access records "in the custody or under the control of" a public body. This is positive but better practice is to give applicants the right to request both records and information (i.e. discrete types of information which are found in records). While this may seem like a small matter, the limitation of the right to just records has caused problems for some applicants in the past.

The requesting procedures in the ATIPPA could be amended to make them more user friendly. Section 11 requires requests to be "in the form set by the minister responsible for

this Act", while better practice here is to accept any document which contains the requisite information as a formal request for information. In addition, the form which is currently being used requires applicants to provide their name, while best practice is to require them only to provide an address for provision of the information (which might be an email address), of course along with a description of the information sought.

The ATIPPA mandates public bodies to transfer requests to other bodies where those bodies hold the information, rather than just to refer the applicant to the other body, which is better practice, but the circumstances in which requests may be transferred are too broad. Section 14(1)(a) provides that a public body may transfer a request for information, even if it holds that information, if the information was produced by another public body or is under the control of that public body. Better practice is to require a public body to process any request for information which it actually holds, following consultation with other public bodies as needed.

According to section 16, public bodies must respond to requests "without delay" and in any case within 20 business days. While this is reasonable, better practice, especially in an era of digital information, is to call for responses to be provided more quickly, ideally within ten business days.

Section 21(1) allows public bodies to apply to the Commissioner for approval to disregard requests. The grounds for this include, among other things, that the request would "unreasonably interfere with the operations of the public body". Given that the right to information is a human right, this is simply not legitimate. At the same time, and despite what we said above about not charging for staff time relating to the processing of requests, it may be legitimate to charge for requests which will take a very substantial amount of time to process, which would at least ensure that only applicants who were quite serious would proceed with those requests. We note that the *Access to Information and Protection of Privacy Act, 2015: Statutory Review 2020 Recommendations* suggested that time spent processing requests could be charged once the limit of 35 hours was exceeded;[39] this would be an appropriate level at which to start charging for very large requests.

Section 21(1)(c) also allows requests to be disregarded on the basis that they represent "an abuse of the right to make a request" among other things where they are "unduly repetitive or systematic" or "excessively broad or incomprehensible". Repetitive requests are already

[39] P. 2, https://www.gov.nl.ca/atipp/files/2020-Statutory-Review-ATIPPA-Final-Report-Summary-Recommendations.pdf.

addressed elsewhere under section 21(1) and the notion of a "systematic" request is unclear, probably illegitimate, since many systematic requests are perfectly proper, and unnecessary, since bad faith is another ground for disregarding requests. If the rule on "systematic" requests is intended to address inauthentic bot-driven requests, then this is likely covered by the idea of a bad faith request and, if not, the rule should apply directly to such requests. As for requests which are unduly broad or incomprehensible, this should apply only after the public body has offered the applicant assistance to address this problem, which assistance has not been taken.

Recommendations

- A provision should be added to the ATIPPA requiring those tasked with interpreting the Act to do so in the reasonable manner which best gives effect to the purposes set out in section 3(1).
- Applicants should have a right to request both records and information.
- Applicants should not be required to use a form to make requests for information or to provide their names when doing so.
- Section 14(1)(a) should be amended so that public bodies can only transfer requests where they do not hold the information which is responsive to that request.
- Consideration should be given to shortening the initial time limit for responding to requests to ten business days.
- The grounds for disregarding a request should be substantially narrowed, as suggested above.