ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, 2015

Statutory Review 2020

The Honourable David B. Orsborn, Committee Chair

June 2021

VOLUME 1: THE REPORT VOLUME 2: APPENDICES

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, 2015

2020 STATUTORY REVIEW

VOLUME 1:
THE REPORT

The Honourable David B. Orsborn
Committee Chair

Submitted to:

The Honourable John Hogan, Q.C.
Minister of Justice and Public Safety and Attorney General
for the Province of Newfoundland and Labrador

June 2021

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Access to Information and Protection of Privacy Act
Statutory Review 2020

The Honourable David B. Orsborn
Committee Chair

June 8, 2021

The Honourable John Hogan, Q.C.
Minister of Justice and Public Safety and Attorney General
P. O. Box 8700
St. John's, NL A1B 4J6

Dear Minister Hogan:

In accordance with the Terms of Reference, the *ATIPPA, 2015* Review Committee is pleased to present the report of the 2020 Statutory Review of the *Access to Information and Protection of Privacy Act, 2015*.

The report has been produced in two volumes – the full report (Volume 1) and Appendices (Volume 2). Detailed findings and recommendations are submitted for your consideration.

I am grateful to the many interested persons and groups who prepared written submissions for the Committee's consideration and to those who took the time to make presentations to the Committee at the public hearings.

In the news release by Minister Parsons in the establishment of the Review Committee, the Minister said:

> **The Government of Newfoundland and Labrador is committed to openness and transparency. ATIPPA, 2015 increases government accountability by providing the public with the right of access to records and protecting the privacy of individuals whose personal information is collected, used and disclosed by public bodies.**

My hope is that this report will be of assistance in advancing this commitment of your government to openness, transparency and the protection of personal information.

Yours very truly,

DAVID B. ORSBORN
Committee Chair

DBO/mm

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ACKNOWLEDGEMENTS

This Report is the product of the combined efforts of many hardworking and dedicated individuals. I am indebted in particular to Marcella Mulrooney, the Administrator of the Review, Adrienne Ding, Counsel, and Christopher McGee, Researcher. Their expertise and work ethic was vital to the work of the Review and to the production of this Report.

Special mention must be made of the cooperation and assistance throughout from Michael Harvey, Information and Privacy Commissioner and the staff at the Office of the Information and Privacy Commissioner and Sonja El-Gohary of the ATIPP Office in the Department of Justice and Public Safety. I am most grateful for the information and background they provided on various matters and for the collaborative and constructive approach that they brought to the Review.

The Report contains a number of recommended amendments to legislation. Ian Tucker, Legislative Counsel in the Department of Justice and Public Safety patiently provided many comments and much valuable advice on the drafts of many of the suggested amendments.

At the risk of leaving someone out, I extend my thanks to the Office of the Chief Information Officer for their assistance in the development and presentation of the Committee's website; Darren Churchill, Calvin Tobin and Cathy Simms of the House of Assembly staff who facilitated the webcasting of the public hearings of the Committee; the transcribers of the House of Assembly who quickly and expertly produced transcripts of those hearings; and Neil Croke for his work in ensuring that the Committee had the facilities and equipment needed to do its work.

Finally, my thanks to all who made submissions to the Committee whether in person or in writing. Hopefully the Report will adequately reflect the thought and effort that went into those submissions.

DAVID B. ORSBORN
Committee Chair

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY STATUTORY REVIEW 2020

About This Report

This Report quotes frequently from submissions presented at or to the Committee during its review. All submissions are available to the public on the Committee's website at www.nlatippareview.ca. Submissions given during the public hearings were transcribed and are also available on the website. Quotes in the Report from oral submissions are cited with a date and transcript page number, while references to written submissions are by page number. Because both types of citations are so numerous in this Report, smaller type was used to reduce their intrusion in the text.

No changes to spelling or punctuation were made in any quoted material. The minimal additions to quotes that were made (for clarity) were inserted [like this].

This Report is in one volume with a separate volume for appendices.

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WHY WE HAVE ATIPPA, 2015

In step with progressive democracies around the world, Newfoundland and Labrador has enshrined in law two fundamental rights of its citizens – the right to obtain information about the workings of their government and the right to appropriate protection of their personal and private information held by government.

That law is the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2 ("*ATIPPA, 2015*").

Why do we have *ATIPPA, 2015*?

The answer is found in the opening words of the *Act*. The fundamental objective is to facilitate democracy – in other words, to support and maintain the very system and process by which we agree to be governed. But how is that objective to be pursued? Again the *Act* provides the answer. Our system of governance, our democracy, is to be facilitated, to be enhanced, and to be protected by:

1. Ensuring that citizens have the information required to participate meaningfully in the democratic process; and by
2. Increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable.

At the same time, there must be protection against unnecessary disclosure by public bodies of personal information. Accordingly, the objectives of the *Act* include:

- Protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

The current *Act* is the result of the extensive revision recommended by the 2014 review chaired by the Honourable Clyde K. Wells, Q.C. That review is acknowledged to be one of the most thorough and comprehensive of its kind. The legislation recommended by that Committee and subsequently enacted is considered a model for access to information and protection of privacy law.

It is the recognition that the fundamental rights provided by the *Act* live in an ever-changing environment that explains the need for a periodic review of its provisions to ensure that those rights remain preserved and protected. Section 117 of the *Act* requires such a review every five years:

117.(1) After the expiration of not more than 5 years after the coming into force of this Act or part of it and every 5 years thereafter, the minister responsible for this Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operation of this Act or part of it.

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

It has been my privilege to conduct the 2020 review. The mandate:

> The comprehensive review of the provisions and operation of the ATIPPA, 2015 will include, but will not be limited to, an examination of the following issues:

- Public and public body experience in using and administering the ATIPPA, 2015 to access information in the custody or control of public bodies in Newfoundland and Labrador and opportunities for improvement;
- Whether there are any categories or types of information (personal information or otherwise) that require greater protection than the ATIPPA, 2015 currently provides;
- Public body response times for access requests and whether the current ATIPPA, 2015 requirements for response and administrative times are effective;
- An examination of exceptions to access as set out in Part II, Division 2 of the Act;
- Whether there are any additional uses or disclosures of personal information that should be permitted under the Act;
- An examination of the complaints process to the Office of the Information and Privacy Commissioner;
- An examination of the request for extensions/disregards process to the Office of the Information and Privacy Commissioner;
- Whether the current Cost Schedule set in accordance with subsection 25(6) of ATIPPA, 2015 is effective;
- Whether there are any entities which would not appear to meet the definition of "public body" but which should be subject to the ATIPPA, 2015;
- Whether the provisions of the ATIPPA, 2015 are effective for local government bodies; and
- Consideration of Recommendations 3, 4, and 16 arising from the Report issued by the Honourable Richard D. LeBlanc, Commissioner of the Commission of Inquiry Respecting the Muskrat Falls Project, dated March 5, 2020, and report on conclusions with respect to those recommendations.

Those recommendations:

3. The Government of Newfoundland and Labrador should amend s. 5.4 of the *Energy Corporation Act* to authorize the Information and Privacy Commissioner to determine if Nalcor is required to disclose information it wishes to withhold on the grounds of "commercial sensitivity."

4. Nalcor should not be entitled to withhold information from the Premier, the Minister of Natural Resources, the Minister of Finance or the Clerk of the Executive Council on the grounds of legal privilege or commercial sensitivity. Persons holding the aforementioned government positions should only be entitled to withhold this information from public disclosure if such action is permitted pursuant to the *Access to Information and Protection of Privacy Act* or the *Energy Corporation Act*.

16. To improve the ability of future Commissions of Inquiry to fufill mandates given pursuant to the *Public Inquiries Act, 2006*, the Act should be amended to provide for the following:

    a. A Commission should be exempted from the *Access to Information and Protection of Privacy Act* legislation so that its investigations can be conducted fully and without potential interference or influence. This exemption should continue at least until each Commission files its final report.

    b. Documents received from third parties on a confidential basis should be returnable to those third parties without the Commission retaining copies, if such is determined necessary by the Commissioner.

    c. Documents that have been entered at Commission proceedings as "Confidential Exhibits" or that have been sealed by the Commissioner should not be subject to further disclosure, even subsequent to the fulfilment of the Commission's mandate.

In simple terms, this review is required to assess how the revised *ATIPPA, 2015* is working and whether its objectives are being met. Is the *Act* in need of amendment? Are the processes set out in the *Act* effective? Is the non-legislated administration of the *Act* in accord with the purposes of the *Act*? Is the *Act* being used for its intended purposes?

What are the nature of the rights encompassed by the *Act*?

THE ACCESS RIGHT

The Wells Committee confirmed that the citizens' right to access information is no ordinary right. The Committee rejected the characterization of the right of access to in-

formation as a human right, but confirmed that it has the status of a quasi-constitutional right. The Committee described the right as "an essential condition" or "requisite" for the exercise of democracy. But a mere statement of a right is of little benefit. Particularly in the context of the right of access to information, any benefit comes from actually being able to exercise it. The procedural provisions of the *Act* address the exercise of the right. These provisions must ensure that, in their exercise, they enhance and do not detract from the ability of all citizens to exercise the right and the ability of public bodies to facilitate that exercise. Further, the non-legislated administrative aspects of ATIPP must ensure that they reflect the nature and purpose of the right and support a firm commitment to excellence in facilitating the exercise of that right. This, of course, is easier said than done. Once outside the four corners of the *Act*, the ATIPP function depends not on the force of law but on the professionalism and commitment of people – from those who do all the essential 'on the ground' work to those who exercise ultimate authority over the carrying out of the legislative mandate.

The nature of the access right demands nothing less than a firm commitment to the right and its essential function in our system of governance, and to procedures and organizational structures that will both enhance and protect continued exercise of the right for the benefit of the public at large.

A culture of commitment to ATIPP cannot be legislated or otherwise forced. But it can be demonstrated, and by consistent example it can become inseparable from the exercise of the function.

THE PRIVACY RIGHT

On the other hand, the right to privacy is an intrinsically personal right, a right that, in one form or another, has been recognized for centuries. The report of the 2014 review contains a lengthy discussion of the recognition and development of privacy rights in general and notes that, in the context of *ATIPPA, 2015,* the focus is on informational privacy – privacy as secrecy, privacy as control and privacy as anonymity. The *Act* recognizes the right of individuals, subject to specified limits, to control their own personal information.

In today's world the means of collecting information and the uses to which that information may be put are not static. Rapid technological change is a constant, facilitating the production, collection, storage and transmission of vast amounts of information

giving a window into a myriad of public and private interests. Neither are the functions of government static, reaching well beyond the traditional core functions of government into service provision and commercial activity.

Unlike the access to information right, the right to protection of one's personal information and privacy is less about exercise than prevention. It requires ever-increasing vigilance on the part of public bodies to protect against the unnecessary collection and unauthorized disclosure of personal information. Importantly, it requires an ongoing and firm commitment to 'look ahead' – to be aware of the possible effects of new programs and services on privacy rights; to recognize the risks to privacy that may present through advances in technology; and to make such system and other modifications as may be required to provide continued excellent and appropriate protection of personal information.

THIS REVIEW

This current review rests on two pillars – the solid foundation built by the 2014 review Committee and the lessons learned from five years' experience in the operation of the 2015 *Act*.

It is, I believe, fair to say that the environment surrounding this review is far removed from the circumstances confronting the Wells Committee in 2014. Although there are similarities in the Terms of Reference, it is clear that the task facing the Wells Committee was not simply a review. The Centre for Law and Democracy described the task, in its view, as the "root and branch reform of the ATIPPA framework". (Report p. 2).

The Wells Committee said, at page 13:

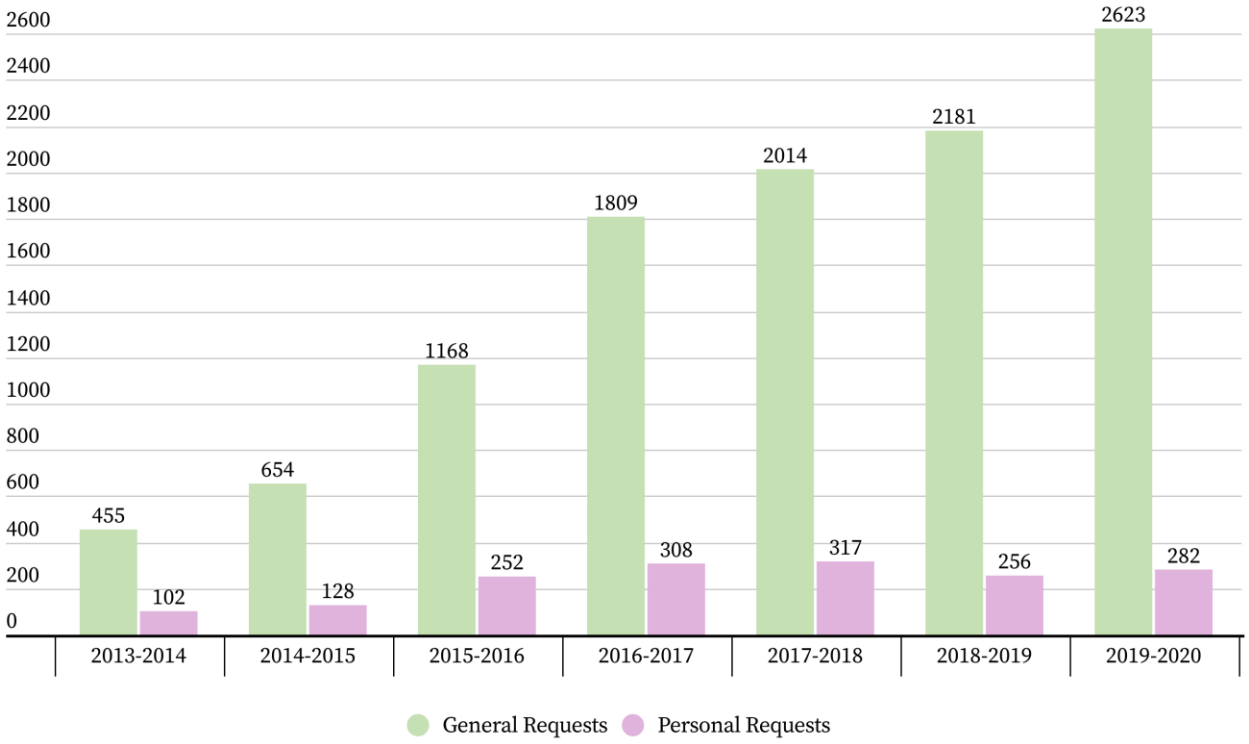
> Early in the course of its work, the Committee realized that the basic observation of the Centre for Law and Democracy was accurate. It would be necessary to undertake an overhaul of the existing *ATIPPA*, in order to address the various issues raised by citizens and organizations, as well as the Commissioner.
>
> It might not be the "root and branch" reform urged by the Centre for Law and Democracy but it would be sufficiently extensive that the task could not be completed by simply recommending amendments to existing provisions.

> It led the Committee to conclude that the more practical approach would be to draft a revised statute.

The situation is different today. The root and branch is in place and has borne fruit over the last five years.

In the last full year of the pre-*ATIPPA*, 2015 regime, there were 455 general access to information requests and 102 requests for personal information. Since the passage of the new *Act*, the demand for information has increased each year – from just over 1400 requests in 2015-16 to almost 3000 in 2019-20. Over 11,000 requests have been processed in the last five years.

General and Personal Requests, 2013-2020



Clearly, the *Act* is working as intended, providing a public window into the operations of public bodies and allowing the citizens of Newfoundland and Labrador to evaluate the performance of their government. In the 2019–2020 Annual Report of the Office of the Information and Privacy Commissioner ("OIPC") – not yet tabled in the House of Assembly at the time of writing – the Information and Privacy Commissioner said, at pages 1–2:

> 2019–2020 was a year in which the access to information system under the Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015) achieved a high point of maturity. The number of access requests received by public bodies increased again, by 467 or approximately 19 percent.
>
> While this has been the largest increase in some years, it is consistent with the pattern in that there have been increases each year. However, access complaints were relatively stable, with the OIPC having received 134 complaints – just 22 more than the previous year. This is not as many as in 2017–2018 (160) and far from the peak of 315 in the first full year after the coming-into-force of ATIPPA, 2015. The fact that the growth in the number of requests, a healthy metric demonstrating that Newfoundlanders and Labradorians are using their access to information system, is outpacing the growth in the number of complaints, suggests that public bodies are increasingly satisfying access clients. This is further reflected in the low number of complaints, as a percentage of access requests, which is under five percent.
>
> The situation was also relatively stable from a privacy perspective as well. The number of breaches reported to the OIPC fell from 240 in 2018–2019 to 214 in 2019–2020, with the number of complaints received remaining stable at 41.

I have found it helpful for the purpose of reflecting on the submissions made to the Committee and in writing this report to consider the analytical process as having two inter-related aspects.

The first is to identify and examine changes – technological and otherwise – in the access to information and protection of privacy environment and to assess whether those changes warrant amendment to the current legislative framework.

The second, and equally important aspect, is to gather the practical experience of the participants in the ATIPPA regime in order to determine whether the past five years of experience teaches that the operation and the administration of the *Act* can be improved.

I would categorize these two aspects loosely as substantive and procedural, recognizing of course that there is some degree of overlap.

Looking particularly at the substantive aspects of the review, let me say at the outset that I do not consider it appropriate to look at this review as an opportunity to simply 'second guess' the recommendations of the 2014 review. In my view, mere disagreement with a recommendation or conclusion of a previous review does not in and of itself war-

rant change. To make recommendations on this basis would create inconsistency and breathe confusion into the operation of the legislation.

I consider it appropriate to consider amendments to the substantive provisions of the *Act* where changes in the access to information and protection of privacy environment provide compelling reason to do so, or where it is otherwise evident that some clarification or adjustment is required.

Experience suggests that the substantive access-related provisions of the *Act*, perhaps with two primary exceptions, are not in need of significant amendment.

Section 33 – workplace investigations – was acknowledged by all who made submissions as being in need of amendment. The unintended and unfortunate consequences caused by the exercise of the access right necessitates a significant adjustment. Section 39 – third-party commercial interests – was, as was the case before the Wells Committee, the subject of much complaint from public bodies and third parties. Based on the experience of the last five years, I consider it appropriate to reorganize the statutory provision so that it is more clearly a harm-based exception and that related class-based factors such as confidentiality do not obscure a fair assessment of the asserted risk of harm. The substantive right of access remains subject to a harm-based exception, but with the addition of the public interest override.

The procedural aspects of the review stand on a different footing. A previous review cannot reasonably foresee how recommended new procedures and rules will work in practice. That can only be learned from experience – in this case, five years' experience of over 400 public bodies processing over 11,000 requests. Where that experience exposes a need for change in order to promote and protect the efficient functioning of the system while preserving the substantive rights of citizens, I have no hesitation in making an appropriate recommendation. Indeed, as will be apparent from this report, the majority of the recommendations are directed at procedural or administrative issues. It bears repeating that a commitment to the principled objectives of the *Act* requires a corresponding commitment to providing the means necessary to meet those objectives, day after day, month after month, year after year. Those means include an effective and efficient system professionally directed and managed by public servants trained in the complexities of access to information, protection of privacy and information management.

While the use of the *Act* has increased and while the volume of information subject to both production and protection has increased, the resources, both personal and tech-

nological, required to meet the demand have not kept pace. This is particularly the case in public bodies dealing with large numbers of documents, but it is equally a concern for very small public bodies with one or two staff responsible for all aspects of administration, including *ATIPPA, 2015*, and with limited information management or other technical assistance. This increased, and increasing, demand, together with the complexity and extent of requests and the need to be vigilant in properly protecting privacy interests, has taken a heavy toll on those charged with making the *Act* work.

It is simplistic to suggest that additional resources are required. I am quite comfortable in concluding that, in today's economic climate, recommending significant additional resources would not generate a positive result. But the substantive rights of access to information and protection of privacy must still be met. As the 2014 Committee pointed out, the right to access information enjoys quasi-constitutional status. That right must be protected and must be accepted, in word and in deed, by all involved.

It is useful to remember, looking at the ATIPPA regime as a whole, that the demand for access to information is unregulated, its potential unlimited. This is as it should be, but the demand for the exercise of the right is not exercised in a vacuum. It must be met by real people working in a variety of environments.

Some adjustments are required to ensure that the public's right to access information can be met within the existing resource structure.

I am satisfied that steps can be taken that will help to ameliorate the difficulties caused by the growing gap between demand and resources. It would clearly not be appropriate to attempt to address supply and demand issues by modifying the substantive provisions of the *Act*; any such adjustments must rest on a different foundation. But the many procedural provisions of the *Act* serve a more prosaic purpose – in the access context, to provide a roadmap from request to response and beyond. My assessment of the experience of the last five years persuades me that this journey can be made smoother and that adjustments to procedure will permit a more efficient use of all the resources involved.

I recognize that any recommendation to adjust a procedural provision may be met with the complaint that it represents a step backwards – a downgrading of the rights given by the *Act*. Indeed, it may well be that any recommendation of any significance, procedural or otherwise, will be met with disapproval. I refer to the written submission of the OIPC, at page 3:

> Our highest priority is to see the current provisions of *ATIPPA, 2015* largely continue as they are. If nothing at all were to change in *ATIPPA, 2015*, it would remain at or near the top of public sector access and privacy statutes in Canada. The worst possible outcome, however, would be one which sees access or privacy rights, or oversight thereof, deteriorate in any way. As an Office dedicated to oversight of this statute, we believe there are only a select few necessary changes to *ATIPPA, 2015*, none of which should impact the overall harmony of the *Act*, but rather support the vision behind *ATIPPA, 2015*.

With all due respect, and particularly with regard to procedural adjustments, I do not agree with this position. Process is not the same as substance. Planning the journey to avoid past difficulties does not change the destination. Adjusting certain processing requirements and allowing for some flexibility in the process of decision-making in no way detracts from the public's right to access information in the hands of public bodies.

A modest adjustment to a matter of timing or placing some decisions in the hands of an ATIPP coordinator rather than the OIPC cannot reasonably be regarded as detracting from the substantive rights given by the legislation. As noted, the resources to meet the demand are finite. The demand is unregulated and subject to no limit. Some reasonable modifications to the procedural provisions of the *Act* are needed if, in the long term, the legitimate needs of the citizens can continue to be met. There is of course a point at which procedural provisions may make access to the *Act* so difficult and untimely as to be meaningless. I am satisfied that the modest adjustments I believe are needed and that I recommend pose no risk of this. Those adjustments are the result of my careful consideration of the remarkably consistent views of those who actually have the responsibility of responding to requests for information.

My interactions with the coordinators persuades me that the ATIPPA regime is in good hands. I am satisfied that, collectively, coordinators can and should be trusted to do their job – to do their part in ensuring that the rights and protections of the *Act* are respected and that the objectives of the *Act* are a continuing goal.

Some of the procedural modifications I recommend reflect the unfortunate fact that, on occasion, there is abuse of the right to access information. The purposes expressed in the *Act* are instructive:

> *3. (1) The purpose of this Act is to facilitate democracy through*
>
> *(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;*

> *(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and*
>
> *(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.*

Meaningful participation in the democratic process and the accountability of and transparency in public bodies are high-level societal goals. The nature of the goals supports the stature of the right as quasi-constitutional. The pursuit of these goals through utilization of the statutory right to access information carries with it the need and obligation to recognize that utilizing the right for other purposes may run the risk of diminishing the rights of others.

As former British Columbia Information and Privacy Commissioner David Loukidelis said:

> ... Access to information legislation confers on individuals such as the respondent a significant statutory right, *i.e.,* the right of access to information (including one's own personal information). All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. (BC IPC Order 99-01 at p. 7)

Providing limited protection against abuse in order to protect the system for legitimate users is not, in my view, a step backwards.

The lessons of experience – looking back over the last five years – inform many of the recommendations in this report. But what of the future? The rights of access to information and to the protection of one's privacy will remain constant. The exercise of the right to access to information and the various exceptions to that right will, even if the recommendations in this report are accepted, remain relatively constant in the days to come.

But how personal information is protected will not and cannot remain constant. Maintaining a real and effective right to privacy takes commitment and effort. The objective must be excellence. Vigilance will be required as the volume and type of information collected by public bodies grows exponentially. The impact of new technology and the accessibility of personal information must be scrupulously assessed on a preven-

tive basis and public bodies must be prepared to accept timely and independent oversight of and recommendations directed to the privacy implications of new programs, new services, and new technology introduced or utilized by public bodies.

A failure to protect personal information collected and held by public bodies because of poor planning or a resistance to incorporate a degree of review and oversight would amount to a decision to ignore one of the principal purposes of *ATIPPA, 2015*.

One of those principal purposes of *ATIPPA, 2015* is to protect "the privacy of individuals with respect to personal information about themselves held and used by public bodies" (s. 3(1)(c)). As achieving this purpose becomes more difficult, so does an unshakeable commitment to that purpose assume new importance.

In the introduction to its decision on the nature of the right to privacy, the Wells Committee quoted from paragraphs 64–65 of Justice LaForest's decision in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 – at page 19 of the Committee report:

> The purpose of the *Privacy Act*, as set out in s. 2 of the Act, is twofold. First, it is to "protect the privacy of individuals with respect to personal information about themselves held by a government institution"; and second, to "provide individuals with a right of access to that information". This appeal is, of course, concerned with the first of these purposes.
>
> The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349–50. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy – the freedom to engage in one's own thoughts, actions and decisions…
>
> Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms.*

The Committee's conclusion, at page 38:

> It is against an international background that Canadian privacy rights, and more particularly, informational rights have slowly evolved. While the recognition of privacy rights and information rights generally is an important first step, the real challenge is how to respect and enforce them. In this report we will examine howprivacy rights and access rights can best be made available for use by a broad range of citizens.

> The Committee's first recommendation is to recast the purpose of the *ATIPPA* and identify the manner in which it is to be achieved.

It is a truism that we now live in a world of 'big data'.

Although written from a particular perspective and in the broader context of privacy law in general, a commentary by Jim Balsillie in the March 20, 2021 National Post provides useful context for any discussion of the protection of personal information:

> The business model pioneered by Google takes human experience – not just your searches, but also where you go, what you buy, who you meet or communicate with, your heart rate, income, political views, desires and prejudices – as its raw material and monetizes it by pushing micro-targeted content to individual users. The algorithms that push this content are addictive by design and exploit negative emotions – or, as Facebook insiders say, "Our algorithms exploit the human brain's attraction to divisiveness." Behavioural monitoring, analysis and targeting are no longer restricted to social media, but have spread across a wide range of products, services and sectors, including retail, insurance, finance, health care, entertainment, education and transportation. In the early 21st century, every industry became a technology industry, and now just about every internet-enabled device, and online service, is a supply-chain interface for the unobstructed flow of behavioural data that's used to power the surveillance economy. This has not only meant the death of privacy, but has served to undermine personal autonomy, free markets and democracy. Today's technologies get their power through their control of data. Data gives technology an unprecedented ability to influence individual behavior. …
>
> The massive scale of data collection and the efficiency with which it is processed using algorithmic decision-making artificial intelligence exposes individuals not simply to identification, but to imbalanced power relationships that seek to control their behavior.
>
> By controlling digital environments and critical information infrastructures, organizations leverage data they have about individuals and their social networks to decide what content people will see, how individuals can interact with it and what other people can see about any person. This is the definition of power in our digital age, and it has profound consequences for democracy because asymmetries of knowledge translate into asymmetries of power. …
>
> With the help of social media companies, political parties scrape online information posted by Canadians and use it to send manipulated and micro-targeted content attuned to each individual's behavioural triggers, in order to persuade them to vote a certain way. The result is that even people in the same household will not see the same political content. As the Jan. 6 insur-

> rection at the U.S. Capitol showed, if voters are not seeing the same information, they are not living in the same world.
>
> Distorting communication between voters has serious moral and political implications, which is why the EU created strict prohibitions against micro-targeting political information to individuals.

This review is not the place for an examination of the protection of personal information in all of its aspects. The focus for present purposes is the collection, use and protection of such data by public bodies.

The recommendations in this report are intended to help in ensuring that public bodies exercise the level of foresight and critical thinking needed to provide excellent protection of personal information. As will be evident, in the protection of privacy I prefer to err on the side of caution. To refer to old technology, once the horse is out, there is no point in locking the barn door.

THIS REPORT

The extensive experience with the 'new product' since 2015 has created fertile ground for suggestions for improvement.

This Committee received 61 written submissions and 21 oral submissions (including supplemental submissions) from public bodies, third party interests and private citizens. Albeit with some element of duplication, those submissions put forward over 400 recommendations, including over 50 recommendations from the OIPC.

Please let me express my appreciation for the effort made by all who made submissions to the Committee, in person or otherwise. However, this report does not specifically address every recommendation or other suggestion made to the Committee.

The supplemental submission of the OIPC recognized, I believe, the task before the Committee, at page 1:

> It is difficult to be comprehensive given the vast array of recommendations outlined in the many submissions received from public bodies, so we are not able to address every single recommendation, proposal or assertion with which we disagree.

And in conclusion, at page 44:

> Had we addressed every single suggestion or recommendation put forward in written submissions this document would have become so lengthy as to become unwieldy, …

Some concerns or complaints are, in my view, not properly addressed in a review of this nature, while others occur too infrequently to require a 'system-wide' response. The reasons for not accepting a particular suggestion are many and varied. In some cases where I concluded that no recommendation was warranted, I have said so in the report; in other cases I have not. It is my hope that despite the absence of mention of a particular suggestion, the report will not be thought "unwieldy" but be considered to reflect a real attempt to listen to, understand, and respond to the legitimate concerns raised by all those who seek and strive for excellence in Newfoundland and Labrador's access to information and protection of privacy regime.

I have just referred to excellence. Why should it not be a stated objective to strive for excellence in the ATIPPA regime? The lives of citizens are affected by many things, some personal, and some more external. Government is a pervasive influence in and on people's lives. The facilitation of democracy and the protection of personal information through *ATIPPA, 2015* is an objective worthy of a commitment to excellence in its pursuit. This commitment is, I believe, shared by the OIPC. Again to refer to the 2019–2020 Report, the commissioner said, at page 8:

> 2020–2021 will be new territory for the OIPC. We will be dealing with a world transformed by a pandemic, on top of ongoing and accelerating changes in technology. We believe that we are well positioned to face these challenges and continue with excellence in access and privacy oversight for the citizens of Newfoundland and Labrador.

Many of the recommendations are accompanied by a suggested amendment to the *Act*. The Committee received invaluable assistance from Mr. Ian Tucker of the Office of the Legislative Counsel on the drafting issues involved in a number of these amendments. However, time did not allow such a professional review of all the recommended amendments prior to the submission of the report and additional drafting work by legislative counsel will be required.

Where I did not consider it appropriate that a matter be addressed through an amendment to legislation, I have made what I refer to as administrative recommendations. These are matters that I am satisfied should be formally addressed, but through, for example, the setting or changing of policy, a commitment to undertake a particular task, or otherwise.

Finally, in some cases, I have made what I consider to be simply suggestions – to give consideration to possible changes that, as a feature of what I would consider good administration and practice, should inform the conduct of the function or activity involved.

At the end of each section there is a brief summary of any recommendations or suggestions. The full text of all the recommended amendments to the *Act* is included as an appendix (Appendix K).

TRANSITIONAL

The extent to which the recommended amendments to the *Act* are accepted and, if accepted, the effective date, are matters for determination by government. I would point out that, for three of the recommended amendments, there is a suggested effective date of January 1, 2023. This delay reflects the administrative effort that would likely be needed in order to comply with the amendment. (Policies for Protection of Personal Information – page 357; Publication Schemes – page 345; Proactive disclosure – page 351)

As of the date of the coming into force of any accepted amendments, there may be ATIPP access or correction requests, complaints or other processes started but not yet completed. To try and minimize any uncertainty, I recommend that any request received by a public body before the coming into force of the amendments be treated in all respects and for all purposes in accordance with the present unamended *ATIPPA, 2015*. The coordinator should advise the applicant accordingly.

ADVOCACY AND OVERSIGHT – THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

The Office of the Information and Privacy Commissioner is at the centre of the ATIPPA regime. Its position and role were carefully considered by the Wells Committee. In confirming the desirability of the ombuds model for the OIPC, with the modification of requiring a public body to comply with a recommendation or seek a declaration from the court, the Committee said, at page 209:

> Adequate jurisdiction, independence, expertise, efficiency, and user-friendly practices and procedures are determining factors for success in an ombuds-style office of the Commissioner. The Committee has concluded that creating an entity with those characteristics would require that the OIPC be recast in a somewhat changed role.

Among the recommendations – at page 210:

> 54. The ombuds oversight model be retained, with the exception that decisions of the Commissioner respecting extensions of time, estimates of charges, waiving of charges and any other procedural matters be final and not subject to appeal.
>
> …
>
> 58. The provisions of the legislation relating to the oversight model should indicate that, with respect to access to information and protection of personal information:
>
> (a) priority is to be accorded to requesters achieving the greatest level of access and protection permissible, within the shortest reasonable time frame, and at reasonable cost to the requester; and
>
> (b) the Office of the Information and Privacy Commissioner has primary responsibility to:
>
> - advocate for the achievement of that priority
> - advocate for the resources necessary
> - monitor, and audit as necessary, the suitability of procedures and practices employed by public bodies for achievement of that priority
> - draw to the attention of the heads of public bodies and to the Minister responsible for the Office of Public Engagement any persistent failures of public bodies to make adequate efforts to achieve the priority

- provide all reasonable assistance to requesters when it is sought
- have in place such procedures and practices as shall result in all complaints being fully addressed, informal resolution, where appropriate, being completed and any necessary investigation and report being completed strictly within the time limits specified in the *Act* inform the public from time to time of any apparent deficiencies in any aspect of the system, including the Office of the Information and Privacy Commissioner, that is in place to provide for access to information and protection of personal information.

ATIPPA, 2015 provides that the purpose of the *Act* – the facilitation of democracy – is to be achieved by a number of elements, including:

3.(2)(f) providing for an oversight agency that

(i) is an advocate for access to information and protection of privacy,

(ii) facilitates timely and user friendly application of this Act,

(iii) provides independent review of decisions made by public bodies under this Act,

(iv) provides independent investigation of privacy complaints,

(v) makes recommendations to government and to public bodies as to actions they might take to better achieve the objectives of this Act, and

(vi) educates the public and public bodies on all aspects of this Act.

The recommendations of the Wells Committee report focus on the oversight and advocacy roles of the OIPC. But the *Act* also confirms the central role played by the OIPC in the independent review and assessment of decisions made by public bodies.

The OIPC is in a difficult and delicate position. The roles of advocate and independent reviewer are in direct conflict. The conflict is softened somewhat by the fact that, on fundamental issues involving the right of access to information and the applicability of exceptions, the OIPC can only make recommendations. But those recommendations come with teeth. As the Wells Committee said, at page 209:

> One additional change, a kind of hybrid of ordermaking and ombuds, could greatly improve the circumstancefor the less than three on average of the Commissioner's recommendations that are rejected by public bodies each year. That change would be a statutory requirement that upon receipt of an OIPC recommendation the public body concerned would, within 10 business days, have the option **only** of complying with the recommendation or applying to court for a declaration that, by law, it is not required to comply.

> The statutory requirement would not be an order that the public body comply, but the result for the requester would be the same. In an order-making model, the public body would still have the option of seeking court review. The big benefit of the hybrid approach is that the burden of initiating a court review and the burden of proof would be on the public body. As well, the Commissioner would be in a position to respond to the public body's application for the declaration, because he would not be the maker of an order under review by the court, and because he would have a statutory responsibility to champion access.

Thus the OIPC is in the position of conducting an investigation into a complaint about a decision by a public body, attempting to resolve the dispute between the parties informally, providing a report after an independent review of the assessment of the issue, making recommendations based on that report that are presumptively binding and must be complied with absent an order from the court, and, in court, being a "champion" for access.

From the perspective of a public body – and indeed, from that of all those involved – much of the respect for and acceptance of the views and opinions of the OIPC – whether expressed during informal resolution or as recommendations – comes from that body's perception of the independence and objectivity of the OIPC.

The submission of the City of Corner Brook:

> s. 3(f)(i) The wording "advocate" is problematic. They cannot be both an unbiased and independent body conducting investigations and making findings and also be an "advocate". I would change the wording so the oversight agency has the role to balance interests of parties with regard to access to information; protection of privacy and exemptions to those privileges as well as addressing administrative burdens; etc., of public bodies in answering requests. It comes down to a fair and equitable interpretation of the provisions of the ATIPPA. (Page 5)

> s. 43-47 Investigation provisions need to be revamped. From our experience when we went through this process the OIPC acted as an "advocate" for the applicant, using the provisions regarding onus of proof being on the municipality to avoid their duties to conduct a formal investigation. Once they get to the investigation stage the onus should be on the OIPC to conduct a fair and impartial investigation as a thorough and unbiased truth-seeking endeavor, not as an advocate for either side. (Page 7)

Given the roles of advocate and investigator, maintaining the reality and the perception of independence in the complaint assessment, informal resolution and recommendation functions is extremely difficult. But it must be done. And, of course, it is far

easier to say than to do. In a supplementary submission, the OIPC explained the dynamics of the informal resolution process. At page 16:

> Section 3(2)(f)(ii) requires the OIPC to "facilitate timely and user friendly application" of the *Act*. Much of our communication with the public, public bodies and other stakeholders has this goal at its heart. One of the primary ways do this facilitation is during informal resolution. The informal resolution process is a fundamental element of our oversight role, one that is often overlooked by courts and others who have attempted to plumb the limits of the Commissioner's powers and authorities. That facilitation necessarily involves adopting a position of maximizing the rights available under the Act, without going beyond them. This may appear to public bodies as the OIPC attempting to take the side of the complainant, when in fact it is the OIPC interpreting the statute and attempting to ensure that the rights granted under it are as fully realized as they can be, without going beyond that statutory framework or impacting the limitations on those rights that are a necessary part of it. As much of our work at the informal investigation stage involves explaining to complainants that public bodies have interpreted the law correctly, we expect that many complainants would believe the opposite, that we are biased in favour of public bodies. Furthermore, it is important to understand that informal resolution efforts do not impact the rights of any parties because informal resolution does not occur unless the parties freely agree to it.

Where, in the course of informal resolution, the OIPC expresses the view that an access request should be granted or refused, the fact of such an expression does not equate to bias. I appreciate, of course, that any opinion so expressed may well end up as a recommendation in a final report. But expressing an opinion or making a recommendation that a complainant or public body does not agree with does not rationally support a conclusion of bias. Although any formal recommendations are presumptively binding, the OIPC does not have in fact or in law the final decision-making authority. In the case of any disagreement or dispute, that authority resides with the Supreme Court. Further, in expressing an opinion or making a recommendation, the OIPC is carrying out its statutory responsibilities. I emphasize however, that the responsibility of the OIPC to provide an "independent review" of decisions make by public bodies and to facilitiate informal resolution of complaints carries with it the imperative to act at all times so as to maintain the perception and reality of that independence.

To illustrate the fact of the OIPC's independence, its supplementary submission includes a table setting out the results of formal reports over the last five years. At page 17:

> For those who are still not convinced regarding the Commissioner's independence and impartiality, the statistics speak for themselves. If the OIPC was

somehow setting aside its role of impartial adjudicator in favour of simply advocating for access to information applicants, it is unlikely we would have seen these kind of results from Commissioner's Reports resulting from access to information complaints agreeing or partially agreeing with the public body 75% of the time from 2015 to 2020:

Outcomes of Commissioner's Reports	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Agree with Public Body	8	30	11	14	19
Partially Agree with Public Body	3	3	4	4	6
Disagree with Public Body	3	4	9	11	3
Number of Reports Issued	14	37	24	29	28

Should the OIPC appear as an intervenor in court, the obligation suggested by the Wells Committee "to champion access" may not fully reflect the need to maintain the objectivity expected of any tribunal whose decision is being challenged. It is desirable to act so as to avoid the perception which triggered the apparently critical comment of the majority of the Divisional Court of Ontario in *Bricklayers and Stonemasons Union Local 2 (Trustees of) v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 3821 at paragraph 40:

> [40] … the commissioner (which took a very active and partisan role on this judicial review of its decision) and Maloney contend that the decision falls within a range of reasonable outcomes. …

The proper approach has been adopted by the OIPC and is explained in its supplementary submission, at page 17:

> When the OIPC intervenes in a court matter, our purpose, which we generally make quite clear to the parties, is to share with the court our views on statutory interpretation regarding the matter before the court. If the matter has proceeded to court subsequent to the issuance of a Commissioner's Report, we will generally share with the court the reasoning we used to arrive at the Report's recommendations. Over the years, this has meant that we have supported interpretations that go both ways. Sometimes our interpretation of the statute would see the applicant receiving more access to information, but in

> our interventions we have equally supported interpretations which align with the public body's application of an exception to the right of access.

It is unfortunate that suggestions of over-zealous advocacy, or perhaps bias, are necessarily directed, not at statutes or systems, but at the individuals involved in the process. Such comments are not helpful. The OIPC felt it necessary to respond in its supplementary submission, at page 18:

> We would be remiss if we did not also reference how accusations of bias and partiality levelled at the OIPC have impacted our staff by impugning their professional ethics. The staff of the OIPC take the mandate of the Office extremely seriously, and without exception they have discharged their roles in the formal investigation of access to information complaints with professionalism and impartiality. All of our Analysts sign a Code of Conduct annually, committing that we will carry out our duties impartially. Most of our Access and Privacy Analysts practiced law prior to joining our Office, while others brought deep professional experience and qualifications in the application of access to information and protection of privacy statutes. The staff and Commissioner takes it as an extremely serious and wholly unfounded accusation that we have failed to act with independence and impartiality in the discharge of our duties regarding the independent review of public body decisions.

The fact remains that, under the ombuds model in the *Act*, the roles of advocate and independent reviewer, specifically bestowed on the OIPC by s. 3 of the *Act*, are inherently in conflict. But it is my assessment that the hybrid ombuds model is a good one and should not be changed. Its proper functioning requires constant vigilance by the OIPC to ensure that its advocacy and decision-review roles remain separate, both in perception and, to the extent that resources permit, in reality. Whether some element of role separation is feasible within the office of the OIPC is a matter best left in the hands of the commissioner.

A formal recommendation on this issue is not necessary. I am confident that the commissioner will continue his efforts to ensure that, in its complaint assessment, informal resolution and recommendation functions, the OIPC will, and will be seen to, act independently and objectively. As a result, its reports and recommendations will receive the respect that accompanies the fact and perception of that independence.

Later sections of this report deal with specific issues relating to the functioning of the Office of the Information and Privacy Commissioner.

THE ATIPP COORDINATOR – THE GATEWAY TO ACCESS AND PROTECTION

It is easy to speak in highly principled terms when viewing any activity or responsibility from the perspective of a reviewer, adjudicator or other periodic commentator – the view from 30,000 feet. But an assessment of any activity – if such assessment is to be considered worthwhile – is only fully informed after learning of the views and experience of those who bear the responsibility of actually carrying out the activity in question.

In the case of ATIPPA, it is the ATIPP coordinators who are 'on the ground', responding to almost 3000 requests annually. They represent the frontline of the access to information regime. They receive all requests, conduct all communications with applicants and process the requests. Processing includes not only identifying and locating records, but reviewing all records retrieved to ensure that the information to be released is responsive to the requests, that possible exceptions to release are identified and considered, and that third parties whose interests may be affected by the release of information are notified of the application.

It is stating the obvious to say that the role of the coordinator is crucial to the effective administration of the *Act*. It was eloquently expressed in the OIPC's Report A-2019-016 – Department of Children, Seniors and Social Development – at paragraph 40:

> [40] The entire scheme of the access request process in the ATIPPA, 2015 places the work of responding to requests in the hands of the ATIPP coordinator. This was one of the main themes in the Report of the 2014 Statutory Review Committee, which emphasized that coordinators ought to be "situated high enough up in the organization where they work to command automatic respect for their functions", that they be trained, and provided with the resources needed to carry out their work. …

The same sentiment was echoed very recently in the 2019–2020 Annual Report of the OIPC. At page 43 the commissioner acknowledged the work of the coordinators:

> As indicated in the Introduction, access to information complaints to this Office are less than five percent of the total number of requests filed with public bodies. For any system of this kind, covering a broad spectrum of public bodies with so many different mandates and types of records, being administered by individuals ranging from part-time town clerks to lawyers to full-time professional access and privacy coordinators, a 95 percent plus success rate is a real accomplishment. It should also be remembered that, of the small proportion of requests that come to this Office as complaints, one-half of those are resolved informally. Of the remainder, Commissioner's Reports issued by this

> Office fully agreed with the public body 70 percent of the time, and partially agreed a further 18 percent of the time.
>
> What does all of that mean? It means we have an Act that works extremely well, but laws don't implement themselves. Above all, it means the people who do the heavy lifting, day in and day out, to make access to information and protection of privacy a reality, are doing an incredible job. …

The Committee held a number of in-person and video meetings with small groups of coordinators. These meetings were informal and anonymous – no names were given and no public bodies identified. The Chair assured those attending that they would remain anonymous. In addition to those meetings, the Committee sent out to every coordinator in the province a survey asking for responses on an anonymous basis. A number responded – the anonymized responses are appended to this report (Appendix F). Without exception the coordinators who provided input to the Committee, in person or otherwise, impressed the Committee as being dedicated to their work and to the principles and objectives of the *Act*. My assessment is that the public is well served by the coordinators.

Two main themes quickly emerged from the comments of the coordinators. The first was the extremely high stress levels experienced by the coordinators. Stories of coordinators being reduced to tears were not uncommon, as were examples of significant uncompensated overtime and use of personal time. Much of this stress came from attempts to meet the timelines in the *Act* while dealing with broad loosely-defined requests. The coordinators made a number of suggestions intended to help in the management of their workload. Some of these suggestions have been incorporated in the recommendations. Others such as, for example, the ability to bank requests or to combine disregard submissions have not. Underlying the workload-related recommendations is the recognition that, notwithstanding the heavy demands placed on those who carry the day to day burden of administering *ATIPPA, 2015*, the primary concern must be to ensure that the rights given by the *Act* are realized in a timely, comprehensive and efficient manner.

The second theme was the amorphous nature of the coordinator's position. There is no classification or salary scale for an ATIPP coordinator. This may be understandable in the many cases where the coordinator's role is not the primary function of the employee. But for those whose primary role is that of coordinator, a classification and salary scale specific to the position would serve to reflect the importance of the role in facilitating meaningful public participation in the process of democratic governance.

While the coordinators shoulder the responsibility for the administration of the *Act* and the various public bodies, their responsibility is complicated by having to rely on others to participate meaningfully and promptly in the response process. The coordinators pointed to the need to consult with subject-matter experts and third parties, to request others to conduct searches and reviews of their files and emails, and to communicate frequently with the applicants.

It was relayed to the Committee, on more than one occasion, that access to information is referred to by some senior public service personnel as a "pain" and a "nuisance", and as a process which detracts from carrying on the important 'core' functions of the public body. One can understand the frustration of having to take time and effort from what has been referred to as 'real work' in order to respond to a time-sensitive request for information. The frustration is exacerbated if a request is viewed as having been motivated by selfish or retributive considerations.

It is generally accepted that the culture of an organization flows from the example of those at the top of the organizational chart. This is true not only for an organization – the public service – as a whole, but also for the subsidiary branches of the organization – here, the departments, agencies and other public bodies. Demonstrating an understanding of and a commitment to *ATIPPA, 2015* and its underlying principles is a core responsibility of the executive in each public body. Only with such a demonstration can the ATIPPA function be seen by all as a fundamental responsibility of the public body – an essential component of its mandate, and not as a pain or a nuisance.

Fortunately this 'ATIPP is a nuisance' sentiment is not widespread. In by far the majority of cases, the coordinators indicated that their superiors are supportive of the legislation and its objectives. But to the extent that such attitudes exist, they cannot and should not be countenanced. Access to information is here to stay. Public accountability for the acts and decisions of those governing us is here to stay. This is as it should be. Those whom we choose to govern us, and those who, in turn, are chosen to carry out the day to day operations of government, must accept and be seen to accept that enabling public accountability of their decisions and actions is a fundamental and critical responsibility in a healthy democracy.

The pivotal role of the coordinator was acknowledged by the 2014 review. Although it did not make a formal recommendation as such, perhaps recognizing the variety of circumstances involved, the Committee said, at page 47:

> .... the coordinators themselves need a surer platform from which to work. They need to be professionally trained and situated high enough up in the organization where they work to command automatic respect for their functions.
>
> In structured, hierarchical organizations, which most public bodies are, senior staff positions are respected for their decision-making authority. Respect for the ATIPP process suggests situating the ATIPP responsibilities at the director level. This might be only one of many responsibilities of the director, but the authority of the position would benefit the administration of the ATIPPA.

I completely agree.

And in his 2018–19 Annual Report, the Information and Privacy Commissioner accurately described the state of ATIPP administration. At page 2:

> There is little question that many public bodies continue to struggle with the volume of requests and the resources that they have dedicated to deal with them. Anecdotally, we also understand that there is a high level of turnover among ATIPP Coordinators.

One cannot easily jump into the shoes of a coordinator. The coordinator must be intimately familiar with the legislation and the operation and functioning of the public body in question; the coordinator must have the respect and trust of their superiors so that recommendations for release or otherwise will carry a presumption of acceptance. A coordinator must be strong and confident enough, and warrant sufficient respect within the public body, to speak truth to power should there be an attempt to insert irrelevant considerations into an access decision or to be less than respectful of the time constraints imposed by the *Act*.

The ATIPP coordinator – a professional – must be regarded as an essential component within the structure of every public body and a vital cog in reaching the objective of excellence in the ATIPP function of government. An individual charged with this role may, depending on the public body and number of ATIPP requests, carry out many other functions. Indeed, in some cases, particularly in some small municipalities or agencies, the designated coordinator may receive few if any requests in the course of a year. But, nonetheless, the role and function of every ATIPP coordinator is exactly the same – in the interest of democratic, transparent and accountable governance, to provide excellent and timely access to information and to protect personal information as contemplated by the *Act*. Section 110 of the *Act*:

110(1) The head of a public body shall designate a person on the staff of the public body as the coordinator to

(a) receive and process requests made under this Act;
(b) co-ordinate responses to requests for approval by the head of the public body;
(c) communicate, on behalf of the public body, with applicants and third parties to requests throughout the process including the final response;
(d) educate staff of the public body about the applicable provisions of this Act;
(e) track requests made under this Act and the outcome of the request;
(f) prepare statistical reports on requests for the head of the public body; and
(g) carry out other duties as may be assigned.

As mentioned above, within government as such there is no classification or pay scale for an ATIPP coordinator. The title and salary of the individuals designated as co-ordinator vary depending on the organizational structure of the particular department or public body. This lack of uniformity is understandable given the wide variation in levels of ATIPPA activity and the size and complexity of public bodies. Indeed, the number of full-time coordinators is minimal compared to the number of public bodies. In the province there are over 430 public bodies; most public bodies do not have a full-time ATIPP coordinator position.

My assessment is that the position of coordinator and the administration of the ATIPPA regime would be enhanced by providing to each coordinator a formal mandate letter – an identical letter for all coordinators, signed by the head of the relevant public body and setting out the responsibilities and authority of the coordinator, and, with specific examples, the commitment of the public body and its head to the objectives of *ATIPPA, 2015*.

A recommended mandate letter is appended to this section and a sample outline of the roles and responsibilities of the ATIPP coordinator is appended in Appendix H. Once completed, it should be placed on the public body's website. As personnel change, a new mandate letter should be completed. Each coordinator, upon receipt of their mandate letter, should execute an oath/affirmation of confidentiality specific to the function of coordinator. There is a reference in the letter to a recommended list of responsibilities. The ATIPP Office provided to the Committee a suggested list of responsibilities. That list has not been reviewed by this Committee but is included as Appendix H for information and assistance as appropriate.

Such formal recognition of the role of the coordinator would confirm the public body's commitment to *ATIPPA, 2015* and contribute to the respect and authority needed by the coordinator to faithfully carry out the responsibilities of the position. Whether the formalization of the coordinator's role in this matter would affect the classification and salary of any coordinator is a matter for that coordinator and the coordinator's employer. However, as a starting point, I recommend that the Classification and Organizational Design section of Treasury Board develop a job description and classification for the position of full-time ATIPP coordinator.

OATH OR AFFIRMATION OF CONFIDENTIALITY

The OIPC recommends that all staff who have contact with personal information should sign an oath or affirmation of confidentiality. It suggests that such a requirement would "raise awareness amongst employees and hopefully improve information handling".

The Committee has been advised that all government employees are required when hired to swear or affirm an oath of confidentiality. This is apparently an administrative rather than legislated requirement. For those employed in health care facilities, the oath is required by legislation. Section 14(1) of the *Personal Health Information Act*, SNL 2008 c. P-7.01:

> *14. (1)A custodian shall ensure that*
> *(a) its employees, agents, contractors and volunteers; and*
> *(b) where the custodian is an operator of a health care facility, those health care professionals who have the right to treat persons at a health care facility operated by the custodian,*
> *take an oath or affirmation of confidentiality.*

These requirements leave gaps in the public sector as a whole. I am not prepared to recommend that all employees of all public bodies sign an oath of confidentiality. However, within the ATIPPA regime a formal assurance of confidentiality should be executed by all designated coordinators. The need for anonymity of requestors and for the protection of personal information together with the very nature of the function supports the conclusion that such an assurance is appropriate.

I recommend that each designated ATIPP coordinator be required to take a specific oath or affirmation of confidentiality confirming that all information received by them

in the course of their duties as coordinator will be kept confidential unless disclosure is required to fulfill the duties of their position. Since the job functions of the coordinators in the province's public bodies vary widely, it may be unwise, at least as a first step, to include this as a legislative requirement. I am content to make it an administrative recommendation directed to the head of each public body. A suggested draft of the oath/affirmation is appended to this section.

RECOMMENDATION

Administrative

- That the head of each public body provide each designated ATIPP coordinator with a formal mandate letter.
- That the Classification and Organization Design section of Treasury Board develop a job description and classification for the position of full-time coordinator.
- That each coordinator sign an oath/affirmation of confidentiality addressing their particular obligations as coordinators.

(Public Body Letterhead)

(Date)

(Employee Name)

(Public Body)

Dear (Employee name),

Re: Section 110(1) Designation by the (Delegated) Head of a Public Body

Pursuant to s. 110(1) of the *Access to Information and Protection of Privacy Act, 2015 [ATIPPA, 2015]*, and as the (delegated) head of _____ (name of public body) responsible for decisions under *ATIPPA, 2015*, I hereby designate you, _____ (employee name) as the primary (backup) ATIPP coordinator responsible for the day to day administration of the legislation on behalf of _____ (name of public body).

The _____ (name of public body) together with all public bodies in the province of Newfoundland and Labrador is committed to the provision and promotion of excellent government. Excellent government requires respect for and compliance with *ATIPPA, 2015*. Accordingly excellent government includes:

1. Ensuring that the citizens of Newfoundland and Labrador have the information required to participate meaningfully in the democratic process;
2. Being transparent in our work and decisions and remaining fully accountable to the people we serve;
3. Making every reasonable effort to respond to requests for information on a timely basis; and
4. Carefully and appropriately protecting the privacy of individuals whose personal information is entrusted to us.

You are expected to carry out the responsibilities of the coordinator as listed in s. 110 of the *ATIPPA, 2015*. In summary, those duties are to:

1. Receive and process requests made under *ATIPPA, 2015*.
2. Coordinate responses to requests.

3. Communicate throughout the process with applicants, third parties and others who may have an interest in the request.
4. Educate staff of _____ (name of public body) about the applicable provisions of *ATIPPA, 2015*.
5. Track requests made under *ATIPPA, 2015* and the outcome of the requests.
6. Prepare statistical and other reports as may be requested.
7. Carry out other such duties as may be assigned.

You are also responsible under s. 12 of *ATIPPA, 2015* to carefully protect the identity of the name and type of each applicant in all circumstances except:

(a) Where a request is for personal information about the applicant; or
(b) Where the name of the applicant is necessary to respond to the request and the applicant has consented to its disclosure.

A more detailed list of your responsibilities is attached.

You are expected to carry out your responsibilities with a high degree of independence and with scrupulous adherence to the Act. The nature of your responsibilities requires that you swear or affirm your commitment to confidentiality. The required oath/affirmation is appended to this letter.

This mandate letter constitutes a grant to you of all the authority you may reasonably require to fulfill your duties and responsibilities as coordinator.

As head of _____ (name of public body), I commit:

(a) to fully supporting you in your role as coordinator and to ensuring that all personnel of the _____ (name of public body) have been informed by me of your authority as coordinator and have, in support of that authority, been instructed by me to provide you with the full and timely cooperation you may require as you carry out your responsibilities;
(b) to exercising my authority, on receipt of your written recommendation, to extend a time limit for a response or to disregard a request only where, after careful consideration, I am satisfied that such decision is in accordance with the principles and objectives of *ATIPPA, 2015*;
(c) to supporting the _____ (name of public body) administration of the *Act* by setting and pursuing the objective of excellent information management; and

(d) to exercising my authority to ensure that you promptly receive such access to email accounts as you reasonably need in order to respond to requests for information.

This designation is effective on or from the date shown below.

Sincerely,

_____ _____

(Delegated) Head Date

Cc: Director – ATIPP Office, Department of Justice and Public Safety

Designated ATIPP Coordinator's Oath/Affirmation

This Oath/Affirmation applies to information which may be verbal, written or electronic.

I will exercise due care in utilizing personal or confidential information in electronic, written or verbal forms.

I understand that I am responsible for reviewing and understanding the *Access to Information and Protection of Privacy Act* and policies related to the management and protection of information and to comply with these requirements. If I do not understand the legislation or policies, I am responsible for seeking assistance and direction.

I, _____, will faithfully, honestly and impartially, to the best of my knowledge, skill and ability, perform my duties as an ATIPP Coordinator.

I will not at any time, other than in the performance of my duties, directly or indirectly:

- Discuss with or disclose to anyone, other than a duly authorized person, any personal information or confidential information to which I may have access or become aware of in the course of performing my duties;
- Remove personal or confidential information from my employer's premises without written permission or as necessary to perform my duties; or
- Release or discuss personal or confidential information, even after my employment or association with my employer is terminated.

I acknowledge that I have read and understand the contents of this Oath/Affirmation.

Name: _____

Signature: _____

Date: _____

Witnessed before me at _____, NL

this _____ day of _____, 20_____.

_____

_____

Commissioner for Oaths

INTENTIONALLY LEFT BLANK

THE APPLICANT

I have said much about the role and responsibility of the ATIPP coordinator. There is another side to the ATIPP process – that of the person initiating the request, the applicant.

The *Act* is public interest legislation. In providing a general right of access to information, the *Act* contemplates a right that, when exercised, will be exercised on behalf of all citizens with a view to keeping government accountable to those citizens. The right is a quasi-constitutional right, which characterization is reinforced by its responsible and reasonable exercise.

Section 13 of the *Act* imposes on coordinators a general duty to assist applicants:

> *13.(1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*
>
> *(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.*

In my view, it is fair and reasonable to place a degree of responsibility on applicants, particularly a responsibility to provide contact information and any necessary clarification of a request.

It is also fair to recognize that the reasonable and responsible exercise of the rights given by the *Act* carries the implicit understanding that utilizing the rights for other than the purposes intended by the *Act* runs the risk of diminishing the legitimate exercise of those rights by other citizens. The caution from the former British Columbia Information and Privacy Commissioner David Loukidelis bears repeating:

> … The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. (BC IPC Order 99-01 at p. 7)

ATIPPA, 2015 includes provisions which address what may be considered to be improper and irresponsible uses of the *Act*. Experience suggests that some modest adjust-

ment is needed in the interest of protecting the legitimate exercise of the rights granted by the *Act*. These adjustments will be discussed later in this report.

CONTACT INFORMATION

Section 12 of the *Act* contemplates that the name of the applicant will accompany the request but, within the public body, will be subject to very limited disclosure – essentially where needed for the coordinator in order to communicate with the applicant. Notably, and unless necessary to respond to the request, the name must be withheld from the decision-maker, the head of the public body. This is as it should be; the response to a request should not be influenced by the identity of the requester. But the *Act* does not contemplate the filing of requests from, the making of complaints by, or the filing of appeals to the Supreme Court of Newfoundland and Labrador by unknown unidentifiable 'persons' using pseudonyms from unknown anonymous and otherwise unidentifiable email addresses. Again, this is as it should be. A request intended to facilitate meaningful participation in the democratic process or to promote accountability of or transparency in a public body is not of a nature that requires complete anonymity. The *Act* should be amended to stipulate that a request must be accompanied by the full name and contact information of the applicant, absent which the request may be disregarded. The recommended amendment to s. 21.1 is included later in the section on disregards. The *Act* should be further amended to make it clear that the cloak of anonymity within the public body continues to apply following the final response to the applicant.

VERIFICATION OF IDENTITY

The protection of an individual's personal information in the custody and control of public bodies is one of the primary objectives of the *Act*. A coordinator responding to a request for or correction of personal information must be vigilant to ensure that any personal information released or corrected is released to the right person or done with appropriate authority. It is prudent that the *Act* allow a coordinator to request proof of identity and authority where considered necessary and that, failing the provision of such proof, the request be considered abandoned. No right of complaint or review should be provided but, assuming the applicant can be notified, they should be advised that a new request may be submitted if the necessary proof of identity or authority can be provided.

I would expect that in assessing any proof of identity or authority provided, coordinators would exercise professional judgment and common sense, recognizing that not all applicants may have available to them the more common forms of proof of identification.

CLARIFICATION OF REQUESTS

While I am not prepared to recommend that an applicant be subject to a statutory duty to assist a coordinator, I do consider it reasonable to require that an applicant be prepared to assist the coordinator in understanding what information is being requested in order to fully appreciate the request and to facilitate the identification, location and provision of the information. If asked to clarify the request, an applicant should have a reasonable time in which to respond to such requests, during which time the public body's response clock should be stopped. If the applicant fails to respond, the request should be considered abandoned.

RECOMMENDATION

That the *Act* be amended to:

- Require the full name and contact information of the applicant for all requests. [Appendix K, s. 11(2)(a.1)]
- Make it clear that the anonymity of an applicant continues to apply following the final response to the applicant. [Appendix K, s. 12(4)]
- Provide that within 5 days of receiving a request, public bodies may ask for identity verification (for personal information requests) or clarification of the request, and applicants must respond within 30 days or their request will be considered abandoned. [Appendix K, s. 11.1]
- Stop the clock on time limits for final responses while waiting for an applicant's response to a request for clarification or identity verification. [Appendix K, s. 11.1(3)]

FEES AND COSTS

The issue of fees for requesting access to information was canvassed in depth by the Wells Committee. The Committee recommended removing the basic application fee and allowing a public body to charge a modest fee for certain time spent in locating a record – time in excess of over 10 hours for a local government body and a 15 hour threshold for other public bodies. In addition, a "modest cost" for copying and printing records may be charged. Where any cost is to be charged, an estimate must be given to the applicant; an applicant can apply to the public body to waive the charge or to the OIPC to review the estimate. Sections 25 and 26 of the *Act* set out the present framework:

> *25. (1) The head of a public body shall not charge an applicant for making an application for access to a record or for the services of identifying, retrieving, reviewing, severing or redacting a record.*
>
> *(2) The head of a public body may charge an applicant a modest cost for locating a record only, after*
>
> *(a) the first 10 hours of locating the record, where the request is made to a local government body; or*
>
> *(b) the first 15 hours of locating the record, where the request is made to another public body.*
>
> *(3) The head of a public body may require an applicant to pay*
>
> *(a) a modest cost for copying or printing a record, where the record is to be provided in hard copy form;*
>
> *(b) the actual cost of reproducing or providing a record that cannot be reproduced or printed on conventional equipment then in use by the public body; and*
>
> *(c) the actual cost of shipping a record using the method chosen by the applicant.*
>
> *(4) Notwithstanding subsections (2) and (3), the head of the public body shall not charge an applicant a cost for a service in response to a request for access to the personal information of the applicant.*

(5) The cost charged for services under this section shall not exceed either

(a) the estimate given to the applicant under section 26 ; or

(b) the actual cost of the services.

(6) The minister responsible for the administration of this Act may set the amount of a cost that may be charged under this section.

26. (1) Where an applicant is to be charged a cost under section 25 , the head of the public body shall give the applicant an estimate of the total cost before providing the services.

(2) The applicant has 20 business days from the day the estimate is sent to accept the estimate or modify the request in order to change the amount of the cost, after which time the applicant is considered to have abandoned the request, unless the applicant applies for a waiver of all or part of the costs or applies to the commissioner to revise the estimate.

(3) The head of a public body may, on receipt of an application from an applicant, waive the payment of all or part of the costs payable under section 25 where the head is satisfied that

(a) payment would impose an unreasonable financial hardship on the applicant; or

(b) it would be in the public interest to disclose the record.

(4) Within the time period of 20 business days referred to in subsection (2), the head of the public body shall inform the applicant in writing as to the head's decision about waiving all or part of the costs and the applicant shall either accept the decision or apply to the commissioner to review the decision.

(5) Where an applicant applies to the commissioner to revise an estimate of costs or to review a decision of the head of the public body not to waive all or part of the costs, the time period of 20 business days referred to in subsection (2) is suspended until the application has been considered by the commissioner.

(6) Where an estimate is given to an applicant under this section, the time within which the head of the public body is required to respond to the request is suspended until the applicant notifies the head to proceed with the request.

(7) On an application to revise an estimate, the commissioner may

(a) where the commissioner considers that it is necessary and reasonable to do so in the circumstances, revise the estimate and set the appropriate amount to be charged and a refund, if any; or

(b) confirm the decision of the head of the public body.

(8) On an application to review the decision of the head of the public body not to waive the payment of all or part of the costs, the commissioner may

(a) where the commissioner is satisfied that paragraph (3)(a) or (b) is applicable, waive the payment of the costs or part of the costs in the manner and in the amount that the commissioner considers appropriate; or

(b) confirm the decision of the head of the public body.

(9) The head of the public body shall comply with a decision of the commissioner under this section.

(10) Where an estimate of costs has been provided to an applicant, the head of a public body may require the applicant to pay 50% of the cost before commencing the services, with the remainder to be paid upon completion of the services.

The imposition of a small request fee and of a charge for locating and processing activities is common across Canada.

The Wells Committee identified the purposes of imposing fees and charges, at p. 56:

> Two reasons are given to support charging fees – cost or partial cost recovery, and deterring nuisance requests. The latter reason was expressed in the 2008 review of the *Right to Information Act* in the state of Queensland, Australia. The University of Southern Queensland commented on the purpose of user fees:
>
> > Whilst the University does not recommend increasing the charges, neither does it wish to see the charges removed as they do act as a deterrent to uncommitted, nuisance making or vexatious applicants.
>
> During the ongoing review of Alberta's *Freedom of Information and Protection of Privacy Act*, Commissioner Jill Clayton recommended that the province's fee structure be reviewed to ensure that fees are appropriate and do not create a barrier to access, and that they are clear and understandable. But she did not recommend doing away with them. She stated: "In my view, while it is reasonable to charge a nominal fee to provide access – this helps to prevent frivolous requests – it is important that fees not be a deterrent to access."

Before this Committee, the majority of the submissions from public bodies suggested that a fee should be re-introduced in order to deter frivolous and vexatious requests. For example:

From the Department of Education, at page 2:

> There is currently no application fee. The absence of an application fee may encourage access requests to the fullest extent possible. However, most provinces have an application fee, and it is felt that even a modest application fee would help reduce the number of frivolous requests without compromising a request that is consistent with the purpose of ATIPPA. However, an application fee should not apply to requests to correct personal information.

From the Department of Tourism, at page 1:

> The processing of ATIPP requests is both a time consuming and expensive process. For some applicants, there is a belief that a request is fulfilled easily, with minimal effort. The reality is the searching and examination of files is only a small part of the ATIPP procedure; consulting with subject matter experts, legal counsel and seeking permission to disclose information by senior executive of public bodies each adds to the cost to the taxpayer to process and release information. This department strongly advocates the implementation of a minimal fee to reduce frivolous and vexatious requests. Other jurisdictions, including the Government of Canada, do charge fees for ATIPP requests and a minimal fee (e.g., $10.00) would assist in streamlining the workload related to the ATIPPA, 2015. Additionally, we recommend that each completed request should contain a sentence indicating to the applicant the estimated cost to the taxpayer/treasury of processing that particular request. This can be done by recording the number of hours spent on processing the request, time of subject matter experts, legal counsel and Executive branch review for disclosure. Requests for personal information of an individual would be excluded from such an application fee.

The Department of Digital Government and Service NL, while supporting the imposition of a fee to reduce frivolous requests, acknowledged that it does not make a practice of charging applicants, primarily since most requests do not take more than the 15 hour threshold allowed, at page 3:

> The Act allows a public body to charge an applicant a modest cost for reproduction, shipping and locating a record (only after the first 15 hours of locating) for general access request only. Digital Government and Service NL (DGSNL) does not make it a practice to charge applicants, as most requests are sent electronically and few requests require more than 15 hours of locating.
>
> Access to information requests are submitted to request access to an individual's own records or are requests for general Information. Requests come from media, outside public bodies, legal firms, business, interest groups, political parties, academics/researchers and individuals. It is recommended the Act be

> amended to introduce a nominal $5.00–$25.00 fee for an access to information request, exemptions to the fee could be provided to individuals where deemed it would interfere with an individual's ability to access to Information. This would apply to general access requests only and not requests for personal information. This small fee may reduce frivolous requests to the department and help offset the cost of Access to Information and Privacy Protection (ATIPP).

The submission of the Department of Industry, Energy and Technology does not include a recommendation with respect to fees and charges. That department, according to its submission, receives the highest number of requests for any public body within government. It noted that as of November 26, 2020, 318 requests had been received since the beginning of the fiscal year. The submission went on to suggest that, presumably as an alternative to the introduction of fees, steps should be taken to reduce the procedural administrative burden where possible:

> It is widely known there is a substantial amount of administrative work that goes along with each ATIPP request. The administrative work on a single file can be upwards of two hours or more. For a department that receives 300 requests in a year this is 600 hours, or 17 weeks, worth of administrative work. Simply averaging one request per day (approximately 250 per year) means two hours every day spent on administrative work for ATIPP. Thus, IET has examined the processing of ATIPP requests and identified areas we believe could become more efficient and streamlined through automation or requirements that can be eliminated, The department recommends the consideration of legislative authority to reduce administrative burden where possible.

In terms of a vehicle for cost recovery, the experience of the last five years shows that, to put it bluntly, 'it's not worth the trouble'. The total fees charged, by *all* public bodies, for the last five years:

YEAR	FEES CHARGED
2015–16	$160.50
2016–17	$176.25
2017–18	$783.25
2018–19	$425.00
2019–20	$597.65
TOTAL	$2142.65

Of this total, $918.75 was charged by Memorial University of Newfoundland, $425 by the Department of Transportation and Works and $275 by Service NL.

As a cost-recovery tool, the present s. 25 charging provision is pointless. One could well infer that the cost of preparing a cost estimate, submitting it to the applicant, and then perhaps having to address a waiver or review application far outweighs the fees at issue.

But what of the use of a fee to deter frivolous, vexatious or otherwise inappropriate requests?

Some comments from ATIPP coordinators:

- I do believe we need to start charging a small fee to file an ATIPP request. This is not to deny access, but to prevent one applicant filing 30-40 requests in one day because they can.
- Application fee: I feel it should be restored. If nothing else, they lend an importance to the decision to file an ATIPP request and add a level of responsibility and, yes, accountability to the requester.
- Minimal fee should be required to stop frivolous requests.
- Will a fee come out of this review? Probably not. It shouldn't have been taken out to begin with. A fee would narrow the frivolous and vexatious requests and requests from media to do their investigative work. This process takes away resources from other work being done by subject matter experts who have the information requested, they answer questions, a file could take hundreds of hours to review and redact and the public gets it for free, never understanding/knowing or appreciating what coordinators do.
- A $10 application fee would prevent many nuisance ATIPP requests. Media organizations and Political offices have budgets that can cover such fees. I have a handful of regulars who only apply for large amounts of information because it is free to them but have cost the taxpayers thousands of dollars to fulfil the ATIPP request. NL only jurisdiction that does not charge for ATIPP request to my knowledge.
- Fees should be reintroduced, especially in the instances of Discovery work for solicitors. This is a common type of request and where it saves money for the solicitor it costs GNL a significant amount in time and processing.

The submission that a modest fee may deter frivolous requests is an attractive one. However, the imposition of a fee on all requestors in order to try and address the conduct of a few would in my view be unfair and contrary to the fundamental principle that the public enjoys a right to receive information from its government. Further, if an ap-

plicant is determined to try and exercise the access right in a manner and for a purpose not contemplated by the *Act*, there is no assurance that a small fee would deter such an applicant. Unreasonableness may not be held at bay by a $5 fee.

But I accept that responding to applicants who insist on acting in a manner contrary to the responsible and reasonable exercise of the rights granted by the *Act* places a significant and unnecessary strain on a public body's human and other resources. The *Act* must provide fair but efficient and effective provisions to alleviate the strain.

In my view, the issue of frivolous and vexatious requests is properly and fairly addressed in the context of a particular request or requestor. This would allow an objective assessment to be made on whether the request should be disregarded or, in more serious circumstances, an application made seeking a vexatious applicant determination.

Where does this all leave the issue of fees? As a cost-recovery mechanism, s. 25 is of no use. Its administrative provisions require the diversion of scarce resources from more productive activities. The imposition of a fee for the purpose of deterring frivolous requests is unfair and contrary to the principles of the *Act*. There are more appropriate directed mechanisms for dealing with frivolous requests.

The cost of responding to public access requests is, for public bodies, a cost of doing business and a small price to pay for facilitating transparent and accountable governance. Subject to the comments below, an applicant should not be required to pay a fee or cost relating to an access to information request.

However, considering the cost of responding to access to information requests as a cost of doing government business is a position that is founded on averages and reasonableness. Foregoing any possibility of charging an applicant anything for a request, however large or complex, would leave open the potential for a public body having to fund responses to requests that, to any reasonable observer, would be considered as requiring significantly more than the average level of resources needed to respond to a request.

The submission of the OIPC includes a comment on a particular request it received in its capacity as a public body. At page 73:

> In the one challenging circumstance, there were persistent, novel technical issues with conversion of requested electronic documents to a usable format so that all of the information in the record could be accessed for review, redaction, and provision to the applicant. This also involved a large number of rec-

> ords - in excess of 1000 pages. In order to respond by the deadline, this process involved several of our staff who were involved in working through the technical issues, consulting outside the office to find solutions, reviewing the records once the issue was resolved, in addition to applying redactions, communicating with the applicant and other normal administrative processes. Ultimately the response was issued on time, but at the risk of impacting our other statutory responsibilities.

Labrador Grenfell Health made the same point, at page 2:

> Labrador Grenfell Health has never charged for ATIPPA. There is significant cost involved in locating records and the work and the effort required to review and redact those records. Large ATIPPA requests require significant organizational resources to respond. …
>
> For example, there have been several ATIPPA requests processed involving upwards of 10,000 emails, requiring significant resources and time to review.

I am not prepared to leave public bodies with no opportunity for some cost recovery where considered appropriate.

Accordingly, I recommend that a public body have the discretion to charge the cost of all time in excess of 35 hours – effectively one week of work - reasonably spent in the services of identifying, locating, retrieving, reviewing, severing and redacting a record. The time chargeable does not include time spent in communicating or corresponding with an applicant or third parties.

The decision to charge for this time would be at the discretion of the head of the public body and would be subject to the present estimate, waiver, OIPC review and other provisions of s. 26.

I do not agree with the suggestion that there should be a lower 'cost-chargeable threshold' for small municipalities. While I appreciate the reason for the suggestion – the limit on resources available to small public bodies – the premise that citizens may be treated differently depending on the resources available to the public body in question is not, in my view, acceptable. The rights given by the *Act* are common to all and the conditions for their exercise should likewise be common. I comment later on how issues specific to the smaller public bodies may be addressed.

The head of a public body should also have the discretion to charge a per page printing or copying cost for pages in excess of 100 pages, the actual cost of any other reproduction or provision of a record, and any shipping costs. These 'out of pocket' costs should be subject to the review and waiver provisions of s. 26.

At present the minister responsible for the administration of the *Act* has the authority to set the amounts of costs that may be charged (subsection 25(6)). I see no reason to change this. Although there may be differences between public bodies in the salaries and other expenses related to the processing of requests, it is preferable that there be uniformity in the unit costs charged for hourly staff time, copying and printing costs. I recommend that this structure be maintained and that the responsible minister revise the current costs schedule in accordance with the above reocommendations.

Given the experience of the last five years, I expect that these provisions will see little use. But it is important that they be available if warranted by the circumstances of any particular request.

I add that the discretion to charge an applicant in the circumstances outlined above should not be influenced by the size or resources of the particular public body. Residents of the province reasonably exercising their rights under the *Act* should not be subject to varying financial consequences of a request depending on the size of the public body concerned.

But one must be practical and recognize the obvious. The costs to the smaller public bodies of responding to access requests – whether in staff time or otherwise – may disproportionately affect the ability of such bodies to finance their other activities. In its submission, the OIPC has fairly pointed out the need to recognize the practical difficulties in administering a province-wide access regime in public bodies with radically different levels of resources.

It is important that the smaller public bodies – in particular the smaller municipalities – be supported in fulfilling their obligations under *ATIPPA, 2015*. Later in this report, I recommend that a team be established by government to consider and address the unique ATIPPA-related needs of the smaller municipalities and that this team develop a discrete ATIPP funding model through which municipalities can recover at least a portion of their marginal costs of processing ATIPP requests.

RECOMMENDATION

That the *Act* be amended to:

- Allow public bodies to charge the cost of time spent identifying, locating, retrieving, reviewing, severing and redacting records for individual requests in excess of 35 hours, subject to the existing estimate, waiver, review and other provisions of section 26. [Appendix K, s. 8(3), s. 25]
- Allow public bodies to charge fees per page for physical reproduction of records in excess of 100 pages. [Appendix K, s. 25(1)(b)]

Administrative:

- That the responsible minister revise the current cost schedule to reflect the recommendations in this report.

NON-RESPONSIVE INFORMATION

Section 8 of the *Act* gives a right of access to a "record" held by a public body.

An access to information request will often ask for "information" on a topic rather than a particular record. Practical difficulties arise for the coordinator when records contain some information that is covered by the request but also other information, perhaps in a significant quantity, that has nothing to do with the subject matter of the request.

Recognizing this difficulty, the OIPC has provided some guidance on the issue through the issuance of a 2016 Practice Bulletin, essentially suggesting a practical way of dealing with information in a record that does not relate to the request.

However, a number of coordinators and at least two written submissions from public bodies have argued for a legislative amendment similar to that in the New Brunswick legislation where the head of a public body may remove information if it "is not relevant to the request …". (I do note that in s. 7 of the New Brunswick legislation, entitlement of an applicant is "to request and receive information", rather than a record as such.)

The submission of the ATIPP Office, at pages 12–13:

> 4. Non-responsive information
> Issue
> Requests are generally made in relation to specific information/subjects. However, responsive records often include information unrelated to the request (i.e. non-responsive). For example, meeting notes, agendas or emails may contain information relating to the subject matter of the request, but also contain information relating to other, non-responsive information. It has been the practice of many public bodies to remove the information unrelated to the topic of the request as non-responsive.
> However, a number of years ago this became an issue when the OIPC stated that the Act does not allow for this; therefore, public bodies could not remove information from responsive records that was non-responsive. Shortly after, they modified their opinion, and issued an updated practice bulletin – Redacting Non-Responsive Information in a Responsive Document outlining under what circumstances information can be removed as non-responsive. While public bodies are now able to remove non-responsive information in limited circumstances, the process outlined in the OIPC guidance document is time consuming and unnecessary given the information in question is unrelated to an applicant's request.
>
> In Stevens v. Nova Scotia (Labour), 2012 NSSC 367 (CanLII), the judge discusses the issue of non-responsive information (referred to as non-applicable) within the decision. While both non-applicable documents and non-applicable information contained within documents were discussed, the following is in reference to both:
>
> > It appears the initial review officer may have taken the position that the Respondent could not withhold documents on the basis that they were irrelevant. The Respondent referred to those materials as "not applicable". According to the Respondent the Review Officer suggested there was no recognized exemption under FOIPOP legislation for "non applicable" materials. Any such ruling would defy common sense. What possible relevance would it be to the Appellant if someone commented in a document that their grandmother had a wart removed from her nose. (Not that any such comment was made in the redacted materials). With e-mail communications the author on a number of occasions mixed personal or non relevant communications with information which was properly disclosed. The personal, non relevant, information is not something to which the Appellant is entitled to access. There are some things in records, such as e-mail, which are clearly irrelevant and should not be disclosed.

> Given the finite resources available for processing ATIPP requests, it seems altogether unnecessary to require public bodies to review and process information contained within a record unrelated to the applicant's request. In addition to requiring additional time, it can be misleading if exceptions to disclosure are applied to non-responsive information, as it appears that the public body is withholding information related to the request, when in fact they are removing information unrelated to the request.
>
> Suggestion
>
> Consider amending section 8 of the Act to allow for non-responsive information within a responsive record to be withheld from disclosure as non-responsive.

From the submission of the Department of Industry, Energy and Technology, at pages 6–7:

> Currently, the OIPC guidelines say if there is responsive information within a record, the entire record is responsive. This policy often creates an extensive amount of work for the department. It is common for the ATIPP team to encounter records, such a briefing notes, which may be multiple pages of highly sensitive information, with a single sentence or paragraph in the record that Is actually responsive to the request. Another common occurrence of this is an email with multiple attachments but not all are responsive. According to OlPC guidance, coordinators are "free to use their discretion" for redacting non-responsive information. This means careful review of the material and the application of exemption codes Is required for all parts of the record, despite the fact that the bulk of the record may have nothing to do with the information requested by the applicant. In the past the OIPC has overruled coordinators when they use non-responsive to redact parts of a record. lET recommends the ability to redact any non-responsive Inlormation, using "non-responsive" as the explanation with the support from the OIPC. This would reduce the time the coordinator and subject matter experts are required to take to review all the non-responsive information for redactions. On the surface this may not seem like a great deal of work, however the department deals frequently with multi-faceted documents that fall into this category. Understandably, it is frustrating for departmental staff to spend significant amounts of time determining and applying redactions to information that is not related to the request. Having the approval and support from the OIPC to flag information as non-responsive would eliminate processing time for the department.

The comment in response from the OIPC, at page 24 of its supplementary submission:

> IET recommends a change to OIPC interpretation of the term "non-responsive" in the context of an access request, and subsequent review by OIPC. The ATIPP Office has also suggested an amendment to the statute to address its concerns on this subject. OIPC guidance on the issue may be found here, and we believe it strikes the appropriate balance. Ultimately, our view is that communication with the applicant can always resolve any confusion around whether an entire record, or simply a section of it, is being requested by an applicant. The duty to assist requires an open, accurate and complete response, and we believe that if there is any lack of clarity in a request, the Coordinator should reach out to the applicant to ensure that the request is understood, including what is intended to be inside or outside the scope of the request. Where there is doubt, bear in mind that courts have said statutes should receive a liberal interpretation in line with their purposes.

To my understanding, the issue is not so much the clarity of the request as suggested by the OIPC, but rather the process to be followed when, for example, 90% of the information in a record clearly does not relate to the information requested.

Given that the *Act* is structured around access to a record, I am not inclined to suggest an amendment that would shift the focus to a production of information. Assuming that a request is clear and does not require clarification, the identification of the information that should be provided – considered responsive – is surely simply a matter of common sense and good judgment on the part of coordinators and the OIPC.

The non-legislative Practice Bulletin takes this approach. It is useful to set it out in full:

> **Redacting Non-Responsive Information in a Responsive Document**
>
> Section 8 of the ATIPPA, 2015 grants a right of access to a record. The only basis for severing information from a record which is provided for in section 8 is where an exception applies, and there is no provision in the ATIPPA, 2015 allowing for the redaction of information because it is "non-responsive". However, the OIPC recognizes that interpretation of this issue varies across other Canadian jurisdictions and that the practice of severing nonresponsive information within responsive records has been widely accepted and endorsed by Commissioners in a number of jurisdictions. It has also been a long standing and accepted practice in this jurisdiction.
>
> We would therefore like to offer the following "best practice" advice to Access and Privacy Coordinators when they are considering severing non-responsive information from an otherwise responsive document:

> • use the "non-responsive" redaction sparingly and only where necessary and appropriate, giving the ATIPPA, 2015 a liberal and purposive interpretation;
>
> • if it is just as easy to release the information as to claim "non-responsive", the information should be released (i.e. releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exceptions);
>
> • avoid breaking up the flow of information (i.e. if possible, do not claim "non-responsive" within sentences or paragraphs); and
>
> • in your final response to the Applicant, it is necessary to explain what "non-responsive" means and that some information has been redacted on this basis.
>
> Coordinators are still free to use their discretion when it comes to the redaction of "nonresponsive" information in a record, however, if you are uncertain as to whether particular information is responsive, call the Applicant to discuss the issue.
>
> The OIPC will continue to review claims of "non-responsive" when complaints are made to this Office, and where it is not readily apparent, Public Body Coordinators must be able to explain to this Office why certain information has been severed on the basis of it being "non-responsive". If we are not convinced, we may recommend disclosure. This practice is consistent with the way this issue has been handled in the past. The above noted advice is in keeping with the overall purpose of the ATIPPA, 2015, including the duty to assist, but also recognizes the challenges of responding to an access request in a timely manner.

From this bulletin I take the following:

1) Notwithstanding that the *Act* gives a right of access to a "record", coordinators may, at their discretion redact information as non-responsive (not relevant) when in their good judgment the information does not relate to the request. No consideration of an exception is required, and the redacted information should simply be identified as non-responsive.
2) In the response to the applicant, the coordinator should point out that certain of the information has been identified as non-responsive and redacted accordingly.
3) In the event of a complaint, the public body will need to explain to the OIPC why certain information was considered non-responsive.

> (The bulletin suggests that notwithstanding that the redacted information is part of a record, the OIPC will not recommend disclosure if it is satisfied that the information in question is in fact not responsive to the request.

In my view, this bulletin addresses the concerns of the coordinators. It recognizes the statutory right of access to a record but at the same time acknowledges the burden and futility of providing information that has not been sought by the applicant.

It is of course necessary for coordinators to review the records to determine what information is responsive or not and, in respect of information considered responsive, whether any of the exception redactions are applicable.

The Department of Industry, Energy and Technology asks for "the ability to redact any non-responsive information, using "non-responsive" as the explanation with the support from the OIPC". As I read the practice bulletin, coordinators presently have the ability to do just that. The bulletin indicates that it was originally issued in May 2016. It is to be hoped that the common sense approach reflected in the bulletin is still in effect today and that, in the event of a complaint, the OIPC still supports the proper redaction of non-responsive information.

This type of practical and fair approach, well within the spirit of the *Act*, is to be commended. But just as its application requires continued and consistent support from the OIPC, so does its continued acceptance and use require its reasonable and professional application by coordinators. Too much overzealous interpretation of non-responsive information and discrepancies of application of the policy by public bodies will, in all likelihood, lead to a less flexible approach to the treatment of non-responsive information within a requested record. When exercising their discretion to redact information that they consider not responsive to a request, coordinators should in every instance exercise their professional judgment in accordance with the principles of the *Act*.

I do not recommend any amendment to the *Act*.

RECORD FORMAT

Section 20 of the *Act* sets out provisions relating to the form or format in which a record is to be provided to an applicant:

20. (1) Where the head of a public body informs an applicant under section 17 that access to a record or part of a record is granted, he or she shall

(a) give the applicant a copy of the record or part of it, where the applicant requested a copy and the record can reasonably be reproduced; or

(b) permit the applicant to examine the record or part of it, where the applican't requested to examine a record or where the record cannot be reasonably reproduced.

(2) 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.

(3) Where the requested information is information in electronic form that is, or forms part of, a dataset in the custody or under the control of a public body, the head of the public body shall produce the information for the applicant in an electronic form that is capable of re-use where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body;

(b) producing it would not interfere unreasonably with the operations of the public body; and

(c) it is reasonably practicable to do so.

(4) Where information that is, or forms part of, a dataset is produced, the head of the public body shall make it available for re-use in accordance with the terms of a licence that may be applicable to the dataset.

(5) Where a record exists, but not in the form requested by the applicant, the head of the public body may, in consultation with the applicant, create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

Section 11(2)(c) stipulates that an applicant shall "indicate how and in what form the applicant would prefer to access the record".

It appears that there is little complaint about the format of records being disclosed, but one submission pointed out that in converting a record from one format to another, relevant information may be lost.

Dr. Anton Oleynik explained that converting a record from its "native format" will in some cases lead to a loss of that record's metadata. Metadata is information embedded in an electronic file which provides some history of that file – when it was created, where it came from, and other data points which will differ according to the type of file.

The Office of the Chief Information Officer ("OCIO"), the ATIPP Office, and Memorial University provided submissions on the practical and technical difficulties involved in routinely providing records in their native format.

From the submission of the OCIO, at pages 3–5:

> The following are concerns with providing information in their native format, some are the same as those raised by Memorial University in their ATIPPA Review submission:
>
> Information Access and Protection:
>
> The OCIO operates in a comparable environment as Memorial University in that there are hundreds of systems propriety, custom built and off the shelf that are managed and maintained on behalf of Government. Presently, to comply with ATIPP's duty to assist, the applicant is provided with easy to use information. This information is converted into readable text (near native) which the applicant can understand and use for their purpose. Some issues with regular use of native format include:
>
> - Vendor owned software may require vendor support to access – which requires a contract and payment (if the vendor is still in business), and adds additional time to access information
> - legacy technology may not allow access to the underlying software to create reports and data needed - if accessible, it may require IT specialists to interpret and may still require transfer to a near native format for ATIPP purposes
>
> Information provided in native formats may be manipulated by a user. This calls into question key information protection principle of integrity of the information provided. It is industry best practice to provide applicants with records that cannot be easily manipulated (i.e. pdf) to protect integrity and authenticity.
>
> Operational:

- Not all ATIPP Coordinators would have the necessary software and knowledge to operate the system to access the records. (i.e.: AutoCAD). This results in an additional cost for training and licenses.
- Providing records in native format could increase IT storage requirements (and cost) as native files are larger than the comparable near native format (i.e.: pdf). Near native format are usually compressed when converted, resulting in smaller file size. Over time, native format usage would lead to significantly higher costs to Government and the taxpayer and potentially will impact the time it takes to search for responsive records.
- Information provided will not be easily redacted using existing software, in fact, potentially the native proprietary software may not allow any redaction software unless printed and manually redacted (e.g. moving to near native format). This could lead to breaches in the mandatory provisions of ATIPPA, 2015 and add time to the process.

Administrative:

- To provide responsive records in the native format will require more time for Coordinators due to the reliance on an IT specialist to first access the record in a complex/proprietary system, review for redactions and then identify a method to redact (if possible) in the native format. These extra steps would affect the timelines of the response.

The ATIPP Office has identified the following concerns:

- providing documents in their native format will pose an additional administrative burden on public bodies when dealing with requests that involve multiple records. This burden would become more problematic the larger the request. For instance, once a Coordinator locates all responsive records they are generally combined into one document for efficiency. These are then reviewed to identify exceptions and redactions are made. Without the use of redaction software either an IT specialist or printing the documents may be required to apply redactions – these actions would ultimately result in a near native format.
- the ability to provide native format where redactions are not required may seem reasonable when the request involves a small number of records – for example one or two emails, or other ATIPP requests at the same time, it would be extremely administratively burdensome to consider disclosure in native format where there are dozens, hundreds or thousands of individual emails.
- By way of an example – consider the case of an ATIPP request for which several hundred emails were considered responsive and native format was required:
    - a Coordinator would not combine all emails into one document for review, rather each email would need to be kept in its original format
    - the records would be difficult to organize, maintain and review which could lead to records being missed or overlooked

    - there would be increased difficulty to complete consults, either internal or external:
        - Coordinators would have to keep track of the various emails and which were sent to whom
        - feedback would be difficult to track as individuals wouldn't be able to refer to a specific page number
        - for larger files, there would be no ability to compress records to reduce the size which could cause difficulties with sharing
- redaction would need to be determined for each document separately
- a method to release the documents in a native format would need to be determined
- the applicant would need to also have the specific licensed software to access the documents when released

In addition to concerns about native format, the submissions raised other issues related more specifically to the provision of metadata. These include the potential inadvertent release of sensitive information technology security information and personal information which may be included in metadata, as well as the additional administrative challenges and specialized expertise required to analyze another level of data embedded in the record.

Currently, most records are provided to applicants in "near-native" format, described by OCIO as a format which "produces the data contained in the document with as much original information as possible in a different, often more easily accessible file type." The example given is conversion of a word file to pdf. For the vast majority of applicants, a response in near-native format provides all the information desired. Despite this, it remains a valid concern that in some cases, relevant information being sought may be lost in the process of format conversion. In the infrequent case where metadata may be of concern to an applicant, there is of course nothing to preclude an applicant from specifying in a request that they are seeking access to metadata or specific information that may be contained in metadata. Whether or not a public body is able to provide such metadata will depend both on the capacity of the public body and the nature of the information requested.

The *Act* addresses the situation when applicants request records in a specific form, but the record does not exist in that form (s. 20(5)). The situation when the record exists in the specific form requested is not directly addressed. OCIO suggests that responding to requests for records in a specified form is adequately covered by the duty to assist in section 13. However, I consider it appropriate to remove any ambiguity and specify

that public bodies should provide records in the form requested where they exist in that form and where it is reasonably practicable to provide them in the form requested.

The production of a record in a particular format may pose challenges for the smaller public bodies which lack ready access to information technology expertise and support. For example, the full extent of the information being disclosed when a record is produced in a particular format may not be readily apparent to a coordinator not versed in the technology. As an administrative recommendation, I recommend that the OCIO and the ATIPP Office make available to the smaller public bodies basic training and information on document formats and the issues for consideration when presented with a request for a record in a particular format.

The cases in which it is reasonable to provide records in the form requested will necessarily be limited by the considerations raised above as well as by any exceptions to disclosure. When the record cannot be provided in its existing format, it may be appropriate to consult with the applicant to determine a format that will meet their needs. I would expect that coordinators will consider the issue of record format as an aspect of fulfilling in good faith their duty to an applicant. It is neither necessary nor useful to impose on coordinators an obligation to give reasons for the decision to provide records in a particular format.

The intent of the amendment is not to effect a major change in practice around formats, but to enshrine and clarify both good practice and a right to the material information contained in records. The concept in the recommended amendment of a record being provided in a format that "does not materially change the information that was originally created, sent or received" is found in the *Management of Information Act*, SNL 2005, c. M-1.01.

RECOMMENDATION

- That the *Act* be amended to specify that when a record exists in a format specifically requested, a public body should provide it in that format when it is reasonably practicable. Otherwise, it can be provided in a format either agreed upon with the applicant or that does not materially change the content. (Any record provided, regardless of format, remains

subject to redaction in accordance with the exceptions in the *Act*.) [Appendix K, s. 20(6) and (7)]

Administrative

- That the OCIO and the ATIPP Office make available to the smaller public bodies basic training and information responding to requests for a record in a particular format.

TRANSFER OF REQUESTS

The *Act* allows for a public body to transfer a request for information to another public body in certain circumstances:

> *14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it, where it appears that*
>
> *(a) the record was produced by or for the other public body; or*
>
> *(b) the record or personal information is in the custody of or under the control of the other public body.*
>
> *(2) The head of the public body to which a request is transferred shall respond to the request, and the provisions of this Act shall apply, as if the applicant had originally made the request to and it was received by that public body on the date it was transferred to that public body.*

Statistics from the ATIPP Office indicate that there have been 200 transfers of requests in the last five years. Some public bodies have suggested that more time is needed to determine if a request should be transferred.

The Department of Education, at page 2:

> Tirneline for Transfer – Currently, a public body has to transfer a request within five days of its receipt. The process requires conducting an internal search to identify potential responsive records prior to a transfer. The search sometimes involves the need for OCIO approval to conduct a multi-mailbox which can take several days. Consideration should be given to extending the time to complete a transfer.

And from the survey of coordinators:

- I also find the deadline to transfer requests can be difficult to meet since it requires coordination on behalf of the department to determine that it's not a record we have and then coordination with another department to determine if they do indeed have the record. This can be difficult when you have a number active requests and especially so if any are large. Transferring a request involves communication with the applicant, another coordinator and a formal letter. If the records requested are with multiple departments then it requires multiple letters and emails. And at the end of the day if the department does not make the transfer in time we still have to reply with a non-responsive letter anyway. The way the act is written it's often easier to ask the applicant to withdrawal the request or reply with a non-responsive. Given this, I don't think there should be any deadline for transferring and possibly have the onus on the applicant to submit the request to the department that has the records.

The 2002 *ATIPPA* set out a seven day time limit for transfers. The present provision, expressed in business days, is essentially unchanged. The time limit for transfers received only passing comment in the 2014 review as part of a broader discussion of response times. At page 259:

> Newfoundland and Labrador has the shortest mandatory transfer time at 7 days; however, a transfer restarts the 30-day time frame for the receiving public body to respond to the request. Ontario's timelines stick to the strict 30-day requirement; the transfer must take place within 15 days of being received; the 30-day clock begins to run from the time when the first agency received the request; it does not restart.

The majority of Canadian jurisdictions provide a transfer of time of 10 days or longer. A 10 day window in which to effect a transfer is reasonable, provided that any transfer decision is made without delay. In the event of a formal transfer, there should also be an administrative requirement that the public body in question notify the ATIPP Office of any such transfer. Notwithstanding the time allowed in which to effect a transfer, the prudent coordinator may well opt for the practical and efficient approach of simply contacting the applicant and advising them to submit their request to the appropriate public body.

I recommend that s. 14 be amended to provide that any transfer be without delay and in any event no later than 10 business days after receipt of the request.

RECOMMENDATION

- That the *Act* be amended to expand the window for transferring requests between public bodies to 10 days. [Appendix K, s. 14(1)]

Administrative:

- That concurrently with the transfer of an access request to another public body, the transferring coordinator notify the ATIPP Office of the transfer.

ADVISORY RESPONSE

A number of submissions suggested that the mandatory advisory response is an unnecessary administrative burden. This view was echoed by a number of coordinators.

The submission of the City of St. John's is representative, at page 2:

> … the 10-day update notification letter, which reiterates a file's deadline, is redundant. An acknowledgment letter is sent to the applicant upon receipt of their request which outlines the process, timeline, and other relevant information. If a change in the timeline/deadline is needed (as is in the case of an extension, cost estimate, etc.), applicants are notified as part of those processes. The 10-day update letter offers no new information and can, in fact, be confusing to the applicant if the timeline changes after they receive the same.

The present s. 15:

Advisory response

15. (1) The head of a public body shall, not more than 10 business days after receiving a request, provide an advisory response in writing to

(a) advise the applicant as to what will be the final response where

(i) the record is available and the public body is neither authorized nor required to refuse access to the record under this Act, or

(ii) the request for correction of personal information is justified and can be readily made; or

(b) in other circumstances, advise the applicant of the status of the request.

(2) An advisory response under paragraph (1)(b) shall inform the applicant about one or more of the following matters, then known:

(a) a circumstance that may result in the request being refused in full or in part;

(b) a cause or other factor that may result in a delay beyond the time period of 20 business days and an estimated length of that delay, for which the head of the public body may seek approval from the commissioner under section 23 to extend the time limit for responding;

(c) costs that may be estimated under section 26 to respond to the request;

(d) a third party interest in the request; and

(e) possible revisions to the request that may facilitate its earlier and less costly response.

(3) The head of the public body shall, where it is reasonable to do so, provide an applicant with a further advisory response at a later time where an additional circumstance, cause or other factor, costs or a third party interest that may delay receipt of a final response, becomes known.

This requirement should be deleted. Given the widespread use of acknowledgment letters on receipt of a request and the legislated timelines for a response, the advisory response is not needed and consumes unnecessary resources. Digital Government and Service Newfoundland and Labrador recommends an automated reply when a request is submitted through the ATIPP portal, at page 2:

> 3. Acknowledgment Letter
>
> When a new request is submitted through the ATIPP portal, the coordinator clicks the "Confirm Receipt' button, completes an Acknowledgment Letter containing personal information and details of the request and sends the letter by email to the applicant. The letter references specific sections of the Act, provides a link to the Access to Information Policy and Procedures Manual, and contact information for ATIPP coordinator.
>
> While not a legislative change, it is recommended this process be automated, so when a coordinator clicks the "Confirm Receipt" button, an email response is generated requiring the coordinator to simply hit send on the email. This

would reduce administrative work for the coordinator and reduce the potential for a privacy breach.

The automation of the acknowledgment letter, where possible, is a worthwhile administrative recommendation.

I recommend that s. 15 be repealed.

RECOMMENDATION

- That the *Act* be amended to remove the requirement for advisory responses. [Appendix K, s. 15]

Administrative:

- That acknowledgement letters be automatically generated and sent to applicants when a coordinator confirms receipt of a request.

DISREGARDING A REQUEST

The *Act* allows a public body to apply to the OIPC for permission to disregard a request. The process of applying for a disregard does not 'stop the clock'.

The present provision:

21. (1) 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 where the head is of the opinion that

(a) the request would unreasonably interfere with the operations of the public body;

(b) the request is for information already provided to the applicant; or

(c) the request would amount to an abuse of the right to make a request because it is

(i) trivial, frivolous or vexatious,

(ii) unduly repetitive or systematic,

(iii) excessively broad or incomprehensible, or

(iv) otherwise made in bad faith.

(2) The commissioner shall, without delay and in any event not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(3) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16 (1).

(4) Where the commissioner does not approve the application, the head of the public body shall respond to the request in the manner required by this Act.

(5) Where the commissioner approves the application, the head of a public body who refuses to give access to a record or correct personal information under this section shall notify the person who made the request.

(6) The notice shall contain the following information:

(a) that the request is refused because the head of the public body is of the opinion that the request falls under subsection (1) and of the reasons for the refusal;

(b) that the commissioner has approved the decision of the head of a public body to disregard the request; and

(c) that the person who made the request may appeal the decision of the head of the public body to the Trial Division under subsection 52 (1).

The OIPC Annual Reports show for disregard applications:

YEAR	DISREGARD APPLICATIONS
2015–16	12
2016–17	41
2017–18	102

2018–19	94
2019–20	162

The OIPC reports that in 2018–19 it "partially or fully approved" 79% of disregard requests and in 2019–20, 33%. The OIPC does not provide reasons for its disposition of a disregard request. I have not been made aware of any appeal of a disregard decision to the Supreme Court of Newfoundland and Labrador.

The disregard function evoked two common suggestions. The first was that the five-day period in which to apply for a disregard be extended to allow more time for consideration of the request. This suggestion is supported by the OIPC in its recommendation that the 5 day period be increased to 10 days. The second is that the public body itself be empowered to disregard a request, with a right of complaint to the commissioner.

In considering the reasons for applying for a disregard, the prospect of an unreasonable interference with the operation of a public body (s. 21(1)(a)), in and of itself, does not in my view sit comfortably with a denial of the exercise of a quasi-constitutional right. It may be that the contemplated unreasonable interference is because of the complexity of an otherwise appropriate request and the anticipated time needed to respond, a concern that in my view should be addressed through a reasonable extension of time.

In other Canadian jurisdictions, unreasonable interference is considered a reason to disregard a request only if that unreasonable interference is as a result of the repetitious or systematic nature of the request, a characterization that engages consideration of the bona fides of the request.

In my assessment, the focus of the disregard function should be on the nature of the request rather than on what might be needed to respond to a large but bona fide request. The ability to disregard a request simply because of an unreasonable interference should be limited to requests the character of which fall outside that contemplated by meaningful participation in the democratic process.

The time taken to assess a request for purposes of a disregard application to the OIPC, to complete the application and, in due course, to receive the OIPC decision, is essentially non-productive procedural time. Should the OIPC refuse the request or modify it in some fashion, that time will have been lost to the substantive time needed to respond to the application. It would not be out of step with Canadian practice to 'stop the clock' from the date of submission of a disregard application to the date of receipt of the

OIPC decision and, if necessary, to the date of any Supreme Court decision setting aside the decision of the OIPC to approve a disregard. In light of the limited three day timeframe for the OIPC's decision (subsection 21(2)) the suspension of time will have minimal effect.

It bears repeating that the *Act* is intended to promote accountability and transparency in public bodies, meaningful participation in the democratic process by citizens, and an individual's right to protection of their personal information. The right given by s. 8 is given to a person, either individual or corporate. A request from an unidentifiable source, with unidentifiable contact information, suggests that the motivation for the request may not accord with the purposes of the Act. Information submitted to the Committee suggests that the receipt of such requests is not an infrequent occurrence. This is unfortunate and should be discouraged.

The head of a public body, upon the written recommendation of a coordinator, should be authorized to disregard a request when it does not appear that the applicant is an identifiable person and is not prepared to provide the coordinator with verifiable contact information.

There should not be a right of complaint or review in this circumstance. The *Act* should however provide that where a request is disregarded on this basis, the head must make every reasonable effort to notify the applicant and advise the applicant that a new request, with appropriate contact information, may be submitted.

Otherwise, should a public body be empowered to disregard a request subject only to a review by the OIPC? In my view the answer is no, except in one limited and objectively ascertained circumstance. The ability to disregard a request, as noted above, involves the denial of an important democratic right. It is not a right that should be lightly taken away and it should only be taken away following the application of principles that are consistently and fairly applied to all disregard requests. Even though a public body's decision to disregard may be subject to OIPC review, it is unlikely that every disregard would result in a complaint and an independent adjudication. With over 400 public bodies with varying levels of ATIPPA work and experience, there is a real risk that there would be inconsistent application of the authority to disregard and a resultant loss of public confidence in the administration of the legislation. The authority to authorize the disregard of a request must, subject to the discussion below, remain with the OIPC.

It was suggested quite strongly to the Committee that a public body should be able, of its own volition, to disregard a request where there is evidence that the applicant al-

ready has the records in question. It is suggested that a second request may be simply for the purpose of checking the thoroughness of the first search or for some other purpose not related to access to information.

The OIPC pointed to the difficulty of the public body's accurately ascertaining whether or not the requested information is the same as information previously provided or otherwise in the possession of the applicant. Its supplementary submission, at page 33:

> The Applicant may have "had" the record at one point, but it may have been lost, damaged, or they may no longer be able to access it. This is typical where emails have been deleted, or where the applicant is a former employee of a public body, who received the records in that capacity but no longer has access to them. Also, there is the possibility that different versions or drafts of a record may exist, and the difference could be a material one. Sometimes a record that has been distributed to different people may be annotated by one of the receiving parties, and the annotation could be the information of interest. Even if the applicant definitely had the records at one point, say five or ten years ago, but lost them, can they never obtain them again?

These concerns are not fanciful; I am not prepared to recommend that a public body have a unilateral right to disregard where the assessment of the circumstances surrounding the request could well involve considerable subjectivity and speculation. I prefer to leave a disregard on this basis subject to the prior approval of the commissioner. (Present 21(1)(b)).

The one circumstance where I consider that a public body should be authorized to disregard a request is where the information is available from other sources, whether by payment of a fee or otherwise. While ATIPP is not intended to replace other sources, neither is it intended to be used to circumvent other available and established procedures created to provide the particular information sought.

In saying this, I wish to make it absolutely clear that in order to justify a disregard, the ability to obtain information from other sources must be one that is available to <u>any</u> applicant, not just the applicant in question.

There were many complaints to the Committee about applicants who were involved in litigation utilizing ATIPP as an alternative or an addition to discovery procedures under the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Sch. D. During the hearings, Koren Thomson, Chair of the CBA-NL Privacy and Access Law Section, but speaking only for herself on this issue, drew a distinction between using the ATIPP process before

commencing litigation and using it after litigation has commenced and the discovery processes of the Supreme Court are available to the parties. She said:

> My perspective is that using the access to information regime for discovery purposes in advance of bringing a claim is entirely appropriate. Somebody is trying to determine if they have a right to bring an action. I think that's probably what the legislation – one of the ways in which it's intended to be used. It's to provide transparency and it's to hold public bodies accountable. If you're getting information to hold them accountable by eventually pursuing litigation against them, I think that's probably entirely appropriate.
>
> If you're using it as a discovery mechanism while you're within the confines of ongoing litigation, I think that's entirely inappropriate. Section 3(3) indicates that the act is in addition to and does not replace other means of gaining access to information. I would suggest that it should be interpreted narrowly to suggest that if you have another means, a more appropriate means, then that is the path that you should go down, particularly because disclosure under ATIPPA is disclosure to the world.
>
> If you're getting it for the purposes of litigation, it should be done in the confines of the litigation when principles such as the implied undertaking apply. Otherwise seeking it through the access to information regime is simply a means of potentially overburdening the public body. (Transcript – January 19, 2021- page 70)

I agree completely with Ms. Thomson. It is disappointing that litigants and their counsel choose to burden the public service and the public purse to advance their private litigation.

Utilizing the *Act* and public resources for such a purpose is not a use consistent with the purpose of the *Act*. But disappointment and disapproval notwithstanding, the purpose or motive of a requestor is not and cannot be a determining factor in a decision to grant or refuse access to information. The supplementary submission of the OIPC notes, at pages 39–40:

> … the motive of the requestor is not a consideration when responding to an access request. Alberta OIPC F2015-22 held:
>
> > [72] *I agree with the Applicant that Canada (Information Commissioner) v. Canada (Commissioner of the RCMP) 2003 SCC 8, states the law regarding the extent to which a public body may consider the motives of a requestor; that is, the motive of a requestor is irrelevant. There is no reason why a litigant cannot make a request for access to a public body as may any other citizen. Indeed, the Alberta Court of Appeal appears to acknowledge*

> *that this is so, as it recognized that the FOIP Act contains a process "independent of the litigation process". In University of Calgary, cited above, the Court of Appeal did not go so far as to say that an individual cannot be involved in litigation and make an access request at the same time.*

Alberta OIPC in P2011-D-003 wrote: "that the fact that a person's motive for an access request is related to litigation, and that access is or may be available through the litigation process, does not detract from the an applicant's right to take advantage of the access rights in the FOIP Act." And in Order 97-009:

> *In my view, the Freedom of Information and Protection of Privacy Act, which is a substantive body of legislation, operates independently of the Rules of Court, which is a regulation. The Rules of Court do not prevent an applicant from making an application for information under the Act, nor does the Act prevent an applicant from making an application for information when the applicant has used the discovery process under the Rules of Court to get that same information. Furthermore, the Rules of Court do not affect my jurisdiction to apply the Act where there is an issue of whether information in the custody or control of a public body is subject to a privilege to which the Rules of Court may also apply.*

In our view, the *ATIPPA, 2015* should not be amended to limit the right of access to information where the legal discovery process, or another process, is also available.

I agree that it would not be right to refuse access to an applicant who is involved in litigation but to grant access to the same information to an applicant who is not involved in litigation. The *Act* does not contemplate such differential treatment of applicants.

In my view, the same argument does not apply when established processes for access to certain information are available to all persons – in other words, to **any** applicant. To utilize ATIPPA, for convenience or otherwise, when there are other established processes which are intended to provide all citizens with access to the information sought does not sit comfortably with the purposes of the *Act* and places an unnecessary burden on the resources needed to meet requests for information not otherwise available to applicants. In these limited circumstances – where there is an established and readily accessible means available to any applicant to acquire the requested information, I recommend that a public body have the discretionary authority to disregard the request. Such authority to disregard a request on this basis should be exercised cautiously. I acknowledge the risk of quick and perhaps arbitrary decisions, but in all cases the particular circumstances of the applicant should be understood and taken into account. Issues such as accessibility and online access capability should be considered where appropri-

ate. This authority should only be exercised by the head of the public body following a written recommendation of the coordinator.

Any exercise of discretionary authority to disregard a request would be reviewable by the commissioner on the basis of a refusal of access. I also recommend that, given the nature of this action, whenever the head of a public body disregards a request under this section, the commissioner be notified of the action and the reasons for it. As an administrative requirement, the public body, whether a government department or not, should concurrently advise the ATIPP Office of the disregard.

RECOMMENDATION

That the *Act* be amended to:

- Extend the period in which to apply for a disregard to 10 days. [Appendix K, s. 21(1)]
- Remove the ability to apply to disregard a request on the basis of unreasonable interference with the public body. [Appendix K, s. 21(1)(a)]
- Stop the clock on time limits for final responses while waiting for the commissioner's approval of a disregard application. [Appendix K, s. 21(3)]
- Allow the head of a public body to approve disregard applications in cases of requests for information otherwise accessible to any applicant and requests from unidentifiable applicants. The commissioner must be notified in writing. [Appendix K, s. 5(2)(a), s. 21.1]

Administrative:

- That where the head of a public body disregards a request, the coordinator of the public body notify the ATIPP Office of the disregard and reasons therefor.

VEXATIOUS APPLICANTS

As set out in the previous section, the *Act* provides that the commissioner may, upon application, approve the disregarding of a request that is an abuse of the ATIPP process.

However, maintaining the capacity of the ATIPP system to respond to bona fide requests on a timely basis and, more importantly, maintaining respect for the *Act* and its objectives, calls for the ability to be able to prevent, up front, the repeated filing of such requests from a single applicant. One coordinator reported that one applicant had, over a period of years, filed 80 requests, 50 of which resulted in an approval to disregard. Another reported that, over 12 months, a requestor had filed requests containing over 304 individual questions and had made 33 complaints to the OIPC. This type of experience is not unique. The quasi-constitutional right to access information is not a right to harass; the resources needed to respond to legitimate requests cannot be squandered in responding to vexatious requests and in filing the inevitable disregard applications.

A public body should be able to ask the commissioner to declare an applicant to be a vexatious applicant, with the commissioner having the authority to order that future requests be subject to the prior approval of the commissioner for the period of time specified by the commissioner. Such an order would be subject to appeal to the Supreme Court. This oversight by the commissioner, exercised in accordance with established principles, would help to preserve the ATIPP system for its intended uses. While my expectation is that this authority will be rarely used, its presence and considered exercise when required may act as a deterrent to abuse of the process.

RECOMMENDATION

That the *Act* be amended to:

- Allow the head of a public body to ask the commissioner to declare an applicant to be a vexatious applicant for a period of time determined by the commissioner. [Appendix K, s. 21.2]
- Allow an applicant to appeal a vexatious applicant declaration to the court and allow the court to make an appropriate order. [Appendix K, s. 54.1, s. 60(4)]

TIME LIMITS AND EXTENSIONS

The *Act* sets timelines for complying with requests and for addressing the various matters that may arise in the course of responding to access to information requests.

Section 16 stipulates that a response must be provided within 20 business days. There are provisions for extending the time limits for a response, but any request for an extension must be submitted to the OIPC for consideration and approval.

The current extension provision:

> *23.(1) The head of a public body may, not later than 15 business days after receiving a request, apply to the commissioner to extend the time for responding to the request.*
>
> *(2) The commissioner may approve an application for an extension of time where the commissioner considers that it is necessary and reasonable to do so in the circumstances, for the number of business days the commissioner considers appropriate.*
>
> *(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, decide to approve or disapprove the application.*
>
> *(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16 (1).*

(5) Where the commissioner does not approve the application, the head of the public body shall respond to the request under subsection 16 (1) without delay and in any event not later than 20 business days after receiving the request.

(6) Where the commissioner approves the application and the time limit for responding is extended, the head of the public body shall, without delay, notify the applicant in writing

(a) of the reason for the extension;

(b) that the commissioner has authorized the extension; and

(c) when a response can be expected.

This provision is general, and gives no legislative direction or delineation of the circumstances in which an extension may be sought. The sole criterion is that which the OIPC may consider necessary and reasonable in the circumstances. According to submissions from coordinators, the OIPC does not provide reasons for granting, denying or modifying an extension request and the decision cannot be challenged. The OIPC acknowledges that perhaps more could be done. Its supplemental submission, at page 31:

> When declining an extension, we typically provide a brief explanation noting the key factors in our decision. We will review the level of detail in our responses and consider how we could provide additional detail that could be beneficial, but do not believe a statutory amendment would be necessary or helpful.

The *Act* provides that the time taken to request and receive an extension does not, in and of itself, extend the time in which the public body must respond to the request for information.

No doubt because of the general nature of the authority given by s. 16, the OIPC has developed a comprehensive guidance document "Requesting a Time Extension" to assist in completing the "time extension application form". That multi-page form gives nine possible reasons for an extension request, with an opportunity to provide additional reasons if necessary. The form states that "clear and convincing evidence" is required to demonstrate the need for the length of extension sought.

The guidance document lists the type of information that must be provided to support each reason for the requested extension. For example, if the public body is saying

that more time is needed because responding within the time limit would "unreasonably interfere with the operations of the public body" the document says:

> When requesting an extension on this basis, public bodies must provide the following information to the Commissioner, if applicable:
>
> - How would meeting the time limit set out in section 16(1) unreasonably interfere with the operations of the public body?
> - How many active requests is the public body currently processing?
> - What other access and privacy activities is the public body currently managing and have these activities been influenced by the time taken to respond to this Access Request?
> - How has this Access Request affected the public body's staffing resources and the current workloads of staff?
> - Were staff members required to work overtime to process the Access Request?
> - Were staff members reallocated from other activities to respond to the Access Request?
> - Were staff members from other business areas required to assist in responding to the Access Request?
> - Has responding to the Access Request affect the public body's ability to respond in a timely manner to other Access Requests or other access and privacy related activities?
> - Does the public body have an alternative/back-up ATIPP coordinator who is able to assist in processing this Access Request?
> - Does the size of the public body (total number of employees) impact your ability to respond to this request?
> - Has the applicant submitted multiple concurrent requests to the public body or hove two or more applicants who work in association with each other submitted multiple concurring requests? If the answer to this question is yes, please also provide the following information:
>
> - What is the number of multiple concurrent requests submitted by the applicant?
> - What are the dates on which the public body received each of the applicant's requests?
> - On what dates did the public body receive the requests from the persons with whom the applicant is working in association?
> - What is the evidence that the applicant is working in association with others who have submitted Access Requests?
> - What is the wording of the multiple concurrent requests in question?
> - What other information would be helpful to the commissioner in making the decision whether or not to grant the extension?

Over the last four years the number of extension applications submitted to the OIPC shows a steady increase:

YEAR	EXTENSION APPLICATIONS
2015–16	37
2016–17	151
2017–18	173
2018–19	181
2019–20	449*

*239 for the main part of the year, 110 during the state of emergency in January 2020 and 100 during the Covid-19 shutdown from March 16–31, 2020.

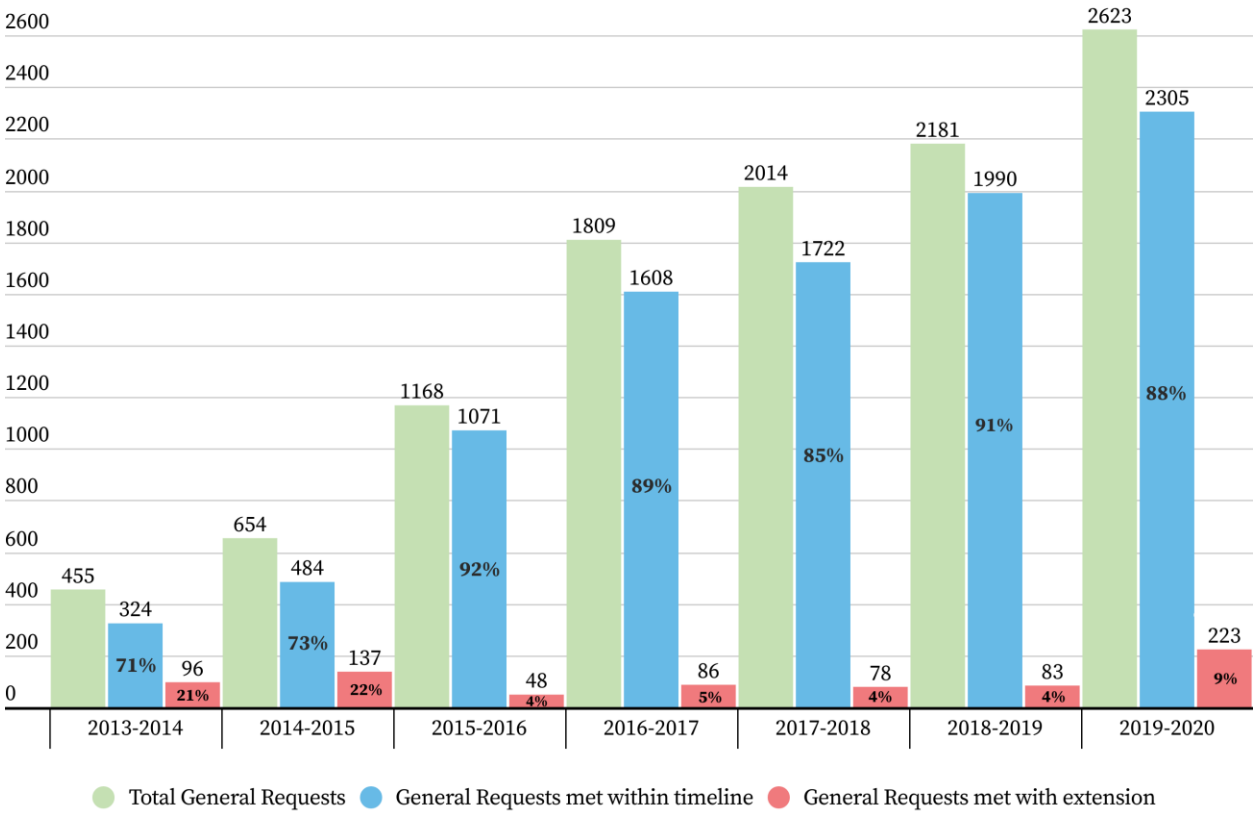
Time spent by a coordinator in applying for a time extension – what I would call 'procedural time' – is time lost to the actual processing of requests – 'substantive time'. Time spent by the OIPC in assessing and responding to extension requests is time lost to the core statutory functions of the OIPC – the adjudication of substantive complaints, the education of the public service and the public on the ever changing field of the protection of privacy, and the carrying out of the important duties and responsibilities set out in s. 95 of the *Act*.

The legislation in most other Canadian jurisdictions grants a public body the authority to make its own determination for the need for an initial extension of time. The federal government, the Northwest Territories and all provinces with the exception of Quebec allow such extensions for a minimum of 30 calendar days. Such a determination is subject to review by the oversight body. Further extensions require the approval of the oversight body.

The 2018-19 Report of the ATIPP Office states that during that fiscal year, the departments responded to 90% of general requests within the legislated timelines and other public bodies responded to 93% of requests within the legislated timelines. When approved extensions are included, the response rates increased to 95% and 96% respectfully. Statistics from the ATIPP Office for the fiscal year 2019-2020 show that a total of 2623 general access to information requests were received by government departments and other public bodies, and 223 time extensions approved in respect of those requests. Overall, 97% of all requests received by all public bodies were met either within the legislated timeline or with an extension.

Looked at in its totality, the performance of public bodies is to be commended. But statistics from the ATIPP Office do indicate some variances from this overall success rate. For example, in 2018-19 in the Department of Fisheries, Forestry and Agriculture, 23 out of 108 general requests (21%) were not finalized within the statutory or extended timeline; for the Department of Municipal Affairs and Environment, the number was 31 out of 160 (19.3%). The 2019-20 period showed considerable improvement, but was still short of the overall performance figure – for the Department of Fisheries, Forestry and Agriculture, 17 out of 144 (11.8%) not completed on time – the Department of Municipal Affairs and Environment, 22 out of 203 (10.8%). These figures should be contrasted with those for the Department of Natural Resources – 2018–19, one out of 233 not completed in time and in 2019–20, zero out of 357 requests.

Extension Usage for General Requests, 2013-2020



One should of course be cautious about drawing any conclusions from such figures. Suffice it to say that when indicators of ATIPP performance raise a question about a public body's compliance with the *Act*, commitment to the objectives of the *Act* requires that the matter be brought to the attention of the head of the particular public body and that the matter be promptly addressed with a view to effecting the necessary improvements.

I have given very serious consideration to the competing views on whether or not to recommend that a public body, in defined circumstances, should be able, without OIPC approval, to extend for a limited period the time for responding to an access request.

The view of those opposed is that such an ability amounts to the denial of the right to access and in effect excuses a public body from addressing delays perhaps caused by poor records management or otherwise. Given the excellent record of timely responses, as the commissioner has said, 'if it's not broke, why fix it'.

The submission of those tasked with meeting the deadlines is essentially a plea for help. With a constantly growing and unpredictable demand, particularly in the larger public bodies, the increasing breadth and complexity of requests, and the need to ensure that personal information is not inadvertently disclosed, they say that some provision for breathing space is needed. To quote one coordinator:

> Coordinators have little control over their workload, including the number and frequency of requests. Requests range from simple straightforward requests to large and complicated. Records may be held by 1 person or the search may require a large number of staff, including staff now located other departments. Records may require consults with other public bodies within government or external and consults with third parties. This coupled with the large administrative burden and short timelines can, at times, make this role very challenging. There is no pause to the volume of work and while extensions can help, delaying a file does not change the amount of work.

Another coordinator said:

> Meeting the demands of my job is the most challenging part of my role as ATIPP Coordinator. I have watched the workload steadily increase over the years and there will soon come a time where those demands will not be able to be met unless the resources in place increase. Information requests are more frequent (and often more complicated/broad); privacy concerns and the need for privacy assessments more prevalent; and my role more recognized and utilized throughout the organization. In my opinion, this is all very positive; however, the demand is quickly becoming too great to meet deadlines, adequately train staff, properly assess projects for privacy compliance, etc.

It is easy to say, as some have said, that the solution is simple – just add more information management and access-related resources. If I felt it necessary to recommend that, I would do so. But I do not. Considerable stress in the system can be relieved and, importantly, some accommodation for future increases in demand made by a very modest amendment to allow a public body, in defined circumstances, to extend the response deadline by up to 10 business days. This limited ability would benefit both the public bodies and the OIPC, with little if any detrimental effect on the time an applicant must wait for a response.

Allowing a public body to extend the time limit for a response does not detract from the substantive right enjoyed by the applicant. It is a simple recognition of the fact that some requests reasonably take longer than others to process, particularly when the request involves a large volume of records; time may also be reasonably needed for con-

sultation with subject matter experts who inform the rational assessment of any exceptions to disclosure, and for consideration of third party interests.

Those opposed to an amendment of this nature say that a right to grant themselves more time will remove the discipline on the coordinators and public bodies imposed by the present timelines and that the 20 day time limit will automatically become 30. The OIPC is strongly opposed to any ability for a public body to self-extend the time for a response. From its supplemental submission, at page 31:

> In the earliest version of *ATIPPA*, public bodies were able to extend their own time limits at their own discretion. In our view, this was the subject of substantial abuse which significantly impacted the rights of applicants. This remains the case in some other jurisdictions where public bodies have this discretion. For example, the Manitoba Ombudsman's Office released an audit in June of this year into timeliness of access to information responses. In our experience, and as demonstrated most recently in Manitoba, jurisdictions lacking clear time limits, and jurisdictions where public bodies can extend their own time limits, tend to see the development of a lax culture around timeliness of access to information requests. Despite the inconvenience to Coordinators of having to apply for approval to extend the time limit, we believe this best supports and protects the right of timely access to information. It is our view that where there is a time limit that can easily be extended, the extended time invariably becomes the new time limit. (Emphasis in original)

I acknowledge the fact of such a risk and the possibility that my confidence in the good faith of coordinators and their supervisors may be misplaced. But I hope not. I believe it is fair and reasonable, until proven otherwise, that in matters involving the administration of the *Act* there should be an underlying presumption that the public body, assisted and advised by a competent and respected coordinator, will respond to each application in good faith and with respect for and in pursuance of the objectives of the *Act*. And as said by the coordinator quoted earlier – "delaying a file does not change the amount of work".

Allowing a public body to have the benefit of a 'first instance' extension would divert time from procedural to substantive and reinforce the role of the public body as carrying the primary responsibility for the effective and efficient administration of the legislation. Any such extension would be authorized by the head upon the written recommendation of the coordinator; the requirement for a written recommendation and response serves to confirm that any decision to extend the time for a response should not be taken lightly and provides appropriate documentation for the decision. Further, to provide some level of oversight on the use of the extension authority, the coordinator

would be required, when notifying the applicant of the reason for and length of the extension, to also notify the OIPC. Administratively, a coordinator should also notify the ATIPP Office of any use of this extension authority.

Compared to other Canadian jurisdictions, a ten-day extension is very short. Indeed, many coordinators would say it is too short and should be closer to 20 or 30. But balance is needed. The ability to grant a ten-day extension in specific circumstances fairly balances the need for some level of flexibility as demand for information both fluctuates and increases against the right of applicants to a timely and considered response to their requests.

Given the procedural and quite limited nature of a decision by a public body to extend the response time, I do not consider it necessary to provide a right of complaint to the OIPC. Should, based on the reporting to it of extensions granted, the OIPC form the view that a public body may not be reasonably exercising its 'first instance' extension authority, the OIPC may investigate the issue on its own motion pursuant to s. 95 of the *Act*, and, if thought necessary, address it in the commissioner's Annual Report to the House of Assembly (s. 105).

In many cases, a unilateral extension by the public body may not be necessary. Coordinators made the point to the Committee that an applicant and a coordinator should, if warranted by the circumstances of the request, be permitted to agree on a fixed time limit for a considered response. As expressed by the coordinators:

> - I would suggest, there should be provisions in the ACT that the public body should also be able to ask the applicant for a time extension and if the applicant is agreeable, the extension should be permitted without having to go to OIPC …
> - [One thing] that could be looked at specifically to ease some of the administrative burden would be … Coordinators having more ability to work with applicant regarding extensions. If the public body and applicant agree to a reasonable amount for an extension, this should be able to be communicated to the OIPC via notification of extension as opposed to the work that goes into submitting a formal request for extension to the OIPC. This will reduce workload on the public body coordinators and the OIPC.

I agree and recommend an amendment to this effect. The practical, informal and consensual approach is to be encouraged.

RECOMMENDATION

That the *Act* be amended to:

- Allow the head of a public body to approve, in specified circumstances, an extension to the time limit for a response of up to 10 days based on a written recommendation from the coordinator. The commissioner must be notified in writing. [Appendix K, s. 23.1]
- Allow the head of a public body and an applicant to agree to an extension to the time limit for a response. The commissioner must be notified in writing. [Appendix K, s. 23.1]

Administrative:

- That where the head of a public body approves an extension, the coordinator notify the ATIPP Office of the reasons for and length of the extension.

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INFORMATION MANAGEMENT AND INFORMATION TECHNOLOGY ISSUES

Once information is put into a record, the ability of a public body to respond appropriately and efficiently to a request for access to that information depends in large measure on how information is managed within the public body and what information technology systems are utilized.

Information management is an integral part of the day to day functioning of any public body. Its importance is reflected in the existence of the *Management of Information Act*. This Review is concerned only with *ATIPPA, 2015* and has neither the mandate nor the expertise to discuss in depth information management by public bodies. But excellence in the ATIPP function requires excellence in information management and it is evident that more concentrated and focused effort is required.

The Committee received a number of submissions, primarily from coordinators and government departments, on a wide range of information management issues:

In the survey sent to the coordinators the question was asked:

> Does your IM system provide adequate support for your ATIPP responsibilities: If not, what is needed?

Among the responses:

- Many times when responding to an application there is an abundance of duplication due to repetition involved in email records. It would be great to have a system to deal with this issue. …
- You learn about computer programs you should have from other coordinators and then there's a struggle to get them due to cost but they make the process 100% more efficient and less stressful. But unless you talk to other coordinators, you only know the bare basic requirements of rapid redact, access to MMS and Adobe Pro.
- It depends on the division the request falls under and whether they are stored in the electronic data system, or paper files are the responsibility of the IM division. I have access to HPRM so I am able to search for any documents within that database. If the files are with the IM division the staff there are amazing and extremely helpful. However, some divisions have difficulty locating and searching for records due to IM issues. This can cause problems that are out of my control. I think this is an IM issue rather than ATIPP issue. Our IM division is awesome,

and continue to work with other divisions to try and support them and encourage them to use HPRM.

- We have an IT division whose main responsibility is managing computer hardware. They are not really familiar with IM software. If we could avail of better IM software to help us manage the information I believe this would be extremely helpful in processing applications, particularly email threads. We do not have the expertise in-house to know which systems we would be availing of.
- No, it needs to move to more digital records and a better use of the HPRM/TRIM data management system we currently use within Government.
- IM provides adequate support in our Dept. OCIO could provide additional support by allowing Coordinators to have continual access to employee emails instead of having to make MMS requests each time you get a new request for email records. Furthermore, the merging of some of the functions of the ATIPP TRIM and the ATIPP Time Tracker could alleviate some of the administrative burden.
- Not sure, what this system is. Can you provide information on this system.
- Stronger IM is required across the board. Should there be executive support and resources managing the requests would be a tangible task. Improper IM within Departments have allowed a build-up of paper records, drafts and transitory records throughout. As we cannot charge for searching just locating this task in some instances can take many months. The Records Retention and Disposal Schedule (RRDS) Process in GNL is also archaic and of little importance. Departments have to wait years to complete a RRDS and go through multiple approval channels as well as the Government Records Committee (GRC) prior to proper authority to dispose of records. This has allowed many years of build-up creating requests which in some cases exceed thousands of pages.

Outside the broad area of record and information management, the technological aspects of receiving and responding to ATIPP requests are managed within the public bodies themselves, subject to general oversight and assistance from the OCIO for government bodies.

This Committee has not considered in depth the record management system in public bodies. The recommendations in this report specifically directed at addressing ATIPP administrative issues will, I hope, help in improving information management and information technology in small municipalties. These bodies do not come within the ambit of the *Management of Information Act*. The other public bodies not subject to the

Management of Information Act – e.g. Memorial University, the regional health authorities and cities – did not express concerns about information management issues, although the City of Corner Brook suggested:

> Where possible I would encourage that the provincial government provide additional financial and training support so that municipalties have the adequate resources to respond to ATIPPA requests as efficiently as possible without passing on the cost to the public. As a suggestion, it would be beneficial if municipalties could avail of IT/IM solutions through the provincial government central purchasing branch (Public Procurement Agency). While this issue may be outside the scope of the statutory review, it does highlight some of the challenges public body employees face in processing requests. Many municipalties do not have in-house expertise in the information management field. I believe some of the challenges with processing ATIPPA requests could be reduced if all public bodies were equipped with the resources to manage ATIPPA requests.

(Municipalities and the cities are considered public bodies for the purposes of the *Public Procurement Act* passed in 2016, so the opportunity to avail of group purchasing may already be available.)

The responsibility for the administration of the *Management of Information Act* is that of the OCIO under Digital Government and Service NL. The obligation:

> *5. (1) The minister shall*
>
> *(a) be responsible for the development and implementation of a management program for government records in the province;*
>
> *(b) provide advice to and assist public bodies with the development, implementation and maintenance of record management systems and provide direction on that material as it relates to the preservation of potential archival material; and*
>
> *(c) recommend standards, principles or procedures to the Treasury Board for adoption.*
>
> *(2) The minister may, in the manner permissible by law, appoint and employ those persons necessary to carry out the purposes of this Act.*
>
> *(3) A person appointed or employed under subsection (2) to be responsible for information and record management shall consult with the Director of The Rooms Provincial Archives appointed under section 22 of the Rooms Act to ensure the ef-*

ficient implementation of information management policies and procedures for the preservation of archival government records.

Responsibility for carrying out the mandate of the *Act* is given to the Government Records Committee:

> *5.1 (1) There shall be a committee to be known as the Government Records Committee consisting of …*
>
> *(5) The committee may*
>
> *(a) establish and revise schedules for the retention, disposal, destruction or transfer of records;*
>
> *(b) make recommendations to the minister respecting government records to be forwarded to the archives;*
>
> *(c) establish disposal and destruction standards and guidelines for the lawful disposal and destruction of government records; and*
>
> *(d) make recommendations to the minister regarding the removal, disposal and destruction of records.*

The *Act* goes on to impose a specific obligation on the "permanent head" of a public body:

> *6. (1) 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.*

The following discussion is directed primarily to government departments. The Committee is grateful to Sonja El-Gohary of the ATIPP Office for her assistance in explaining the technological and other issues which must be borne in mind when considering information management issues relating to ATIPP requests.

The components of the current information system for coordinators in government departments:

Online Request System

Applicants who request records from the Province's government departments can submit their ATIPP requests online. This system automatically forwards requests to the

appropriate ATIPP coordinators. The system also enables ATIPP coordinators to notify the ATIPP Office that the coordinator has received the request. As the administrator of the Online Request System, the ATIPP Office can track submitted requests and follow up if there are any issues with outstanding requests or requests that have not been confirmed as received. Applicants are still able to submit a request manually by downloading or getting a copy of the ATIPP request. The form can be filled out electronically or by hand and submitted electronically or by mail.

Department's HP Records Manager ("HPRM")

Each government department uses a records management database called HPRM (formerly TRIM) to store documents and records. Departments periodically import or upload records to HPRM. To locate responsive documents, coordinators perform searches using the search functions in their department's HPRM database.

ATIPP Office's HPRM

The ATIPP Office has an ATIPP Office HPRM database, which is used for the purposes of tracking ATIPPA statistics for public bodies. Coordinators are instructed to fill out forms in the ATIPP Office's HPRM, according to the specific circumstances of each request and the stage of processing. For instance, there are specific HPRM forms for applications to the OIPC (eg. disregards and time extensions), s. 19 notifications, final responses, complaints, and disclosure exceptions. This system enables the ATIPP Office to track ATIPPA statistics and complete the annual ATIPPA report required by s. 113 of *ATIPPA, 2015*.

Online Tracking System

Government department coordinators can also use the "Online Tracking System", which enables coordinators to document and track their activities on individual requests. The Online Tracking System is linked with the Online Request System. When a request is submitted, the coordinator inputs the details of the request. The ATIPP Office can monitor the status of the requests and provide assistance to coordinators. Some coordinators do use the system to track fees, however, many coordinators do not use the Online Tracking System consistently. As such, the statistics generated by the Online Tracking System are largely incomplete and unreliable. Full adoption/use of the Online Tracking System could be achieved through integrating the ATIPP Office's HPRM and the Online Tracking System, an issue explored below.

MERGING THE ATIPP OFFICE HPRM AND THE ONLINE TRACKING SYSTEM

The submission of the Department of Industry, Energy and Technology, at page 4:

> There are multiple mediums where ATIPP Coordinators must enter data. lET is recommending the information captured in ATIPP HRPM/TRIM be moved to the online ATIPP Time Tracker. The platform used to track time can be expanded to gather the information HPRM/TRIM does. Response time details (including extensions) and a list of the sections of the Act used would need to be features added to the time tracker.

From one coordinator: "… the merging of some of the functions of the ATIPP (HPRM) and the ATIPP time tracker could alleviate some of the administrative time burden".

It is an unfortunate and perhaps unnecessary administrative burden for a coordinator to have to enter the same information twice, one for the ATIPP Office's HPRM forms and again for the Online Tracking System. While the online tracking system does not require as much information as the HPRM system, there is still a duplication of effort. However, the Committee has been advised that merging the two systems is not a simple fix since the Online Tracking System is prone to interruptions and function issues. If HPRM were integrated with the online system, those online issues would affect HPRM. Further, since the Online Tracking System is linked/integrated with the Online Request System, there are often errors that are transferred to the tracking system from submitted online requests. For instance, on the online request form, an applicant may click "submit request" multiple times, resulting in the creation of multiple identical requests. Browser or internet connection issues may also cause duplication of requests. This duplication issue would interfere with the accuracy of the ATIPP Office's statistic tracking and would have to be manually monitored and fixed.

While I am not comfortable with recommendations such as 'systems should be improved', the Committee does not have the information nor the expertise to make specific meaningful recommendations relating to the inner workings of information management systems. But recognition of the issue and a recommendation for improvement may still be worthwhile, and I am prepared to make such a recommendation. Accordingly, I recommend that the ATIPP Office and OCIO conduct a review of the HPRM and Online Tracking Systems to explore options for system integration and/or a meaningful reduction of duplicate administrative work for coordinators.

From the coordinators:

> …[The IM system] needs to move to more digital records and a better use of the TRIM/HPRM data management system we currently use within Government.

- Getting more people engaged in use of the IM system...too frequently people decide something is too difficult to use and choose to do something else.
- Our information system still consists of mostly hard copies, if the contents of our hard copies were digitized it may make takes less time consuming.
- Stronger IM is required across the board. Should there be executive support and resources managing the requests would be a tangible task. Improper IM within Departments have allowed a build-up of paper records, drafts and transitory records throughout. As we cannot charge for searching just locating this task in some instances can take many months. The Records Retention and Disposal Schedule (RRDS) Process in GNL is also archaic and of little importance. Departments have to wait years to complete a RRDS and go through multiple approval channels as well as the Government Records Committee (GRC) prior to proper authority to dispose of records. This has allowed many years of build-up creating requests which in some cases exceed thousands of pages.
- We are new to the IM systems here. Our system has only been in use for the past two years and not all departments are using it.
- …some divisions have difficulty locating and searching for records due to IM issues. This can cause problems that are out of my control. I think this is an IM issue rather than ATIPP issue. Our IM division is awesome, and continue to work with other divisions to try and support them and encourage them to use [HPRM]. I am not sure what the solution would be (other than more resources which is not likely to happen right now).

These concerns reflect the reality of working in an environment which depends on people properly performing all the regular and mundane tasks that their job requires. If, for example, documents are not properly converted to electronic form or are not regularly transferred into departmental databases, thorough electronic searches will be impossible. The proper performance of one's position is the responsibility of the individual filling the position; ensuring that this happens is in turn the responsibility of the various levels of supervision. Improvement in this area lies not in the legislative regime, but with management and supervision. The legitimate concerns of the coordinators can only be addressed by scrupulous adherence to good information management practices.

No recommendation is required. However, in the recommended coordinator's mandate letter there is a commitment by the head of the public body to facilitate the ATIPP function by commiting the public body to strive for excellent information management.

EXPANSION OF ONLINE REQUEST SYSTEM

The Department of Education's submission, at page 1:

> On-Line Requests – The On-line Request System currently accounts for the vast majority of the Department's requests. It permits the public to submit a request to the Department in an efficient manner. However, the drop-down menu to select the public body to whom the request is directed is limited to Government Departments. The list does not include many other public bodies subject to ATIPPA. As a result, many requests actually intended for the Newfoundland and Labrador English School District and/or the Conseil scolaire francophone provincial de Terre Neuve-et-Labrador are submitted to the Department. This results in an additional administrative burden for those who are processing requests within Departments as it takes time to investigate the request and route it to the appropriate public body. Accordingly, the review of ATIPPA could note the preceding and recommend suitable revisions to the On-Line Request System.

This concern reflects the fact that public bodies other than government departments do not have access to the Online Request System. I note that Memorial University has developed its own online request portal.

The ATIPP Office has advised the Committee that expansion of the Online Request System beyond government departments is not currently feasible. Expanding the system would require additional resources to maintain the list of coordinators, ensure that requests are directed to the appropriate bodies, and monitor any outstanding/unprocessed requests.

The public bodies other than government departments have varying constituencies and capacities. By way of administrative recommendation I would encourage OCIO, the ATIPP Office and the appropriate responsible department(s) to explore possible extension of the Online Request System to those public bodies – such as the Newfoundland and Labrador English School District and the Conseil scolaire francophone provincial de Terre-Neuve-et-Labrador – who may wish to avail of it.

MMS (MULTI-MAILBOX SEARCH)

A number of coordinators referred to the need – within government departments – to seek specific MMS (Multi-Mailbox Search) access to emails each time a new access request is received.

The coordinators comments:

> OCIO could provide additional support by allowing Coordinators to have continual access to employee emails instead of having to make MMS requests each time you get a new request for email records.
>
> I would also like to change the business process for searching staff's (or past staff) emails. We have to submit a request to the OCIO for every request and include staff names or pst files for which we need access. The form can be lengthy and it can take days to get access and we only have access for a specific period of time. Furthermore the OCIO does not track these requests. So they will close access to my current ADM because the length of time requested for that ATIPP is up. However, I may have that same ADM on another request but since the OCIO closed out access I end up having to request it again.
>
> … The business process to completing a multi-mailbox request with the OCIO can take up to three days. And prior to submitting it I also need to know who in the department has this information to include on the request for records form that the OCIO requires.

How does the MMS system work? A request for information located in emails is received. If the coordinator is unsure who in the department may have the information in their emails, they will have to consult the department head or managers. The coordinator then must fill out required OCIO forms to get access to employee emails. The forms require approval from the department head. The coordinator must fill out one form for each person (and get approval for each person) whose email is to be searched. The coordinator's access to a person's email expires after 60 days. Multiple ATIPP requests require that a coordinator search the same person's email. The coordinators can do so without having to submit a new form for each search, but once the access to that person's email expires, the ATIPP coordinator must submit a new form and get a new approval. Once OCIO receives request for access forms from the ATIPP coordinator, it may take several days to process the request and grant access. Once the ATIPP Coordinator has MMS access, they are able to search multiple mailboxes at a time, using search words.

The MMS request/access process is understandably tedious, especially in cases where the ATIPP coordinator must search multiple email accounts.

Subject to any appropriate technical and security limitations required by OCIO, pre-authorized email access for ATIPP coordinators should be facilitated. As an example, access should be arranged for the most frequently searched email accounts – likely the deputy minister, assistant deputy ministers and executive positions within each department. The recommended coordinator's mandate letter addresses this issue. Any perhaps understandable misgivings over such access should be more than offset by recognition of the essential and professional role of the ATIPP coordinator and by the fact that each coordinator has signed an oath or affirmation of confidentiality.

I recommend that, as a priority, the ATIPP Office and the OCIO investigate and explore options to provide coordinators with pre-authorized access to search the most frequently searched email accounts, subject to approval of the head.

DISPOSAL OF TRANSITORY EMAILS

A number of coordinators commented on the proliferation of emails and the consequences for a search:

- When ATI/FOI statutes were enacted in Canada, public body records were mainly paper-based. There was a registry in which all official records were carefully maintained; transitory records having no value were destroyed. Records were managed by secretaries and clerks. Today, all employees, regardless of rank, generate their own correspondence, whether emails, memos, letters, proposals, reports, etc. There are countless emails between containing drafts of documents; there are no "official" records. Everything is subject to ATIPPA. Electronic storage systems means there's absolutely endless storage of records that have no value and, as a result, all the emails and drafts are saved. There is no official mechanism to properly manage records. Even with an information management policy that permits transitory records to be destroyed, they rarely are – endless electronic storage and under-resourced employees with little time. But ATIPP requests for "all records concerning …" mean the ATIPP coordinator is provided with hundreds and even thousands of responsive records, the majority of which are the same email threads, over and over, and ever expanding, many of which have absolutely no value, and multiple drafts, also most of which have no value.
- But the ATIPP coordinator must process them, with line-by-line reviews, and then the OIPC must review them line, by line.

- One of our biggest challenges in responding to an ATIPPA request is reviewing emails. Emails can be complicated especially when it involves several individuals. Each email has to be analyzed to determine whether an email has unique content or if the chain is wholly contained in a different email. It can also be problematic in reviewing the documents for redactions. Many times when responding to an application there is an abundance of duplication due to repetition involved in email records. It would be great to have a system to deal with this issue.

- Narrowing the scope of a request can often be challenging when processing a request, specifically when the applicant is unwilling to assist. It is really difficult when applicants request all emails, all records from all staff. In an organization of over 200 people, this is a very broad request and can be problematic when the applicant is unwilling to clearly specify the information they are seeking.

- Stronger IM is required across the board. Should there be executive support and resources managing the requests would be a tangible task. Improper IM within Departments have allowed a build-up of paper records, drafts and transitory records throughout. As we cannot charge for searching just locating this task in some instances can take many months. The Records Retention and Disposal Schedule (RRDS) Process in GNL is also archaic and of little importance. Departments have to wait years to complete a RRDS and go through multiple approval channels as well as the Government Records Committee (GRC) prior to proper authority to dispose of records. This has allowed many years of build-up creating requests which in some cases exceed thousands of pages.

One specific issue that requires attention is the disposal of transitory emails. This is a 'cleanup' issue, the processes for accomplishing which are already in place.

A transitory record is defined in the *Management of Information Act*:

> *2. (h) "transitory record" means a government record of temporary usefulness in any format or medium having no ongoing value beyond an immediate and minor transaction or the preparation of a subsequent record.*

For those public bodies subject to the *Management of Information Act*, I recommend that the Government Records Committee established under s. 5.1 of that *Act* review the adequacy and effectiveness of its guidelines and policies with respect to the identification and disposal of transitory emails and advise the head of each public body subject to the *Management of Information Act* accordingly. The head of each public body should thereupon ensure that:

1. the provisions of the record management system developed pursuant to s. 6.1 of the *Management of Information Act* for that public body properly reflect the guidelines for transitory records (including emails) established by the Government Records Committee;
2. that the identification and appropriate disposal of transitory emails is carried out accordingly.

I further recommend that each public body not subject to the *Management of Information Act* review the content of and compliance with any existing guidelines for the disposal of transitory emails and that, if lacking such guidelines, they be developed forthwith, perhaps with assistance from the ATIPP Office.

RECOMMENDATIONS

Administrative:

- That OCIO and the ATIPP Office conduct a review of the HP Records Manager and Online Tracking System with a view to system integration and/or a meaningful reduction of effort arising from the duplication of systems.
- That OCIO, the ATIPP Office and relevant department(s) conduct a review of the Online Request System with a view to making the online system available to such other public bodies who may wish to avail of it.
- That OCIO and the ATIPP Office investigate and take steps as are appropriate to provide coordinators with pre-authorized, continuous access to frequently searched email accounts.
- That the Government Records Committee constituted under the *Management of Information Act* review its guidelines and policies with respect to the identification and disposal of transitory emails.
- That the head of each public body subject to the *Management of Information Act* ensure that their record management system properly reflects the approved guidelines for transitory records and that the identification and appropriate disposal of transitory emails is carried out accordingly.
- That each public body not subject to the *Management of Information Act* review the content of and compliance with any existing guidelines for the disposal of transitory emails, or develop guidelines forthwith.

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EXCEPTIONS TO ACCESS

CABINET CONFIDENCES

Section 27 of *ATIPPA, 2015* sets out a class-based list of Cabinet records that are subject to a mandatory exception from disclosure.

> *27.(1) In this section, "cabinet record" means*
>
> *(a) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;*
>
> *(b) draft legislation or regulations submitted or prepared for submission to the Cabinet;*
>
> *(c) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;*
>
> *(d) a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material;*
>
> *(e) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;*
>
> *(f) a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy;*
>
> *(g) a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet;*
>
> *(h) a record created during the process of developing or preparing a submission for the Cabinet; and*
>
> *(i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).*
>
> *(2) The head of a public body shall refuse to disclose to an applicant*
>
> *(a) a cabinet record; or*
>
> *(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.*

Generally speaking, this list reflects records that would reveal the "substance of deliberations" of Cabinet or other material relating to those deliberations.

Ed Hollett provided a comprehensive submission addressing his concerns with respect to access to Orders-in-Council, and in particular what he considers to be an inappropriate practice of unnecessary redactions of "administrative information" from disclosed orders. In the course of his discussion he set out the recent history of s. 27, starting with the provision as it existed prior to Bill 29, at pages 3–6:

> ATIPPA (2002) dealt with the matter differently:
>
> 17. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet.
>
> Although there was no mention of this aspect of the legislation during debate on second reading (03 December 2002), there is implicitly in this construction a more narrow definition of what must be kept secret than that contained in the earlier FOIA. This description of the exemption refers to deliberations of Cabinet, not the information prepared for those deliberations. That could be interpreted as being a meeting of the Executive Council - its formal deliberations – or that of a subcommittee of the Council.
>
> Bill 29 made significant amendments to ATIPPA (2002) one of which was to the sections on Cabinet confidences.
>
> The revised ATIPPA now exempted from disclosure what the amendment called "Cabinet records" and provided description of what constituted a Cabinet record in a new set of definitions.
>
> The definition of "Cabinet record" included at the new s. 18 (1) a document that was "(v) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet…." This is a very broad re-interpretation since it includes documents that involved the deliberations of Cabinet but also a decision taken by it.
>
> Note that the definition of Cabinet record in Bill 29 is identical in almost every respect to the definition of the term used in the *Management of Information Act:* following a 2008 amendment. A "Cabinet record" under that Act includes a document that "(iii) is an agenda, minute or other record of Cabinet recording deliberations or decisions of Cabinet…".
>
> This is not accidental. As the Minister of Justice, then Felix Collins, explained to the House of Assembly on second reading of Bill 29 (11 June 2012), as "recommended by Mr. Cummings, for consistency, the definition of Cabinet records will reflect the list found in the Province's Management Of Information Act."

In the lengthy filibuster on Bill 29, members discussed the exemptions of documents used to make Cabinet decisions but none of them, including former Cabinet ministers noted or drew attention to definition that encompassed a document that included the decision itself. …

ATIPPA (2015) came out of the recommendations of the review commission appointed in 2014 to respond to public complaints about the impact of Bill 29 on public access to government information. It made significant changes to many parts of the access law but left intact the approach to and definition of cabinet documents established in Bill 29.

In its final report, the review commission dealt at length with the issue of cabinet confidences and what ought to be protected from disclosure. The commission conducted a survey of practices in other Canadian jurisdictions and some international jurisdictions. The definition of cabinet records and associated exemptions from disclosure matches word-for-word the list of records contained in the federal *Access to Information Act*.

None of the discussion either in the hearings or in the report by the 2014 review commission focussed on Orders-in-Council. The only particular issue that drew widespread attention from intervenors was public access to briefing materials. In general, all agreed that cabinet confidences and the deliberations of cabinet as well as supporting documentation (generally called cabinet paper) ought to be exempt from disclosure. …

An essential element of Canada's legal system is that the rules by which Canadians are governed are public. Thus, it is the practice in Canada dating to Confederation in 1867 or, arguably, to the grant of Responsible Government in its constituent parts before that, that Acts of the legislature, regulations under statutory authority, and orders issued by the Executive Council are public documents. It would be absurd to censor the law in any form, including the legal order of Cabinet on any subject.

There is no doubt, however, that a plain reading of ATIPPA (2015) prohibits the disclosure of a document that contains a Cabinet order. This left government officials in 2012 with a conundrum which they resolved by disclosing portions of any Order but censoring some parts of it using sections of ATIPPA (2012).

After 2015, officials revised the practice by disclosing the contents of the Order but by deleting two innocuous pieces of information that are not covered by any mandatory or discretionary exemption in ATIPPA (2015). What is more, officials do not indicate that they have deleted two pieces of information, thus compounding the problem for individuals who may not be aware that the information they are receiving is incomplete compared to other versions that have been made public until very recently.

The Clerk of the Executive Council responded to the submission, at pages 1–3:

> Orders in Council themselves are not "cabinet records" pursuant to ATIPPA, 2015 as they are the records of the Lieutenant-Governor in Council rather than records of the cabinet. MCs are the formal records of the decisions of cabinet and are not publicly available due to their confidential nature. Cabinet decisions that require the consent of the Lieutenant-Governor in Council are expressed through OCs. These OCs are publicly available through one of three ways:
>
> > OCs have been accessible to the public via the Cabinet Secretariat web-site since 2013, with OCs from 2004 to present available at the following link: https://www.exec.gov.nl.ca/exec/cabinet/oic/index.html. This public availability of OCs is made outside of the requirements of ATIPPA, 2015, but is carried out in a manner that is consistent with the relevant considerations that would apply if those records had been requested pursuant to ATIPPA, 2015.
> >
> > Cabinet Secretariat makes available, upon request, certified copies of OCs through its Information Management Division (IMD). While these requests for certified copies through the IMD are not made under ATIP-PA, 2015, the IMD carries out each request consistent with the relevant considerations that would apply if the DC had been requested pursuant to ATIPPA, 2015.
> >
> > Should an applicant so choose, OCs may be obtained by submitting a re-quest to Cabinet Secretariat pursuant to ATIPPA, 2015, as an alternative to the two options noted above. Please note that applicants can readily access OCs without making a request under ATIPPA, 2015.
>
> Regardless of the method by which OCs are accessed by the public, the rele-vant considerations under ATIPPA, 2015 are applied by Cabinet Secretariat in releasing the OCs. As noted above, an OC is not a "cabinet record" pursuant to ATIPPA, 2015 but may contain information that meets the definition of "cabi-net record". Paragraphs 27(l){a) to (h), inclusive, of ATIPPA, 2015 define "cabinet record" and explicitly include an MC. Paragraph 27(l)(i) also defines as a "cabinet record" that portion of a record which contains information about the contents of a record within a class of information referred to in par-agraphs (a) to (h). All "cabinet records" as defined in subsection 27(1) are mandatory exceptions to access pursuant to paragraph 27(2)(a). …
>
> The cabinet system is core to the method of government in the province and in the country and cabinet confidentiality is core to the cabinet system; all Ministers of the Crown are collectively responsible for all actions taken by the cabinet and must publicly support all decisions of cabinet. For this reason, many jurisdictions in Canada make express provisions in law to provide broad

> protection to cabinet confidences and Newfoundland and Labrador is no exception. …
>
> As noted previously, MCs are the records of the actual decisions of the cabinet. There exists a mandatory exception to access for MCs themselves and for other records that contain information about the content of MCs. The numbers that are assigned to MCs form part of the content of the MCs. Therefore, this information is appropriately removed from OCs prior to release.
>
> An OC may contain an MC number, cabinet submission number, and/or a Treasury Board Minute number, all of which are "cabinet records", as defined by both the Management of Information Act and section 27 of ATIPPA, 2015. For this reason, when a request is received for an OC or an OC is published on the Cabinet Secretariat website, any information contained within the OC that meets the definition of "cabinet record" is removed. If an OC is over 20 years old, the IMD does not remove references to "cabinet records" contained therein, as this information would be released under an access to information request for the same information, pursuant to paragraph 27(4)(a) of ATIPPA, 2015.
>
> Distribution Lists
>
> With respect to distribution lists for OCs, I can confirm that the distribution list does not actually form part of any OC as made by the Lieutenant-Governor. A distribution list is compiled by officials within Cabinet Secretariat as an administrative function to ensure that OCs are received promptly by appropriate officials or others in order to take necessary action. As this is an administrative list compiled by officials, rather than a part of the OC itself as made by the Lieutenant-Governor, OCs are disclosed without this distribution list. To do otherwise would be to add information to a record that does not actually form part of that record. If, however, an applicant were to request the distribution list in respect of a particular OC, that distribution list would be disclosed as it does not meet the test of a "cabinet record".

Thus an Order-in-Council is a record of the Lieutenant-Governor-in-Council that is available to the public, subject to redactions for information that may be subject to an exception under *ATIPPA, 2015*.

A Minute of Council (MC) is the record of the actual decision of Cabinet.

Some of the concerns identified by Ed Hollett may be addressed either through revised wording of an access request or through a complaint to the OIPC if there is a question of unsupported redaction.

But a fundamental question raised by his submission is the inclusion in the exception of a record that that may be considered "a decision" of Cabinet pursuant to s. 27(1)(e)).

This description first appeared in the listing of Cabinet records in Bill 29. Before that, the ATIPPA legislation incorporated the general "substance of deliberations" exception. The listing in Bill 29 reflected the then (and present) *Management of Information Act*, perhaps for convenience and without any discussion of the different purposes of that statute and *ATIPPA, 2015*. Apparently the only purpose of the listing and definition of Cabinet records in the *Management of Information Act* is to identify those records which are subject to a particular management regime – see, under the heading "Exceptions" subsec. 5.4(1):

> *5.4 (1) Cabinet records shall be managed in the manner determined by Cabinet Secretariat.*

The Wells Committee dealt at length with the issue of Cabinet confidences and concluded that, while the "substance of deliberations" test was an appropriate non-disclosure standard, its administration was difficult, at pages 99–100:

> Having to apply a substance of deliberations test to every record in respect of which Cabinet confidence is claimed would be a waste of time and increase costs unnecessarily for all those records that are so obviously Cabinet confidences as to be beyond rational challenge.
>
> It may be a small list but certain types of records are so clearly Cabinet confidential that it is unnecessary to have endless arguments as to whether disclosure could reveal the substance of Cabinet deliberations or as to whether the public interest would be harmed by their disclosure. Subject to one proviso, listing such documents and exempting them from disclosure would save time and money, and contribute to a more efficient and user-friendly access regime. **That one proviso is that the Commissioner would have the unrestricted right to have all records of Cabinet, bar none, produced, to verify that the exemption is valid**.
>
> Protecting genuine Cabinet confidences from disclosure is essential to the successful functioning of the government in the public interest. The standard should accord absolute exemption to a confined list of records that are unarguably Cabinet confidences, and subject all other records in respect of which Cabinet confidence is claimed to a substance of deliberations test. …
>
> The Committee would also recommend that the refusal to disclose continue to be mandatory, subject to one exception: the Clerk of the Executive Council

> should have the discretion to disclose any Cabinet record that he or she concluded should, in the public interest, be disclosed.
>
> With those safeguards in place, using a basic list of records that are Cabinet confidences and according those records absolute protection from disclosure should result in more efficient management of access to Cabinet records. It should also be easier to use and reduce delays and costs for both the requester and public bodies. In short, it would help to make the *ATIPPA* more user-friendly. (Emphasis in original)

In terms of the listing adopted from the *Management of Information Act,* the Wells Committee expressed only one concern, at page 100:

> The Committee concluded that the only item on the list of records in the present definition that should be altered is what is presently item (iv):
>
> > a discussion paper, policy analysis, proposal, advice or briefing material, including all factual and background material prepared for the Cabinet.
>
> The Committee believes that factual material included in these records should not be accorded absolute protection from disclosure. Officials preparing "a discussion paper, policy analysis, proposal, or briefing material" for Cabinet, acting in good faith, could express all the factual material in a separate section of the document that could be easily severed for release on request. The fact that any part or all of the factual material might also appear elsewhere in the document would not, in such circumstances, require that full document to be released. Factual material should be protected from disclosure only if it is shown that disclosure would reveal the substance of Cabinet deliberations.

Of interest is the fact that the unifying theme underlying the listing is information that relates to "the substance of Cabinet deliberations". The inclusion of "decision" in the listing was not the subject of comment. Further, in terms of the absence of a necessary relationship between the *Management of Information Act* and *ATIPPA*, *2015,* s. 5.2(a.2)(ii) of the *Management Information Act* still contains the phrase "including all factual and background material". As recommended by the Wells Committee, s. 27(1)(d) of *ATIPPA, 2015* is the opposite – "excluding … factual and background material".

Saskatchewan, Yukon and Canada exempt Cabinet decisions from disclosure, with Canada providing a four-year sunset clause. Ontario, New Brunswick and Manitoba refer to decisions in their provisions dealing with Cabinet confidences, but in the context of an overall substance of deliberations exception. The Ontario provision:

> *12(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,*
>
> *An agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees; …*

The remaining provinces apply a class-based substance of deliberations test with no reference to decisions. The British Columbia provision:

> *12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.*

Including a decision of Cabinet as a Cabinet record for the purpose of *ATIPPA, 2015* runs contrary to the principle of only keeping in confidence the substance of deliberations of Cabinet. It is the deliberative process, the giving and consideration of advice, the expressions of agreement and disagreement, and the evaluation and re-evaluation of options and priorities that demand the confidentiality that is required for effective and informed decision-making in government.

But the end result of that deliberative process – the decision – does not stand on the same principled footing. The final decision does not reveal the conflicting advice and recommendations or the views of particular ministers on the issue.

In its oral submission to the Committee, government expressed the strong view that Cabinet decisions may be made "incrementally" as part of a continuing process and that to disclose such decisions could reveal something of the deliberative process. No specific examples were provided. Removing 'decisions' from the definition of Cabinet record does not weaken the 'substance of deliberations' exception in paragraph 27(2)(b). If a record characterized as a decision may be reasonably considered as revealing the substance of Cabinet deliberations, I would expect that access would, properly, be refused.

Cabinet confidences properly extend to the substance of deliberations of Cabinet. However, unless they can reasonably be read as revealing the substance of deliberations, the formal decisions of Cabinet cannot be considered as Cabinet confidences. As pointed out by Ed Hollett, Cabinet decisions are part of "the rules by which Canadians are governed". Transparency and accountability require public access to the decisions of government.

I recommend that "decisions" be removed from the definition of Cabinet record.

RECOMMENDATION

- That the *Act* be amended to remove "decisions" from the definition of "Cabinet record". [Appendix K, s. 27(1)(e)]

LOCAL PUBLIC BODY CONFIDENCES

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

(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

The relationship of this section to the specific legislation governing the meetings of municipal bodies has raised questions, particularly with respect to privileged meetings of municipal council committees. A further question is the value of the unexercised regulation-making authority in s. 116(f):

116. The Lieutenant-Governor in Council may make regulations …

(f) authorizing, for the purposes of section 28 , a local public body to hold meetings of its elected officials, or of its governing body or a committee of the governing body, to consider specified matters in the absence of the public unless another Act

(i) expressly authorizes the local public body to hold meetings in the absence of the public, and

(ii) specifies the matters that may be discussed at those meetings; …

No regulations have yet been passed.

The submission of the ATIPP Office, at pages 40–41

Issue

There is confusion as to whether this section applies to municipal committees, as defined in section 25 of the Municipalities Act, 1999, and if it does, under what circumstances. Paragraph 28(1)(c) of the Act notes that:

The head of a local public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

Section 213 of the Municipalities Act, 1999 refers to privileged meetings of council and notes that:

> (1) meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.
>
> (2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.
>
> (3) A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.

Based on the wording of section 28, the meetings contemplated by section 213 of that Act would be protected from disclosure. However, section 25 of the Municipalities Act, 1999 allows council to establish committees to consider matters and make recommendations to council. It specifically notes:

> (1) A town council may establish the standing or special committees that it considers desirable to consider and make recommendations on matters referred to them by the council.
>
> (2) A town council may appoint persons to serve on a committee established under subsection (1) and where a council does not appoint persons to a committee, the mayor shall appoint those persons.

While these committees are created to inform council, it is unclear whether committee meetings are “meetings of council” as per section 213 of the Municipalities Act, 1999, and whether that Act authorize the holding of committee meetings “in the absence of the public”. Therefore, it is unclear whether section 28 of the Act would apply to the substance of deliberations of privileged committee meetings.

Suggestion

Consider amending subsection 28 to clarify whether privileged meetings of a standing or special committee established under section 25 of the Municipalities Act, 1999, can be protected under section 28 of the Act.

And from the City of Mt. Pearl, at page 6:

Section 28. (1)(c) identifies that deliberations of a committee of a Public Body's elected officials could be withheld as Local Public Body Confidences. Clarification as to whether Committee meetings of the Public Body, which may consist of elected officials are considered as part of the Local Public Body Confidences provision in relation to the Act is needed.

The comment of the OIPC, at pages 58–59:

Municipal Governments and Privileged Meetings

A further issue related to local public body transparency involves the circumstances under which a municipal government may enter into a privileged meeting. Presently there are no statutory restrictions on this, and there is nothing to keep a municipal governing body from conducting much of its business in terms of debate and discussion about community issues in an opaque forum. This is significant from an *ATIPPA, 2015* perspective because section 28(1)(c) contains a discretionary exception allowing the substance of deliberations of a privileged meeting to be withheld from an applicant. If there are no limits on the purposes for a privileged meeting, this gives municipalities an extremely wide latitude to conduct business in private, impairing the likelihood of accountability through access to information.

Specifically, section 213 of the *Municipalities Act, 1999* allows a council to hold a privileged meeting. Although any decisions taken at that meeting must be ratified at a public meeting, the general public can be left in the dark as to the rationale for those decisions. Sometimes that may be necessary for personnel matters and other appropriate reasons, however the *Municipalities Act, 1999* provides no limitations on the purposes for such private meetings. Similar provisions exist in the *City of Corner Brook Act*, the *City of Mount Pearl Act*, and the *City of St. John's Act*, and none of these specify the purposes for which a privileged meeting may be held.

Ontario's *Municipal Act, 2001* at section 239 governs the conduct of meetings, and it limits the purposes for which a privileged meeting may be held, including labour relations, litigation, etc. There is even, in section 239.1, a provision for an investigation if a municipality is alleged to have contravened these requirements. Nova Scotia's *Municipal Government Act* at section 22 contains

similar limitations on the purposes for which a privileged meeting may be held.

Under section 116 of *ATIPPA, 2015*, the Lieutenant-Governor in Council may make recommendations:

> *(f) authorizing, for the purposes of section 28 , a local public body to hold meetings of its elected officials, or of its governing body or a committee of the governing body, to consider specified matters in the absence of the public unless another Act*
>
> *(i) expressly authorizes the local public body to hold meetings in the absence of the public, and*
>
> *(ii) specifies the matters that may be discussed at those meetings;*

The municipal acts in this province, referenced above, do not contain anything which specifies the matters that may be discussed at meetings held in the absence of the public, therefore it would appear that a regulation that specifies these matters could be made.

OIPC's Recommendation 14.3: Create a regulation under section 116(f) of *ATIPPA, 2015* that specifies the purposes for which a local public body may hold a privileged meeting.

Sections 28 and 116(f) were in the 2002 *ATIPPA* (s. 19 and s. 73(c)). They were not the subject of any comment in the Wells Committee report.

The references to "an Act" in s. 28 and to "another Act" in s. 116(f) engage the provisions of the *Municipalities Act, 1999*, SNL 1999 c. M-24 and the statutes governing the three cities in this province.

The relevant provisions of the *Municipalities Act, 1999* are set out above in the ATIPP Office submission.

The *City of St. John's Act*, RSNL 1990 c. C-17:

> 38. Meetings of the council shall be held in public unless a meeting is called as a special or privileged meeting or declared by a vote of the council at a meeting to be a special or privileged meeting, in which case all members of the public present shall leave.
>
> 40. Special or privileged meetings of the council may be called at the times that the mayor may consider necessary, or on the written request of 3 members of the council.

I was not directed to any specific provision in the *Act* addressing council's authority to establish committees or to hold privileged meetings of a committee. But there are numerous references to particular committees or to committees and subcommittees generally. For example:

> 44. A member of the council shall not be permitted to vote or speak upon a question before the council, or before a committee, where the member's private interest is immediately concerned, distinct from his or her public interest, or where he or she is personally interested, directly or indirectly, or where that member is the agent for a person or company interested in that question.

The statutes governing the cities of Mt. Pearl and Corner Brook are identical:

> 41. (1) A meeting of the council is open to the public, unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.
>
> (2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.
>
> (3) Where a decision is made by the councillors at a privileged meeting, the decision, in order to be valid, shall be ratified at a public meeting of the council.
>
> 42. The council may establish those standing or special committees that it considers desirable to consider matters referred to them by the council and make recommendations to the council.

It is beyond the mandate of this review to make recommendations directed to the circumstances in which a municipal council may exercise its authority to hold a privileged meeting of council or a committee of council. This is a broader question involving the regulation of municipal governments in the province. If an appropriately authorized privileged meeting is held, whether of council or of a committee, the substance of the deliberations should be protected from disclosure. This is clearly the intent of s. 28(1)(c).

The extent of the discretionary exception should be fully addressed in *ATIPPA, 2015*. Accordingly, I consider it appropriate to recommend that s. 28 be amended so that the substance of privileged deliberations, whether of a council or committee, is subject to the exception. Section 116(f) should be repealed, thus making it clear that the

exercise of the authority to hold privileged meetings of a local public body or a committee of that body is not a matter properly dealt with within the purview of ATIPPA.

As a gratuitous observation, one would expect that, if a meeting can be considered privileged simply by vote of a council or a committee, any such decision would be made in good faith and not to circumvent the democratic principles of transparency and accountability.

RECOMMENDATION

That the *Act* be amended to:

- Make it clear that privileged meetings of a municipal council committee have the same exceptions to disclosure as privileged meetings of the council. [Appendix K, s. 28(1)(c)]
- Remove regulation-making authority relating to privileged meetings of a local public body or committee. [Appendix K, s. 116(f)]

SOLICITOR-CLIENT PRIVILEGE

In 2012 Bill 29 changed the then-existing process for the review of a public body's decision to refuse access to information on the grounds of solicitor-client privilege.

The Wells Committee thoroughly reviewed this issue. The introduction to its analysis, at page 109 of its report:

> Many participants criticized changes made to the *ATIPPA* in 2012 that related to solicitor-client privilege. Those changes, introduced by Bill 29, have several key consequences:
>
> - They mean that if access to information is refused on the grounds of solicitor-client privilege, requesters can no longer ask the Commissioner to review the refusal.
> - They remove the right of the Commissioner to require that a record be produced to determine that it is solicitor-client privileged.

- They remove the right of the Commissioner to enter an office of a public body to examine such a record.
- They also mean that if the head of a public body refuses to produce information to an applicant, the applicant's only recourse is an appeal to the Trial Division of the Supreme Court.

The Committee concluded that the commissioner's ability to review a claim of privilege should be restored and that it should be clarified that confidential legal communications should be protected pursuant to both solicitor-client privilege and litigation privilege.

The Committee's assessment, at page 120:

> The Committee concludes that the privilege is vital, not only to clients entitled to its benefits but to the interests of society as a whole. The views expressed in recent decisions of the Supreme Court of Canada dealing with these issues demonstrate beyond question the critical importance of the privilege to the fair and efficient administration of justice. We should not therefore make recommendations that would jeopardize the role of the privilege in the administration of justice in the province, nor adversely affect the interest of an individual or entity entitled to claim the benefit of the privilege.
>
> On the other hand, the Centre for Law and Democrary and other participants are justified in calling attention to its potential for abuse. The comments of the Commissioner and the Director of Special Projects clearly demonstrate that abuse can occur if there is not a reasonably efficient and cost-effective way to evaluate objectively any claims that records cannot be released because they are solicitor-client privileged. The challenge for the Committee is to identify a means of objective evaluation that will be reasonably efficient and accessible to the average citizen, and will have minimal, if any, risk of adversely affecting the interest of the client entitled to the benefit of society in the proper administration of justice. Maintaining the status quo does not meet these requirements.

Among the Committee's recommendations:

22. The revised *Act* contain a provision similar to existing section 21 respecting solicitor-client privilege.

23. The *Act* have no restriction on the right of the Commissioner to require production of any record for which solicitor-client privilege has been claimed and the Commissioner considers relevant to an investigation of a complaint.

24. The *Act* provide that the solicitor-client privilege of the record produced to the Commissioner shall not be affected by disclosure to the Commissioner pursuant to the *Act*.

25. The *Act* not contain any limitation on the right of a person refused access to a record, on the basis that the record is subject to solicitor-client privilege, to complain to the Commissioner about that refusal.

26. The *Act* contain a provision that would require the head of a public body, within 10 business days of receipt of a recommendation from the Commissioner that a record in respect of which solicitor-client privilege has been claimed be provided to the requester, to either comply with the recommendation or apply to a judge of the Trial Division of the Supreme Court for a declaration that the public body is not required, by law, to provide the record. …

29. The *Act* contain a provision that prohibits disclosure by the head of a public body of information that is subject to solicitor-client privilege of a person that is not a public body.

The current *ATIPPA, 2015* provisions:

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

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

97. (1) This section and section 98 apply to a record notwithstanding …

(d) a privilege under the law of evidence. …

97.(3). The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.

100.(1) Where a person speaks to, supplies information to or produces a record during an investigation by the commissioner under this Act, what he or she says, the information supplied and the record produced are privileged in the same manner as if they were said, supplied or produced in a proceeding in a court.

> *(2) The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner.*

A number of submissions argued that should a public body refuse access to a record based on solicitor-client privilege, any dispute over the existence of the privilege should be decided by the Supreme Court and not be subject in any way to review by the OIPC. That is, they suggest that the OIPC should not have the right to require the production to it of records over which solicitor-client privilege is asserted. They point to the well-accepted fundamental nature of the privilege and suggest that even allowing the OIPC any access to such records – even if limited – is itself a breach of the privilege.

The argument of those seeking to reverse the approach endorsed by the Wells Committee and to again preclude the OIPC from viewing records subject to a claim of solicitor-client privilege is based on the decision of the Supreme Court of Canada in *Alberta (Information Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.

The court was called upon to interpret s. 56(3) of the *Alberta Freedom of Information and Protection of Privacy Act*, RSA 2000 c. F-25:

> Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

The question was whether the phrase "any privilege of the law of evidence" included solicitor-client privilege.

Speaking for the majority, Côtė, J. spoke of the nature of solicitor-client privilege, at paragraph 20:

> 20. As this Court said in *Blood Tribe*, solicitor-client privilege is "fundamental to the proper functioning of our legal system" (para. 9). It is also a privilege that has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy. …

This point was amplified in paragraphs 34–35:

> 34 It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice (*Blood Tribe*, at para. 9). Lawyers have the unique role of providing advice to clients within a complex legal system (*McClure*, at para. 2). Without the assurance of confidentiality, people cannot be expected to

> speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive (see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46). It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances" (*Pritchard*, at para. 17).
>
> 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.

Côtė, J. continued, confirming that solicitor-client privilege may be set aside by statute, but only by very clear language, at paragraph 28:

> 28 To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so. The privilege cannot be set aside by inference (*Blood Tribe*, at para. 11; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, at para. 33; *Lavallee*, at para. 18). As this Court affirmed in *Thompson*:
>
> > ... it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, although these might provide supporting context where the language of the provision is already sufficiently clear. If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect. [para. 25]

On the other hand, the court recognized the importance of the public right of access information held by public bodies, at paragraph 30:

> 30. Access to information is an important element of a modern democratic society. As this Court stated in *Criminal Lawyers' Association*:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance. [para. 1]

The court was careful to frame the issue narrowly – disclosure of records to the commissioner for purpose of review – not public disclosure.

> 33. … The primary issue in this case is whether s. 56(3) of *FOIPP* requires a public body to produce to the Commissioner records over which solicitor-client privilege is claimed, to review the validity of the claim. This appeal therefore deals with the obligation of the University to disclose solicitor-client privileged documents to the Commissioner for review. This appeal does not raise the issue of whether the Commissioner may order the disclosure of solicitor-client privileged documents to the applicant.

Of some concern was the dual role of the commissioner as advocate and adjudicator – paragraph 36:

> 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.

In the end, the majority concluded that a privilege "under the law of evidence" did not encompass solicitor-client privilege, at paragraphs 41-44:

> 41. … In its modern form, solicitor-client privilege is not merely a rule of evidence; it is "a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" (*Lavallee*, at para. 49).
>
> 42 I find that the present case engages solicitor-client privilege in its substantive, rather than evidentiary, context. This case is not occupied with the tendering of privileged materials as evidence in a judicial proceeding. Rather, it deals with disclosure of documents pursuant to a statuto-

rily established access to information regime, separate from a legal proceeding. …

43 This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary …

44 Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such as spousal communication privilege, religious communication privilege and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of "privilege of the law of evidence".

Later in the judgment, Côtė, J. pointed to the absence in the Alberta legislation of the equivalent of s. 100 of *ATIPPA, 2015*, at paragraph 58:

58 Third, given its fundamental importance, one would expect that if the legislature had intended to set aside solicitor-client privilege, it would have legislated certain safeguards to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right. In addition, there is no provision in *FOIPP* addressing whether disclosure of solicitor-client privileged documents to the Commissioner constitutes a waiver of privilege with respect to any other person. The absence from *FOIPP* of any guidance on when and to what extent solicitor-client privilege may be set aside suggests that the legislature did not intend to pierce the privilege.

Of interest are the comments at the end of the decision referring to the circumstances in which production of records should be ordered, assuming the authority to do so, at paragraphs 67-68:

67 Lastly, even if the language of s. 56(3) did clearly evince legislative intent to set aside solicitor-client privilege, I would find that this was not an appropriate case in which to order production to the Commissioner.

68 The Commissioner argues she has an adjudicative function akin to that of a superior court, to determine whether a public body has validly claimed solicitor-client privilege. As this Court found in *Blood Tribe*, however, even courts will decline to review solicitor-client documents to

> ensure the privilege is properly asserted unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue (para. 17, citing *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct. (Gen. Div.)), at para. 20).

This reflects the not "unless absolutely necessary" caution referred to in paragraph 43 reproduced above.

Also of interest is the minority decision which, although disagreeing on the interpretation of the statute, agreed that it was not in any event an appropriate case in which to order production to the commissioner.

Cromwell, J. said, at paragraph 121:

> 121 Having found that s. 56(3) of *FOIPP* allows the Commissioner to abrogate solicitor-client privilege, we must decide whether the Commissioner's delegate made a reviewable error by ordering production of the documents subject to a claim of solicitor-client privilege in the circumstances. This Court's jurisprudence imposes a requirement that solicitor-client privilege should only be abrogated when it is absolutely necessary to do so in order to achieve the ends sought by the enabling legislation. As Binnie J. noted in *Blood Tribe*, "[e]ven courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue": para. 17.

In her companion dissenting judgment, Abella, J. voiced similar sentiments, at paragraph 137:

> 137 In my view, however, the Commissioner's decision to order disclosure was unreasonable because it did not sufficiently take into account how solicitor-client privilege works or why (see *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809; *Canada (National Revenue) v. Thompson*, [2016] 1 S.C.R. 381; and *Blood Tribe*). As noted by Justices Côté and Cromwell, even if s. 56(3) had allowed the Commissioner to order production of documents protected by solicitor-client privilege, the University of Calgary had provided sufficient justification for solicitor-client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta. The Commissioner should have exercised her discretion in a manner that interfered with solicitor-client privilege only to the extent absolutely necessary to achieve the ends sought by the *Freedom of Information and Protection of Privacy Act.*

A number of the public body submissions point out that the *University of Calgary* decision is subsequent to the Wells Committee report and argue that the wording in the present statute, interpreted in light of the 2016 decision, does not contemplate the abrogation of solicitor-client privilege in sufficiently clear language. But the submissions go on and suggest clarifying the *Act* to ensure that there is no uncertainty and that the legislation does not compel a public body to produce privileged information to the commissioner.

The submission of the Department of Justice is illustrative, at pages 5–6:

> The Report of the 2014 Statutory Review Committee did recommend that the Act include no restriction on the right of the Commissioner to require production of any record for which solicitor-client privilege has been claimed. However, the Committee did not have the benefit of the *University of Calgary* decision which further outlined and examined the law surrounding solicitor-client privilege in the context of access to information legislation. Furthermore, the legislature chose not to include an explicit and unequivocal provision in the Act which would allow the Commissioner to compel production.
>
> Even if the legislature had chosen to include a provision in the Act which allowed the Commissioner to compel production of solicitor-client privileged documents, it does not mean the Commissioner should compel production in relation to all matters involving solicitor-client privilege.
>
> In the *University of Calgary*, the Supreme Court of Canada is clear that such power would only be appropriate to use in rare cases where there is some argument that it is "absolutely necessary" to do so. The SCC in *Goodis v. Ontario (Minister of Correctional Services)*, 2006 SCC 31, stated that "[a]bsolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case."
>
> While the Commissioner in *University of Calgary* argued that she has an adjudicative function akin to that of a superior court to determine whether a public body has validly claimed solicitor-client privilege, the majority of the SCC noted that "even courts will decline to review solicitor-client documents to ensure the privilege is properly asserted unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue." Because there was no evidence or argument made to suggest that solicitor-client privilege had been falsely claimed by the public body the SCC concluded that it would not have been an appropriate case to compel production of such records even if the power existed to do so.
>
> *Recommendation*

> The Department recommends that the Act be amended to clarify that the Commissioner cannot compel production of documents subject to solicitor-client privilege.

With respect to the submissions that may suggest to the contrary, this review does not require me to interpret the provisions of *ATIPPA, 2015* in light of the *University of Calgary* decision. If it were necessary to do so, I would be inclined to the view that, given the difference in *ATIPPA, 2015* and the Alberta legislation, *ATIPPA, 2015* as it presently stands bestows on the OIPC the authority to compel the production to it of documents over which privilege is claimed when it is absolutely necessary to do so in order to assess the claim.

It is clear that the Wells Committee intended that, in order to assess a claim for privilege, the OIPC should have the authority to compel the production to it of records over which solicitor-client privilege was claimed. I reiterate that the OIPC cannot compel production of such records to an applicant. It can only recommend disclosure, and a public body not prepared to accept any recommendation to grant access can apply to the Supreme Court to adjudicate the privilege claim.

The recommendation of the Wells Committee on this substantive issue was made after careful analysis and consideration. In my view there is no compelling reason to revisit its conclusion.

The OIPC has a statutory mandate to oversee the exercise by citizens of their right to access information in the possession of public bodies. This oversight role includes the responsibility to review a public body's refusal based on an exception and to reach an informed conclusion on the applicability of the exception claimed.

When a refusal is based on a claim of solicitor-client privilege, the OIPC must have the necessary authority to enable it to assess the claim and to decide, if in the opinion of the OIPC, the privilege is validly claimed.

The manner of exercise of the commissioner's general authority to order production was not canvassed by the Wells Committee. In view of the nature of the privilege and the limitations placed by law on the review of privileged documents, some further comment is necessary. Those limitations stipulate that an order for production of documents to assess a claim of solicitor-client privilege should be made only where such production is absolutely necessary for the purpose of the assessment.

This requirement that production of the documents be "absolutely necessary" for determination of privilege is important. It reflects the clear direction from the Supreme Court of Canada that production of documents in this context – whether to a court or otherwise – is, in effect, a last resort. It is only when there is no other way to fairly assess the claim of privilege that production of the documents themselves may be ordered.

In *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General)*, 2011 NLCA 69, Harrington, J.A., speaking for the court, offered comment on the practical operation of the "absolutely necessary" limitation and on the undesirable practice of an ill-founded blanket claim of privilege. He said at paragraphs 80–82:

> 80 The following points are *obiter dicta*. They relate to matters that provided context for this decision. The Court is concerned by the possibility of misuse of authority conferred by the legislation. One form of misuse would be for the DOJ to claim a "blanket" privilege for files which, while they contain some privileged documents, also contain others for which privilege clearly does not attach. Another form of misuse of authority would arise if the Information Commissioner demanded to have documents produced that he could reasonably conclude, without inspecting them, were covered by solicitor-client privilege.
>
> 81 If the Commissioner were to receive a letter (or possibly an affidavit) from a senior Justice official indicating that all materials were provided as per an access to information request save for documents containing legal advice (identified by subject matter, date and solicitor) could not the Commissioner reasonably rely on that to conclude that the documents in question are in fact privileged? Such an arrangement, it seems to me, should operate to deal with the vast majority of cases. And, in the few where the Commissioner felt compelled to pursue matters further, the discussion would be focused in a way that should assist reasoned consideration.
>
> 82 The key to all this is good faith in the exercise of authority. With that comes mutual trust, by the Commissioner that senior Justice officials are being truthful and by Justice officials that the Commissioner will not unreasonably call for the production of legal opinions and advice. Cooperation should be the rule and litigation very much the exception.

In my assessment, the efforts of the OIPC to deal with this difficult issue have demonstrated good faith and a recognition that any authority to demand production of documents over which privilege is claimed should be cautiously exercised. I refer, for example, to a very recent report – 2021-007:

> [4] … The Department was provided an alternative to discharge the burden of proof and advised that descriptions of the withheld records in the form of an affidavit or at minimum a description of the records may be accepted. The Department responded and refused to provide affidavits or any description of the records. …
>
> [15] As discussed in previous reports, our Office acknowledged that it might not always be necessary to have such records produced for review if the public body were to provide sufficient evidence to substantiate its reliance on an exception. In the present matter, as in previous investigations, this Office was prepared to consider an affidavit with a sufficiently detailed description of the records so as to discharge the Department's burden of proof and establish that the exception applied.
>
> [16] Whether this Office requires the production of the records or an affidavit, the burden of proof remains on the public body at all times and a public body therefore runs the risk that if it fails either to provide the records or to adequately describe them in an affidavit or otherwise, it will not succeed in meeting the required burden of proof. We would also note that in this case, the Department had the opportunity to provide a description of the records without an affidavit, and the Department nevertheless refused to do so. …
>
> [20] This Office appreciates that solicitor-client privilege is a fundamental principle of Canadian law which must be safeguarded and held in the highest regard. Accordingly, the significance of recommending disclosure of solicitor-client records is not lost on us. However, this Office is bound by legislation which places the burden of proof on the public body. In this case, the Department declined the offered alternative of providing an affidavit or descriptions of records and therefore our Office had to proceed with its investigation based on the information available to us. With no records to review and no description of the records in an affidavit, this Office can only conclude that the Department has not met the burden of proof under section 43 to withhold the information for which the exception under section 30 has been claimed. Regretfully, I have no option under the Act but to recommend that the withheld records be disclosed.

Subject to my earlier comments concerning legal advice relating to *ATIPPA, 2015* litigation, it is appropriate to clarify s. 97 of the *Act* to recognize that the OIPC has the authority to require production to it of records over which solicitor-client privilege is claimed, but only after the OIPC has determined that such production is absolutely necessary for a fair determination of the claim. I expect that if public bodies, in good faith, follow the suggestion of Harrington, J.A. and support any claim of solicitor-client privi-

lege with a solicitor's affidavit and an appropriate listing and description of each document, any OIPC order for production would be rare.

One exception to the right of production must be considered. The submission of Memorial University suggests that where the legal advice over which privilege is claimed pertains to advice on an ATIPP issue, no production to the commissioner should be permitted. From Memorial's original submission, at page 14:

> Over the past three years, the majority of requests that involved solicitor-client and/or litigation privileged records at the university pertained to ongoing ATIPP-related disputes. Production of those records to the Commissioner in the context of their role as a decision-maker, and party to ATIPP Appeals, would be fundamentally unjust.

The OIPC did not take issue with the position that production be ordered in situations where the documents in question related to *ATIPPA, 2015* litigation. At page 20 of the OIPC's supplementary submission:

> … Despite the rarity of this circumstance in our experience, we acknowledge the basis for such a concern. Because of its rarity, however, such a concern does not justify a blanket prohibition against review of records by the Commissioner where there has been a claim of solicitor-client privilege. It may, however, justify inclusion of a very specific exception and alternate procedure in this unlikely event.
>
> We would propose that such an exception to the Commissioner's authority to compel production of and to review claims of solicitor-client privilege should be limited to circumstances where the records at issue in the complaint relate directly to a matter in which the Commissioner is or has been a party in a proceeding, as well as a public body's legal advice about responding to complaints that are or have been before the Commissioner. In such circumstances, a statutory provision could establish that the public body may attempt to discharge its burden of proof by way of a detailed affidavit satisfactory to the Commissioner. If the Commissioner is not satisfied that the burden has been discharged as a result of the affidavit, the public body would be required to apply to court to demonstrate that the records relate directly to a proceeding in which the Commissioner is or has been a party, and if this is established, to require the Court to review the records and make a determination whether or not the records are protected by section 30. While this approach would drastically extend the time and expense of the process, negatively impact the likelihood of informal resolution, and delay a decision on access to information for the applicant, the circumstance warranting it is sufficiently rare that it can be justified.

I agree. Disclosing to the commissioner a document over which solicitor-client privilege is claimed because it relates to advice given in the context of an ATIPPA complaint or related litigation is unacceptable. In such a case, any assessment of the privilege, should it be disputed, must be done by the court, either in context of the litigation in question or perhaps by way of an appeal of a refusal of access. I recommend that the commissioner's authority to order production of records over which solicitor-client privilege is claimed be limited accordingly. It should be clear that this exception to production depends on the characterization of the record in question, not on whether the commissioner is or has been a party or intervenor to the litigation question.

As the OIPC's submission points out, in the event of a dispute over whether a record relates to a complaint or litigation under the *Act*, recourse to the court may be avoided if the public body provides sufficient information, without breaching the privilege, to persuade the OIPC both that the record in question is privileged and that it relates to a complaint or litigation under the *Act*. I prefer to leave this circumstance to the application of common sense and reasonableness rather than insert another provision into the statute. I would expect that any public body acting in good faith in asserting this position would, in the first instance, provide the commissioner with the solicitor's affidavit and listing referred to above. Should the OIPC not be satisfied as to the claim for privilege and the context of the advice, the matter should be considered as a decision by the public body to refuse access and proceed accordingly.

Finally, and for the sake of clarity, the *Act* should be amended to reflect that the commissioner's right of entry and examination and copying of a record does not extend to a record over which solicitor-client privilege is asserted.

RECOMMENDATION

- That the *Act* be amended to make it clear that the OIPC can require the production to it of records over which solicitor-client privilege is claimed when production is determined to be absolutely necessary to assess the claim for privilege, but no production may be ordered when the privilege relates to advice given in respect of an ATIPP matter. [Appendix K, s. 97]
- That the *Act* be amended to provide that the commissioner's right of entry and examination and copying of a record does not extend to a

record over which solicitor-client privilege is claimed. [Appendix K, s. 98]

Suggestion:

- That public bodies support claims of solicitor-client privilege with a solicitor's affidavit and a listing and description of each document.

SETTLEMENT PRIVILEGE

Section 30(1) of *ATIPPA, 2015* provides a discretionary exception in respect of information "that is subject to solicitor and client privilege or litigation privilege": In Report 2018-002 the OIPC concluded that this wording did not encompass settlement privilege and that the common law settlement privilege did not exist, in the context of the exhaustive *ATIPPA, 2015* code, as a free standing exception to access.

At present any claim of settlement privilege by a public body is assessed against the harm-based exception in paragraph 35(1)(g):

> *35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose …*
>
> *(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or …*

A number of submissions urged the Committee to recommend the inclusion of information subject to settlement privilege as a specific class-based exception to disclosure.

What is settlement privilege? In *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, the Supreme Court of Canada explained the privilege. The context of the decision, from the headnote:

> Sable Offshore Energy Inc. sued a number of defendants who had supplied it with paint intended to prevent corrosion of Sable's offshore structures and onshore facilities. Sable also sued several contractors and applicators who had prepared surfaces and applied the paint. The paint allegedly failed to prevent corrosion. Sable entered into Pierringer Agreements with some of the defendants, allowing those defendants to withdraw from the litigation while permitting Sable's claims against the non-settling defendants to continue. Pierringer Agreements allow one or more defendants in a multi-party proceeding to set-

> tle with the plaintiff, leaving the remaining defendants responsible only for the loss they actually caused. All of the terms of those agreements were disclosed to the remaining defendants with the exception of the amounts the parties settled for. The remaining defendants sought disclosure of the settlement amounts.

Speaking for the Court, Abella, J. explained the privilege, at paragraphs 12–13:

> 12 Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).
>
> 13 Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible …
>
> What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

Where disclosure of documents relating to the proceeding might otherwise be ordered pursuant to the relevant rules of court, settlement privilege will prevent disclosure. Settlement privilege may also arise, as in *Sable Offshore*, in the context of litigation involving multiple defendants where one defendant seeks information relating to a settlement or settlement discussions between another defendant and the plaintiff. Further, in a situation where, for example, pre-trial negotiations did not result in a settlement, evidence of those negotiations will not be admissible in the subsequent trial.

As said by Abella, J. the purpose of the privilege is to promote settlement. However, she went on to point out that the privilege is not absolute and that some balancing of interests may be required. At paragraph 19:

> 19 There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

The Department of Justice and Public Safety, relying on the decision in *Sable Offshore*, says that notwithstanding the view of the office of the OIPC, settlement privilege remains as a free standing common law exception to ATIPP requests. The submission comments on the position of the OIPC, at p. 8:

> The Commissioner, however, has found differently. In *Paradise (Town) (Re)*, A-2018-022, the Commissioner found that the reasoning of the British Columbia Supreme Court in *Richmond* was deficient in that there was "no evidence that the Court took into account the many factors relevant to statutory interpretation…". The Commissioner also distinguished *Richmond* as:
>
> > [64]…the purpose section of BC's FIPPA is a much-abbreviated version of that found in the ATIPPA, 2015, without reference to facilitating democracy, participating in the democratic process, or many of the other elements in the purpose section of the ATIPPA, 2015.
>
> The Commissioner ultimately found that the Act is a "complete, exhaustive code" and that "settlement privilege does not exist as a free-standing exception overriding the ATIPPA, 2015." The Commissioner also found that there may be circumstances in which s. 35(1)(g) of the Act could be used to protect some of the same information protected by settlement privilege.

The submission of the Department continues:

> This provision [s. 35(1)(g)] is applicable to situations in which the financial or economic interests of a government or public body may be prejudiced. However, the purpose behind settlement privilege is broader than preventing prejudice to financial or economic interest. As described above, settlement privilege has an effect on the efficient and proper functioning of our judicial system.
>
> Furthermore, settlement privilege belongs to all parties to a matter and cannot be unilaterally waived or overridden by just one of the parties. Settlement privilege therefore does not belong only to the public body. In cases where there are co-defendants and joint settlements, settlement privilege belongs to the plaintiff and all defendants, some of whom may not be public bodies, but private citizens and entities. They should not have their right to settlement privilege abrogated without clear, explicit legislative language.
>
> Breaching settlement privilege also has an effect on a public body's settlement strategy. The Province is often a defendant in many similar claims, for example, matters relating to historic abuse or highway maintenance. Plaintiffs who are aware of how similar claims are settled have insight into the Province's settlement position. This leads to an increasingly high bar for settlement

> which is not in the public interest as it leads to an increase in the expenditure of public funds.
>
> As outlined above, the Supreme Court of Canada has clearly stated the significance of settlement privilege and its importance to the administration of and access to justice. Settlement is generally encouraged by the courts as a cost-effective and efficient means of dealing with disputes that could otherwise take years and substantial cost to resolve. Settlement privilege is a fundamental common law privilege that plays a key role in promoting settlement. Furthermore, there is public interest in the maintenance of settlement privilege for public bodies. Public bodies are responsible for public funds and must be allowed the protection of settlement privilege as a means of properly and meaningfully engaging in settlement negotiations in which public money will be at issue.

The Department's recommendation, at page 9:

> While JPS believes that settlement privilege remains applicable though it is not explicitly included in the Act, to ensure that this fundamental privilege is protected, JPS recommends that it be explicitly included as an exemption to disclosure. JPS acknowledges that there must be a balance between the public interest in settlement privilege and the public's right to know how public funds are distributed. To address these concerns, similar to both solicitor-client privilege and litigation privilege, an exemption for settlement privilege should be a discretionary exemption subject to the public interest override found in s. 9 of the Act.

The Department's position is supported by the submission of the Canadian Bar Association, at pages 5–6:

> 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 have concerns that this is a misinterpretation of the legislation which ought to be rectified.
>
> In Magnotta Winery Corporation, 2010 ONCA 681, 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, 2017 BCSC 331, and the Supreme Court's approach to solicitor client privilege in University of Calgary, and its approach to litigation privilege in Lizotte.

> With the foregoing in mind, and on behalf of our members, we respectfully request that the legislation be amended to specifically include settlement privilege within the scope of the section for legal advice, the section 30(1) exceptIon respecting solicitor-client and litigation privileged records.

The situation confronting the OIPC in Report 2018-022 illustrates the issues involved when settlement privilege is raised in a context other than the litigation to which the settlement relates.

The summary of the report:

> The Town of Paradise (the "Town") received an access request seeking records, including, the minutes of a public meeting approving a legal settlement, a list of all active lawsuits against the Town and a list of all settled lawsuits against the Town for the past two years and all minutes approving the settlements. The Town provided access to the public minutes that it located. The Town also withheld privileged minutes relying on section 28(1)(c) of the ATIPPA, 2015. The Town provided the active lawsuit information requested but denied access to the settlement amounts, claiming section 30(1) (legal advice) and section 35(1)(f) and (g) (disclosure harmful to the financial or economic interests of a public body) of the ATIPPA, 2015. The Town also relied on settlement privilege to withhold the settlement amounts. The Commissioner determined that the Town conducted a reasonable search for the minutes even though not all minutes were located. The Commissioner further determined that the Town could not rely on section 35(1)(f) or (g) to withhold the settlement amounts. The Commissioner also found that section 30(1) does not contain an exception for settlement privilege and that the Town could not rely on common law settlement privilege as the ATIPPA, 2015 is an exhaustive code. The Commissioner recommended that the Town disclose the settlement amounts to the Applicant.

The Town's position, at paragraphs 13–17:

> [13] The Town relies on Sable Offshore Energy Inc. v. Ameron International Corp. ("Sable") stating that settlement privilege extends to settlement amounts even after reaching settlement and successful negotiations are entitled to the same protection as those yielding no settlement. The Town relies on Sable for its position that settlement privilege is a class privilege that promotes settlements.
>
> [14] The Town stated that while the public may have an interest in the expenditure of public funds, the potential harm associated with the release of the information prevails over that interest. The Town argues that the harm would undermine the very protection that settlement privilege af-

fords, as parties may be less willing to settle if their negotiations and results are subject to disclosure.

[15] The Town believes that disclosure of settlement amounts will set unrealistic expectations about the value of claims and as a result, the Town will face similar expectations in negotiations of future settlements, expectations that may harm the public at large. They stated, "Put bluntly, disclosure is adverse to the effective administration of justice. By way of contrast, withholding the information maintains settlement privilege and protects the effective administration of justice."

[16] The Town also relies on Liquor Control Board of Ontario v. Magnotta Winery Corporation ("Magnotta") for the premise that the public interest in transparency succumbs to the public interest in encouraging the settlement of litigation.

[17] The Town argues alternatively that in the event that section 30 does not encompass settlement privilege, it is a common law privilege that is not abrogated by the ATIPPA, 2015.

The settlement amounts were those in respect of closed files, presumably reflecting the completion of all aspects of the litigation in which the settlement was concluded.

The report continues, at paragraphs 71–72:

[71] Settlement privilege is a class-based privilege. Some exceptions in ATIPPA, 2015 are harms-based, while others are class-based. This is an important element of ATIPPA, 2015 and it represents a clear legislative choice. Rather than exempt a record from disclosure because it fits into a certain class of records, harms-based exceptions apply when disclosure can reasonably be expected to cause harm.

[72] Certain records, including records of communications between the public body and the opposing party, whether in the course of litigation or settlement negotiations, might be exempt in accordance with section 35(1)(g) on the basis that disclosure could prejudice the financial or economic interests of the pubic body. Depending on the content of an individual record, this could encompass all such information, up to and including a final settlement amount. For this reason, 35(1)(g) is the exception that is most relevant to situations where common law settlement privilege might otherwise apply.

In the result, the OIPC concluded that the Town could only rely on the harm-based exception in s. 35 and that the necessary support for that exception had not been forthcoming.

In that case, the Town, as did government in its presentation to the Committee, relied on the decision of the Ontario Court of Appeal in *Liquor Control Board of Ontario v. Magnotta Winery Corp.,* 2010 ONCA 681. The claim of settlement privilege arose not in the usual litigation context, but rather in the circumstance of an access to information request for the complete record of a mediated settlement involving a public body. Some records were provided but others withheld, the public body relying on a discretionary exception in the Ontario legislation, at page 4:

> 19. 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.

As I read the decision and its comments on the decision of the lower Divisional Court, it focuses on the interpretation of s. 19 and whether or not it included settlement privilege as a discretionary exception. The Court of Appeal agreed with the Divisional Court's interpretation that the provision, properly interpreted, extended its protection to settlement discussions and the details of negotiated settlements. The records were considered to have been prepared "for use in litigation".

The court said, at paragraph 36:

> Furthermore, interpreting the word "litigation" in the second branch to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation.

Interestingly, the court went on to say, at paragraph 38:

> [38] Further, based on recent judgments of the Supreme Court of Canada, I understand that fundamental common law privileges, such as settlement privilege, ought not to be taken as having been abrogated absent clear and explicit statutory language: see Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, at para. 11; and Lavallee, Rackel & Heintz v. Canada (Attorney General), [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61, at para. 18. While both of these cases relate to solicitor-client privilege, many of the same considerations apply to settlement privilege. Section 19 does not contain express language that would abrogate settlement privilege. Accordingly, in my view, it ought not to be so interpreted.

I note that the decision was in the context of interpreting an exception to access rather than whether the words of the provisions abrogated settlement privilege. Indeed, this approach was confirmed in a concluding paragraph, at paragraph 48:

> Does settlement privilege at common law apply to the Disputed Records?
>
> [48] Having concluded that the Disputed Records fall within the second branch of s. 19, it is unnecessary to decide this issue. Whether common law settlement privilege is a free-standing exemption under FIPPA or whether FIPPA is a complete code is a complex, serious question that is better decided in a case that depends on the answer to that question.

I read this decision as a discussion of interpretation principles applicable to s. 19 of the Ontario legislation and that a broad interpretation of the exception is to be preferred because the public interest in "encouraging the settlement of litigation" is more compelling than the "public interest in transparency". There was no reference in the decision to the implicit exercise of discretion inherent in the discretionary exception nor any discussion of the specific harm that could flow from disclosure.

However, in the Divisional Court decision – (2009), 97 O.R. (3d) 665, Carnwath, J. recognized that a claim for settlement privilege requires a case by case analysis to determine whether the privilege is properly claimed.

At paragraph 51:

> [51] Solicitor-client privilege is a class privilege which never ends unless waived or unless the communication is in furtherance of [page679] a crime. Settlement privilege is not a class privilege. Its existence must be established on a case-by-case analysis first applying the "Wigmore" test, as described in Slavutych v. Baker, [1976] 1 S.C.R. 254, [1975] S.C.J. No. 29, at p. 260 S.C.R.:
>
> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
>
> (3) The relationship must be one which, in the opinion of the community, ought to be "sedulously fostered".
>
> (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

Of particular interest is the last Wigmore condition, a condition which requires a case by case weighing of any injury from disclosure against the "benefit gained for the correct disposal of litigation". Carnwath, J. concluded, at paragraph 73:

> [73] I conclude that the public policy interest in encouraging settlement as embodied in the common-law concept of settlement privilege trumps the public policy interest in transparency of government action, **in the circumstances of this case**. … (my emphasis)

The emphasized phrase was not referred to by the Court of Appeal.

It appears from the Divisional Court decision that, other than through the records characterization as being privileged, there was no other mechanism to prevent disclosure.

> [91] … in the IPC's interpretation of the Branch 2 exemption [the closing words of s. 19(c)] any "asymmetry" created by the LCBO's interpretation of Branch 2 pales into insignificance in comparison with the asymmetry created by the IPC's interpretation of Branch 2. It denies to all government institutions the privilege available to private litigants otherwise found to be applicable to mediation and settlement materials. All private litigants can engage in settlement discussions confident that settlement materials will remain confidential. The IPC would have it that the Crown can not. That is true asymmetry.

I take from both decisions that, in the context of an access to information request, a refusal to grant access could only be based on a claim of settlement privilege. However, in determining whether or not a settlement privilege in fact applied to any record, that determination requires, in the context of the case, an assessment of whether any harm that would flow from disclosure would outweigh the benefit to the litigation of keeping the settlement information confidential. The need for such an assessment, specific to the context of access to information legislation, was made clear at paragraph 74:

> [74] This interpretation is plausible because it complies with the legislated text (s. 1(a) of FIPPA) which provides for "necessary exemptions" that are "specific and limited". The exemption is "necessary" to maintain confidentiality of negotiated settlements. The exemption is "specific" and "limited" in that it is specific to and limited by the circumstances of this case. A case-by-case analysis ensures settlement privilege will always be specific to and be limited by particular fact situations.

Also of interest is the comment at paragraph 60:

> [60] The Requester in this matter is anonymous. We have no knowledge of why the Requester seeks the information in the disputed records. If there is a public policy reason that would [page681] support and explain why the Requester is entitled to obtain the otherwise privileged information vis-à-vis the Requester, we do not know what it is. Absent such an explanation, the competing public policy interests in this matter are simply those created by FIPPA versus the interest in promoting settlements of disputes through confidential settlement negotiations.

And further, at paragraphs 65–66:

> [65] What follows from the IPC's view of the law regarding settlement negotiations? First, the details of negotiations and settlement of any dispute between a government institution and a third party will be available to the world at large, following a request. Apparently, a Requester need but ask anonymously and the IPC will undertake the heavy lifting, as in this case. There is [page682] a delicious irony in this matter whereby the IPC, in the name of transparency, labours for an anonymous Requester. Second, and perhaps more important, no third party would willingly entertain settlement discussions with a government institution, particularly where admissions are made and concessions offered that would enure to the detriment of the third party, if publicly disclosed. As this court said in Rudd, above, at para. 38:
>
> > Parties may also reveal information to a mediator which they wish to keep confidential even after a settlement is reached, perhaps because the information is private, or because it may injure a relationship with others.
>
> [66] Government institutions are not strangers to litigation. They are entitled to have disclosure of their settlements considered on a case-by-case analysis of their common-law entitlement to settlement privilege.

As I have said elsewhere in this report, in my assessment the motives or purpose of a requestor are not relevant – absent perhaps an abuse of process argument – to a decision to grant or refuse a request for information. But there can be no argument that a decision relating to a grant or refusal of access to documents over which privilege is claimed must be done on a case by case basis. In *Magnotta Winery*, given the interpretation of s. 19 as including settlement privilege, the determination of whether the privilege existed at all involved the balancing of the harm and benefit involved.

ATIPPA, 2015 contains very different language to that of the Ontario legislation, including in the s. 30 discretionary exception only "solicitor and client privilege or litigation privilege". While I do not have to decide the point, I consider it doubtful that the

wording could be interpreted to include settlement privilege. In *Magnotta Winery*, given the interpretation of s. 19 of the Ontario legislation as extending to settlement privilege, the courts did not find it necessary to consider whether the common law settlement privilege stood as a free standing exception to disclosure.

In their submissions to this Committee, public bodies and government advanced this view that, notwithstanding the limited wording of s. 30, settlement privilege remained available as a free standing common law privilege to prevent disclosure. This argument is based on the proposition that *ATIPPA, 2015* is not a complete code governing the right of access to information held by public bodies. This proposition may appear doubtful, but I do not have to decide the point. There is a clear public interest in knowing what public funds have been expended in order to settle a legal claim. At some point this interest should prevail over the public interest in the settlement of litigation involving public bodies. I note that this particular interest of course does not arise when the protection afforded by the privilege is considered in the context of litigation involving only private parties.

According to *ATIPPA, 2015*, the public interest in transparency and accountability prevails when the public body cannot establish a reasonable expectation of prejudice to its financial or economic interests. This threshold is expressed as a reasonable risk of prejudice and does not seem to me to be exceptionally onerous. Further, different considerations may apply to different aspects of the information under consideration. For example, disclosure of only the amount of a settlement may not prejudice a public body's future ability to defend itself or engage in settlement discussions. However, and depending on all the circumstances, including the length of time since the settlement disclosure of the details of the negotiations, strategies and the like could well be seen as prejudicing the ability of the public body to enter into future discussions on an equal footing with opposing parties.

In my view, a fair assessment of the risk of prejudice applied carefully to the particular information sought in the full context of the request would result in an acceptable balance between transparency in the expenditure of public funds and the public interest in the settlement of disputes involving public bodies. This approach reflects that endorsed by Carnwath, J. and explained by the Court of Appeal in *Magnotta Winery*. The only difference is that one assessment is done to determine whether or not settlement privilege exists, while the other approach assumes that settlement privilege exists but any decision on disclosure will be based on the same harm/benefit analysis.

Section 35(1)(g) was applied in Report 2018-021 to support a recommendation of non-disclosure of a settlement agreement. In that situation, the Newfoundland and Labrador English School District had been sued by a busing contractor for damages arising out of the cancellation of a busing contract. The report specifically acknowledged the "element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm". It went on to explain the context of the request – continuing related litigation by two other plaintiffs and the prospect of still further claims – at paragraphs 27–28 of Report 2018-021:

> [27] The District states that in the past, there were relatively few bus services contracts cancelled by predecessor school boards. The District terminated the contract involved in the present request on February 2, 2015. Since then, the termination of two other contracts, with a different company, resulted in the commencement of litigation in April, 2017 by that company. While the termination of other contracts has yet to result in litigation, the two-year limitation period for the commencement of legal action has not expired for any of those cases.
>
> [28] The newly created District has little experience with the repercussions of cancelling these contracts. Litigation commenced in two of those cases (in May 2015 and April 2017). This lends weight to the District's anticipation of further litigation in the other cases. These contract disputes are not minor. The claim advanced by the Plaintiff bus company in the present case, from public court records, is in the hundreds of thousands of dollars.

The report's conclusion at paragraphs 29–31:

> [29] One of the considerations in taking a decision to terminate a contract is, of course, the likelihood of resulting court action. A related consideration is the anticipated likelihood of settling such litigation through negotiation. The District maintains that a current or future claimant could view the settlement details of the present case as a "baseline" by which to pursue its own settlement negotiations. This, it states, would prejudice the District's ability to defend individual claims, or to negotiate reasonable settlements, and thereby put the public purse at risk. The District is of the view that this meets the standard of "reasonable expectation of probable harm".
>
> [30] I agree with this reasoning. As the Court in Calian observed, while there is an element of forecasting and speculation involved, the District "grounded its prediction in ascertainable facts" and has therefore met the requirements of section 35(1)(g). I am satisfied that disclosing the details of the present settlement could reasonably be expected to result in prejudice to the financial or economic interests of the District.

> [31] I therefore conclude that the settlement agreement, the inter-party correspondence and attached documents that led to the settlement, and other records containing any of that information, are exempt from disclosure as their release can reasonably be expected to result in prejudice to the financial or economic interests of the District.

This analysis reflects the analysis required by *Magnotta Winery*.

There is no specific mention of settlement privilege in the Wells Committee report. However, the general tenor of the discussion at page 282 – in the context of a discussion on municipalities – is supportive of public disclosure of amounts paid by public bodies to settle legal claims.

The harm-based exception in paragraph 35(1)(g) serves a similar purpose to the Wigmore condition used in the determination of settlement privilege. The exception thus contemplates a case by case balancing of the potential harm and the public benefit from disclosure thus reflecting in turn the approach endorsed by Abella, J. in paragraph 19 from *Sable Offshore* cited earlier.

I appreciate that having the ability to utilize access to information processes to require disclosure of settlement information before the litigation in question is fully completed, or where future related litigation is expected, is contrary to the purpose of the privilege. In such a case there may be a risk that, notwithstanding the ongoing litigation, the OIPC may not be satisfied that the evidence supports application of the s. 35 harm exception and proceeds to recommend disclosure.

However, I consider that prospect unlikely. The harm based exception in s. 35(1)(g) requires only a reasonable expectation of prejudice to the financial or economic interests of the public body; the modifiers 'significant' and 'undue' used in s. 39 are not present in s. 35. Further, the recognition by the OIPC in Report 2018-021 that the harm assessment may require a degree of (informed) speculation and forecasting suggests a rational and reasonable approach to the application of s. 35.

I expect that, if an application were made for access to settlement information while the litigation in question – or related litigation – is ongoing, it would almost automatically lead to a finding of prejudice under s. 35 and a recommendation not to grant access. To conclude otherwise would be to allow disclosure of information in the *ATIPPA, 2015* process that could and would not be disclosed or admitted in the concurrent court proceedings. In these circumstances, any recommendation to disclosure could, and probably should, be challenged in Supreme Court.

However, once the litigation is completed and the inadmissibility of the information no longer a factor, the public interest in disclosure may be greater than the more general public interest in promoting settlements in litigation involving public bodies. Absent satisfactory proof of possible prejudice as seen in Report 2018-021, the information should be disclosed.

My conclusion is that settlement privilege should not be included in s. 30(1). To introduce it as a class privilege, albeit as a discretionary exception, when it is intended to operate in the context of particular litigation is unnecessary. I am satisfied that a fair application of s. 35 will allow settlement-related information to be excluded from disclosure where warranted.

Two final points. The submission of the Department of Justice makes the point that the benefit of settlement privilege extends not only to the public body in question, but also to the other parties to a settlement. Third parties cannot rely on s. 35 to protect their interests, which interests will likely be significantly different from those of the public body. However, they could point to s. 39 and its exception based on significant harm to commercial interests. (In passing, I refer to the section in this report dealing with s. 39 and the comments in that section pointing out that the level of harm that must be established by third parties is, in most cases, greater than that required of public bodies.)

But where privileged information is concerned, and recognizing that whether settlement privilege can be established in the first place involves a case by case contextual analysis, I do not think it either appropriate or necessary in the public interest that a non-public body be required to establish harm to avoid disclosure. It is true that any information of the public body that is disclosed may necessarily provide information relating to a third party. However, to the extent that information over which settlement privilege is claimed may be found to be information "of a third party", or, to put it another way, not "of a public body", the third party should be able to avail of the protection afforded by the privilege. This view reflects the intent of the mandatory exception in subsection 30(2) for solicitor-client or litigation privileged information:

> *30.(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.*

Where other than a public body is concerned, the disclosure of information determined to be privileged should not, in the context of *ATIPPA, 2015*, be subject to a further test involving commercial harm or otherwise. The public interest is served by having settlement-privileged information of a public body subject to a discretionary harm-based

exception. The public interest is not served by the disclosure of privileged information not belonging to a public body.

Finally, I note that s. 31(1)(p) provides a discretionary exception from the disclosure of information which could reasonably be expected to "harm the conduct of existing or imminent legal proceedings". This exception was denied in Report 2019-017 – in the context of disclosure of settlement amounts – on the basis that clear and convincing evidence had not been offered of likely harm to the proceeding. The exception has been limited to consideration of harm only to the conduct of a proceeding, and not to harm to one or other of the parties or to the public body. See Reports 2006-014, 2007-003 and 2008-002. Whether, with appropriate evidence, the exception would preclude the disclosure of the amount of a settlement is a matter that awaits determination in a proper case.

I recommend that settlement privilege not be included in subsection 30(1). I further recommend that settlement privilege be specifically included in the mandatory exception contained in subsection 30(2).

RECOMMENDATION

- That the *Act* be amended to include settlement privilege in subsection 30(2). [Appendix K, s. 30(2)]

CONFIDENTIAL EVALUATIONS

This section provides a discretionary exception for personal evaluative information that is supplied in confidence for the purpose of assessing the research of employees of educational bodies:

Confidential evaluations

32. *The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of …*

(e) assessing the teaching materials or research of an employee of a post-secondary educational body or of a person associated with an educational body.

The Health Research Ethics Authority ("HREA") is a public body established under the *Health Research Ethics Authority Act*, SNL 2006 c. H-1.2. Section 5:

5. (1) The authority has power to ensure that health research involving human subjects is conducted in an ethical manner.

(2) The authority shall have responsibility to enhance public awareness of the ethical dimension of health research involving human subjects.

The Authority must establish an ethics board which must approve all health research involving human subjects:

7. (1) The authority, following consultation with the minister, the president of the Memorial University of Newfoundland and the chief executive officer of the Eastern Regional Health Authority, shall appoint the Health Research Ethics Board comprising not fewer than 10 members.

9. (1) A person shall not engage in health research involving human subjects without first obtaining approval for the research from the research ethics board or a research ethics body approved by the authority under section 8.

The ethics board is required to monitor and review the approved research activities and reports:

11. (5) Where, as a result of a review conducted under this section, the research ethics board or a research ethics body approved by the authority under section 8, whichever gave approval for the health research project, believes

(a) the health research being conducted does not conform to the health research project it approved;

(b) record keeping associated with the project is inadequate;

(c) the research methodology being applied is not in keeping with the methodology approved for the project; or

(d) conduct towards human subjects involved in the research project is improper,

the board or other body may suspend the research project until the deficiencies identified by it have been corrected, or the board or other body may cancel the research project.

In its submission to the Committee, the Authority suggested that the information it holds concerning the evaluation of research into human subjects should be covered by s. 32. At present, it applies only to research conducted by an employee of an educational body. Some if not all of the research approved and monitored by the HREA is conducted by private or industry researchers.

There is clearly a public interest in ensuring that research into human subjects conducted under the authority of the HREA is thoroughly reviewed by the appropriate professional personnel. The integrity of such reviews requires confidentiality of the opinions of the reviewers.

I consider it appropriate that s. 32 be amended to include the assessment of research carried out under the authority of the HREA.

RECOMMENDATION

- That the *Act* be amended to include an exception to disclosure of the confidential assessment of research carried out under the authority of the Health Research Ethics Authority. [Appendix K, s. 32(f)]

WORKPLACE INVESTIGATIONS

The *Act's* provisions regarding information generated in the course of an investigation into workplace conduct are intended to provide a zone of protection for that information, limiting access to it to participants in the process.

Information from a workplace investigation

33. *(1) For the purpose of this section*

(a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;

(b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and

(c) "workplace investigation" means an investigation related to

(i) the conduct of an employee in the workplace,

(ii) harassment, or

(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

which may give rise to progressive discipline or corrective action by the public body employer.

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

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

(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.

This section, acknowledged to be unique in Canada, was recognized by all who made submissions to the Committee as requiring amendment.

The section was introduced in 2012 and, based on submissions made by the then commissioner to the Wells Committee, was amended slightly in the new *Act*.

The OIPC's current submission is an extensive and thoughtful expression of the concerns relating to s. 33. This submission reflects the worry of public bodies faced with providing workplace investigation records to specified applicants without restriction as to content or time.

From the OIPC's submission, at page 13:

> Section 33 has been a challenge for public bodies and access to information applicants, as well as for those other parties to a workplace investigation whose information has been accessed through this unique provision. It has also challenged this Office in overseeing compliance. …
>
> The essence of the section, unique in Canada, is that it first creates a mandatory exception to access for "all relevant information" connected to a workplace investigation; however in the next breath creates a mandatory *right* to access to that same information to a party to that workplace investigation. Both are powerful clauses: as a mandatory exception to access, section 33 is not subject to discretion by the public body nor the public interest override in section 9. …
>
> Moreover, it applies broadly: it is not limited by time and thus records that are relevant to the investigation become responsive the minute they are created, regardless of the status of the investigation. It is broad in scope as well, covering *all* relevant documents, with no limitation to categories of documents and with no protections for the privacy of witnesses or complainants.
>
> While the OIPC supports the principle of a right of access of a party to a workplace investigation to certain information relevant to the investigation, the breadth of this right in scope and time in the current statute has, we believe, created a number of likely unintended consequences. …

The submission sets out the history of the section, at pages 13–14:

> This provision first appeared with the Bill 29 amendments to the *ATIPPA* in 2012, when it became section 22.2 of that *Act*. It was subsequently amended following the Wells Review at our suggestion, replacing the phrase "the substance of records collected or made during a workplace investigation" with "all relevant information created or gathered for the purpose of a workplace investigation" to provide greater clarity. The Cummings Legislative Review Report featured some discussion of workplace investigations, but did not specifically recommend the approach that was ultimately taken in the Bill. Anecdotally, our observation is that in the years prior to the inclusion of section 22.2 (now section 33) that public bodies found it particularly challenging to process requests for access to information from parties involved in workplace investigations.
>
> In particular, a request for access to one's own personal information that was collected or gathered as part of a workplace investigation (whether filed by the complainant or respondent) would typically result in a set of responsive records including things such as the statements of the parties, witness statements, investigator's notes, comments or discussions in emails between parties

> or among HR officials about the investigation, etc. Various exceptions to the right of access may have been applied to some of this material, but ultimately individuals have a right of access to their own personal information, including the opinions of others about them. Access and Privacy Coordinators found it particularly difficult at times to untangle, within these types of records, whether information was the personal information of one party or another, which led to inconsistent redaction and frequent complaints to the OIPC. This is our perspective on the genesis of why we have a section 33, although we cannot claim any inside knowledge in terms of any discussions which may have been had or rationales debated among government officials leading up to the time the original version of section 33 first appeared.

The submission continues, discussing the context of most workplace investigations and the expectation and need for confidentiality, at pages 16–17:

> Section 33 is intended to provide the parties to a workplace investigation with an equal right to information. However, because the parties to a workplace investigation are usually not equal, the disclosure required by section 33 could harm individuals as well as negatively impacting the process itself.
>
> Section 33 is intended to apply primarily to investigations of harassment in the workplace. Harassment is defined in section 33, and that definition is similar to those found in other statutes and in numerous harassment or respectful workplace policies, both of public bodies and private sector employers.
>
> What section 33 does not reflect is that harassment typically involves a power relationship between the perpetrator or abuser and the subordinate victim. Harassment is only possible because of that inequality. The power relationship also means that harassment is easily accompanied by intimidation of the victim, and a complaint can easily result in retaliation. It is only because of that inequality that specific respectful workplace policies, and specific workplace investigation processes, are necessary.
>
> There are in Canada a number of practitioners who specialize in workplace investigations, and there is a professional literature on the conduct of such investigations. In that literature, and in many respectful workplace policies, it is recognized that because of the inequality in power relationships, harassment complainants and witnesses need assurances of confidentiality. Otherwise the fear of intimidation and retaliation will prevent them from coming forward. The investigator needs to be able to provide assurances of confidentiality in order to build a relationship of trust with the complainant and witnesses, and to ensure complete disclosure during the investigatory process. …
>
> In many circumstances disclosure of the identities of witnesses, or the details of their statements, can have extremely harmful effects. Disclosure makes it

> possible for the perpetrator to intimidate the victim or the witnesses, to prevent them from confirming their statements at a later stage, or in another proceeding. It also makes it possible for the perpetrator to retaliate against the complainant or witnesses, even outside the workplace. Perhaps worst of all, in circumstances where the complainant and witnesses were promised and expected confidentiality, disclosure will have the effect of poisoning the workplace and nullifying any potentially positive results of the harassment investigation. Just as the right to refuse unsafe work is difficult for employees to assert outside of unionized workplaces, the right to make a harassment complaint will seldom be exercised in a workplace where it is known that confidentiality will not be preserved and retaliation is possible.

These concerns are well taken.

To help in better understanding the issues imposed by s. 33, the Committee held a 'roundtable' session with a number of interested groups and persons. It was clear that there are genuine concerns about the operation of the section and that there is a uniform desire to ensure that any amendments reflect the interests involved in workplace conduct matters.

Many of the submissions reflected the view that any disclosure pursuant to s. 33 should be subject to specified exceptions in the *Act*, in particular s. 37 (individual and public safety). The view was further expressed that no disclosure should take place until after the formal investigation is completed. Some suggested deleting the section entirely, while others noted the need to be 'fully informed' of the case to be met if an employer elected to impose discipline.

The representative from the City of Mt. Pearl spoke of the human cost of a loss of confidentiality:

> **MS. PITTMAN:** The city has recently had a very public investigation, which under ATIPP legislation required us to release witness statements from witnesses in a workplace investigation to the respondent in a harassment investigation. …
>
> Witnesses often have significant personal concern over coming forward in a workplace investigation, especially when the party in question is in a position of authority. …
>
> The City of Mount Pearl had a large number of people come forward providing what were believed to be confidential statements. However, once the OIPC ruling was made releasing the statements to the respondent, city staff experienced torment, complemented with increased sick leave and stress-related

> leave. In addition, the mental anguish caused by the release of this information resulted in employees crying in offices over the fear that they and/or their families would be retaliated against by the respondent. This specific example generated a significant concern in relation to the likelihood of information provided via witness statements being used against someone as a form of retaliation or reprisal.(Transcript – March 27, 2021 – pp.194–195)

The Information and Privacy Commissioner candidly acknowledged the concern in providing an independent adjudication and interpretation of the section in the face of credible allegations of the risk of personal harm:

> **MR. HARVEY:** I will say this has put me personally in an uncomfortable situation. I think my predecessors have found this as well, but I'll speak personally about how I felt uncomfortable. There were two reports in which the public body was suggesting there was some risk of personal harm that may arise if personal information was disclosed. They cited section 37. Now, as it happened we – this is all, of course, in the public domain because it was the subject of two reports that were written within the past year – probed the public body to see if indeed they could bring forward evidence that there was such a risk of harm.
>
> They weren't able to do so and so we proceeded to recommend disclosure. I felt quite uncomfortable because even if they had come forward with evidence that would support a claim of section 37, I would've still felt obliged to find that section 33 was paramount and that the information should still be disclosed. That would put me in a very uncomfortable situation to recommend the disclosure of information that could create a risk of harm. I also feel that it doesn't make sense for section 33 to override certain other exceptions in the act and that it's not necessary for it to do so. (Transcript – January 27, 2021 – p. 196)

In the course of the discussion, J. Y. Hoh, speaking for the Centre of Law and Democracy, suggested that one option for consideration may be to treat workplace investigation information in a similar matter to that of law enforcement investigations; he went on to say that it would be appropriate to allow the exception to be overruled if it was clear in any particular case that the public interest required disclosure.

As it is presently structured, s. 33 grants access to records and information only to a party to an investigation – a complainant, respondent or a witness who has provided a statement. In the latter case, a witness may have access only to their own statement. Thus, as it stands, there is no general public right of access to information "created or gathered for the purpose of a workplace investigation". However, neither are there any

limits on what an individual in possession of such information can do with it. I refer to the point made by the City of Corner Brook:

> Once in the complainants hands under ATIPPA there is no restriction on the use that can be made, so it is not inconceivable that an employee who cooperated with a workplace investigation by giving honest, forthright and sometimes very personal/emotional information could then find their witness statement posted on a social media site for all to see.

In the course of the roundtable discussion, I pointed out the limited distribution contemplated by s. 33 as it now stands and asked the participants for their views on the interests that are actually engaged in obtaining access to information on workplace investigations. Specifically, I asked whether or not there was a public interest to be considered in the application of this section. The consensus seemed to be that the public interest was quite limited – perhaps an interest in promoting self and healthy workplaces in public bodies and an interest in the integrity and fairness of the public bodies' investigation processes.

It is apparent from reading the Wells Committee report that no concern was expressed to the Committee about the operation of what was then s. 22.2. As already noted, the section had been included in the Bill 29 amendments. Commenting on the amendment, the Committee said at page 18 of its report:

> Similarly, a new section (22.2) required that workplace investigations remain largely confidential and personal information be unavailable to third parties not participating in the investigation. **Finally, the definition of what constitutes personal information was qualified in one case. An individual's opinions remained personal information. But a new exception was added: "except where they are about someone else".** (my emphasis)
>
> As discussed above, few of these changes attracted much public comment either at the time of their adoption or since, with some exceptions that are dealt with elsewhere in this report.

Later, at pages 327–328, the Committee discussed the limited submissions on the section. In the end, the Committee recommended, as suggested by the Information and Privacy Commissioner, that "information that would reveal the substance of records" be changed to "all relevant information".

The OIPC notes in its submission that, although the provision first appeared in 2012, it was not until 2016 that the OIPC was called upon to interpret it in a formal re-

port. Since then it has been considered in six access reports and two privacy reports. Three of these reports are currently the subject of court proceedings.

Workplace conduct issues can arise in a myriad of circumstances and be influenced by countless objective and subjective factors. While "harassment" as presently defined in paragraph 33(1)(a) may cover many of the situations that arise, it is not all inclusive. Attitudes and interactions that fall short of being abusive, offensive, demeaning or vexatious can have serious unwanted effects on individuals and workplaces. The issues are usually intensely personal and, to be properly addressed, called for objective yet understanding assessment by the appropriate management personnel. To refer again to a comment from the City of Corner Brook:

> A workplace is akin to a second home and sometimes there are disputes among the "family" members that should be resolved internally.

Not all workplace conduct issues result in a formal investigation. Indeed, I would expect that most are addressed within the public body in question.

Clearly, and as acknowledged by all who made submissions, assurances of confidentiality are necessary to ensure management's full knowledge of the situation and to protect individuals from retaliation or other adverse consequences.

I accept that, together with the interests of the employer, the predominant interests involved in workplace investigations or in less formal inquiries into workplace conduct and interactions are the personal and private interests of the individuals involved. If a safe and healthy workplace is to be promoted and provided, those persons' interests must be protected. The protection of these interests and fairness to all involved in any investigatory process is properly left to be managed through comprehensive and informed workplace investigation policies appropriate for the public body/employer in question.

The issue of fairness to a 'respondent' in the case of discipline or other sanction proceedings was the subject of comment. Dr. Anton Oleynik pointed out the difficulty in preparing for and responding to a disciplinary decision in the context of a labour arbitration, court hearing, or other formal adjudication. If, as suggested by many, only the final report of an investigation is produced and there is limited time to respond, Dr. Oleynik suggested that the full and timely disclosure required by the principles of natural justice – knowing the case to be met – would not be met.

In the context of court litigation, there is ample opportunity for the production and discovery of documents relating to the litigation. And in any adjudication – court or otherwise – involving an individual's rights, the principles of natural justice require appropriate disclosure of information to the individual as a pre-condition to a fair hearing and adjudication.

The need for adherence to the principles of natural justice was acknowledged by Bernadette Cole Gendron on behalf of the Newfoundland and Labrador English School District.

> **MS. COLE-GENDRON**… in my world, I work in a very highly unionized environment, so the majority of our workplace investigations are investigations carried out with unionized employees. There is certainly a very clear process there, an understanding of what an investigation has to look like. The rules of natural justice govern our workplace investigations. We're all aware of those, one being the requirement, of course, that all information and allegations have to be put before an employee before a decision can be made. …
>
> Again, it's certainly our practice that employees would be notified that they're under investigation, whether it's required anywhere or not, as a matter of procedural fairness, natural justice, but the timing of that is often an issue. There has to be protection of evidence, for example. Sometimes, if you're dealing with having to secure evidence, we've had that issue arise. We have given a lot of thought as to when an employee is even notified.

She continued, commenting on the effect of non-disclosure:

> But would have to be disclosed prior to an employer making a decision or rendering a discipline, for example. To me, as legal counsel for the district, that would go without saying, because any employer who doesn't do that, the decision would never stand up to challenge, in any event, under the rules of natural justice. (Transcript – January 27, 2021, pp. 200-201)

In my view, it is not helpful, in the context of considering amendments to *ATIPPA, 2015*, to include considerations relating to access to information sought for the purpose of advancing or defending litigation in whatever form. To do so would be to introduce unnecessarily the notion of individual benefit into a statute intended to protect personal information and to advance and protect the public interest in democratic, transparent and accountable governance.

There is a genuine public interest in ensuring that public bodies are properly managed and that the public employees and others in the workplace work and interact in an environment that is safe – in the broadest sense – and that enhances the provision

of an excellent work product. But there is little if any public interest in the 'nuts and bolts' of workplace conduct issues, whether involving a formal investigation or otherwise. The fact that Employee A may have an issue with Employee B is a matter for those employees and for management. It is true that some members of the public may be interested in knowing whether or not Employee A harassed Employee B and the particulars of allegations that may have been made. But as the Wells Committee observed, at page 67, quoting the Information Commissioner of the United Kingdom, "the public interest is not necessarily the same as what interests the public".

In my view the legitimate public interest in the management of public bodies and in the integrity of their investigative processes would in most situations be comfortably met by providing that a final investigation report into issues of workplace conduct may be disclosed, subject to any appropriate exceptions, to a complainant or respondent, or otherwise where the public interest overrides the potential harm from disclosure of the report. Further, to reflect the fact that not all individuals who work in or are closely associated with a public body are employees, the amendment should extend the access right to investigation reports or work conduct information relating to a person holding a position in the public body. However, given the specific provisions in the *House of Assembly Act*, RSNL 1990 c. H-10, and the *House of Assembly Integrity and Administration Act, 2007*, SNL 2007 c. H-10.0, providing for inquiries by the commissioner for legislative standards into the conduct of members of the House of Assembly – which provisions contain a requirement to report to the House of Assembly – such inquiries should be specifically removed from the ambit of s. 33.

Apart from the final report of a workplace investigation, any and all records and information created or gathered for the purpose of a workplace investigation or for generally dealing with issues relating to conduct within the workplace should be outside the purview of the *Act*. As a corollary to this, the Bill 29 amendment to personal information should be modified to reflect that opinions expressed about an individual in the context of a confidential discussion about workplace conduct are not the personal information of the individual spoken about but rather remain, in that context only, the personal information of the person expressing the opinion. However, and as noted earlier, the circumstances surrounding workplace conduct are infinite and the broadness of the characterization could protect more information than is reasonably needed to maintain a safe and productive workplace. Accordingly, such workplace conduct information – outside the formal investigation and final report context – should be protected by a discretionary exception. A head in receipt of an access request will thus be required to consider, in every case, whether the public interest in disclosure outweighs the harm intended to be prevented by the exception.

RECOMMENDATION

That the *Act* be amended to:

- Extend the definition of "workplace investigation" to include others holding a position within a public body. [Appendix K, s. 33(1)(c)(i) and (iii)]
- Provide a mandatory exception to access for all relevant information created or gathered for the purpose of a workplace investigation, but allow discretionary disclosure of the final report of a workplace investigation to a complainant or respondent, or otherwise where in the public interest. [Appendix K, s. 33(2) and (3)]
- Require the head of a public body to disclose to an applicant a statement provided by the applicant for the purpose of a workplace investigation. [Appendix K, s. 33(4)]
- Remove the *House of Assembly Act* and *House of Assembly Accountability, Integrity and Administration Act* inquiries from s. 33. [Appendix, s. 33(1.1)]
- Allow the head of a public body to refuse access to information relating to workplace conduct provided in confidence, including opinions about another individual. [Appendix K, s. 33(5)]

INTERGOVERNMENTAL RELATIONS

Section 34, the exception relating to harm to intergovernmental relations, is not inclusive with respect to government's dealings with Indigenous communities. The present provision refers only to the Nunatsiavut Government:

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

(v) the Nunatsiavut Government; or …

The submission of the Executive Council, at pages 16–18:

> This creates an unfair advantage for maintaining relations with other IGOs, as the above section captures the Nunatsiavut Government but excludes other IGO5. On a number of occasions, Indigenous Affairs and Reconciliation (IAR) has received requests from IGO5 to redact information from documents but has no means to do so under the Act. IAR works to develop and strengthen relationships with all IGOs within the province, including the Nunatsiavut Government, Innu Nation, Sheshatshiu Innu First Nation, Mushuau Innu First Nation, Miawpukek First Nation, Qalipu First Nation and the NunatuKavut Community Council.
>
> It is important to maintain friendly, trustworthy and cooperative relationships with all IGOs. This includes the sharing of information that assists IAR in working with all IGOs in fulfilling its mandate. Releasing certain documents would create mistrust between the lGOs and the Provincial Government and would harm its relationship with the IGOs as they may feel they can no longer communicate with the Provincial Government in confidence and with candour.
>
> Moreover, the relationship between the federal and provincial Crowns and Indigenous peoples with accepted, proven or asserted Indigenous land claims rights is one of Honour. Failing to have the ability to redact information shared in confidence would harm this honour. Other jurisdictions have language that provides an exemption allowing refusal to disclose records where the disclosure could reasonably be expected to prejudice the conduct of relations between an Indigenous community and the government or reveal information received in confidence from an Indigenous community by a government or an institution …
>
> Suggestion:
>
> As noted above, other jurisdictions have language that provides an exemption allowing refusal to disclose a record where the disclosure could reasonably be expected to prejudice the conduct of relations between an Indigenous community and the Government or an institution or reveal information received in confidence from an Indigenous community by the Government or an institution. A revised section should be created specific to lGOs similar to Ontario's legislation to reflect and acknowledge all Indigenous groups. Additionally, section 34 could then be amended to remove reference to Nunatsiavut Government.

There is no dispute that this section requires amendment. I recommend that it be amended to reflect the acknowledgment and inclusion of all Indigenous/Aboriginal self-governing bodies.

RECOMMENDATION

- That the *Act* be amended to extend the intergovernmental relations exception to all Indigenous self-governing bodies. [Appendix K, s. 2(l.1), s. 34(1)(a)(v), s. 34(1)(b)]

CONSERVATION

36. The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of

(a) fossil sites, natural sites or sites that have an anthropological or heritage value;

(b) an endangered, threatened or vulnerable species, sub-species or a population of a species; or

(c) a rare or endangered living resource.

This section is unchanged from *ATIPPA, 2002*.

The Department of Fisheries, Forestry and Agriculture points out that waiting for an official designation of a species as "endangered, threatened or vulnerable" could allow the release of information that may hamper conservation efforts.

Its submission, at page 4:

> The Wildlife Division of FFA is responsible for the management and control of measures for the protection, preservation and propagation of wildlife, including inland fish, as defined in the Wild Life Act. ATIPPA, 2015 ensures the conservation of Newfoundland and Labrador's species, sub-species or populations under Section 36. Interpretation is made through the Endangered Species Act.
>
> Based on Section 36 of ATIPPA, 2015 the species, sub-species or population must be listed as either endangered, threatened or vulnerable. This listing is a

> result of a status assessment by the provincial Species Status Advisory Committee (SSAC) and/or the federal Committee on the Status of Endangered Wildlife in Canada (COSEWIC), a recommendation from the committees and acceptance by the Minister to list. Status assessments by COSEWIC and/or SSAC can take years to complete.
>
> The situation surrounding the George River Caribou Herd (GRCH) illustrates the need to protect information that may be harmful to conservation if publicly released.
>
> Evidence of population declines for the GRCH date back to the late 1980s. A provincial hunting ban was put in place on the herd in 2012 to mitigate further population decrease while awaiting formal status assessment recommendation from COSEWIC. In 2016, prior to the formal status assessment by COSEWIC, officials within the Department of Environment and Conservation were developing a proposal for emergency designation under Section 9 of the Endangered Species Act. In October 2017, formal recommendation from COSEWIC was received. In January 2018, a decision was made not to list the GRCH as endangered, based on consultations with Labrador indigenous groups. The listing was deferred pending further discussions with Indigenous groups around the management of unsanctioned harvest.
>
> While the initial GRCH decline was not precipitated by hunting, as the population became smaller, hunting combined with natural mortality led to a faster decline and impeded recovery efforts. The unsanctioned harvest that has been occurring since 2013 continues to impact the recovery of the herd. It is imperative to the herd that locational data, breeding grounds, migration patterns, etc., be protected.
>
> As previously noted, under ATIPPA, 2015, in order to protect information such as locational data, breeding grounds, and migration patterns, FFA must wait for an official designation and listing. However, immediate conservation concerns should be able to be addressed by professionals within the department. FFA recommends an amendment to Section 36 (b) to include: an endangered, threatened or vulnerable species, sub-species or a population of a species; upon a recommendation to the department head by the Director of Wildlife. (emphasis in original)

This is a valid concern. Conservation, like safety, is harmed by delay. If the head of a public body reasonably believes that, prior to a formal designation as "endangered, threatened or vulnerable", a species (etc.) is in need of protection, access to the harm-based exception should not have to await the designation. To be clear, such reasonable belief of the head relates only to the characterization of the species in question. The reasonable expectation of harm from disclosure must still be established in order to exercise the discretionary authority to refuse disclosure.

Any such designation would, of course, be only for the purposes of *ATIPPA, 2015*. Any other consequences, for enforcement purposes or otherwise, are beyond the scope of *ATIPPA, 2015*.

RECOMMENDATION

- That the *Act* be amended to extend the harm-based exception to information about species and populations which the head of a public body has reasonable grounds to believe are in need of protection. [Appendix K, s. 36(b)]

THIRD PARTY COMMERCIAL INTERESTS

The issue of the disclosure of information related to third party – i.e., non-public body – commercial interests is one that evokes strong opinions. On the one hand, private businesses, often supported by public bodies, seek greater protection for commercial information relating to their businesses; on the other hand, information and privacy advocates – including the OIPC – and supported by the public and other media, argue for more liberal disclosure to promote accountability and transparency.

Like previous reviews, this current review has had the benefit of divergent opinions.

The current framework for the grant of or refusal of access to third party commercial information is generally referred to as the "three-part test" – that is, each of three specified elements must be established in order to apply the mandatory exception. The current provision:

> *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.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or

(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

There is no public interest override.

The three necessary elements may be summarized:

1. A trade secret or information of a commercial nature;
2. Supplied to the public body in confidence;
3. Disclosure will lead to a reasonable expectation of probable harm; there are four enumerated types of potential harm.

I believe it is critical that, for the purpose of a fair and objective analysis and review, the factors that must be established in order to trigger the exception be carefully distinguished from the nature, quality and sufficiency of evidence needed to establish each of the factors.

The following discussion will address only the substantive elements of the exception; the evidentiary assessment relating to proof of these factors is discussed separately.

The use of the three-part test in this province was briefly interrupted by the passage of Bill 29, but was restored following the 2015 Wells report. It is used in most other Canadian jurisdictions; Manitoba, Saskatchewan and the federal jurisdiction use what may be called a one-part test.

Generally speaking, in these latter jurisdictions, establishment of one of the enumerated factors will preclude disclosure. However, in Manitoba and Saskatchewan, there is provision for a public interest override. The legislation in Saskatchewan is representative:

> *19. (1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:*
>
> *(a) trade secrets of a third party;*
>
> *(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;*
>
> *(c) information, the disclosure of which could reasonably be expected to:*
>
> *(i) result in financial loss or gain to;*
>
> *(ii) prejudice the competitive position of; or*
>
> *(iii) interfere with the contractual or other negotiations of; a third party;*
>
> *(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;*
>
> *(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or*
>
> *(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).*
>
> *(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.*

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or (iii) interference with contractual or other negotiations of; a third party.

The Wells Committee, as far as I can ascertain, did not receive submissions from public bodies other than from Nalcor and Memorial University. The previous review, which had led to the use of the one-part test, had reported that "the main push for change came from public bodies". The Wells Committee noted, at page 127:

> It is clear from the Cummings review that public bodies played a very persuasive role in the recommendation to lessen the test in section 27. There is no indication whether the public bodies presented in public, or whether their comments and recommendations were tested by interests with different or opposing views.

The Wells Committee recommended that the three-part test be restored. It is important for the purpose of this review that the reasoning of the Wells Committee be carefully read in order to understand the concerns underlying the recommended change. My assessment is that the Committee was concerned that harm would not necessarily have to be established in a one-part test and that most of the previous complaints of public bodies were of their own making – a failure to bring forward the necessary evidence.

The following excerpts from the Wells Committee report illustrate the focus of the Committee's consideration, at pages 122–128:

> Canadian access laws generally stipulate that the protection for business interests involving third parties is mandatory, which means that a public body must apply the test that is set out in the Act. …
>
> The essential question is how far should protection extend to prevent harm to *legitimate* commercial interests? …

Third party business interests are among the most frequently adjudicated sections of access laws in Canada. As a result, this area of the law has come to be well understood. Third parties have to do more than simply claim they will be harmed, if they hope to oppose successfully the disclosure of information. …

A helpful approach to assessing "harm" under section 27 is contained in a May 2013 report by the OIPC, its first assessment of the post-Bill 29 version of section 27. In Report *A 2013-008*, the Commissioner relied on the definition of harm quoted in Ontario Order PO-2195:

> Under part 3, the Ministry and/or OPG must demonstrate that disclosing the information "could reasonably be expected to" lead to a specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.

A recent decision from the British Columbia Information and Privacy Commissioner connects the dots in terms of a third party claim that it would be harmed by disclosure of certain records. The case involved a towing company (Jack's) in the City of Abbotsford, and a request for records. The City informed Jack's that it would release emails to the applicant, prompting Jack's to ask the Commissioner to review the City's decision on the grounds that its interests would be harmed:

> [37] Jack's submissions on harm are brief. They say that releasing the emails could reasonably be expected to harm their competitive position or interfere with their negotiating position with the City or with other potential customers. They also say that the emails could reasonably be expected to result in undue gain for a competitor, namely the applicant. This amounts to no more than an assertion that Jack's meets the s. 21 test. Without evidence in support of the assertion, Jack's falls well short of proving its case.

Public officials can find strong guidance in decisions such as the one cited above, …

The Centre for Law and Democracy favours a strict application of section 27, so that it applies only to information whose release would harm the commercial interests of third parties. …

The discussion over section 27 is a tussle over how to properly balance the public's interest in transparency and accountability against an appropriate level of non-disclosure to prevent harm to business interests.

> The submissions to the Committee, both oral and written, reflected these divergent views. … The heightened interest in section 27 arose from the amendments to the *ATIPPA* in June 2012, which reduced the threshold for proving that documents and information should be withheld. …
>
> In the only case adjudicated by the courts since the changes brought about under Bill 29, the Supreme Court Trial Division ruled that a claim to withhold documents must be accompanied by "clear, convincing or cogent evidence" either that the requested information was supplied in confidence or that release would harm its competitive position or result in financial loss.
>
> As stated above, the Trial Division's ruling in *Corporate Express* followed the law that has been developing since the *Merck Frosst* decision at the Federal Court in 2006. Information Commissioners across Canada have consistently treated speculation about harm as an insufficient reason to withhold information under the exemption that protects business interests of a third party. The Supreme Court of Canada in *Merck Frosst* ruled the standard for claiming harm has to be more than possible or speculative, but need not be likely or certain. …
>
> The amendments brought about by Bill 29 effectively broadened the exceptions by weakening the test to be applied to business interests of a third party. The amendments eliminated the requirement for establishing that all three factors had to be present to cause harm, and replaced it with a provision that any one of them was sufficient to invoke the exception. …
>
> If there are not high standards of proof for invoking the section 27 exemption, then it could appear that a major objective of the *Act* is to protect business interests of third parties. Section 27 is linked to the purpose of the *Act*, which is expressed as giving the public a right of access, subject to the need, in limited circumstances, to withhold information. …
>
> This Committee is satisfied that the legitimate interests of business are protected through the application of the three-part test that existed in the *ATIPPA* prior to the Bill 29 amendments. The three-part test is the law in several of Canada's biggest provinces. The Committee believes the growing body of legal decisions around business interests of third parties has brought certainty and stability to this part of the law.

I believe it is fair to conclude that the Committee did not focus on whether or not, in order to ensure transparency and accountability, it was necessary to have a test of one, two or three parts. The Committee was rightly concerned that to withhold access without appropriate proof of harm would not be in the public interest. In other words, if I am reading the report fairly, the Committee concluded that simply establishing that the

information was commercial or confidential, without proof of harm, was not in the public interest and was not in harmony with the principles of the *Act*.

It is interesting to note that the Committee considered as a "strict application" of the *Act* the suggestion of the Centre for Law and Democracy that the exception apply "only to information whose release would harm the commercial interests of third parties".

As the Wells Committee confirmed, it is a question of balancing the public right of access – its interest in transparency and accountability – against the potential for harm to the interests of a third party doing business with or otherwise providing commercial information to a public body. To repeat the comment of the Wells Committee – "The discussion over s. 27 [now s. 39] is a tussle over how to properly balance the public's interest in transparency and accountability against an appropriate level of non-disclosure to prevent harm to business interests".

The 2019–2020 Annual Report of the OIPC – not yet tabled in the House of Assembly as of the date of writing – comments at length on the complaints arising from the application of s. 39:

> … there are a number of access issues that continue to be the subject of numerous complaints. One theme worthy of comment at this juncture, as in previous years, is that a number of reports arose from complaints by third parties objecting to release of information that they view as confidential, proprietary information subject to the mandatory exception to access under section 39. Without exception, in this reporting period, the reports found that the information did not pass the three-part harms test established in that section of the Act.
>
> These tended to fail for one of two reasons. A number of them failed the second test – that the information must be "supplied in confidence". That phrase exists in similar provisions in access to information statutes across Canada, and there is well-established case law as to its meaning. Third parties tended to claim some purported implicit understanding that it was all confidential, or else pointed to general boilerplate text claiming confidentiality over the entire record(s), neither of which meets the well-established threshold for a third party to discharge its burden of proof. And while most matters did not require assessment of the third test – that there must be a reasonable expectation of harm arising from disclosure – those that did failed on that test. Third parties tended to claim that such things as the prices of the goods or services sold to a public body or the manner in which they wrote their tenders were inherently proprietary. Again, reports and courts in this jurisdiction and elsewhere have found that this is not sufficient to demonstrate harm.

The report continues:

> The net effect of these complaints by third parties is a delay in access for the applicants. Indeed, third parties also sometimes appeal these Commissioner recommendations to the Court, creating further delays. As cited further below, there are numerous examples of ongoing court actions brought by third parties related to Reports issued in years past. Moreover, there are a number of examples of concluded Court actions where, on the eve of the matter being heard in Court, the third party abandoned the matter. At this point, the applicant has likely lost interest, perhaps because the information that they were looking for some years previous is no longer of interest to them. There is one example of a case which is stuck at Court because the applicant cannot be reached to determine their interest or lack thereof.

To help its understanding of the application of this exception in practice, the Committee reviewed all of the OIPC reports since 2015 in which a s. 39(1) exception was claimed by a public body or third party (Appendix I).

Leaving aside three reports involving Nalcor and the operation of the *Energy Corporation Act*, there were 57 OIPC reports (June 1, 2015 – May 10, 2021) addressing s. 39(1). This is out of a total of 180 OIPC access reports issued since June 1, 2015.

Of the 57 reports, only eight found that the requirement of commercially-related information "of a third party" was not met.

With respect to the requirement of "supplied, implicitly or explicitly in confidence", six found this requirement satisfied. Of these, one was a trade secret, three related to casinos and casino type gambling, and two were found to have an expectation of confidentiality based on correspondence.

Report 2018-007 involved a request by an unsuccessful bidder for information provided to government by Vale Canada regarding its procurement processes for the supply of anode bags. With respect to the requirement of confidentiality, the report said, at paragraph 23:

> Following a review of Vale's press releases and public reports, and the Department's own press releases and media coverage, it is apparent that the information contained in the record is information not available from other sources accessible by the public or that could be obtained by observation or independent study. Vale's correspondence with the Department indicates an expectation of confidentiality at the time it communicated the information. The information in question meets the second part of the test.

Report 2021-010, released February 18, 2021 concerned, in part: "the login information of a third party law firm's teleconference account". These login numbers were specifically assigned to the public body to enable secure conversations with counsel. The OIPC accepted that the information was commercial information and, as to part two of the test said, at paragraph 30:

> 30. With respect to the second part of the test, the information was supplied in confidence. An explicit confidentiality statement was included in the email supplying the information to Memorial.

It is interesting to note, in contrast, that an acknowledgement that an ATIPP request may be made with respect to information provided by a third party can, in and of itself, be regarded as an indication of a lack of confidentiality.

From Report 2020-004:

> [40] The second part of the three-part test states that the information must have been "supplied, implicitly or explicitly, in confidence." The third parties submit it is stated clearly in the PLAs that the information is to be kept confidential. The PLAs also have "confidential" marked on each page.
>
> [41] However the PLAs [Product Licensing Agreement] outline the terms of agreement and include provisions about the expectations of confidentiality. One such provision acknowledges that information may be subject to access to information requests:
>
> > 7.3 The Parties acknowledge that the Minister is subject to the provisions of the Newfoundland and Labrador Access to Information and Protection of Privacy Act (ATIPPA) and the Management of Information Act. Where Supplier Confidential Information is requested under the ATIPPA and the Management of Information Act or required to be released under an order, the Supplier will be notified in writing at least fifteen (15) business days in advance of the disclosure deadline, and if not practically possible to do so, the Supplier will be notified as soon as practically possible.
>
> [42] Therefore, this Office is satisfied that the information in the records is not supplied in confidence by the third parties.

Some may question why the simple acknowledgement that an ATIPP request can be made – a possibility that does not need acknowledgement – is considered to foreclose the possibility of arguing – as specifically contemplated by ATIPPA – that information was supplied in confidence.

It is not necessary for present purposes to review the decisions that have considered the confidentiality factor. But it is self-evident that refusing to apply the exception based on the absence of acceptable proof of confidentiality could well lead to disclosure in circumstances in which there could be a reasonable expectation of probable harm.

For example, in the circumstances considered in Report 2020-018, the City of Mt. Pearl, although believing that s. 39 was not applicable to the request, nonetheless gave the third party notice. The third party complained.

From the report:

> [5] The City submitted that it did not believe the information contained within the records would cause significant harm to the Third Party's competitive advantage, or result in undue gain or loss to any party, highlighting this Office's previous findings on this portion of the test requiring the likelihood of harm to be, "more than speculative" and that, "heightened competition should not be interpreted as significant harm." …
>
> [6] While the City did not conclude that disclosure of the information within the records would result in significant harm to the Third Party, it acknowledged there are no subject-matter experts at the City. The City therefore decided to notify the Third Party pursuant to section 19(5) of the Act.

The third party was unable to prove the element of confidentiality. The report continues:

> [20] As the Third Party has not satisfied the second part of the three-part test under section 39(1) of ATIPPA, 2015, this Office finds that section 39 does not apply to the information at issue and the records cannot be withheld from disclosure. The Third Party failed the second part of the test, and therefore we do not need to assess the third part.

The report went on to point out that if the public body is of the view that the confidentiality element is not established, then no question of refusal of disclosure can arise and there is no need to engage the third party in the process, regardless of any potential harm. At paragraph 21:

> [21] It is worth highlighting that public bodies assessing the application of section 39(1) of ATIPPA, 2015 to records during the request for information process should ensure they are examining each of the three parts of the test as outlined above. In this case, if a proper assessment of sec-

> tion 39(1)(b) had been conducted, the City could have concluded the records in question do not meet that portion of the test and an assessment of harm requiring subject matter expertise would not have been necessary to conclusively determine the records fail the application of section 39. Had that occurred, there would not have been need to notify the Third Party and the records could have been released to the Applicant in a more timely manner.

This scenario is of course a creature of the three-part test. The confidentiality element, based on this Committee's analysis, is notoriously difficult to establish and, to the objective observer, engages what may be considered an unnecessarily technical and complex analysis. It is a class-based factor, not directly related to harm, other than in the sense of being regarded as implicit in any finding of harm. That is, it may be argued, 'if it is not confidential, then how would any harm flow from release of the information?'

With respect to the s. 39(1)(c) requirement of a reasonable expectation of an adverse consequence – in four iterations – only two reports found that the expectation had been established. Of the 57 reports reviewed, 40 did not find the requirement established, the issue was not considered in 13, one found the requirement partially met, and two found the requirement met.

The 'partially met' instance involved bank account numbers – Report 2019-027. Report 2018-007 found that an expectation of an adverse consequence was established under paragraph 39(1)(c)(ii) – similar information not being supplied to the public body in the future. The second report which found that harm had been established is 2021-010 - referred to earlier. Harm was established pursuant to paragraph 39(1)(c)(iii) in the form of potential financial loss resulting from a loss of teleconference security. Paragraph 31:

> [31] As to the third part of the test, we accept that, in this instance, disclosure of the information could be reasonably expected to result in the harms listed in 39(c)(iii): undue financial loss or gain to any person. Communications between lawyers and their clients are among the most guarded conversations. Compromising the security of the law firm's teleconferencing platform potentially opens its clients to financial loss or harm and the law firm to liability for such losses incurred by its clients. Therefore, harm is not merely possible, but could be reasonably expected. The only purpose that the disclosure of this information could serve is the unauthorized access into a privileged conversation between a lawyer and their client.

This is the only report in which there was a finding of a reasonable expectation of loss to a third party.

It will be evident, even from this brief discussion, that a focus on a stand-alone confidentiality factor obscures the real point. That real point for consideration is not the nature of the information, nor its (uncertain) characterization as confidential or otherwise. The real point is the interest of the third party in non-disclosure; will the third party suffer harm – as defined by the *Act* – if the information is released? And as confirmed in the 2019–2020 OIPC Annual Report referred to above, "most matters did not require assessment" of a reasonable expectation of harm.

I recognize that any recommendation to change the current three-part test would be a departure from what is now considered to be the norm and would likely face strong opposition from the OIPC. However, the 'norm' has not, to my understanding, been subject to an independent review of its operation.

There are only five jurisdictions in Canada that require mandatory periodic review of their freedom of information legislation – Yukon, British Columbia, P.E.I., New Brunswick and Newfoundland and Labrador:

- British Columbia's Act requires that a special committee of the Legislative Assembly review the provisions of the *Act* every 6 years. BC appointed a Special Committee consisting of a number of elected officials to undertake a comprehensive review of the *Act* on May 27, 2015. Third party business interests were not discussed at length in the Committee's report. The Committee wrote, "Committee Members were sympathetic to the concerns of ICBC and BC Lottery Corporation regarding the application of s. 21 in the context of their particular corporate activities. However, they questioned whether the concerns were so serious and widespread that they warranted amendments to FIPPA." It does not appear that the next review has commenced.
- The Yukon has a legislative requirement to review its *Ac*t every 6 years. The last review began in late 2015 and amendments came into effect on April 1, 2021. The 2015 report does not discuss issues regarding third party interests. Despite the lack of reference in the 2015 report to third party interests, the amendments that came into force on April 1, 2021 repealed the three-part test and substituted a one-part confidentiality test and a harms-based approach to non-confidential information.

- Prince Edward Island amended its *Act* in mid-2018 to add a mandatory statutory review requirement every 6 years.
- New Brunswick has a legislative requirement to undertake a comprehensive review of the operation of its *Act* every 4 years. The last review was completed by the Minister of Government Services in 2015. The discussion on third party business information in the report was limited to whether the 30 day response time timeline was long enough to consult third parties. The minister's recommendation was to "Develop guidelines for public bodies on the process and timelines for third-party consultation." It does not appear that the next review has commenced.

While the Newfoundland legislation does not specifically refer to an "independent" review, it is clear from the practice and from the Terms of Reference that the review is intended to be independent of government. Of course, it is not only independent of government. The review is independent of all interest groups – public bodies, advocates, and third parties.

At the risk of some repetition, what is the purpose of the exception for third party commercial interests? It is, as acknowledged by the Wells Committee, to provide a limited area in which a third party can say that the potential harm to its interests from disclosure are such that they outweigh the public's right to have access to the information in question.

The exceptions in *ATIPPA, 2015* are, broadly speaking, either harm-based or class-based. There is much to be said for the elegant and focused view of the Centre for Law and Democracy that any exception should be harm-based. Indeed, the prospect of harm underlies many of the other exceptions in the *Act*. For present purposes, it is instructive to review the structure of the other harm-based exceptions (excluding those relating to personal information).

Disclosure harmful to law enforcement

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

(a) interfere with or harm a law enforcement matter;

(b) prejudice the defence of Canada or of a foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;

(c) reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement;

(d) reveal the identity of a confidential source of law enforcement information or reveal information provided by that source with respect to a law enforcement matter;

(e) reveal law enforcement intelligence information;

(f) endanger the life or physical safety of a law enforcement officer or another person;

(g) reveal information relating to or used in the exercise of prosecutorial discretion;

(h) deprive a person of the right to a fair trial or impartial adjudication;

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) facilitate the commission or tend to impede the detection of an offence under an Act or regulation of the province or Canada ;

(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;

(m) reveal technical information about weapons used or that may be used in law enforcement;

(n) adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

(o) reveal information in a correctional record supplied, implicitly or explicitly, in confidence; or

(p) harm the conduct of existing or imminent legal proceedings.

Each one of these requires a straightforward assessment of a reasonable expectation of harm. It is necessary only to ask the question – 'what could reasonably happen if this information is released?' Some of the types of information referred to could, in all

likelihood, have come from a third party – e.g. (l), (m), (n); nonetheless, the question remains the same – 'what if the information is released?'

Disclosure harmful to intergovernmental relations or negotiations

34. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:

(i) the government of Canada or a province,

(ii) the council of a local government body,

(iii) the government of a foreign state,

(iv) an international organization of states, or

(v) the Nunatsiavut Government; or

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.

It is interesting that this provision sets out a one-part test – harm to intergovernmental relations **or** the disclosure of confidential information. It is also noteworthy that the level of harm necessary to trigger the exception is less than that required to satisfy the element of harm to a third party's commercial interests – "harm" versus "significant harm".

For present purposes, the relevance of s. 34 is the fact that disclosure may be refused simply on the basis of proof of a reasonable expectation of harm.

Disclosure harmful to the financial or economic interests of a public body

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

(a) trade secrets of a public body or the government of the province;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

(e) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;

(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or

(h) information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.

This section refers mainly to class-based exceptions. There are harm-based exceptions in (d), (e), (g) and (h). When a harm-based exception is invoked, nothing more need be established other than the particular harm outlined. Again, it is of passing interest to note the differing levels of protection granted to a third party – "significant loss or gain" and to a public body – "prejudice" or "injurious".

Disclosure harmful to conservation

36. The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of

(a) fossil sites, natural sites or sites that have an anthropological or heritage value;

(b) an endangered, threatened or vulnerable species, sub-species or a population of a species; or

(c) a rare or endangered living resource.

This exception requires only proof of damage to or interference with conservation.

Disclosure harmful to individual or public safety

37. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to

(a) threaten the safety or mental or physical health of a person other than the applicant; or

(b) interfere with public safety.

Only a reasonable expectation of the specified harm must be established.

Disclosure harmful to labour relations interests of public body as employer

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

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

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

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

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

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

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

As with s. 34, it is interesting to note the use of the one-part test – confidentiality or proof of harm. Where harm is concerned, the element of harm to the "competitive position of the public body as employer" stands in contrast to the "harm significantly the competitive position" provision applicable to a third party in s. 39. However, the phrase "significant financial loss or gain to the public body as an employer" uses the same 'third party' words as in s. 35(1)(d); in s. 39(1)(c)(iii) the phrase is "undue financial loss or gain to any person".

What does one take from all of this?

Perhaps four points. The first is that where other harm-based (non-personal information) exceptions are provided in the *Act*, nothing more is required than appropriate proof of the harm or reasonable expectation of harm. No additional proof of a class-type element such as confidentiality is required.

The second point is that in s. 35 and s. 38, the interests of the public body in non-disclosure may be protected simply by proof of confidentiality.

Thirdly, the exception available in s. 35(1)(a) to "trade secrets of a public body" requires only proof of the fact of a trade secret. Contrast this with a trade secret asserted by a third party under s. 39; the third party must establish not only the fact of the trade secret, but also that it was supplied in confidence and that one of the harm-based factors also exists.

Lastly, the differing levels of harm applicable to public bodies and third parties are notable.

The focus of the submissions to the Wells Committee was on the reversion to the one-part test in Bill 29 and whether that one part regime should be retained. It was not necessary to engage in a detailed consideration of the actual operation of the three-part test nor to discuss the rationale for the different levels of protection afforded to public body commercial interests and private commercial interests.

While the varying levels of protection – harm versus significant harm and the like – may be an interesting topic for debate, I do not propose to discuss it further. The difference as between public and private interests was not raised in the presentations or submissions to this Committee and, as a result, I am not fully informed on the reasons for

the current wording of the provisions. But having said that, one can readily appreciate that the overall public interest in the protection of information in the custody of public bodies may be paramount to the interests of a single private entity in the protection of its own information.

However, 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.

I mentioned previously the 2021 amendments to the legislation in the Yukon. The 2002 legislation (s. 24(1)) included the mirror image of Newfoundland and Labrador's s. 39(1) – (with the exception of the deletion of the word "organization" in paragraph (c)(iii). The new *Act* contains a mandatory exception for confidential information:

> *69(1) Subject to subsections (2) and (3), the head of a responsive public body must not grant an applicant access to information held by the responsive public body that*
>
> *(a) is a trade secret of, or is the commercial, financial, scientific or technical information of, a third party that a public body has, in the prescribed manner, accepted in confidence from the third party; or …*
>
> *(2) The head of a responsive public body may grant an applicant access to third party information referred to in subsection (1) if*
>
> *(a) the third paty consents, in writing, to the disclosure of the information;*
>
> *(b) the third party has made the information available to the public; or*
>
> *(c) the information is publicly available information.*

If the information is not confidential, a discretionary harm-based exception applies:

> *77(1) Subject to subsections (2) and (3), the head of a responsive public body may deny an applicant access to information held by the responsive public body that is a trade secret of, or commercial, financial, scientific or technical information of,*

a third party that a public body has not accepted in confidence in the prescribed manner from the third party if

(a) the head determines that disclosure of the information could reasonably be expected to result in undue financial loss or gain to a person or entity;

(b) the head determines that disclosure of the information could reasonably be expected to result in similar information no longer being supplied to the responsive public body and the head is satisfied that it is in the public interest that similar information continue to be supplied to the responsive public body;

(c) the head determines that disclosure of the information could reasonably be expected to significantly harm the competitive or negotiating position of the third party; or

(d) the head determines that disclosure of the information could reasonably be expected to harm or interfere with the work of an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute. …

In the course of the public presentations, the Committee convened a session of interested parties at a s. 39 roundtable, intended to provide an opportunity for a focused exchange of views on the operations of that section. The following are some excerpts from that session and subsequent submissions. The excerpts are lengthy, properly so, but they provide a good indication of the opposing views and the reasons offered in support of those views.

CHAIR ORSBORN: I'm finding the discussion interesting and I'm trying to get my head around the interests that are at stake in section 39. I guess I would ask you each to just take an objective look at it and just say – and I appreciate this is a common provision – what would be lost if the confidentiality section were taken out? What difference would it make? I would be interested in your views on that and, in essence, rather than focusing on the character of information, that one would focus on the harm that would flow from any disclosure. I think it would be a useful discussion, for me, anyway. (Transcript of January 28, 2021, p. 229)

MR. MURRAY: …

You asked the question about what if we removed the in-confidence provision entirely. …

I think that's a necessary provision to protect the interests of third parties. Even though we've found that in the procurement context, in most cases third

parties are not able to meet that threshold of supplied implicitly or explicitly in confidence, but that's not necessarily in every instance. (p. 236)

MR. HARVEY: Just to respond to a couple of the things that have been said so far, and some of this is going to kind of echo the things that Mr. Murray has said. When I think practically about how the analysis is done on the three-part test, so an ATIPP coordinator is thinking about the three-part tests in sequence. Even though in the act each of the three parts stands on their own, they also have a logical sequence to them where you can imagine that part number one is potentially broader than part number two, which in turn is potentially broader than part number three. So there's a logic to why you would consider them in sequence.

It does become a kind of screening operation to help assist in the processing of documents to say, okay, well is this indeed commercial information? Then, yes, the exception applies. Then you move on to the second part and it helps when you're processing 1,000 to 6,000 pages of responsive records to be able to proceed down through that checklist.

When it comes to our office, however, the hypothetical notion has been raised: Well, what if we had a record that would have passed on the third test and the first test but failed on the second test and therefore removing, if we truly want this to be a harmless based exception and I think we believe that it should be a harm's based exception, then would removing the second part of the test, which is kind of class-based, therefore allow us to more quickly get to the heart of the matter which is the harm's-based question?

If that had been a real problem, if we were indeed stumbling and we do, I would say, a lot of the cases that we've reviewed fail on the second part of the test, but that's not to say that the analysis on the third part of the test doesn't get done. Often when we write reports, we will say: The record doesn't pass the second part of the test, therefore, we recommend its release and we don't need to go into the third part of the test.

Although, there's been a number of reports that I've signed over the last year and a bit where we've said: Well, it fails on the second part of the test, but we're going to talk about the third part of the test anyway. Even in the reports where we don't talk about it, the analysis is done. I mean, we would give consideration and we would receive submissions from the third party and from the public body about the third part of the test.

CHAIR ORSBORN: Do you happen to run into a situation where the second part has not been satisfied but you found that the third part was satisfied?

MR. HARVEY: We have not run into that situation, we just haven't. (p. 239)
…

> **MR. HARVEY:** Essentially, our take on this whole section of the act is, really, there's no problem. Even though it's problematic, I'll say, in that it makes things uncomfortable – it causes work for public servants, and third parties might not be happy about it because they might be revealing more than what they want to – I'd argue that just because it's problematic and just because it creates work doesn't necessarily mean that there is actually a problem. Doing business with government may require hard work and being transparent may require hard work. That is kind of the nature of the game. …
>
> **CHAIR ORSBORN:** Sorry, I keep coming back to it. You have the situation then that stuff comes in to you and you're satisfied, in this particular case, on the evidence that's brought before you that the third part is established. Let's assume that. The contract or whatever it is, the documents also say they were subject to ATIPPA so that takes away the confidentiality aspect of it, so the information then gets released, even though you concluded there would be significant harm?
>
> **MR. HARVEY:** If I were to be in that situation, I would comment on that in the conclusion section of the report. I would comment that this was an unusual situation in which they failed on the second part of the test, but they would have passed on the third part of the test and the first part of the test. So while under normal circumstance such information would have been released, I'm compelled to recommend – sorry, while usually it would be withheld, I would be compelled to recommend that it be released. (p. 240)

It will be evident from this exchange that it may have been somewhat unfair to the parties present to put the hypothetical question to them without giving them adequate opportunity to gather their thoughts. Accordingly, subsequent to the roundtable, the Committee wrote each of the participants as follows:

> As participants/viewers in the s. 39 roundtable session, you may recall that I asked a question aimed at the issue of refusing to provide a record simply on the basis of proof of a trade secret or proof of a specified harm (proof to the satisfaction of the OIPC). The question was an attempt to assess the value/point of the stand-alone confidentiality requirement in a harm-directed exception. The requirement to establish confidentiality, some may suggest, seems to generate a lot of perhaps unnecessary work and discussion unrelated to any issue of real harm.
>
> No doubt because I asked the question in less than clear terms, the discussion in response did not focus on the 'added value', if any, of the confidentiality provision.
>
> I thought it might help the discussion and my consideration if I were to frame the issue in the context of a hypothetical 'for discussion purposes only' statutory provision.

May I ask you, for purposes of discussion, to assume the following provision:

> 39. (1)The head of a public body shall refuse to disclose to an applicant information
>
> (a) that would reveal trade secrets of a third party,
>
> (b) commercial, financial, labour relations, scientific or technical information of a third party 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,
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person ore body appointed to resolve or inquire into a labour relations dispute, or
>
> (v) otherwise cause significant harm to the third party or the public body due to any loss of any confidentiality.
>
> (2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.
>
> (3) Subsections (1) and (2) do not apply where
>
> (a) the third party consents to the disclosure; or
>
> (b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50(?) years or more.

(Need to amend s. 9 to include s. 39)

(Generally this reflects the current 39, but with the deletion of the confidentiality requirement and the addition of an override.)

Assuming the above statutory provision I would ask you to:

Assume that the OIPC is satisfied that the information is a trade secret, or the OIPC is satisfied that one of the harms in paragraph (1)(b) has been proven. Assume also that the (4) public interest override is not satisfied. In these circumstances, should disclosure be refused or granted? Somewhat related, should it be made explicit that the OIPC can recommend granting access on the basis of the public interest override?

Any comments you would have on this scenario would be appreciated. Responses will be posted on the Committee website. As I have said on more than one occasion, and although the product of this review is of course my responsibility, I do consider the review a collaborative effort by all interested in the legislation.

Four considered responses were received.

From the Heavy Civil Association of Newfoundland and Labrador, in part:

Should Disclosure be Granted in the Assumed Circumstances: The Confidentiality Requirement

The Heavy Civil Association of Newfoundland and Labrador (the "**Association**") believes disclosure should be refused in the circumstances outlined in the Feb 9 Letter.

If a third party has proven that records subject to disclosure are either (a) a trade secret or (b) information causing the types of harm outlined in the revised section 39(1)(b), the Association believes that alone is enough cause to withhold the record. There should not be a stand-alone confidentiality requirement. Whether records were supplied to the public body in confidence does not add significant value in determining whether the information is such that a third party could be harmed by its disclosure to the public (including if the potential third-party harm is being weighed against any public interest override).

The types of information described in the revised sections 39(1)(a) and (b) are inherently confidential in nature. A trade secret is just that, a secret held by the third party. Information that, if disclosed, would result in financial loss to a third party or harm a third party's competitive position is intrinsically information that such third party would treat confidentiality. If the test for either revised section 39(1)(a) or (b) is met, the question as to whether the in-

> formation is in fact confidential has already been answered– there is no need for a separate part of the test in that regard.
>
> The Association submits that the revised section 39(1)(b)(v) is a more relevant, realistic, and commercially reasonable reference to confidentiality in respect of third party information. The current stand-alone test for confidentiality is burdensome and often difficult to make out. Although the wording requires the information to have been provided "implicitly or explicitly in confidence", interpretation of the provision has gone far beyond that wording and requires information to explicitly be provided in confidence. The Association submits that the wording in revised section 39(1)(b)(v) achieves the proper goal of protecting third party information by asking if, in fact, at the time of disclosure, the information would cause the third party a loss of confidentiality. That test is significantly more relevant than whether the third party marked "confidential, subject to section 39 of the Act" next to the confidential information it submits – a part of the current test according to the Office of the Information and Privacy Commissioner's (the "**OPIC**") interpretation of section 39(1)(b) and section 8(2) of the *Public Procurement Regulations* (Newfoundland and Labrador). That requirement of the test can be irrelevant in determining if, in fact, the third party considers the information to be confidential in nature at the time of its potential disclosure.

And on the availability of the public interest override in the context of third party business interests – in part:

> A Public Interest Override
>
> The Association understands the rationale supporting a public interest override – the Act is public interest legislation. If there was to be a limiting factor on the protection of third-party interests under the Act, it makes sense that it would be the legitimate interest of the public. The Act already contains a broad public interest exception applicable to most exceptions to disclosure at section 9.
>
> However, as drafted in the revised section 39(4), the Association has concerns about the vagueness of the wording and how it may be interpreted. "[T]he public interest in disclosure clearly outweighs in importance any harm to the… third party" leaves a lot of room for interpretation on what constitutes "public interest" and "clearly outweighs in importance." The Association's concern is that without more specific or limiting language, public bodies could rely on this override to justify disclosure of any information that members of the public would like to know – even if it is not truly in the "public interest" in the broader and more significant sense. …
>
> Construction and infrastructure projects, particularly large-scale ones, often contribute to public debate in the Province. The Association submits that

wide-spread debate regarding an issue by itself does not necessarily create a public interest in disclosure of information related to the issue, unless the debate itself is in respect of a legitimate lack of transparency. Even in that instance, disclosure should relate specifically to the information being requested by or necessary to properly inform the public debate. …

The Association submits that any public interest override added to section 39 of the Act should contain more specific wording or limiting factors than what is presently in the revised section 39(4).

For example, New Brunswick's *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6 contains a public interest override for third party records with specific language as to what should be considered:

> 22(4)Subject to section 34 and any other exception provided for in this Act, the head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of
>
> (a) improved competition, or
>
> (b) government regulation of undesirable trade practices.

Further, Ontario's *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31's public interest override is only applicable to records that reveal significant risks to the public:

> *11 (1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.*

The submission of the College of the North Atlantic – in part:

Using the hypothetical version of S. 39 presented in your letter and assuming that the information in question is a trade secret or proven to be one of the harms set out in S.(1)(b) and that the public interest override set out in S.4 is not satisfied, we believe disclosure should be refused.

CNA maintains that any circumstance where information can potentially harm a third party's business interests and where the public interest is either unaffected, or even possibly negatively impacted, the information should be withheld from disclosure. The experience of the college is that business relationships formed with private businesses have significant benefits to the people of

Newfoundland and Labrador. Protecting these relationships serves the public interest.

2. Should it be made explicit that the OIPC can recommend granting access on the basis of the public interest override?

The college does not believe this is necessary. The OIPC has the ability to review the decisions of a public body as per S. 42 of the Act. This continues to be sufficient. We caution that adding such wording may in fact create ambiguity and promote future requests for clarity from the courts.

The OIPC's submission, in part:

Thank you for your letter of February 9, 2021. We have responded to your questions below, however, we have also taken the opportunity, on the presumption that this particular model may be under consideration as a potential recommendation, to make other comments about the hypothetical amendments.

The access to information provisions in *ATIPPA, 2015*, and indeed all similar statutes in Canada, begin with the proposition that there is a public right of access to records in the control or custody of public bodies, with limited and specific exceptions. If there is consideration being given to broadening those exceptions, we are of the view that there must be clear and substantial evidence that it is necessary to take that action, because it amounts to a reduction in the public right of access. When it comes to section 33, for example, that evidence is readily apparent that an amendment is required. To date, nothing that we have seen in written submissions, nor in oral presentations, nor in our many years of carrying out our oversight role, constitutes evidence that section 39 is not adequate to the job, and that Newfoundlanders and Labradorians should accept less than our current standard of access to information.

Background

The vast majority of requests to public bodies for information that requires consideration of sections 19 and 39 are for disclosure of the financial and other details relating to contracts to supply goods or services to a public body.

As a matter of policy, it is accepted across the country that most of the information contained in such contracts should be disclosed, to further the goals of accountability and transparency. Our Court of Appeal recognized this in the *Corporate Express* decision:

> [35] Also, see the comments of Strayer J. in his earlier decision of Société Gamma Inc. v. Canada (Department of Secretary of State) (1994), 47

A.C.W.S. (3d) 898, 56 C.P.R. (3d) 58. In that case, when considering whether information supplied in the course of public procurement was confidential in the context of subsection 20(1) of the *Access to Information Act* (the "*Federal Act*") being equivalent to subsection 27(1) of *ATIPPA*, Strayer J. wrote:

> One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract, he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability. *The onus as has been well established is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature.* [Emphasis mine]

It is not because the disclosure of the information in such contracts cannot affect confidentiality, or the competitive position of suppliers – sometimes it will. Rather, it is fundamentally because government procurement must be done on the basis of "open contracts, openly arrived at." Some loss of confidentiality, or intensification of competition, is to be regarded as a necessary effect of doing business with public bodies.

Of the confidentiality element, the OIPC submitted:

> Supplied in Confidence – the Lynchpin of Section 39
>
> The key to the predictable, smooth and efficient operation of this provision of the Act is not the harms test, or even the confidentiality test. It is the "supplied" test. It neatly and clearly encapsulates the distinction between the terms of a negotiated agreement, on the one hand, and other background information that may be provided by the third party to support its position, on the other hand. That is the distinction between what is "negotiated" and what is "supplied."
>
> The former is the subject, and the result, of the negotiation between the parties that led to an agreement. It must be disclosed so that the public can scrutinize how much a public body is paying, to whom, and for what. These are

the specifications, unit prices and quantities that are the core of every procurement contract. This is the essence of accountability, and there is no more important measure of the effectiveness of an access to information statute than the mechanisms through which it makes available information about how and on what public money is spent.

The "supplied" information is different. It has sometimes been referred to as "immutable" not merely because it cannot change, but because it was not and could not have been arrived at in the course of negotiating the agreement, but outside and prior to it. For example, the details of a third party's insurance coverage, or its audited financial statements; details of its arrangements for security or protection of a worksite; details of its proprietary data-management software; details of the experience and professional qualifications of its personnel. This information may have to be provided to the public body as a requirement of a contract, but it was not created by the negotiation of the contract.

The great value of this "supplied" test is that it clearly and easily distinguishes between the two kinds of commercial or financial information. If the information does not meet the "supplied" test, then the analysis is over. This means that public bodies and third parties proposing to enter into contracts with them can easily and quickly determine what information can be kept confidential (if the harm test is also met) and what cannot. Everyone can be clear from the beginning about what information may be subject to disclosure through an access request.

For clarity, certainty and ease of operation the "negotiated or supplied" distinction should be kept as a component of section 39. Without it, we lose the clarity we now have, and along with it, thirty or more years of Canadian case law.

There are other practical considerations for the ATIPP system as a whole. Under the hypothetical formulation, lacking the relatively clear cut "supplied" test, it would be in the interest of third parties to appeal every time, and the decision will come down to harm, which is a more nebulous concept to grapple with than supplied in confidence. Certainly, we would be much less likely to see public bodies claim the hypothetical version of section 39 without needing to notify third parties, because the main thing public bodies have identified as being difficult about section 39 as it currently exists is the assessment of harm. As it currently exists in the three-part test, they need only concern themselves with the harm portion if they believe that "supplied in confidence" has been met. By removing the "supplied in confidence" requirement, every request involving a third party will require a harm assessment, which will likely result in a large number of complaints and subsequent court appeals.

One of the key features of the Bill 29 review was a keen focus on "user-friendliness" in the Act. Certainly, while the "supplied in confidence" concept

might be new to third parties when they first encounter it, there are ample guidance documents and case law available to explain it. Harm, on the other hand, is an often misunderstood concept, and a more nebulous one to explain. The other important user here is the public body coordinator. It is worthwhile to briefly scan the ATIPPA Guide for Municipalities to get a flavour for the level that most municipal coordinators, and therefore most coordinators, are operating from. Clarity and consistency are necessary for these public servants, who often perform coordinator duties from the proverbial "corner of the desk" along with many other duties. The more straightforward we can make the decision-making process, with the clearest guard rails, the more we will contribute to the user-friendliness of this provision from their perspective.

Another important rationale for retaining the current three-part test with the "supplied in confidence" threshold which is common to several jurisdictions across Canada, is that it facilitates informal resolution of complaints. When we have a well-established, clear threshold in the statute, we have the ability to walk through the guidance and case law with third parties to resolve cases that would otherwise absorb the resources of public bodies and third parties, and potentially delay access for applicants unnecessarily. It will be much more difficult to resolve those cases when they revolve around proof of harm. Our experience is that the mere idea of disclosing information that references them has at times resulted in third party appeals. Harm is often asserted by third parties but is much less often supported by evidence.

The hypothetical section 39, if implemented, might result in roughly the same level of transparency, or it might result in less. It will certainly result in a great deal more difficulty to administer, and a much higher investment on the part of public bodies, applicants and third parties in the complaint and appeal process.

With respect to trade secrets:

Trade Secrets

British Columbia's FIPPA contains a definition of "trade secret". Ontario's Commissioner adopted its own definition in an early Order (M-29). After reviewing dozens of decisions from these and other jurisdictions, it is apparent that cases where information was found to actually meet the definition are extremely rare. As expressed in our earlier oral presentation, we suspect this is likely because it would be extremely rare for a third party to provide its trade secrets to a public body.

In Société Gamma Inc. v. Canada (Secretary of State) Strayer J. held:

> *In the absence of authoritative jurisprudence on what is a "trade secret" for the purposes of s. 20(1), the Court held that "trade secrets" must have a*

> *reasonably narrow interpretation, since one would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial … confidential information supplied to a government institution … treated consistently in a confidential manner …" which is protected under s. 20(1)(b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution.* A trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure.

Effectively, the definition of "trade secret" is such that if a record were to be encountered to which the label "trade secret" could be correctly applied, by its very definition the disclosure of it would likely meet the harm threshold. Alberta's statutory definition, for example, even includes harm as one of its essential elements:

> 1(s) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process
>
> (i) that is used, or may be used, in business or for any commercial purpose,
>
> (ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,
>
> (iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (iv) the disclosure of which would result in significant harm or undue financial loss or gain.

The only question, then is whether such information could be deemed to be "supplied in confidence" even in the procurement context. After searching dozens of decisions from several different jurisdictions, it has been very difficult to even find an instance where the trade secret of a third party has been included within a set of responsive records that is subject to a complaint. Decisions which find that the responsive information *does not* meet the definition of "trade secret" are not particularly rare, however. Alberta Order F2011-011 appears to be one exception. The Adjudicator in that case found the information to be a trade secret, and also that it met all three parts of the test, despite the procurement context.

Given the foregoing, redesigning a statutory provision in *ATIPPA, 2015* by carving out a special place for trade secrets seems unnecessary because

(a) the jurisprudence from ours and other Commissioner's offices indicates that it is extremely unlikely that trade secrets will be subject to access to information requests because of the apparent rarity of such information actually being disclosed to public bodies by third parties; and

(b) in the exceedingly rare event that such information is disclosed to public bodies, Alberta Order F2011-011 demonstrates that the statute is capable of supporting information being withheld when warranted.

Alternatively, if the status of trade secrets within section 39 is of particular concern, given the rarity of its appearance in access to information complaints, Commissioner's Reports, and court decisions, one option might be to incorporate within *ATIPPA, 2015* the definition of trade secrets in Alberta's *FIPPA*, and carve trade secrets out as a standalone exception, leaving the remainder of section 39 as is.

The OIPC's position on the public interest override:

> The starting assumption and questions you posed are as follows:
> Assuming the above statutory provision I would ask you to:
>
> 1. Assume that
> (i) The OIPC is satisfied that the information is a trade secret, or
> (ii) The OIPC is satisfied that one of the harms in paragraph (l)(b) has been proven.
>
> 2. Assume also that the (4) public interest override is not satisfied.
>
> Your two questions are as follows:
> *A) In these circumstances, should disclosure be refused or granted?*
> *B) Somewhat related, should it be made explicit that the OIPC can recommend granting access on the basis of the public interest override?*

Our combined response to both questions follows, along with additional comments:
On review, the Commissioner would recommend that disclosure should be refused. The assumption you provided indicates that we have found that the exception applies. The language in the hypothetical section 39(4) is different from the language that currently exists in section 9. Section 9 says the exception "shall not apply" where the conditions are met for the override. The hypothetical draft of 39(4) appears to simply give the public body the discretion to release information that is otherwise subject to a mandatory exception, because it says "the head of a public body *may* disclose."

The Commissioner does not have the authority to recommend disclosure of a record to which a public body is authorized to refuse disclosure. Conceivably, we could recommend reconsideration of the decision under section 47(b), but that would be the extent of our authority. The answer to your second question, then, is that the provision would need to be formulated differently in order for the OIPC to recommend that access be granted on the basis of the public interest provision as currently proposed.

There are also other considerations for the statute in light of such a hypothetical provision. In terms of the burden of proof, the public body in section 43(1) has to prove that the applicant has no right of access. Functionally that means that the public body must prove that the exception applies, which as noted, we are presumed to have concluded.

If hypothetical section 39(4) were to be contemplated for inclusion in the statute, consideration would need to be given to the declaration provision in section 50(2), which is currently divided into (a) and (b) for circumstances where refusal is either authorized or required. In either case, if we have already made a finding that the exception applies, yet recommended disclosure based on consideration of the hypothetical 39(4), a Court must grant a declaration that the public body need not follow the recommendation to disclose.

Section 50(5) says that sections 57 to 60 apply to a declaration application. We should therefore turn to section 60(2), where again, we encounter statutory language which has been customized for the present section 9, but is not a good fit for the hypothetical section 39(4).

It is our view that the hypothetical section 39(4) could not result in a recommendation for disclosure once we have concluded that the exception applies as such a recommendation would likely not survive a declaration application, or for that matter, an appeal by a third party.

Furthermore, and most importantly, the hypothetical section 39(4) is unlikely to be used. For one, our experience is that when public bodies find that a discretionary exception applies, they claim it. Whether or not the claim is valid is the matter under consideration upon review by the OIPC or in a Court Appeal, rather than the exercise of discretion. To convert section 39 to a discretionary exception under the conditions outlined in section 39(4) is unlikely to result in greater transparency to any significant degree. Even section 9 itself is a very high threshold, however it at least has the advantage that once the threshold is met, the exception no longer applies. Functionally, the hypothetical section 39 cannot be considered to be an "over-ride" provision because it does not actually over-ride the exception. It merely inserts an additional decision point where the public body has an opportunity to exercise discretion. Based on what we have heard and what we know from our experience with public bodies, there is a strong orientation towards maintaining positive working relationships with third parties, which we believe would certainly militate against

> a public body exercising its discretion to disclose information to which the exception has been found to apply. An alternative may simply be to list section 39 in section 9(2).
>
> We appreciate your efforts to improve this section of the *Act* that has generated so much discussion. With respect to the submissions made by other parties, just because there is dissatisfaction with the section does not mean that it is not achieving the public policy purpose for which it was intended. Certainly, we have not heard any dissatisfaction from the public, who are largely absent but essential stakeholders whose voice we attempt to represent in addition to our own. As we noted above, the policy purpose of the section as we understand it was to provide greater transparency and accountability in how public bodies do business and spend public money. Such transparency may indeed place a higher level of competitive pressure on commercial third parties who do business with government. This is not a flaw of the provision; it is an essential byproduct. We believe the present level of disclosure is desirable and in the public interest. And so we reiterate that, with the greatest of respect to your efforts to improve this section, it is our view that the evidence is not present to demonstrate that the provision requires amendment or that it does not work well as it is currently designed.

In the course of an email exchange with the Committee, Toby Mendel of the Centre of Law and Democracy said:

> The harm test and public interest override are the touchstones of a proper system in terms of pure standards. But adding in a confidentiality requirement along those lines formally ties officials hands, preventing abuse and thus helping to level the playing field (albeit there is a lot of interpretive scope to the idea of implicit confidentiality). I suppose the issue we need to consider is whether it is likely that third parties will provide commercially sensitive information, or potentially information which becomes commercially sensitive later on, without providing any sign that they are doing so on a confidential basis. If this risk is very low, or can effectively be mitigated by constructing a theory of implicit confidence which addresses such situations (eg to address changing circumstances where information subsequently becomes confidential), then I think there is value in keeping this requirement. If the risk is more material, then perhaps this requirement is not appropriate. I am not sure about this as a matter of fact. Perhaps the experience of the last five years in Newfoundland provides some evidence? …
>
> The point of the confidentiality requirement is to create an essentially procedural barrier to officials over protecting information, which our experience shows happens quite a lot. There is also a certain logic to it. If the supplier of the information does not consider it to be confidential, why should an official bother about that.

This reflects the comment of the Information and Privacy Commissioner during the roundtable:

> **MR. HARVEY:** Just to respond to a couple of the things that have been said so far, and some of this is going to kind of echo the things that Mr. Murray has said. When I think practically about how the analysis is done on the three-part test, so an ATIPP coordinator is thinking about the three-part tests in sequence. Even though in the act each of the three parts stands on their own, they also have a logical sequence to them where you can imagine that part number one is potentially broader than part number two, which in turn is potentially broader than part number three. So there's a logic to why you would consider them in sequence.
>
> It does become a kind of screening operation to help assist in the processing of documents to say, okay, well is this indeed commercial information? Then, yes, the exception applies. Then you move on to the second part and it helps when you're processing 1,000 to 6,000 pages of responsive records to be able to proceed down through that checklist. …
>
> … there's no question that the third part of the test is a high bar and that's why, I mean, practically speaking, it assists in having this kind of sequential process in the act because if an ATIPP coordinator is to know that – there's a lot of work. If I'm going to demonstrate that this is truly proprietary information and its release is truly going to cause harm, then, yeah, I need to hold it back. Well, all of the detailed work, then, might need to be done in that regard, doesn't need to be done if it fails the second part of the test. (Transcript of January 28, 2021, p. 239)

In a subsequent and more comprehensive response, the Centre for Law and Democracy expanded on this argument:

> The first question was whether disclosure of the information should be granted or refused. We assume, from the assumptions, that the matter is before OIPC for this purpose (and that the public body has refused disclosure). The short answer to this question is that, based on the amended provision, disclosure should be refused.
>
> However, we also want to comment here on the first change you have proposed for s. 39, which effectively changes confidentiality from an additional barrier to secrecy to an additional (harm-tested) ground for secrecy (in other words, reverses its role vis-à-vis secrecy). CLD both supports the original formulation of confidentiality in s. 39 as a barrier to secrecy and is strongly opposed to the new formulation of it as an additional ground for secrecy.
>
> In terms of retaining the original formulation, CLD believes that a confidentiality requirement has value as an additional procedural safeguard against

public officials' tendency to treat information in an overly sensitive manner. The fact is that the balance of power in access to information systems is tilted towards public officials, and global experience, as well as experience in Canada, shows that they tend to err on the side against disclosure. CLD's recommendation is therefore to build as many safeguards into the legislation as possible to redress that imbalance. One such safeguard would be to require information to have been provided in confidence, in addition to proving harm and that the public interest does not favour disclosure. This safeguard also makes intuitive sense. If even the original supplier of the information did not do so in confidence, suggesting his or her indifference to others viewing the information, the official should be equally equitable to its release. It may also be noted that inasmuch as this is an essentially objective test (albeit not entirely since it also covers implicit provision in confidence), it introduces clarity and predictability into the system, thereby reducing disputes, including costly appeals to the OIPC and potentially even the courts, which is always a virtue in an administrative system.

It is true that third parties may sometimes provide information that is commercially sensitive or that later turns out to be commercially sensitive without indicating at the time that they are doing so in confidence. We believe that these situations are very rare, with the opposite (information that is not sensitive being stamped as confidential) being far more common. And the implicit confidentiality rule may go some way to redressing any risk of this. We therefore recommend that the current formulation of the "supplied in confidence" be retained.

In terms of the new formulation which relies on "loss of any confidentiality" as an additional form of harm that would justify non-disclosure, we do not believe this is warranted. We note that it is not found in other legislation and yet this has never been considered to be a problem. Put differently, the exception as it is, along with other exceptions, provide sufficient protection for secrecy interests. In other words, the law should not allow a breach of third party confidentiality alone to constitute a harm which would trigger the exception. The main harm that could conceivably result from this would be to relations between the third party and the government, due to the latter refusing to respect the former's confidence. However, third parties are on clear notice that they do business with government under the condition that their information might be released through an objective application of the RTI law, albeit subject to protecting their legitimate commercial interests. As such, any risk of damaged relations is effectively negated.

CLD also notes that subjecting a "loss of confidentiality" exception to a harm test would probably be ineffective in practice, as officials would likely default to assuming harm whenever a third party document had been stamped confidential. This would, then, effectively give third parties a veto over disclosure simply by claiming that any information was confidential. We therefore

> strongly that even if the current formulation is removed from the law, that the new formulation not be added.
>
> Your second question was whether it should be made explicit that OIPC could apply a public interest override in relation to s. 39. Your proposed amendment here would grant the head of a public body the discretion to release information in the public interest, even though this is a mandatory ("shall refuse") exception which are currently excluded from the public interest override provided in s. 9 of the Act.
>
> CLD welcomes any extension of the public interest override, which international law stipulates should apply to all exceptions. However, casting this as a discretionary override probably cannot be justified as a matter of principle and likely robs it of much of its potential benefit in practice. As a matter of principle, if the public interest demands disclosure, public officials should not have the discretion to withhold the information. As a matter of practice, government tendencies towards secrecy mean that public officials will almost inevitably exercise their discretion to decline disclosure. As OIPC indicated during the 28 January 2021 hearing, even the s. 9 mandatory override has never been successfully used in the past five years. A discretionary override would be even less likely to be used. We therefore strongly recommend that the override be cast in mandatory language, just as the existing override in s. 9 is.

The supplementary submission of the OIPC repeated its strong opposition to any change to s. 39. It dealt at length with the particular requirement that information be "supplied in confidence" and with the differences of opinion over whether information is "supplied" or not. At pages 4–5:

> Nalcor and the Oil and Gas Corporation say in their submissions that information in a contract cannot meet part 2 of section 39. While this is often the case, it is not always the case. The exception is immutable information, i.e. information that the third party cannot change. Changeable information is the subject, and the result, of the negotiation between the parties that led to an agreement. Even if no actual negotiation occurs (ie, an offer is made and accepted with no further discussion), a contract arrived at between two parties is the product of both parties. This negotiated information must be disclosed so that the public can scrutinize how much a public body is paying, to whom, and for what. These are the specifications, unit prices and quantities that are the core of every procurement contract. This is the essence of accountability, and there is no more important measure of the effectiveness of an access to information statute than the mechanisms through which it makes available information about how and on what public money is spent.
>
> It is not because the disclosure of the information in such contracts cannot affect confidentiality, or the competitive position of suppliers – sometimes it will. Rather, it is fundamentally because government procurement must be

> done on the basis of open contracts, openly arrived at. Some loss of confidentiality, or intensification of competition, is to be regarded as a necessary effect of doing business with public bodies.
>
> Industry Energy and Technology (IET) submitted that the definition of "supplied" must be changed, that third party companies may not do business in the province because of the current wording of section 39 or that the province may lose opportunities. To this submission we reiterate our original submission – jurisdictions operating with the three-part test that is now in *ATIPPA, 2015* have been doing so for decades (and in this province for the past 5 years) and fears that third parties will no longer do business with public bodies, unless access to information is weakened, have not been borne out.
>
> Another important rationale for retaining the current three-part test with the "supplied in confidence" threshold which is common to several jurisdictions across Canada, is that it facilitates informal resolution of complaints. When we have a well-established, clear threshold in the statute, we have the ability to walk through the guidance and case law with third parties to resolve cases that would otherwise absorb the resources of public bodies and third parties, and potentially delay access for applicants unnecessarily. It will be much more difficult to resolve those cases if step 2 was removed and the test primarily revolves around proof of harm.
>
> The key to the predictable, smooth and efficient operation of this provision of the *Act* is not the harms test, or even the confidentiality test. It is the "supplied" test. It neatly and clearly encapsulates the distinction between the terms of a negotiated agreement, on the one hand, and other background information that may be provided by the third party to support its position, on the other hand. That is the distinction between what is "negotiated" and what is "supplied."
>
> Certainty and ease of operation require that the "negotiated or supplied" distinction should be kept as a component of section 39. Without it, we lose the clarity we now have, and along with it, thirty or more years of Canadian case law.

As I appreciate the submissions of the OIPC and the Centre for Law and Democracy, the rationale for the inclusion of the "supplied in confidence" element as a class-based element of the three-part test is:

1. The requirement of "supplied" is key to the "predictable, smooth and efficient operation" of s. 39, since it is easy to explain, weeds out "negotiated" terms from the information, and thus brings clarity and consistency to the process.

2. Without the 'simple' supplied in confidence element available as an "essentially procedural barrier" to screen out any possible use of the exception, coordinators, being unsure of the availability of the harm element, are more likely to notify third parties, thus delaying access and probably leading to complaints and appeals.

3. It facilitates informal resolution, presumably on the basis that if a third party is persuaded that the supplied in confidence test cannot be met based on established jurisprudence and guidance, there will then be no point in proceeding with a complaint asserting the "nebulous concept" of harm.

I trust that I have fairly characterized the submissions on the benefit of the inclusion of the confidentiality factor in the three-part test. In essence, it is a factor that, in practice at least, serves as a ready screening mechanism – both as to the confidential nature of the information and as to the process or mechanism by which the information came into the possession of the public body.

It is clear from the analysis of the OIPC reports dealing with s. 39 referred to earlier that the 'procedural' screening mechanism is working as anticipated and that it avoids the analysis of a reasonable expectation of harm.

With respect, I do not consider that establishing a class-based procedural barrier or screening mechanism to circumvent what may well be a difficult assessment of likely harm is appropriate or is in accordance with the principles or intent of the harm-based exceptions to the *Act*. Those exceptions serve a purpose – achieving a principled balance of the right of access and the right to be protected from harm. Requiring a party in the possession of commercial information to get over unnecessary procedural hurdles as a pre-condition to the assessment of the asserted harm is not a fair exercise of the balancing process.

This review, as I have said, has had the benefit of being informed by five years' experience, the experience of public bodies, of requestors, of third parties and of the OIPC. That experience, considered together with the structure of the other harm-based exceptions in *ATIPPA, 2015*, persuades me that amendment is required to the structure of s. 39. Any amendment would not affect the substantive level of harm required to be established, but would ensure that the assessment of every request is in fact focused on the potential harm or risk to the interests of the third party.

Leaving aside the particular type of information known as a trade secret – a term familiar to courts and to other adjudicators – I see no point in addressing anything other than the potential for harm – as defined by the *Act* – to the third party.

While this approach may be considered to be a 'one-part test' it should not be equated to the one-part test in other jurisdictions. In those jurisdictions, proof of confidentiality alone is sufficient to trigger the exception. That is not the case in the amendments I am suggesting.

I prefer to refer to the suggested amendment as promoting a 'sufficiency of harm' approach, one that does not allow for dismissing a third party's objection simply on the basis of a lack of acceptable proof of confidentiality and without regard for the possible existence of harm.

If the appropriate standard of proof is applied and the appropriate evidentiary analysis undertaken, and a reasonable expectation of probable "significant harm" is established, what possible sound reason is there for not allowing the exception? Conversely, if the harm is not established, why should access not be granted, supported by the knowledge that a fair assessment of potential harm has been concluded?

In my view, this analysis is all that is reasonably required to balance the interests of the public and the interests of the third party.

After considering all the submissions made, I have concluded that s. 39 should be amended to remove the required element of confidentiality and to rather require the establishment of one of the four existing harm-based factors as the pre-condition to non-disclosure. The present 50-year sunset clause provision in s. 39(3)(b) covering archived third party records should be replaced with a straightforward 20-year sunset clause. (See the discussion of this in the section on sunset clauses.)

As discussed in the section of this report addressing s. 9, I consider it appropriate, notwithstanding the mandatory nature of the exception, to make the exception subject to the s. 9 public interest override.

RECOMMENDATION

That the *Act* be amended to:

- Remove the requirement that information has to have been supplied in confidence from the exception for disclosure harmful to third parties' business interests. [Appendix K, s. 39]
- Provide a mandatory exception for trade secrets. [Appendix K, s. 39(1)(a)]
- Provide a 20-year sunset clause on third-party business information. [Appendix K, s. 39(4)]
- Make the exception for disclosure harmful to third parties' business interests subject to the public interest override. [Appendix K, s. 9(2)]

THIRD PARTY NOTIFICATION

The experience with this provision reveals confusion and non-productive differences of opinion, to the point where the OIPC has chastised public bodies for giving what the OIPC considered unnecessary notification to third parties. The relevant sections:

> *19. (1) Where the head of a public body intends to grant access to a record or part of a record that the head has reason to believe contains information that might be excepted from disclosure under section 39 or 40 , the head shall make every reasonable effort to notify the third party.*
>
> *(2) The time to notify a third party does not suspend the period of time referred to in subsection 16 (1).*
>
> *(3) The head of the public body may provide or describe to the third party the content of the record or part of the record for which access is requested.*
>
> *(4) The third party may consent to the disclosure of the record or part of the record.*
>
> *(5) Where the head of a public body decides to grant access to a record or part of a record and the third party does not consent to the disclosure, the head shall inform the third party in writing*

(a) of the reasons for the decision and the provision of this Act on which the decision is based;

(b) of the content of the record or part of the record for which access is to be given;

(c) that the applicant will be given access to the record or part of the record unless the third party, not later than 15 business days after the head of the public body informs the third party of this decision, files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53 ; and

(d) how to file a complaint or pursue an appeal. …

The submissions to the Committee set out in considerable detail the differing views.

The public bodies ask for clarity. From the submissions of the ATIPP Office:

6.1 Third party representations

Issue

Under both prior versions of the Act, the process for third party notification was similar. In the 2005 version, public bodies were required to send an initial notification to a third party if they were "intending" to disclose the information, while the 2012 version required notification when the public body was "considering" whether the information fell under the mandatory exception to disclosure. In both versions, the third party could either consent to the disclosure or "make representations to the public body explaining why the information should not be disclosed." In addition, third parties had 20 calendar days to review and either provide consent to disclose the information or make said representations. While the language varied, the process was essentially the same – the third party was consulted. The 2014 ATIPPA Review Committee found this process to be unnecessary. In chapter 3.6 of the Report of the 2014 Statutory Review, the Committee summarized their reasoning:

> It is the Committee's view that the notification required by section 28 amounts to a doubling of the consideration that third parties receive under the ATIPPA, since they have a 20-day period to consider whether to object to a disclosure once they receive a written notice. It might also be argued that the requirement to provide notice in the consideration stage provides the third party with the opportunity to influence the public body in its initial determination on whether records should be disclosed. The Committee concludes that it is appropriate for the public body to notify the third party when it has formed the intention to release the in-

formation, and to provide formal notice to the third party when the actual decision to release is made.

Part of their reasoning was that the third party may unduly influence the public body. However, in many cases, consultations with third parties are essential as public bodies are not the owners or subject matter experts of a third party's business information. What the Committee saw as an opportunity for a third party to "influence" a public body, was in fact, the opportunity for a public body to receive input from the owners of the information who would be in the best position to advise whether the release of information in question may or may not be harmful to their business. The public body could then determine whether the harm that the third party had articulated would meet the threshold of the exception to disclosure under the Act.

This consultation did not displace the burden of proving that the applicant has no right to the information from public bodies under the Act; it provided them with necessary insight that would assist in their assessment of whether section 39 (formerly section 27) applied.

Additionally, while the previous Committee took issue with the change in language from "intending" to "considering", this Office would argue that the language under the 2012 Act was clearer than the 2005 and current version of the Act. It is often unclear at what point a public body is "intending" versus "deciding" to disclose information. The clearest way to differentiate the two is to interpret "intending" to mean that you have essentially decided to release the information but have not made the final determination; you are still in the process of deciding (i.e. considering).

Furthermore, the Committee found that this initial notification could occur within the regular 20-day timeframe for responding to a request. It should be noted that contacting third party companies in regards to section 39 can be time consuming. In many cases, coordinators are required to not only compile the records in question and draft a notification letter; they are required to try and explain to third parties what section 39 means and the threshold that must be met for it to apply. Notified companies can be either large or small, depending on the nature of the request and the records involved, with each bringing different challenges. For instance, small companies with limited resources may not have a clear understanding of the Act or what is being asked of them, requiring coordinators to spend additional time answering phone calls and responding to emails in order to help companies understand the process.

Moreover, without a legislated timeframe in which they are required to reply, companies may take longer than required to respond or not respond at all; companies may be difficult to contact or require notice through the mail; or companies may be difficult to work with. Given the considerable time it can take to conduct third party notices, as well as the practical challenges that

may occur, there is often not enough time for public bodies to complete an initial third party notification as required under subsection 19(1) as the time does not suspend for this process.

Time should therefore be either suspended or added when conducting third party notices under this section of the Act, prior to formal notification. If section 23 of the Act was modified to allow public bodies to grant their own initial time extensions, changing this subsection of the Act may not be as necessary.

6.5 What is meant by "might be excepted from…" (ss.19(1))

Issue

By the very nature of section 19, the only time notice can occur is if a public body believes section 39 or subsection 40(1) does not apply. If it believes either applies, it is required to withhold the information as both are mandatory exceptions to disclosure. However, there is a disparity of opinion regarding notification requirements under section 19 of the Act. In their guidance document, Business Interests of a Third Party, the OIPC states that:

> Public Bodies sometimes notify Third Parties despite determining that the records in question clearly fall outside of section 39. The most commonly cited reasons for these gratuitous notices is the desire to preserve long standing business relationships or perceived ethical issues associated with 'blind siding' business partners. While business relationships may be important, these reasons are clearly irrelevant in the ATIPPA, 2015 context, and such notices unacceptably deny timely access to information.

Report A-2020-022 further summarized the commissioners views in relation to section 19:

> If a public body concludes that all three parts of section 39 apply, then it must withhold the information, and there is no need for a notification to the Third Party. If it concludes that any one part of the three-part test cannot be met, then it must disclose the information, and in this case as well there is no need for notification. It is only when, after a thorough review, the public body is unable to decide whether the test might be met, that it should notify the Third Party under section 19(5) of its intention to disclose the information.
>
> This view is further supported by numerous decisions in which they have questioned a public body's decision to notify in the first place. In report A-2019-029 the public body was of the view that two parts of the three-part harms test outlined in section 39 were not met. However, in consultation with a third party "a degree of uncertainty" was raised. Based on this, the public

body provided the third party a notification under section 19. The OIPC found:

> initial notification was unnecessary and sending it was a misapplication of section 19 of ATIPPA, 2015. Notice to third parties must comply with ATIPPA, 2015. If, and only if, a public body is genuinely uncertain whether the section 39 test applies, then notice should be given. If the public body has determined that section 39 clearly does not apply then notice should not be provided, as third party complaints arising from these situations delay the applicant's right to timely access to information…

However, recent court decisions, which appear to be contrary to this view, have caused confusion for public bodies. In Atlantic Lottery Corporation Inc. v. Newfoundland and Labrador (Finance), the Judge noted the following in relation to third party notifications:

> The institutional head cannot repent after the fact from an ill-advised decision to disclose. Disclosure without notice and any harm that might follow are irreversible. Giving notice in all but clear cases reduces the risk of irremediable harm to the third party through inappropriate disclosure.
>
> Moreover, the institutional head may not have enough information to make a correct judgment about whether the information is exempt; the input of the third party may be required in order for the institutional head's decision to be properly informed. It is, therefore, both prudent and consistent with the text of the Act for the institutional head to disclose without notice only where the exemptions clearly cannot apply.
>
> The obligation on the head is clear. Fulfilling it will not be easy, and I read 2018 NLSC 133 (CanLII) Page 17 into Merck the admonition that, when in doubt on the issue of 'reason to believe,' the head should err on the side of caution and give notice.

Furthermore, in Beverage Industry Association v. NL (Finance), NL SC 2019, Justice Marshall found that there is a "low threshold for notification under s. 19, and a high threshold for disclosure without notice. When there is any doubt on whether there is reason to believe 39 applies, public bodies should err on the side of caution and give notice."

In regards to the above, the OIPC may argue that cases in which a public body does not believe part of the three-part harms test is met, notification should not occur. However, as the Judge above noted, the public body "may not have enough information to make a correct judgement without notice."

Suggestion

Consider amending the Act to clarify when notification under section 19 is required and what is meant by "might be excepted from disclosure."

Todd Stanley's comment, at page 2-3:

> Finally, there is a procedural aspect of section 19 which is not unique to the Act, but which I have seen cause concern in the business community. Section 19 is tied to section 39 (as well as section 40) which sets out the tests for the protection of third-party business information. Section 19 requires notice to be provided to third parties on the potential release of information they have provided to a public body, where the public body intends to release information it "has reason to believe contains information that might be" exempt from disclosure under sections 39 or 40. If the public body determines on its own that there is no "reason to believe" the records qualify under section 39 or 40, no notice is provided to the third party who supplied the information and the records of that third party will be released, without the third party having any knowledge or receiving any notification that such release has occurred. The concern is that this assessment with respect to whether there is a "reason to believe" records that are planned to be disclosed may fall under sections 39 or 40 is carried out by the public body in isolation, without input from the third party who supplied the information. With respect to the application of section 39, this raises the obvious issue of the competency of the public body to determine what information supplied by a business might meet the tests in section 39, including whether release may reasonably be expected to be harmful to the interests of that business if released. It presumes and requires a level of expertise and familiarity of a public body with the business and business environment of the third party which submitted the information. Understandably the release of their information without notice can be a surprise to business third parties, who may have expected the ability to at least argue the case with the public body as to the classification of its information under section 39.

In contrast, from the submission of the OIPC, disagreeing with any suggestion to provide a greater opportunity for notice to third parties, at pages 45-47:

> In addition to restoring the three-part test in section 39 as it existed prior to Bill 29, the *ATIPPA, 2015* also saw a new notification regime in section 19. The Committee explained that other notification regimes tended to result in an unnecessary level of notification of third parties. In particular, the 2014 Statutory Review Committee amended the third party notification provision so that the first notification occurs under section 19(1) when the public body formed an *intention* to release information that might be excepted from disclosure, rejecting the model whereby public bodies must notify when they are *considering* whether to disclose information. An appeal opportunity is then

provided under 19(5) when the public body has made a decision to disclose. If an appeal is filed, the disclosure does not occur until all appeals are exhausted. We agree with that approach.

One of the reasons we agree with the notification provision crafted by the 2014 ATIPPA Review Committee is that a very high percentage of third party appeals are lost by third parties, and the information is ultimately disclosed anyway. In those circumstances, access to information is delayed substantially, particularly if the third party skips the OIPC process and goes directly to court, or if they appeal to court following the OIPC process.

…

While the OIPC has issued numerous third party Commissioner's Reports, the vast majority have found that the exception does not apply and the information should be released. A relatively small number of these Reports have become the subject of court appeals. Even when court appeals have been filed, there has yet to be a case where the third party has, in the end, prevented the release of information that the public body had decided to release.

There may be a number of reasons for this. One is that public bodies are relatively cautious about deciding to release third party information. They may in fact be refusing access to information in clear-cut cases without the need to notify third parties, and perhaps these decisions are not being appealed. The other, more likely explanation, is that government typically does not collect the kind of information intended to be protected by section 39. One presenter, quoted in the 2014 Statutory Review Report, put it this way: "Well, I guess I can say do we have a right to know what the public body paid for a stapler. It is not the Colonel's secret that we're asking for. It is not for the components that go into manufacturing a widget..."

When government is procuring widgets, they are typically just buying them, not inquiring into the manufacturing process for widgets. If a public body is purchasing a chicken dinner, they are not typically requiring the Colonel to submit a copy of his recipe. While there are undoubtedly circumstances where public bodies do require proprietary information of third parties, section 39 is available to ensure that such information is not disclosed.

Why then, do third parties even file appeals, when public bodies are typically cautious about releasing third party information, and section 39 is only meant to cover a limited set of information? In our experience, some companies are not knowledgeable about government access to information laws. Receiving a notice under section 19 may be the first time they have even heard of it. Perhaps the majority of their customers are in the private sector, where this issue doesn't normally arise. The reaction from such third party complainants can range from indignation to surprise. Sometimes matters are resolved informally

by explaining the statute and the three-part test, and that the third party bears the burden of proof to establish that section 39 applies. Other times these matters result in a Commissioner's Report, and rarely, a court appeal.

The ones that tend to proceed to court involve third parties that are, more often than not, national companies with legal departments. Filing a complaint with our Office costs nothing, whereas filing an appeal in court can be more costly. If a third party suspects the applicant might be an industry competitor, there is every incentive to file an appeal to delay access. While we cannot say with certainty that this has been the case in any individual appeal, a pattern has certainly emerged.

Third Party	Public Body	Date of Access Request	Report	Date of Report	Court Docket	Court Outcome	Date of Decision	Total Days
Coporate Express	Memorial University	28-Aug-12	A-2013-009	4-Jun-13	2013 01G 3476	Appeal Dismissed	30-Oct-15	1,158
Coporate Express	Memorial University	28-Aug-12	A-2013-009	4-Jun-13	2014 01H 0085 (CA)	TP Claim Dismissed	19-Sep-14	
Coporate Express	Memorial University	13-Jun-14	A-2014-013	12-Dec-14	2015 01G 0823 (TD)	Discontinued	14-Jun-16	732
Bell Canada	OCIO	17-Jun-15	A-2015-005	21-Oct-15	2015 01G 6086	Discontinued	28-May-17	711
Bell Canada	OCIO	29-Oct-15	A-2016-001	22-Feb-16	2016 01G 1709	Discontinued	20-Apr-18	904
Bell Canada	Eastern Health	6-Nov-15	A-2016-002	23-Feb-16	2016 01G 1761	Discontinued	31-Jan-18	817
Bell Canada	Health and Community Services	11-Aug-16	A-2016-030	19-Dec-16	2017 01G 0320	Discontinued	21-Feb-18	559
Bell Canada	Business, Tourism, Culture and Rural Development	30-Aug-16	A-2017-005	8-Feb-17	2017 01G 1296	Ongoing		1,546
Atlantic Lottery Corp.	Finance	13-Oct-16	A-2017-004	8-Feb-17	2017 01G 2004	Appeal Dismissed	19-Jun-18	614
Don Gibbons Limited	Health and Community Services	1-Nov-16	A-2017-009	10-Mar-17	2017 01G 2562	Discontinued	15-Dec-17	409
Bell Canada	Memorial University	24-Jan-17	A-2017-014	9-May-17	2017 01G 4033	Discontinued	26-Feb-18	398
McKesson Specialized Distribution Inc.	Health and Community Services	7-Sep-18	A-2019-001	7-Jan-19	2019 01G 0529	Discontinued	22-Nov-19	441
Bell Canada	OCIO	13-May-19	A-2019-026	26-Sep-19	2019 01G 6549	Ongoing		560
Bell Canada	City of Mount Pearl	9-Jan-20	A-2020-018	15-Sep-20	2020 01G	Ongoing		319

One of the things we have found is that no third party has yet won a claim in court, and in fact most appeals have been discontinued by the third party on the eve of a court hearing. It is our view that if the notification in section 19 were broadened that it would have no measurable impact on the protection of third party business information. In cases where notification is justified, third parties are receiving appropriate notification. However, if the bar is lowered, and public bodies were required to notify third parties that today would not quite meet that threshold, based on the history of how this has played out, the chances of success of that additional class of third party claims would be very low indeed.

As addressed in several of our reports, public bodies have notified third parties when notification cannot be justified under section 19(1). In such cases, a public body will have received an ATIPP request where some or all of the responsive records pertain to a third party business. The public body has conducted an assessment, and concluded that section 39 does not apply. No doubt or uncertainty has been expressed in that assessment. However, on a number of such occasions, public bodies have proceeded to give a section 19 notice to third parties, despite the language in section 19 that notification is only triggered when the head intends to give access and the head also "has reason to believe" that the record or part of the record "contains information that might be excepted from disclosure."

> Section 19 exists for circumstances that fall into a grey area, where there is a lack of certainty about whether or not section 39 applies. If the public body determines that section 39 applies, it is a mandatory exception and the public body must refuse disclosure. No notification is required, and the public body bears the burden of proof in the event of a complaint. If the public body determines that section 39 does not apply, it must disclose. Section 19 speaks to that "in-between" circumstance, where there is at least a "reason to believe" that section 39 "might" apply. Absent that reason, the information should be released to the applicant. What we have seen in some circumstances, however, is that the assessment has been completed by the public body, and a definitive conclusion has been reached that section 39 does not apply. However, whether out of an abundance of caution or a desire to maintain a positive relationship with a third party, the public body may issue a section 19 notification even when it is not warranted. This is not a neutral decision, as it can substantially impact the applicant's rights by significantly delaying disclosure where there are no grounds to do so.
>
> In our view, the current notification regime already tips the balance very much in favour of ensuring that legitimate section 39 claims are protected, however we appreciate that this fulfils the purpose of the *Act* in section 3(2)(c)(iii). On the other hand, access to information applicants are sometimes required to wait years while an appeal is ongoing, only to see the matter withdrawn at the last minute or the appeal dismissed. We do not wish to see the scales tip further towards an over-notification or over-protection of third party information. If section 19 is to be amended at all, it should be amended to simply make it clear that section 19 notification should not occur unless the conditions described in 19(1) apply.
>
> **OIPC Recommendation 10.1: Consider whether an amendment may be necessary to indicate to public bodies that notification to third parties should not occur where the conditions described in 19(1) are not met. Otherwise, retain sections 19 and 39 as they currently exist.**

The issues and differences of opinion are evident.

The 2019-2020 Annual Report of the OIPC repeats its concern with notice being given to third parties with the resultant delay in obtaining access, at page 3:

> The problem here is not in the statute but rather in the actions taken by the public body. The third party's right to appeal is triggered by its notification by the public body, per section 19, that it intends to release information that *might* be subject to section 39. Public bodies should only be providing such notification if they truly have some uncertainty. At this point in the maturity of ATIPPA, 2015, public bodies should more often be quite comfortable in conducting this assessment and releasing the information without third party notification. We certainly understand that this can be uncomfortable for pub-

> lic bodies who want to maintain good relations with vendors and stakeholders; however, the price of doing business with public bodies is compliance with ATIPPA, 2015, which provides transparency and accountability for Newfoundlanders and Labradorians about how their public bodies are doing business and spending money from the public purse.

One of the reasons offered by the OIPC for its support of the present s. 19 notice provision is the "high percentage of appeals that are lost by third parties", with the information ultimately being disclosed. This argument seems to be that, generally speaking, notice to third parties is pointless. As discussed elsewhere in this report, the high percentage of lost appeals is attributable not to any assessment of harm, but to the third party's inability to establish the class-based 'supplied in confidence' element of the exception. If the recommendations in this report directed to the use of a harm-based exception are accepted, the percentage of appeals lost may change; in any event, the need to fully appreciate the basis for an assertion by a third party of potential harm suggests the need to make it clear that a public body can at least talk to a third party as part of its process of considering the applicability of the exception.

The submissions reflect the experience of the last five years. What should be a simple common sense process has become far too contentious and complex, with the issue of notice becoming, in and of itself, a subject of unnecessary and non-productive litigation.

It is time to take a step back and consider the interests that are at stake with respect to records containing information of third parties.

The interest of the public in timely access to information is unquestioned. The interest of the public body in responding to access requests in a timely but fair and considered manner is also important. But they are not the only interests. The interests of third parties who have provided information to public bodies, under compulsion or otherwise, cannot be summarily dismissed. The avoidance of significant harm to third parties, unless overriden by the public interest, must be a principle underlying the operation of the legislation.

Where there is the potential for a third party's interest to be affected by disclosure of information, the threshold for third party notice should not be high. This is an elementary aspect of natural justice and fairness.

The need to balance the interests involved was recognized by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3. At paragraph 2:

2. Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. **Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information**. (my emphasis)

Speaking in the context of a formal notice requirement and the phrase "intended to disclose", Cromwell, J. said at paragraphs 77–80:

77 As discussed earlier, in order to disclose third party information without giving notice, the head must have no reason to believe that the information might fall within the exemptions under s. 20(1). Conversely, in order to refuse disclosure without notice, the head must have no reason to believe that the record could be subject to disclosure. If the information does not fall within one of these clear categories, notice must be given. I would therefore interpret the phrase "intends to disclose" as referring to situations which fall between those in which the head concludes that neither disclosure nor refusal of disclosure without notice is required. In other words, the head "intends to disclose" a record "that the head ... has reason to believe might contain" exempted information unless the head concludes either (a) that there is no reason to believe that it might contain exempted information (in which case disclosure without notice is required) or (b) that he or she has no reason to believe that disclosure could be required by the Act (in which case refusal of disclosure without notice is required). To the extent that the reasons of the Court of Appeal, at para. 34, suggest the head must have actually formed an opinion on the matter as opposed to simply having no "reason to believe", I respectfully disagree.

78 The approach I propose sets quite a low threshold for the requirement of giving notice. This is not only consistent with the text of the Act, but properly reflects the balance the Act strikes between disclosure and protection of third parties.

79 **Given the nature of the exemptions in issue - trade secrets, financial and other confidential information, etc. - the third party whose information is being considered is generally in a better position than the head of the institution to identify information that falls within**

one of the s. 20(1) exemptions. The third party knows and understands the industry in which it participates and has an intimate knowledge of the specific information, how it has been treated and the possible harm that could come from its disclosure. As Deschamps J., writing for the majority of the Court in *H.J. Heinz*, put it:

> The unique notice given to third parties is tied to the specific nature of the exemption... . [A] government institution would not have any specific knowledge of the business or scientific dealings of a third party ... . In the case of confidential business information ... the assistance of the third party is necessary for the government institution to know how, or if, the third party treated the information as confidential. Indeed, the third party's information management practices may be an important means of determining whether the information actually meets the definition of "confidential" ... . Whether the information is confidential cannot be determined without representations from the third party. [References omitted; para. 51.]

80 ***Moreover, observing a low threshold for third party notice ensures procedural fairness and reduces the risk that exempted information may be disclosed by mistake. In addition, because the giving of notice opens the way to judicial review of a decision to disclose, observing a low threshold for third party notice also accords with one of the Act's animating principles - that decisions on the disclosure of government information should be reviewed independently of government - while also being consistent with the principles that government information should be available to the public and that necessary exceptions to the right of access should be limited and specific (s. 2(1)).*** (my emphasis)

And of the responsibility of the head of the public body when considering the information requested – at paragraphs 87–88:

87 There are important policy and practical considerations that must be balanced in order to decide what sort of review is required of the head when deciding to give notice. First, information should be disclosed whenever required by the Act. Second, third party confidential commercial information must receive the protection which the Act intends for it. Third, it is the duty of the institutional head to make the disclosure decision and respect the rights of third parties without simply shifting that responsibility onto the third party. **While the head will often require the assistance of the third party in order to reach a decision about how the Act ought to apply, the duty to decide whether to disclose or not remains with the head. The head does not discharge that duty by simply giving notice at the first sign of potentially exempted information and leaving it to the third party to do all the work. The**

> **head is not entitled to simply put the entire onus of review on the third party.** Finally, the practical constraints on the head must be considered. The head may not be well informed about the subject matter of the information and may therefore be disadvantaged in assessing it. The head is also bound by the time limits under the Act; one of the responsibilities of the head is to provide timely access to the record. (my emphasis)
>
> 88 In my view, the head must conduct a sufficient review of the requested material in order to decide if the threshold for notice, as I have discussed it above, has been met. The federal government's Access to Information Policy, Chapter 1-1, published in the Treasury Board Manual at the relevant time, specified that institutions must review each individual record to determine which portions, if any, may be excluded or exempted. This statement, in my view, correctly describes the nature of the review required before the decision is made to give notice to the third party. The institutional head must make a serious attempt to apply the exemptions within the constraints I have noted. The same principle applies, in my view, to the head's severance of material under s. 25. I will discuss that question more fully in the part of my reasons dealing with s. 25. However, my view is that applying s. 25 is part and parcel of the head's initial review, subject of course to the constraints I have mentioned.

Perhaps one of the benefits of a periodic statutory review is that it provides an opportunity to reflect on the underlying issues without becoming embroiled in an exercise of statutory interpretation.

In simple terms third party information requests involve the following:

1. An applicant requests information that, in one way or another, is connected to a third party.
2. The head of a public body reviews the information to assess whether any of the third party or other exceptions may be applicable. It makes no sense to say to the head, at this stage of review, that, unless you are actually intending to release the information, you cannot talk to the third party so as to better inform the assessment. As *Merck* makes clear, and as emphasized in their submissions to this Committee, public bodies do not and cannot be expected to understand all relevant aspects of the third party's business. The head must be free to talk to the third party if and as necessary.
3. Having made an informed assessment of the applicability of any exception, the head then makes the considered decision to grant or refuse access and the appropriate formal notice is given, as required, to the applicant or third party. The complaint/review process then proceeds if required.

At the risk of sounding simple, while the assessment and decision-making functions of the head may not be easy, the process itself is not rocket science. It is a reflection of the incontrovertible fact that, in the case of information involving third parties, the public body cannot always reasonably assess the applicability of an exception without input from the third party. It should be readily accepted that, as a practical matter, ATIPP coordinators will seldom be sufficiently familiar with the business and interests of a third party to confidently make a determination that a risk of significant harm to the third party's interests is or is not engaged in any particular request.

Consultation with a third party is also a recognition of the principle of the fair and responsible application of the *Act*. It is too easy to suggest sacrificing fairness on the altar of not delaying an applicant's access to information. But it is, as pointed out in *Merck*, always a question of balance.

However, the timeliness of the response cannot be disregarded. I have earlier recommended that, if necessary for adequate consultation with a third party, a public body may extend by up to ten days the time for a response. But despite a number of submissions to the contrary, third party consultation should not, in and of itself, stop the clock from running. The decision of the head to grant or refuse access – and formally notify the third party if necessary - must be made within the 20 day (or extended) period. Once that decision is made, the 15 day clock for the complaint/appeal process starts to run. Thus, absent a complaint or an appeal or an extension approved by the OIPC, the maximum time from application to response would be 45 days (20 plus 10 plus 15). I consider the 30 days in which to provide a fair and reasonable opportunity for the public body, if necessary, to meaningfully consult with the third party and to reach a decision on access, and the total of 45 days – subject to complaint or appeal or approved extension – as reflecting a fair balance of the rights of the applicant and those of the third party.

As already mentioned, if the recommendations on the amendments to s. 39 are accepted, the focus of the assessment of third party information will shift to the expectation of significant harm. Time will not be lost debating issues of confidentiality or "supplied or negotiated", issues which do not engage the heart of the matter – whether disclosure will cause a reasonable expectation of one or other of the enumerated harms. And if the third party cannot establish, on a balance of probabilities, the appropriate level of risk of harm – not an easy burden – the recommendation will be to release the information. Still further, if a third party, in an effort to delay access, insists on filing an appeal pursuant to s. 54 from a decision of the head of a public body to disclose information in circumstances where the head followed an OIPC recommendation which was

in turn based on a principled and objective assessment of the evidence, the likelihood of the court overturning the decision of the head would, I venture to suggest, not be high. In such circumstances, an award of significant costs may deter appeals which serve only to delay access.

The recommended amendment to s. 19 deletes the reference to "intends to grant access" and refers to consultation rather than notice, thus making it clear, hopefully, that the head is not precluded from consulting with a third party as considered necessary. It is my understanding that the OIPC does not take issue with amending s. 19 to provide a public body with the ability to consult with a third party as needed. An amendment to the complaint and appeal process requires a third party who files a complaint or appeal to provide a copy of the document to the head of the public body. This places the onus clearly on the third party to alert the public body, within the timeframe indicated, that the complaint/appeal process has been triggered and that access should not be granted at this time.

The specific recommendations for amendment to s. 39 are addressed elsewhere. But s. 39 and s. 19 should be considered together, the s. 19 requirement for notice being inextricably linked to the prospect of the harms set out in s. 39. (The issue of the status of a third party where a complaint is made concerning a public body's denial of access pursuant to s. 39 is discussed in the section of this report dealing with the complaint process.)

RECOMMENDATION

That the *Act* be amended to:

- Allow public bodies to consult with third parties while considering requests for information the release of which might be harmful to their interests. [Appendix K, s. 19(1)]

- Require a third party who files a complaint or an appeal to provide a copy of the complaint or notice of appeal to the public body. [Appendix K, s. 19(5)(c)]

A number of submissions referred to what they perceive as difficulties in establishing to the satisfaction of the commissioner the harm which will trigger, in particular, the s. 39 exception.

The phrase "could reasonably be expected to" is the standard incantation used in the harm-based exceptions to express the degree of risk or harm or other defined consequence that must be established to trigger the exception. See sections 31, 34, 35, 36, 37, 38, 39.

In view of the concerns expressed and the mandate of this review to assess the operation and administration of the *Act*, I consider it appropriate to comment on, in general terms and hopefully not too critically, the manner in which the harm-based exceptions have been assessed.

By far the majority of the OIPC reports which address a claim to a harm-based exception are in the context of s. 39 – harm to a third party's commercial interests. But there have been a limited number of reports involving other sections; a review of these will be helpful in assessing the consistency of the analysis, particularly the nature of the evidentiary assessment.

SECTION 39

The operative provisions of s. 39:

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.

There are three discrete issues in any s. 39 analysis:

1. What a third party must establish; – (the factual element(s) supporting non-disclosure);
2. To what standard the third party must establish the necessary element(s) – (the standard of proof) and
3. The assessment of the evidence led by the third party – (whether, applying the appropriate standard of proof, the evidence supports the necessary element(s)).

SUPPORTING A SECTION 39 EXCEPTION

What must a third party establish to support a section 39 exception? The *Act* presently requires:

1. A specified class of information – generally, a trade secret or commercially sensitive information;
2. The confidentiality and ownership of the information; – third party information – supplied implicitly or explicitly in confidence, and
3. A reasonable expectation of a specified consequence or, in the case of a labour relations dispute, specific disclosure of certain information.

Previously, I discussed the almost complete inability of third parties over the last five years to support a claim for an exception pursuant to s. 39. If the recommendation concerning the structure of s. 39 is accepted, the analysis of a claim of a reasonable expectation of harm assumes primary importance. Accordingly, I believe that the structure of the analysis appropriate to that assessment merits discussion.

The discussion that follows will focus on the third element – a reasonable expectation of harm.

The concept of a reasonable expectation of harm in the context of an access to information request was considered in detail by the Supreme Court of Canada in *Merck Frosst Canada Ltd. V. Canada (Health)*, 2012 SCC 3. The court considered the existing jurisprudence that required a third party to demonstrate "a reasonable expectation of probable harm". Cromwell, J. said at paragraph 196:

> It may be questioned what the word "probable" adds to the test. At first reading, the "reasonable expectation of probable harm" test is perhaps somewhat opaque because it compounds levels of uncertainty. Something that is "probable" is more likely than not to occur. A "reasonable expectation" is something that is at least foreseen and perhaps likely to occur, but not necessarily probable. When the two expressions are used in combination - "a **reasonable expectation** of **probable** harm" - the resulting standard is perhaps not immediately apparent. However, I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show **on a balance of probabilities** that the harm **will in fact come to pass** if the records are disclosed, **the third party must nonetheless do more than show that such harm is simply possible**. Understood in that way, I see no reason to reformulate the way the test has been expressed. (my emphasis)

He continued at paragraph 199:

> … A third party claiming an exemption under s. 20(1)(*c*) of the Act must show that the **risk of harm** is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur. This approach, in my view, is faithful to the text of the provision as well as to its purpose. (my emphasis)

And further, at paragraph 201:

> … I conclude that the English text of the statute suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, **but somewhat lower than harm that is more likely than not to occur.** (my emphasis)

Cromwell, J. then recognized that there are particular concerns when assessing the likelihood of future events.

At paragraph 204:

> This interpretation also serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to infor-

> mation would be thwarted by a mere possibility of harm standard. **Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason**: see *Air Atonabee*, at p. 277, quoting *Re Actors' Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2)* (1985), 7 A.L.D. 584 (Admin. App. Trib.), at para. 25. The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively": *Watt v. Forests*, [2007] NSWADT 197 (AustLII), at para. 120. **On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof**. (my emphasis)

I take the reference to "standard of proof" in this passage as not referring to the **level** of proof required, but rather to **what** must be proven – a realistic expectation of harm. This conclusion was reinforced by the Supreme Court two years later in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

At paragraph 52 Cromwell and Wagner JJ, speaking for the court said:

> As this Court affirmed in *Merck Frosst*, the word "probable" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation of probable harm" formulation simply "**captures the need to demonstrate that disclosure will result in a risk of harm** that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm": para. 206. (my emphasis)

And further, at paragraph 54:

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

The use of the phrase "risk of harm" is helpful. And it may also be helpful, at least for present purposes, to think of describing the middle ground between "merely possible"

harm and "probable" harm as a 'real risk' of harm. This is **what** must be proven by a third party, the primary element of a third party's claim to a harm-related exception.

STANDARD OF PROOF

The need to prove a real risk of harm arises, for present purposes, in the context of an access to information dispute – a request, a refusal and a complaint or appeal. This is a civil context.

As Rothstein, J. made clear in *F. H. v. McDougall*, 2008 SCC 53, there is only one standard of proof in civil cases – the balance of probabilities. This is the standard of proof applicable to the elements of a third party claim for an exception pursuant to s. 39 of *ATIPPA, 2015*.

As Cromwell, J. noted, it is unfortunate that the phrases 'reasonable expectation of probable harm' and 'balance of probabilities' both contain references to the notion of probability. But, in my view, it is essential for a clear and fair analysis that the appropriate standard of proof be carefully separated from what must be proven. Again it may be helpful to use the phrase 'real risk' rather than possible or probable harm.

Real risk must be proven – on a standard of probabilities – to be more probable than not. In other words, the evidence must establish that it is more probable than not that disclosure will create a real risk of harm.

THE ASSESSMENT OF THE EVIDENCE

What evidence must a third party bring forward to establish that a real risk of harm is more probable than not?

It is in the evidence assessment function that care must be taken to ensure that the need for a particular type of evidence is not prescribed or dictated. Doing so blurs the distinction between what must be proven, the standard of proof, and the assessment of the evidence.

To put it shortly, the evidence necessary to prove that a real risk of harm is more probable than not will depend on the context, and in particular on the type of harm said to be at risk.

To repeat the passage from *Merck* – "What is at issue is risk of future harm that depends on how future uncertain events unfold". Assessing the likelihood of future risk is a much more nuanced exercise than determining past facts. There is more reasoned judgment involved, more reliance on inferences and, perhaps, on occasion, more resort to common sense and experience. As the court said in *Ontario (CSCS)*, speaking specifically of the evidence necessary to prove the "middle ground" – 'real risk', at paragraph 54:

> This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40. (my emphasis)

The reference to the importance of context reflects the decision of the court in *F.H. v. McDougall* where in the context of a civil sexual assault case, Rothstein, J. spoke of the evidentiary assessment:

> 40. … I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. **Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof**. …
>
> 45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. **I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case**. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> 46 **Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency**. … If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. … (my emphasis)

48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:

> **Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities**. (my emphasis)

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

The distinction between the standard of proof and the assessment of evidence and the importance of context was again emphasized in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56. The case involved an application for rectification of a written agreement – an assertion that a written document does not reflect the actual agreement of the parties. Speaking for the majority, Brown, J. said this, at paragraphs 34–35:

34 The second point requiring clarification is the standard of proof. In *Performance Industries*, at para. 41, this Court held that a party seeking rectification will have to meet all elements of the test by "convincing proof", which it described as "proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil 'more probable than not' standard". This, as was observed in *Performance Industries*, was a relaxation of the standard from the Court's earlier jurisprudence, in which the criminal standard of proof was applied: see *Ship M. F. Whalen*, at p. 127, and *Hart*, at p. 630, per Duff J.

35 In light, however, of this Court's more recent statement in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40, that there is "only one civil standard of proof at common law and that is proof on a balance of probabilities", the question obviously arises of whether the

> Court's description in *Performance Industries* of the standard to which the elements of the test for obtaining rectification must be proven is still applicable.

Brown, J. continued, pointing out the difference between the standard of proof and the quality of evidence needed to meet that standard, at paragraph 36:

> 36 In my view, **the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is that which McDougall identifies as the standard generally applicable to all civil cases: the balance of probabilities. But this merely addresses the standard, and not the quality of evidence by which that standard is to be discharged**. As the Court also said in McDougall (at para. 46), "evidence must always be sufficiently clear, convincing and cogent". A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action. This idea was helpfully encapsulated, in the context of an application for rectification of a common mistake, by Brightman L.J. in Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd., [1981] 1 W.L.R. 505 (C.A.), at p. 521:
>
> > The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. **But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties**. (my emphasis)

One can draw two conclusions from *Fairmont Hotels*. The first is that the court – at paragraph 34 – recognizes that **requiring** "convincing proof" in any particular situation is effectively imposing a higher **standard** of proof than the balance of probabilities. The second is the clear confirmation of the importance of context, in particular, the environment surrounding the assertion sought to be established – in *Fairmont Hotels*, the assertion that a written agreement do no reflect the real agreement of the parties, an 'inherently improbable assertion' that would require compelling evidence to contradict it.

The phrase 'detailed and convincing evidence' or a variation of it appears in many access to information reports and adjudications, whether by a court, a tribunal or otherwise.

Some examples from the reports of the OIPC of this province:

2020-004

> 48. We do not accept that the Applicant could derive the rebate amount per unit from the disclosure of the Total Quantity Eligible. The mere assertion of this risk of inference **does not meet the threshold of clear and convincing evidence required to establish this exception** and therefore the information in question does not meet the criteria of section 39(1)(b). …. (my emphasis)

2018-007

> 25. The threshold the Department must meet is that disclosure "could reasonably be expected to" result in "similar information no longer being supplied to the public body" and that "it is in the public interest that similar information continue to be supplied". To establish a reasonable expectation of such consequences, **a party must provide detailed and convincing evidence that logically explains why and how the disclosure could lead to a particular identifiable outcome or harm**. The Supreme Court of Canada in Merck Frosst Canada Ltd. v. Canada (Health), [2012] 1 S.C.R. 23 states that a party "must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur." (my emphasis)

2018-014

> 26. Claims under section 39(1)(c) **require detailed and convincing evidence** that the likelihood of significant harm is more than merely speculative. Rather, third parties must establish a reasonable expectation of probable harm. (my emphasis)

2017-004

> 12. Finally, **there must be clear and convincing evidence that one of** the types of harm referred to in paragraph 39(1)(c) **is likely to occur**. (my emphasis)

2013-008

Although written in the context of the previous legislation, this report comments on the standard of proof – at paragraph 12:

> However, the amended section 27 still uses the words "disclosure of which could reasonably be expected to", which, as more fully set out below, **requires a specific standard of proof**. (my emphasis)

This passage appears to conflate what must be established with the standard to which it must be established.

Report 2013-008 continues at paragraph 32:

> Given the **standard** of evidence **required** to show harm as established by the case law, it is my opinion that the GPA has not met the burden of proof to show there is a reasonable likelihood of probable harm in this case. The evidence was neither detailed nor convincing. (my emphasis)

In a report on standard of proof in 2020-009, the OIPC said this at paragraphs 43–48:

> [43] Before embarking on the application of section 39 we must deal with a preliminary issue raised by ALC: whether the standard of proof for section 39 invoked by this Office in its Guidance document is higher than that established by the Supreme Court of Canada in Merck-Frosst Canada Ltd. v. Canada (Health). We do not agree that it is.
>
> [44] First of all, it is settled law that under section 39 of ATIPPA, 2015 the burden is on the third party to show that a disclosure should not be made. The burden is not on the applicant or the public body to show that the information should be disclosed. When our Guidance refers to the fact that the third party must "make the case" that information should be withheld, it is simply emphasizing where the burden of proof lies.
>
> [45] It is also now settled law that there is only one civil standard of proof at common law, and that standard is proof on the balance of probabilities (see Merck-Frosst, paras. 92-94). That is the standard explicitly referred to in our guidance document. **However, as the Court in Merck-Frosst states, the proof of risk of future harm is often not easy, and "…what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case"**.

[46] Proof of harm, as required in section 39 of ATIPPA, 2015 must meet the standard that is affirmed by the Court in Merck-Frosst as a "reasonable expectation of probable harm":

> [196] …I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. Understood in that way, I see no reason to reformulate the way the test has been expressed.

[47] Proof of harm must be more than merely speculative. As the Court stated:

> [206] …the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.

[48] In other words, there must be at least some evidence in support of an argument, and that evidence must be rationally connected in some way to the harm that is alleged to result. The likelihood of the occurrence of the outcome that is alleged must be higher than a mere possibility, but somewhat lower than "more likely than not". (my emphasis)

While one may question the reference to a reasonable expectation of probable harm as being a standard – rather than a statement of what has to be proved – this report, in my view, generally reflects the obligation to consider all evidence in the context of what must be established.

However, the report goes on, at paragraph 59:

> [59] Section 39(1)(c) requires that the disclosure must be "reasonably expected to" have one or more specified results. That phrase refers to the standard of proof that must be met by a third party, as explained earlier in this Report. In order to meet that standard, the third party must support its argument with evidence that is "detailed and convincing" (see Report A-2013-008).

With respect, this assertion blurs the distinction between what must be established and the applicable standard of proof. Further, by stating that to meet the stand-

ard the evidence "must" be "detailed and convincing" is to suggest that a higher standard of proof than the balance of probabilities is being applied. More of this below.

Not all reports refer to a requirement of detailed and convincing evidence. Report 2017-022 refers to the distinction between the standard of proof and what must be proven to that standard, and also acknowledges that what is involved is an assessment of the likelihood of future events. At paragraph 19:

> [19] An obvious question is by what standard does one assess proof of the probability of future events? The balance of probabilities test is the measure, recognizing as the Supreme Court of Canada did in Merck Frosst Canada Ltd. v. Canada (Health), [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 94 that:
>
> > … a third party must establish that the statutory exemption applies on the balance of probabilities. However, what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case.

In Report 2018-021, although written in the context of an assertion of s. 35 harm, there is a reference to a 2017 Federal Court of Appeal decision which addresses the issue of the nature of the evidence needed to support proof of risk of future harm to a third party – at paragraph 21:

> [21] A recent Federal Court of Appeal decision, Canada (Office of the Information Commissioner) v. Calian Ltd. [2017 FCA 135] concisely describes evidence capable of demonstrating a reasonable expectation of prejudice to financial or economic interests. While third party business interests were involved in that case, the language of the respective provisions is similar as it relates to harm. At paragraph 50, the Court states:
>
> > For many of the same reasons spelled out earlier in the context of paragraph 20(1)(c), I find that the interference with contractual or other negotiations that would result from the disclosure is not merely speculative but rests on cogent, credible and reliable evidence … Having carefully considered the case law marshalled by the appellants in support of their argument, **I have not been convinced that the level of specificity that they have insisted upon to establish a reasonable expectation of probable harm is warranted. As frequently mentioned in those cases, there is an element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm. As long as the prediction is grounded in ascertainable facts, credible inferences and relevant experience, it is unassailable.** Accordingly, it was open to the Judge to find that Calian could rely on the paragraph 20(1)(d)

> exemption to request the redaction of its personnel rates. [emphasis in original]

And at paragraph 30:

> [30] I agree with this reasoning. As the Court in Calian observed, while there is an element of forecasting and speculation involved, the District "grounded its prediction in ascertainable facts" and has therefore met the requirements of section 35(1)(g). I am satisfied that disclosing the details of the present settlement could reasonably be expected to result in prejudice to the financial or economic interests of the District.

This approach reflects the contextual and inclusive approach to the assessment of evidence required by *McDougall*, *Merck* and *Ontario (CSCS)*.

Similarly, the decision in Report 2021-010 demonstrates the importance of context and of the use of reasonable inferences and common sense to ground a finding of a reasonable expectation of harm. At issue was the disclosure of the teleconference access code of a law firm teleconference platform. At paragraph 31:

> [31] As to the third part of the test, we accept that, in this instance, disclosure of the information could be reasonably expected to result in the harms listed in 39(c)(iii): undue financial loss or gain to any person. Communications between lawyers and their clients are among the most guarded conversations. Compromising the security of the law firm's teleconferencing platform potentially opens its clients to financial loss or harm and the law firm to liability for such losses incurred by its clients. Therefore, harm is not merely possible, but could be reasonably expected. The only purpose that the disclosure of this information could serve is the unauthorized access into a privileged conversation between a lawyer and their client.

Detailed and convincing evidence was not needed to reach this conclusion.

Use of phrases such as "detailed and convincing" to describe the quality of evidence **required** to substantiate harm should, in my view, be discouraged. Case law makes it clear that this phrase can be regarded as reflecting a higher **standard of proof** than the balance of probabilities.

In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, the Supreme Court referred to a police disciplinary hearing conducted under a statutory provision which required the alleged misconduct to be "proved on a clear and convincing evidence" (paragraph 11).

The Court clearly stated that this was a standard of proof – imposed by statute – that is higher than the civil balance of probabilities. At paragraph 60:

> 60 … As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action **where the balance of probabilities - a lower standard of proof** - would apply. However, this cannot be said in the case of an acquittal**. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof,** there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". (my emphasis)

In dissent, but not on this point, LeBel and Abella, JJ. wrote, at paragraph 123:

> 123 Finally, Mr. Penner argues that issue estoppel should not apply in this case since the burden of proof is different in civil proceedings. **The statutory standard of proof under the *Police Services Act* requires that a finding of misconduct against a police officer be "proved on clear and convincing evidence" (s. 64(10); now s. 84(1)). This standard is higher than the balance of probabilities standard required in a civil trial**. (my emphasis)

In *Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345, the Ontario Court of Appeal addressed the standard of proof applicable in the context of a statutory requirement for "clear and convincing evidence".

> 2 The discrete issue for determination on this appeal is the standard of proof applicable to a finding of misconduct under s. 84(1) of the *PSA*, which provides:
>
> > If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 85. …
>
> 12 Counsel for the respondents fairly concede that if the Supreme Court determined the issue of the standard of proof under the *PSA* in *Penner*, the appeal must be allowed and it is unnecessary to engage in a statutory in-

> terpretation of s. 84(1). **In my view, we are bound by the Supreme Court's statement in *Penner* that the standard of proof in *PSA* hearings is a higher standard of clear and convincing evidence and not a balance of probabilities**. (my emphasis)

It is clear that the use of the phrase "clear and convincing evidence", when used in a statute, connotes a higher standard of proof than that of the balance of probabilities. Outside the statutory context, use of the phrase, particularly when coupled with directions such as 'must prove' or "essential" suggests that the fact finder, perhaps unintentionally, is requiring a higher standard of proof than is warranted.

This point was reinforced in a very recent article by Justice Todd Archibald and Kenneth Jull – "*Clear and Convincing" Evidence Cannot Reside in the House of Balance of Probabilities: A Scientific Approach* (2021), The Advocates Quarterly, Vol. 51, at page 315. Although the focus of the article was the application of a scientific approach to the measurement of the standard of proof, it contains a number of references to the undesirability of referring to the need for "clear and convincing evidence" in an adjudication where the standard of proof is the balance of probabilities. I refer to the following:

> No one should be lulled into a false sense of security that somehow a clear and convincing standard within the balance of probabilities framework is somehow a higher standard. …
>
> That language is unfortunately confusing and has led to the erroneous view that there are two standards of proof within the compass of a balance of probabilities. The only true case of higher standards is where legislation such as the *Police Services Act* explicitly states that the standard is one of clear and convincing evidence. … (p. 318)
>
> … In civil matters, there is only one standard of proof, which is the balance of probabilities. That civil standard should remain uncluttered from any reference to the phrase "clear and convincing". … (p. 327)
>
> When the *Penner* line of cases is followed, the clear and convincing standard is not a higher burden or proof in contrast to that afforded to police officers covered by legislation such as the *Police Services Act*. Moreover, if the scientific analysis advanced in this article is accepted, the use of the subset of "clear and convincing" within the balance of probabilities fulcrum does not make logical sense. Serious consideration should be given to avoiding the use of such language in all future civil cases since the standard is balance of probabilities. … (p. 337)

The distinction between the standard of proof and the quality of the evidence needed to meet that standard in any given case was emphasized by the Supreme Court

of Canada in *Nelson (City) v. Mowatt*, 2017 SCC 8. In the context of a civil adverse possession claim, the Court said this:

> 38 … It is certainly possible to weigh parts of the evidence differently than the chambers judge did. … The chambers judge, having held two hearings, the latter of which occurred as a result of his allowing the Mowatts an opportunity to adduce further evidence, and having carefully canvassed the evidence in two sets of cogent and thorough reasons for judgment, reached findings that were available to him on the evidence. Those findings should not have been disturbed.
>
> 39 My conclusion is unaffected by the historical nature of the claim, which the Court of Appeal thought merited an assessment of the evidence that is "broad" and "curious-minded". The City criticizes this aspect of the Court of Appeal's reasons. It says that, in light of the Court of Appeal's statement (at para. 74) that "**[h]ow [the standard of proof on a balance of probabilities] may be met depends on the proof that is capable of presentation**", the Court of Appeal should be taken as having effectively imported a new standard of proof. This is, the City adds, contrary to this Court's direction in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40, that there is "only one civil standard of proof at common law and that is proof on a balance of probabilities". (my emphasis)
>
> 40 I do not take the Court of Appeal to have espoused or applied a standard of proof other than the balance of probabilities. **The impugned statements go not to the standard of proof, but to the quality of evidence by which that standard is to be met. This Court said in *McDougall* (at para. 46) that "evidence must always be sufficiently clear, convincing and cogent". Those are relative, not absolute qualities. It follows that the quality of evidence necessary to meet that threshold so as to satisfy a trier of fact of a proposition on a balance of probabilities will depend upon the nature of the claim and of the evidence capable of being adduced** (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 82; *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, at para. 36). **In the context of historical adverse possession claims, the quality of the supporting evidence must merely be "as satisfactory as could reasonably be expected, having regard to all the circumstances"** (Anglin J., as he then was, in *Tweedie v. The King* (1915), 52 S.C.R. 197, at p. 220; see also Sir Arthur Wilson in *Attorney-General for British Columbia v. Canadian Pacific Railway*, [1906] A.C. 204 (P.C.), at pp. 209-10). (my emphasis)

These comments reinforce, once more, the importance of context when assessing evidence to determine if the element or fact in question has been established to the rele-

vant level of satisfaction – beyond a reasonable doubt – balance of probabilities – or prescribed statutory standard.

Particularly when the evidence is not directed to a past fact, but rather to the risk of occurrence of a future event or state, the element of "forecasting and speculation" is an integral and expected part of the context and analysis. Whether there is proven – on a balance of probabilities – a reasonable expectation of probable harm – a real risk – is a matter for an assessment of all the evidence and argument presented, such assessment to be informed by context, including the particular kind of harm asserted, and by common sense and good judgment. As in *Mowatt*, involving an assessment of a historical possession claim, so with claims involving the risk of future harm flowing from uncertain future events – the evidence must be "as satisfactory as" can "reasonably be anticipated".

In the 2016 decision of the Ontario Divisional Court, referred to earlier, *Bricklayers and Stonemasons v. Ontario (Information and Privacy Commissioner)*, the majority of the court found unreasonable and reversed a decision of the Ontario Information and Privacy Commissioner that had ordered disclosure of information because, in the words of the commissioner "… I find that the ministry and the affected parties have not provided sufficiently detailed and convinccing evidence that the *disclosure of the records at issue* could reasonably be expected to cause the harms they describe in their representations." (emphasis by commissioner). In the context of the requirement to establish a reasonable expectation of harm resulting from the disclosure of labour relations information the court said:

> 45. Reasonable expectation of probable harm cannot be merely fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason. Conversely, requiring a party to demonstrate that harm is more likely than not to occur sets the legal burden too high. …
>
> 46. The difficulty inherent in this test is that an affected party is required to provide evidence relating to an event that has not yet occurred. …
>
> 48. … How much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences.

The court concluded that the "clear and convincing evidence" approach espoused by the commissioner imposed too high a standard of proof and did not take into account the significance of context.

What can be learned from the assessment of harm in other cases?

Outside the confines of s. 39, there are only a limited number of reports that have considered other harm-based exceptions. But one can glean some indication that the approach to the assessment of harm, particularly the evidentiary assessment, is somewhat more flexible than one informed by the "detailed and convincing evidence" mantra.

One of the earliest reports – 2015-003 – considered a request for disclosure of a report on sexual exploitation and the sex trade in Newfoundland and Labrador. The public body relied on the exception in s. 37(1)(a):

> *37. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to*
>
> *(a) threaten the safety or mental or physical health of a person other than the applicant; or …*

Paragraph 8 sets out the framework:

> [8] The burden of proving that section 37(1) of the ATIPPA, 2015 applies to the Report is on the Women's Policy Office. The Women's Policy Office must prove that it is more likely than not that the disclosure of the Report could reasonably be expected to threaten the safety or mental or physical health of individuals or interfere with public safety.

After pointing out the requirement of a causal connection between disclosure and the expected harm, the report says, appropriately, that speculation of harm is not sufficient. Two paragraphs are instructive:

> [11] Turning to the Report in question, the Women's Policy Office's argument centered on the fact that certain individuals or groups of individuals will be at risk of harm if the Report is released. The Women's Policy Office also argued that the Report could identify individuals which would in turn put them at risk of harm.
>
> [12] The Report does not identify individuals specifically, however, sometimes identity can be ascertained through a mosaic of information. While it is my opinion that the Women's Policy Office's argument could have been stronger, with more evidence provided, after reviewing the Report

> I believe it is self-evident that certain information in the Report would meet the harms test and should be withheld.

This last paragraph illustrates, I believe, the type of approach set out by the Federal Court in *Calian*, which approach has been relatively recently endorsed by the OIPC. Peering into the future to assess the likelihood of harm is not an exact endeavour which must have detailed and convincing evidence as a pre-requisite to a finding of harm. Common sense and the drawing of reasonable inferences, particularly where a conclusion is "self-evident", will, in many cases, suffice.

In Report 2017-015, an applicant sought disclosure of reports commissioned by government relating to the commercial viability of Wabush Mines. It does not appear that any evidence was proffered other than the reports in question. Paragraph 15 of the report:

> [15] I will begin by considering the application of 35(1)(g). Obviously, there are competing interests involved with respect to the resolution of these bankruptcy proceedings. Prospective purchasers naturally wish to obtain any assets at the lowest possible price, whereas the creditors would wish to secure the highest possible price. People in the town of Wabush, and in the province as a whole, desire an outcome that restores employment in western Labrador. The government of the province, and in particular the Department, will have an interest in the outcome, and may well become involved in discussions with the purchasers regarding regulatory or environmental issues, tax concessions, public infrastructure investment, direct investment, or any number of things. Generally, the government has an ongoing responsibility to promote and facilitate economic development while ensuring that environmental protection requirements are met.

Section 35(1)(g) reads:

> *35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose …*
>
> *(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or*

The report continues – at paragraph 18:

> [18] The same analysis applies with respect to section 35(1)(d) in terms of disclosure that could reasonably be expected to result in significant loss or gain to a third party. It would be premature to release the authors'

> conclusions about how the information in the 2016 reports impacts the viability of Wabush Mines while the CCAA proceedings are ongoing. Only those portions of the 2016 reports may be withheld pursuant to section 35(1)(d).

I note the drawing of the inference of prejudice or harm based simply on a review of the information requested.

Report 2019-017 dealt with a request for the amounts of three settlements of legal actions. The public body relied on both s. 31(1)(p) – harm the conduct of legal proceedings – and s. 35(1)(g) – prejudice to financial or economic interests of the public body.

The report concluded that there was no "clear and convincing evidence" of harm for the purposes of s. 31(1)(p). But in the discussion of the 35(1)(g) exception, the report cites Report 2018-021 and its reference to the Federal Court decision in *Calian* and says, at paragraph 19:

> [19] In Report A-2018-021 this Office adopted the reasoning of the Federal Court of Appeal in Canada (Office of the Information Commissioner) v. Calian Ltd. In doing so, it was accepted that there will always be a degree of speculation inherent in any attempt to establish a reasonable expectation of probable harm, and that it is sufficient that the "prediction is grounded in ascertainable facts, credible inferences and relevant experience".

The conclusion:

> [21] As noted above, the Department has made only a general reference to ongoing litigation involving institutional physical and sexual abuse and when asked to provide specific details of the nature of its other, allegedly related litigation, it did not do so. We find that the Department has not met the burden of establishing that section 35(1)(g) applies to the request information.

For present purposes, I believe it is fair to question why the s. 31(1)(p) exception – reasonably be expected to harm the conduct of legal proceedings – requires clear and convincing evidence while s. 35(1)(g) – reasonably be expected to prejudice the financial and economic interests of government – may be established, recognizing a degree of speculation – with a prediction grounded in ascertainable facts, credible inferences and relevant experience.

In a recent report – 2020-010 – the OIPC considered a request for information relating to a request for proposals. The public body relied, in part, on s. 37(1)(b) – reasonably be expected to interfere with public safety. At paragraph 14:

> [14] This Office reviewed the records which included redactions under section 37(1)(b). The information withheld consists of information which could reasonably be expected to interfere with public safety. The records include information about a government facility that, if disclosed, could potentially expose the public body to a security risk. The Department's application of section 37 is appropriate.

Again I note that the conclusion on the establishment of the risk of harm was based solely on the inferences to be drawn from the requested information. No additional "clear and convincing evidence" was proven.

In terms of the analytical process used in determining whether a certain harm may 'reasonably be expected' to result in disclosure, I believe that, in fairness to applicants, public bodies and third parties, there should be a degree of consistency. While the particular type of harm alleged may differ, the proof of a 'reasonable expectation' of that harm is the same throughout the *Act's* harm-based exceptions. To require detailed and convincing evidence of a reasonable expectation of harm to a third party's commercial interest while allowing a reasonable expectation of harm (e.g. to a public body's economic interests) to be established simply on the basis of the inferences to be drawn from the information in question may suggest that a different standard is being applied.

The use of phrases such as 'clear and convincing' or 'detailed and convincing' can, again perhaps unintentionally, impose a higher than appropriate standard of proof and constrain the flexibility and the scope of the evidentiary analysis. They should be avoided.

I reiterate, specifically referring to s. 39, that should the Committee's recommendation on the structure of s. 39 be accepted with the result that the assessment of likely harm becomes the focal point of the analysis, the assessment of the evidence offered will be of primary importance.

I hope that the foregoing assessment has been fair. The OIPC is in the difficult position of being both an advocate for access to information and an independent reviewer of the decisions made by public bodies. It is essential that public bodies and those dealing with public bodies have trust and confidence in the independence of the OIPC in its review function. Particularly when assessing the likelihood of harm, the integrity of

the process and confidence in the fairness of the result requires careful and consistent attention to context and to a principled analysis.

INFORMATION TECHNOLOGY SECURITY

The critical importance of protecting both information technology systems and the information they contain or to which they provide a gateway is self-evident. The public interest in that protection cannot be minimized.

The statutory protection of information relating to systems that manage and store information – personal and otherwise – held by public bodies must be comprehensive and clear. There must be no possibility that, through use of the *ATIPPA, 2015* channels, information is released that could jeopardize the security of the information technology systems used by public bodies. That level of protection must extend to information technology infrastructure that controls and manages other public body assets, including communication systems and computer networks.

The *Act* contains a general system protection provision:

> *31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to …*
>
> *(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;*

The supplementary submission of Memorial University describes, in stark terms, the efforts that are made to gain access to its systems, at pages 7-8:

> 1. Memorial's network is under constant assault by both foreign and domestic entities, including state actors, attempting to gain access to our network.
> 2. Brute force attacks are attempted on Memorial's network roughly every couple of weeks.
> 3. In April 2020, Memorial's Office of the Chief Information Officer observed an increase in traffic that, over a period of days, resulted in a total accumulation of hundreds of millions of attempts to connect to the campus that was sourced from China, Russia, the Netherlands, and other overseas entities. Billions of connection attempts sourced from overseas have been blocked at the campus firewall.

4. Memorial deployed additional security tools to further protect the network based on new activity since COVID-19. These security tools use vendor designed proprietary detection methods based on industry standards to identify and drop malicious traffic. More than 90 million malicious connections were dropped within the first 30 days of deployment.
5. An average week of Memorial firewall statistics show hundreds of millions of rejected hits. Many days since COVID-19 have shown elevated levels of attack traffic in the range of 1 billion every couple of hours.
6. Attacks are becoming more sophisticated in nature and harder to detect by end users and by tools and technology. Memorial regularly receives phishing, spear-phishing and spoofing emails against its user population. Popular targets often align with published names on websites, public lists and forums. These targets include Memorial's president, vice-presidents, deans and other senior leaders.
7. On average during the summer of 2020, the university received approximately 950,000 - 1 million emails every 24 hours, of which 80-85% are threat messages and are blocked. Email volumes can often exceed 3-7 million over a 24 hour period during elevated attack periods.

In a further submission Memorial explained the need for more robust protection of IT security-related information, at page 4:

> Records containing details about IT infrastructure may include information identifying the location of critical infrastructure and the security controls in place to protect it. Examples of sensitive information include credentials, IP addresses, hostnames, other system identifiers, vendor and technology names, versions, network configurations, security assessments and diagrams, among others. When malicious users are in possession of this information, there is an increased probability of attack and increased likelihood the attack will be successful.
>
> When responding to ATIPP requests, subject matter experts, such as IT experts, may need to be engaged to identify sensitive security information that may fall outside traditional disclosure exceptions. An example could be as simple as an interpretation of a website address to determine if any sensitive information is embedded in the URL link. While traditional disclosure exceptions may be well understood when responding to ATIPP requests, other security risks may not be well understood or may have changed from a risk perspective since last discussed. It is important to have strong, clear language in ATIPPA to protect this type of information from disclosure.

These concerns are echoed in the submission of the OCIO, at pages 3–4:

> There is minimal language within the Act that enables the OCIO to ensure information technology (IT) security related information is protected from un-

authorized disclosure. Section 31(1)(I) is the only option to maintaining the confidentiality of IT security related records. As such, the language in that section is essential to the ability to maintain the security of government IT assets and government information.

The unauthorized disclosure of operational IT security information has shown to result in cyberattacks that affect the confidentiality, integrity, or availability of government networks, systems, and data. The National CIO Subcommittee on Information Protection (NCSIP) has written a position paper titled "Protecting Sensitive Information throughout the Access to Information and Privacy (ATIP) Process", which states: "...several types of cybersecurity information has been identified to be harmful in disclosing during an access to information request. These information disclosures includes: records containing details about IT infrastructure, network addressing or hostnames, and user identifiers (user ID's) that form half of the credentials needed to access systems."

NCIP also states: "Records containing details about IT infrastructure may include key information related to the location of critical infrastructure and the security controls in place to protect it. Records may include network addressing or hostnames, which, if disclosed, will result in additional unauthorized access attempts. Records may also include user identifiers (userids) that form half of the credentials needed to access systems. Once cybersecurity threat actors are in possession of this information, there is an increased probability of attack and increased likelihood the attack will be successful. Once attackers gain unauthorized access to one system they can use this access to gain access to additional systems holding sensitive information. Examples of sensitive information include credentials, IP addresses, hostnames, other system identifiers, vendor and technology names, versions, and network configurations and diagrams among others."

Additional information to withhold - network diagrams, file paths, directory structures, vulnerabilities, technology vendors and versions, and other system configuration information that aid attackers." NCIP.

The OCIO contacted its independent 3rd Party Security Assessor (Electronic Warfare Associates Ltd. - EWA), who are experts in IT security. EWA notes that:

- once individuals are in possession of this information or a combination of such information, there is an increased probability of a cybersecurity attack and increased likelihood the attack would be successful
- once attackers gain unauthorized access to one system, they can use this access to gain access to additional systems holding sensitive information
- security and technical information should not be disclosed that would be subsequently used by cybercriminals to compromise the network and information assets.

> Section 6 of the Management of Information Act requires a public body to protect government records. The disclosure of IT security related information would be contrary to the requirement to protect government records. The OCIO has made significant information management and protection investment and put controls in place to prevent unauthorized or inappropriate access or use of government's network and its information assets. These would include the Password Management Directive, Password Management Standard and Acceptable Use of the Government Network and/or Information Technology Assets Directive.
>
> Cyberattacks occur all the time, to large, very well-protected organizations. If a cybercriminal were to access or manipulate personal and confidential government information, the harm to government's reputation would be significant. This has been experienced by other provincial jurisdictions who have fallen victim to social engineering attacks.
>
> Recommendation: Based on the position and best practices of security professionals across the country, including the OCIO, it is recommended that stronger, more inclusive language be included in the ATIPP legislation to provide for the protection from disclosure of information respecting government's IT systems. This would be accomplished by having a separate section in ATIPP legislation dedicated to IT security protection.

The general provision in s. 31 is no longer adequate. It is in the public interest to provide specific language addressing the disclosure of information respecting information technology systems used by public bodies.

Should such language be of a general nature or rather, for consistency and clarity in administration, set out a listing of the specific types of information subject to the exception? Should the exception be discretionary or mandatory?

A discretionary exception, applicable to a wide range of public bodies and administered by coordinators of differing levels of information technology understanding, could allow for the release of information which, with a fuller understanding of the consequences of disclosure, should not in fact be released. If the exception is mandatory but subject to the public interest override, it could perhaps create circumstances where a refusal may be too readily decided without proper consideration of the public interest. For example, the disclosure of vendor names relating to applications and services – where the release of the requested information would be of little consequence – may be refused.

On balance, I conclude that the necessary and appropriate balanced level of protection would be achieved through a general harm-based discretionary exception sup-

ported by a non-exclusive listing of technology security information to inform any assessment of a request for such information. Making the provision discretionary would, I hope, assist in ensuring that in each case the public interest is considered and weighed against any potential for harm. Further, making the exception subject to the public interest override would provide confirmation of the need to consider this balance each time a request is made.

As with the issue of document format, the coordinators of smaller public bodies may not be familiar with all the types of information in the suggested listing. Accordingly, as an administrative recommendation, I recommend that the OCIO and the ATIPP Office provide to the smaller public bodies basic guidance and information on the types of information set out in the listing and the types of record which may include such information, so as to better enable coordinators to respond appropriately to requests.

I would expect that, in the reasonable and fair administration of this provision the head of a public body would routinely consider the public interest and release the requested information where it is apparent, after specific and careful consideration, that the public interest is outweighed by any harm that could reasonably be expected from the disclosure of the information.

RECOMMENDATION

- That the *Act* be amended to provide a discretionary harm-based exception to access for information technology security information. [Appendix K, s. 31.1]

Administrative

- That the OCIO and the ATIPP Office provide to the smaller public bodies basic information and guidance on the types of information technology security information and the records which may contain such information.

TESTING PROCEDURES AND AUDITS

The majority of Canadian jurisdictions include a discretionary exception for information related to testing procedures and audits. At present, *ATIPPA, 2015* does not apply to "a record of a question that is to be used on an examination or test". (Paragraph 5(1)(f)). This reflects the provision in the 2002 *Act*. Digital Government and Service NL suggests that the *Act* should provide the broader discretionary exception in common use across the country. This issue was not raised before the Wells Committee.

The argument is that a discretionary exception is necessary since if a person knows the essential structure of a test or audit procedure in advance, the final result may not be an accurate assessment of the parameters or qualities being measured. The same would apply of course to the specific questions to be used on any test. Clearly, widespread dissemination of procedures or questions would render continued use of any tests meaningless.

I agree with the submission. The degree of protection reasonably required to ensure the integrity and validity of testing and auditing processes extends beyond the specific questions that may be asked. Subject to the public interest override, I recommend a discretionary exception for information related to testing and auditing processes. Any limitation on access relates only to test and audit procedures and techniques; it does not extend to the results of such tests or audits.

As a corollary to the inclusion of a specific discretionary exception, paragraph 5(1)(f) should be repealed.

RECOMMENDATION

- That the *Act* be amended to provide a discretionary harm-based exception to access for test-related information. [Appendix K, s. 5(1)(f), s. 41.1]

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PUBLIC INTEREST OVERRIDE

The present *ATIPPA, 2015* includes a public interest override that extends to most discretionary exceptions:

> *9.(1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.*
>
> *(2) Subsection (1) applies to the following sections:*
>
> *(a) section 28 (local public body confidences);*
>
> *(b) section 29 (policy advice or recommendations);*
>
> *(c) subsection 30 (1) (legal advice);*
>
> *(d) section 32 (confidential evaluations);*
>
> *(e) section 34 (disclosure harmful to intergovernmental relations or negotiations);*
>
> *(f) section 35 (disclosure harmful to the financial or economic interests of a public body);*
>
> *(g) section 36 (disclosure harmful to conservation); and*
>
> *(h) section 38 (disclosure harmful to labour relations interests of public body as employer).*

The discretionary exceptions not included are s. 31 (law enforcement) and s. 37 (individual and public safety).

With one exception, no mandatory exceptions are subject to the override. That exception is the public interest provision governing the release of cabinet records:

> *27.(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.*

The public interest override provision is the product of extensive consideration by the Wells Committee. Its introduction at page 67:

> The public interest override in access laws recognizes that even when information fits into a category that deserves protection, there may be an overriding public interest in disclosing it to an applicant or to the public at large. In that respect, the public interest test is a kind of lens that public officials must look through in order to make a final determination about disclosure.

At the beginning of its subsequent analysis, the Committee said, at page 70:

> Like other jurisdictions in Canada, Newfoundland and Labrador has been reluctant to embrace a broadened application of the public interest override. The failure to do this, together with restrictions imposed in the Bill 29 amendments, has put the *ATIPPA* out of step with progressive access regimes around the world.
>
> Governments everywhere are under increased pressure to release information that formerly was kept under wraps. People are demanding more government information, in the hope of furthering public transparency and accountability. The current worldwide movement toward open government and open data will likely encourage people to ask for even more information. It may be that governments will choose to broaden the public interest provisions of Acts like the *ATIPPA* now, or be forced to do it later.

Its conclusion, at page 78:

> The approach to the public interest override in the *ATIPPA* is in need of an overhaul. It applies to few areas of public interest, and the wording suggests it is intended mainly for urgent matters. The existing section 31(1) is useful for the purpose for which it is intended, where it places a positive duty on the head of a public body to release information related to a risk of significant harm to the environment or to public health and safety even in the absence of a request for the information. The Committee concludes that in a modern law and one that reflects leading practices in Canada and internationally, it is necessary to broaden the public interest override and have it apply to most discretionary exemptions. This would require officials to balance the potential for harm associated with releasing information on an access request against the public interest in preserving fundamental democratic and political values. These include values such as good governance, including transparency and accountability; the health of the democratic process; the upholding of justice; ensuring the honesty of public officials; general good decision making by public officials. Restricting the public interest to the current narrow list implies that these other matters are less important.
>
> The Committee concludes that in addition to retaining the current section 31(1), the *Act* should also contain a new section. It would provide that where a public body can refuse to disclose information to an applicant under one of the exceptions listed below, the exception would not apply where it is clearly

> demonstrated that the public interest in disclosure outweighs the reason for the exception: …

A fair reading of the Wells report indicates that the thrust of the submissions made to the Committee and hence the focus of its discussion was the level of public interest that should be established before invoking the override. It said, at page 69:

> While the public interest override was not a dominant issue in either the written or oral submissions, the current language was seen as weak. The main criticism is that section 31(1) of the *ATIPPA* requires "a risk of significant harm" before the section can be invoked.

There was no general discussion of the assessment of the public interest required in any event when a discretionary exception is being considered, nor of whether the override should apply to any of the mandatory exceptions.

In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada commented on the public interest considerations that must be taken into account, even in the absence of a specific override provision, when dealing with a discretionary exception – in this case law enforcement and solicitor-client privilege. The override provision in the *Ontario Freedom of Information and Protection of Privacy Act* did not extend to those exceptions:

> 23 An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third party information], 18 [economic and other interests of Ontario], 20 [danger to safety or health], 21[personal privacy] and 21.1 [species at risk] does not apply <u>where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption</u>. R.S.O. 1990, c. F.31, s. 23; 1997, c. 41, s. 118 (2); 2017, c. 8, Sched. 13, s. 3. (underlining by Supreme Court)

The Court went on to conclude, in clear terms, that the absence of specific reference to the exceptions in the override clause did not affect the responsibility of the public body to take into account the public interest when considering the exercise of the discretion to release information.

> 45 However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.
>
> 46 A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

47 By way of example, we consider s. 14(1)(a) where a head "may refuse to disclose a record where the disclosure could reasonably be expected to ... interfere with a law enforcement matter". The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information.

48 In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

The Court concluded that the absence of the exception from the override provision was of little analytical consequence:

49 The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.

...

51 This interpretation is confirmed by the established practice for review of s. 14 claims which proceeds on the basis that, even in the absence of the s. 23 public interest override, the head has a wide discretion. The proper review of discretion under s. 14 has been explained as follows:

> The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO's submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.
>
> (IPC Order PO-2508-I/September 27, 2006, at p. 6, *per* Senior Adjudicator John Higgins)

Thus, in the context of the discretionary exceptions in *ATIPPA, 2015*, the s. 9 override provision adds little to the requirement on the head of the public body to consider the public interest, other than perhaps to confirm the need for consideration of the public interest in the case of the specific exception and, conceivably, to lessen consideration of the public interest in the omitted discretionary exceptions.

ATIPPA, 2015 is public interest legislation and must operate as such. The exceptions in the *Act*, either harm-based or class-based, are intended to protect legitimate interests. The override provision, which relates to the public interest in general or to public health and safety, operates as a type of pressure relief valve, allowing the public interest in the disclosure to prevail where warranted. And as pointed out by the Supreme Court of Canada, the override provision itself does little more than confirm the discretion already inherent in a discretionary exception.

The Centre for Law and Democracy's comments on the present override regime, at pages 8–9:

> ATIPPA's treatment of the public interest override falls short of international standards in several respects. These mandate that the override should apply to every 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 the exclusions in section 5. Of these, only section 27 has its own public interest override, leaving out many exceptions. The section 9 override additionally does not apply to exceptions which require the public body to refuse to disclose ("shall refuse"), although all of the exceptions to which it formally applies are already of the "may refuse" type.
>
> The section 9 override is mandatory, in the sense that it must be applied when the conditions for it 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".24 Second, the requirement that there be a "clear demonstration" of why the public interest outweighs the harm unreasonably tilts the consideration in favour of secrecy whereas international standards call for a straight balancing of the two interests concerned.

This position may be influenced by the Centre's view of access to information as a human right, a characterization rejected by the Wells Committee.

The Wells Committee remarked that the notion of the public interest override elicits "unease" in "some politicians and public officials". (page 74). It is fair to say that the very notion of a public right to information in government's possession is one that has required a change in attitude and thinking by those 'on the inside'. That culture shift is well on the way in Newfoundland and Labrador, although some of the comments from the coordinators suggest that, in some quarters, the culture shift may need a push, a push that must come from the top. It is worth restating that access to information is a right, a comprehensive right that should only give way to non-disclosure when circumstances warrant. In some cases, the reasons for non-disclosure will be readily apparent and will support a class-based mandatory exception, with the public interest in disclosure not a factor that must be considered absent a specific direction to do so. In the majority of cases – and this is clear from the structure of *ATIPPA, 2015* – the exceptions are discretionary. It is a requirement of the proper exercise of discretion – whether specifically legislated or not – that the head of the relevant public body consider, in every case, whether the public interest in disclosure outweighs the reason for the exception.

It will be immediately apparent that in the 'real world' such a responsibility places an extremely heavy and difficult burden on the head of a public body – in the case of a government department, the minister. It is a reasonable assumption that information disclosed in response to a request is more likely to lead to criticism than to praise of government or a public body; the one who orders release of such information on the basis of the public interest may not be regarded with favour by others within the public body or in government. But if those in public bodies are to believe in and respect the objectives of the *Act* – the facilitation of excellent democratic governance – the need for transparency and accountability must take precedence over upset feelings and, perhaps, the desire to avoid adverse consequences. And to repeat a comment made a number of times,

the fact and perception of a commitment to excellence, transparency and accountability in governance must be consistently demonstrated at every level of each public body.

Where the public interest in disclosure must be weighed against the reasons for a particular exception, that assessment must be carried out impartially, taking all relevant evidence into account and with regard to potential harm only to those interests intended to be protected by the exception under consideration. It should not need to be said that every decision-maker charged with taking the public interest into account is, in fact, a public servant.

The achievement of a culture of ready disclosure and transparency in the interest of excellence in democratic governance will not happen overnight. It is a dynamic process, and I consider it worthwhile to recommend amendments to the *Act* that will, both by their presence and their application, advance the objectives of the *Act*.

Any discretionary exception in Division 2 of Part 2 of the *Act* should be included in the s. 9 provision and be specifically subject to the override. I recognize that where issues of health and safety are involved (s. 37), the possibility of the public interest in disclosure clearly outweighing the reason for the exception will be remote. But in principle, there is no reason to exclude this discretionary provision from the ambit of s. 9.

While making all discretionary exceptions subject to the public interest assessment may add little to the analysis required in each case, it will confirm that the exercise of the discretion requires consideration of the public interest and the obligation to displace the exception when required in the public interest.

There are two different public interest thresholds applied to exceptions. The wording of the override in s. 27 (Cabinet confidences) is "outweighs". This is a less exacting standard than the "clearly demonstrated" used in s. 9. However, in s. 27, once it is determined that the public interest outweighs the reason for the exception, the decision to disclose remains discretionary. Once the s. 9 override is clearly demonstrated to outweigh the reason for the particular exception, disclosure is required. The higher threshold perhaps reflects that, once met, disclosure is required. It also provides less opportunity for disagreement over whether the threshold has been reached; "clearly demonstrated" is more amenable to a firm conclusion than is "outweighs". I do not recommend modifying this threshold, nor do I recommend changing the discretionary nature of the override in s. 27.

Today, at least in Newfoundland and Labrador, the role of government in the economy – its active participation in economic ventures and its use of public money to support what it views as desirable initiatives – supports the conclusion that the public interest in access to information relevant to that function be clearly recognized. Although in any particular adjudication it may be a hurdle to establish that the public interest in access to the specific information requested outweighs the potential for harm from disclosure, the fact that the public interest must be considered will serve as a reminder that the purpose of the actions of government, whether direct or indirect, is to serve the interests of those who are governed.

The experience of the last five years points to the need for increased transparency and accountability in the economic functions of government, functions undertaken on behalf of the citizens of the province. Certain mandatory exceptions to access, including some exceptions outside the *Act*, should be subject to the public interest override.

These exceptions relate to the economic activities of government, whether as purchaser, investor or otherwise, and whether direct or through an intermediary.

Making these exceptions subject to a public interest override will not affect the substantive aspects or nature of the exception, but will require the public interest in disclosure to prevail when circumstances tip the scales in favour of disclosure. One may ask the simple question – 'why should this not be the case?' – I have not been given a persuasive response.

I recommend that the s. 9 override – in its present 'disclosure required' structure – be extended to s. 39 (third party commercial interests). I do not recommend that the mandatory exceptions in s. 40 (personal information) or s. 41 (House of Assembly and statutory offices) be subject to the public interest override. The public interest in information related to workplace investigations and conduct and to Schedule A corporations is discussed elsewhere in this report.

BURDEN OF PROOF

Section 43 of the *Act* provides that, with respect to an access request, during the complaint and investigation stages the burden is on the public body (or third party) to establish that there is no right of access to the requested information. This approach reflects the presumptive nature of the right of access granted by s. 8.

If the matter proceeds to an appeal in the Supreme Court, s. 59 incorporates s. 43, and s. 60 provides that the court is to determine whether or not the head is required or authorized to refuse access, thus reflecting the burden of proof in s. 43. However, subsections 60(1) and (2) reflect the wording in subsection 9(1) and refer to the public interest override in these terms – where "it has not been clearly demonstrated that the public interest in disclosure outweighs the reason for the exception …".

This suggests that, once the head of the public body satisfies the court that an exception is applicable, then access is refused unless the public interest override is established. But who bears the burden of establishing the public interest? It is not specified in the *Act*.

The difficulty created by the lack of specificity is apparent when in the adjudicative context of the court. The normal approach in litigation is that a party who asserts a right has the burden of establishing the existence of and entitlement to that right. Where the head of a public body is asserting a right or an obligation to refuse disclosure on the basis of an exception, the burden is clearly on the head to prove either the class of document or the level of probable harm that supports the exception.

In *Mastropietro v. Newfoundland and Labrador (Minister of the Department of Education)*, 2016 NLTD(G)156, Justice Murphy, in the context of an appeal of a refusal of access, discussed the conceptual and practical issues that arise when assessing the public interest in litigation.

After setting out s. 43 he said, at paragraph 42:

> 42 Further, section 59(2) of the *Act,* set forth earlier, provides that the section 43 burden of proof applies with the necessary modifications to an appeal. Does this mean that where a public interest assessment must be conducted by this Court on an appeal, the head of the public body bears the onus of proving that it has not been clearly demonstrated that the public interest in disclosure outweighs the reasons for non-disclosure. In my view it does not. Instead the effect of section 43(1) and 59(2) in my view is simply that the head of the public body bears the onus even at the appeal stage of proving that the record or document in question falls within an exception to access under the *Act*.

But Justice Murphy clearly appreciated that the assessment of the public interest in an ATIPPA appeal is not one that is amenable to the accepted onus of proof structure in litigation.

46 Section 23 of the Ontario legislation was dealt with by the Ontario Information and Privacy Commissioner in his decision in Re Stadium Corporation of Ontario, 1991 CanLII 4034 (ON IPC) Order P-241, where the Commissioner stated as follows with respect to section 23:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

47 I agree with the general principle that a party asserting a right has the onus of establishing entitlement to that right. I also agree that this onus cannot be absolute but must be relaxed somewhat in a situation such as this, where the Applicants have not had the benefit of reviewing the document on which they are required to make submissions as to whether the public interest override should prevail. …

49 In my view it would also be open to the party bearing the onus to present evidence on an appeal on the issue of the public interest in disclosure. As noted earlier, an appeal to this Court is a new matter or a *hearing de novo* and section 59(1) of the *Act* specifically provides that the Court may receive evidence by affidavit. I note that the foregoing provision is permissive in nature and does not preclude the Court from receiving evidence in other forms.

50 I am not saying that it is incumbent upon a person seeking to establish that there is a sufficient public interest in disclosure so as to outweigh the purpose of the exception from disclosure, to present evidence of the public interest in disclosure, in every case. There may well be cases where the public interest in disclosure, is so notorious as to be capable of judicial notice by the Court. There may be other cases, where the records or documents themselves, are such that the Court is able to conclude there is a public interest in disclosure. However, in the absence of these or other similar circumstances, it is my view, that a person seeking to argue on an appeal, that the public interest in disclosure clearly outweighs the purpose of the exception from non-disclosure would be well advised to present evidence to the Court to support such an argument.

In its submission, the OIPC commented on this issue – at page 42:

> Section 9 does not reverse the burden of proof in section 43, and from a practical standpoint, if the applicant does not have the records, they may not be in the best position to argue that disclosure is in the public interest, except perhaps from a high level perspective based on the subject matter of the request. Lacking specificity on the burden of proof in section 9, courts have interpreted the statute as they find it.

Its recommendation:

> Recommendation 9.1: Clarify that the burden of proof in the application of the public interest override does not rest solely on the applicant or the public body but that any party, including the OIPC at the review stage, is obligated to bring forward evidence that could be relevant to this determination.

As mentioned, in the context of *ATIPPA, 2015*, the concept of the public interest being weighed against the reason for an exception does not easily fit into the normal framework of litigation. Like justice, the public interest override is an overarching principle meant to inform the decisions contemplated by the *Act*.

After careful consideration, I am not persuaded that much will be achieved by attempting to address the process of consideration of the public interest by an amendment to the *Act*. As Justice Murphy points out, the *Act* contemplates that an appeal is to be considered a new matter and that evidence may be received by affidavit. Any party may introduce evidence, as may the OIPC who, through s. 56(3), has the right to intervene in an appeal. Neither am I comfortable with requiring a party to present evidence. It will be for the court to assess the effect, if any, of the failure of a party to adduce evidence.

It is clear that the appeal provisions of the *Act* require that the court, in the course of the determination of the appeal, consider the public interest where a right of access is denied based on an exception. The task for the court, no doubt not an easy one, is, on the basis of all the evidence properly before it, including the records in question and the facts amenable to judicial notice, to weigh the public interest against the exception and decide accordingly.

I agree with the tenor of Justice Murphy's decision that it is not productive to think in terms of onus or of the obligation to introduce evidence when considering the public interest. No amendment is recommended.

RECOMMENDATION

- That the *Act* be amended to extend the public interest override to all discretionary exceptions, to third party commercial interests, and to the final report of a workplace investigation. [Appendix K, s. 9, s. 33(3)(b)]

SUNSET CLAUSES

A sunset clause provides a pre-determined expiry date for legislation or, in the case of *ATIPPA, 2015*, for the removal of non-disclosure (exception) provisions related to certain information.

Only the Centre for Law and Democracy commented on sunset clauses. Its recommendation, at page 11:

> ➢ Sunset clauses should apply to all exceptions that protect public interests and should be set at 15 or 20 years, with the possibility of an extension where this is approved by the Commission.

There are a number of sunset clauses in the *Act*.

- Cabinet confidences

  s. 27: (4) Subsections (1) and (2) do not apply to

  (a) information in a record that has been in existence for 20 years or more; …

- Local public body confidences

  s. 28: (2) Subsection (1) does not apply where

  (b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.

- Policy advice or recommendations

  s. 29: (3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

- Disclosure harmful to intergovernmental relations or negotiations

  s. 34: (3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.

- Disclosure harmful to labour relations interests of public body as employer

  s. 38: (2) Subsection (1) does not apply where the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland

and Labrador or the archives of a public body and that has been in existence for 50 years or more.

- Disclosure harmful to business interests of a third party

s. 39: (3) Subsections (1) and (2) do not apply where

(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more

- Disclosure for archival or historical purposes

s. 71: The Provincial Archives of Newfoundland and Labrador , or the archives of a public body, may disclose personal information for archival or historical purposes where

(c) the information is about an individual who has been dead for 20 years or more; or

(d) the information is in a record that has been in existence for 50 years or more.

These provisions pre-date the 2014 review and were left in place by that review. After some discussion, the Wells Committee concluded, at page 333–334:

> 50 years is a long time to protect public documents, and those examples point to the need to review such time limits to validate the term. It is worthwhile to ask if those time limits can be defended, given the kind of information they protect. …
>
> … where the *ATIPPA* establishes a time limit for the exception protecting a specific type of information, the length of the time limit for the exception should be defensible as a necessary protection.
>
> For example, there is widespread agreement that Cabinet deliberations should be protected, and that there should be protection for the advice officials provide for their ministers. But how long should that protection last? Protection of 15 years for policy advice and 20 years for Cabinet confidences puts Newfoundland and Labrador around the midpoint for Canadian provinces. …
>
> Records in the Archives related to business interests of a third party and labour relations of the public body as an employer are protected for 50 years. This is extraordinary protection for these categories of records, and while it may be necessary to protect some information such as business tax records for

> this period, there should be a review to determine if such long term protection is warranted, and if it is in keeping with the spirit of the *ATIPPA*. …
>
> These particular sections of the *Act* would benefit from additional scrutiny. However, the limited expression of public interest regarding protected disclosure periods during this review, and the lack of information on which to exercise judgement on the issues makes it inappropriate for the Committee to draw conclusions at this time.
>
> 89. The Committee recommends that the next five-year statutory review of the *Act* be expressly mandated to assess the time limits for provisions that have specific protection periods.

As with the Wells Committee, this Committee observed no great public interest in the present sunset clauses.

Other than for archived records, the 15- to 20-year sunset provisions are not out of step with those in other Canadian jurisdictions. In the absence of a persuasive reason to do so, I do not propose to recommend any adjustment. However, as the Wells Committee noted, the 50-year protection for archived records is "extraordinary protection" and not in keeping with the spirit of *ATIPPA, 2015*. It is reasonable to assume that, as time passes, the potential for harm from disclosure will lessen.

Records placed in the Provincial Archives or the archives of a public body by "a person other than a public body" are not subject to *ATIPPA, 2015* (paragraph 5(1)(h) and (i)). The Committee was not made aware of any definition or legislature addressing "archives of a public body".

The archiving of provincial government body records is governed by the *Rooms Act*, SNL 2005, c. R-15.1. Sections 23–24 of that *Act*:

23. Except where otherwise prohibited

(a) under a law of the province;
(b) by reason of the physical condition of the record;
(c) by order of the Lieutenant-Governor in Council;
(d) under the terms and conditions of an agreement, bequest or other gift; or
(e) at the request, in writing, of the public body that has given the records to the archives,

records in the archives are available for public inspection.

24. (1) A public body that wishes to respond to a request under section 11 of the Access to Information and Protection of Privacy Act, 2015 with respect to a government record that it intends to transfer to the archives shall transfer that record to the archives with instructions, in writing, that all requests for access to that record be transferred to it in accordance with section 14 of the Access to Information and Protection of Privacy Act, 2015 , and the Access to Information and Protection of Privacy Act, 2015 shall apply to that record as if it was still under the care and control of that public body.

(2) Where, in accordance with subsection (1), the director receives instructions from a public body to restrict access to a government record, the director shall comply with those instructions.

Thus, subject to a listed prohibition or to specified *ATIPPA, 2015* restrictions from a public body concerning a transferred record, records in the provincial archives are open to public inspection.

The present sunset provisions in sections 38 and 39 provide that the exception is no longer applicable if the record in question has been in existence for over 50 years *and* is in the archives of a public body. I have been given no explanation why there is a need for both conditions to be met before the sunset clause applies. I do note, however, that wording identical to that in paragraph 39(3)(b) is present in the corresponding legislation in British Columbia and Alberta.

Apart from the tax information referred to in subsection 39(2), I see no reason to extend the availability of the exception in sections 38 and 39 beyond 20 years. Even within that time period, one would expect that in the case of a harm-based exception, proof of the appropriate level of harm would become more difficult with the passage of time. Neither do I see a reason for maintaining the additional requirement that the record be in a public archive. The phrase "the archives of a public body" does not admit of precise definition and the fact that a record is transferred either to the Provincial Ar-

chives or to the 'archives' or other storage facility of a public body should not, in and of itself, be a factor in determining public access to such a record. The Provincial Archives operate pursuant to the *Rooms Act*, which *Act* contains its own disclosure and access provisions and, in s. 24, incorporates the provisions of *ATIPPA, 2015* should the head of the relevant transferring public body consider it necessary.

In my view, records in the custody or control of a public body which contains information (other than tax information) of the nature referred to in sections 38 and 39 should in my assessment be treated no differently than records held by any public body and should lose the protection of the exception after the record has been in existence for 20 years. I have been given no reason why the protection for tax information should be changed from the present 50-year period.

Section 71 addresses personal information held in an archive:

> *71. The Provincial Archives of Newfoundland and Labrador, or the archives of a public body, may disclose personal information for archival or historical purposes where*
>
> *(a) the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40;*
>
> *(b) the disclosure is for historical research and is in accordance with section 70;*
>
> *(c) the information is about an individual who has been dead for 20 years or more; or*
>
> *(d) the information is in a record that has been in existence for 50 years or more.*

Subsection 71(d) effectively deems that after a record has been in existence for 50 years, the disclosure of any personal information in that record will not be an unreasonable invasion of a third party's privacy. I have not been given any reason to warrant displacing that provision and prefer to err on the side of caution in protecting personal information. No change is recommended to s. 71.

RECOMMENDATION

- That the *Act* be amended to replace the 50-year sunset clause on archived records in sections 38 and 39 with a 20-year sunset clause with no reference to archived records. [Appendix K, s. 38(2), s. 39(4)]

SUBMISSIONS OF THE NEWFOUNDLAND AND LABRADOR VETERINARY MEDICAL ASSOCIATION

The Newfoundland and Labrador Veterinary Medical Association made two written submissions to the Committee urging that veterinary medical records in the possession of a public body be excepted from the operation of *ATIPPA, 2015*. In the Association's oral presentation, Dr. Nicole O'Brien and Dr. Julia Bulfon explained that if raw veterinary data is publicly released without context and without proper interpretation by a veterinary professional, the result is likely to lead to misinformation. As Dr. Bulfon said:

> We feel it is paramount that the public be able to access information related to regulatory programs and those that impact public health and animal health. This information is readily available through a number of governing bodies, which report information that provides needed context for understanding complex issues. Our concern is that access to veterinary medical records without additional context will lead to public misinformation. It is irresponsible to release these records without additional context provided by experts. This does not lead to an increase in public knowledge or public trust, but a propagation of misinformation. (Transcript – January 20, 2021, p. 159)

Secondly, the Association argued that the disclosure of veterinary medical information - information considered to be confidential as between the veterinarian and the owner of the animal – is a breach of the mandated ethical obligation of the veterinarian and will lead to a breakdown in trust between the owner and the veterinarian. Dr. O'Brien's comments:

> The other concern that you have is the moral ethical dilemma faced by that veterinarian who has gone to school, received an education, takes that trust very seriously, and it's understood by the client that they have that trust and they have many years of that trust, building it together, and then they're put into this moral ethical dilemma where they have to release these records.
>
> So from a veterinary perspective – being somebody who has to release records – it is difficult for us as veterinarians in general, regardless of whether we're small animal or we're government or large animal, whatever the case may be, it's a difficult moral dilemma when it's drilled into us from the very beginning that we have this trust and we have this confidentiality of records. (Transcript – January 20, 2021, p. 161)

The position of the Association is supported by the Department of Fisheries, Food and Agriculture. The Department's submission, at page 5:

FFA requests that Veterinary Medical Records be protected from public disclosure through the **Access to Information and Protection of Privacy Act** with exceptions to those required by law: 1) to report suspected cases of cruelty against animals and 2) to report a public health risk to Health Canada or a Reportable Disease to the Canadian Food Inspection Agency (CFIA) as required under the **Health of Animals Act.**

The Newfoundland and Labrador College of Veterinarians is the licensing body for veterinarians in the province. Veterinarians are required to be licensed to legally practice veterinary medicine in the province. Veterinarians are required to comply with the **Veterinary Medical Act,** Clinic Standards, By-Laws and Code of Ethics, which require that veterinary medical records are confidential. The Veterinary Clinical Standards for Newfoundland and Labrador (section 2.1.3 (8)) states: "Unless required for the purpose of a clinic inspection, or other legitimate action of the College, a medical record is considered a confidential record that is accessible only to the owner of the animal (or representative) and the attending veterinary clinic." Failure to ensure confidentiality could result in discipline of the veterinarian by the College and potential loss of license to practice.

According to the Newfoundland and Labrador Veterinary Medical Association, "upon entering into a consultation with a client, a Veterinarian-Client-Patient Relationship (VCPR) is formed". The VCPR is the basis for interaction among veterinarians, their clients, and their patients. The VCPR serves to build trust and facilitate honest and comprehensive communication between the client and the veterinarian to ultimately improve accuracy of diagnosis and efficacy of treatment. Maintaining confidential medical records is necessary to ensure that the clients trust that the information will not be released to any third party. Client trust of confidentiality is important with respect to detecting, treating and mitigating disease. This is particularly important with respect to food safety, public safety and detecting reportable/emerging diseases.

The confidentiality of veterinary medical records is protected by law or regulation in a number of jurisdictions including: Nova Scotia's **Fisheries and Coastal Resources Act** Section 8 (5) and Ontario's **Veterinarian's Act** Regulation 1093 Section 17 (1).

It is recommended that the Committee's review of ATIPPA, 2015 include the development of safeguards for veterinary medical records, and that there is clear wording to restrict access to medical record information and protect the privacy of veterinary medical records. Alternatively, Schedule 'A' of ATIPPA, 2015 could be amended to include the Section 9 (Confidentiality by-law) of the Consolidated By-laws of the Newfoundland and Labrador College of Veterinarians 2020 - which states that Revealing information concerning a client, an animal or any professional service performed for an animal, to any person other than the client or another member treating the animal is prohibited.

This submission reflects the concerns expressed by the Association – a loss of client trust because of accessibility of records and a possible breach of professional clinical standards because of disclosure. I note the reference to the situation in Nova Scotia; in that province, the equivalent of Newfoundland and Labrador's Schedule A includes s. 8(4) of the *Fisheries and Coastal Resources Act*.

A supplementary written submission from the Association outlined the professional standards framework, described the different roles played by government veterinarians and summarized the concerns over the release of information:

> Veterinary records are generated during the course of practicing veterinary medicine and intended for veterinary interpretation. Veterinary records are used to make a diagnosis which means that there is an interpretation or conclusion made. Based on the diagnosis, the treatment (including mitigation measures) will be recommended. These activities fall within the definition of veterinary medicine. Only licensed veterinarians are permitted to practise veterinary medicine.
>
> ***Veterinary Medical Act***
>
> 1) The *Veterinary Medical Act* (2004) defines veterinary medicine as veterinary medicine, surgery, pathology and dentistry and includes:
>
>   a. the diagnosing, prescribing, treating, manipulating and operating for the prevention, alleviation or correction of a disease, injury, pain or other similar condition in or of an animal.
>
> 2) The *Veterinary Medical Act (2004)* Section 30 (1) states that a person shall not engage in or practise veterinary medicine unless he or she holds a veterinary licence.
>
> 3) The *Veterinary Medical Act* (2004) section 16 (1) states that the Board may make by-laws about (l) standards of practise for veterinarians and veterinary clinics.
>
>   a. Clinic Standard by-law 2.1 3(8) states that unless required for the purposes of a clinic inspection, or other legitimate action of the College, a medical record is considered to be a confidential records that is accessible only to the owner of the animal (or representative) and the attending veterinary clinic.
>
>   b. VCPR by-law states that when a veterinarians feels that the health and welfare of the animal would be compromised by the VCPR standards, the veterinarians may apply to the Board for permission to work outside of the VCPR.

c. Confidentiality by-law states that revealing information concerning a client, an animal or any professional service performed for an animal, to any person other than the client or another member treating the animal is prohibited except in particular circumstances.

Roles of Government Employed Veterinarians

1) Regulatory Role – Veterinarians conduct and oversee site visits, oversee sample collection and diagnostic testing, interrupt results and provide information for regulatory purposes. This is typical for Active Surveillance Programs which are designed to actively look for specific pathogens. Typically these programs are designed to detect Reportable Diseases or to surveille for emerging diseases of concern.

    a. Active surveillance for Infectious Salmon Anaemia virus (ISAv) is overseen by the Aquatic Animal Health Division of the Department of Fisheries, Forestry and Agriculture. According to the Aquaculture Policy and Procedures Manual AP 17, aquaculture companies are required to report suspect and confirmed cases as well as regulatory actions required.

    b. Veterinarians in this role practise "veterinary medicine" and therefore must be licensed by the Newfoundland and Labrador College of Veterinarians to complete this work.

    c. Veterinary records collected during the course of this work must remain confidential and not shared with individuals who do not have the training to interpret them.

    d. Regulatory programs are designed to safeguard public health and food security; inform government; maintain animal health; and ensure animal welfare. Properly interpreted summary documents can be generated from the active surveillance programs and be provided to government, public or other stakeholders as required.

2) Primary veterinary care – Veterinarians visit farms; provide veterinary care to academic researchers; provide veterinary care to private citizens who own horses; and provide laboratory services to farms; and privately owned veterinary clinics.

    a. Examples include going to a farm because an owner has a lame horse, a cow is having trouble giving birth or it could be a consult to discuss vaccine protocols, nutrition, biosecurity or farm health plans.

    b. Although not common, one of these visits could result in the detection of a Reportable Disease and when that occurs the veterinarians are required to report this to the Canadian Food Inspection Agency under the *Health of Animals Act*, to Chief Veterinary Officer under

the *Animal Health and Protection Act* or to the Chief Aquaculture Veterinarian through the *Aquaculture Act*.

c. Veterinarians in this role practice "veterinary medicine" and therefore must be licensed by the Newfoundland and Labrador College of Veterinarians to complete this work.

3) Policy advisors – Veterinarians also advise on policy and provide input into government related matters.

4) Chief Veterinarians – The province employs two chief veterinarians and they are responsible for many of the regulatory aspects on behalf of the province.

   a. Examples include: response to a Reportable Disease that requires provincial regulatory action by issuing Quarantine Orders, Depopulation Orders and overseeing related activities.

   b. To make informed decisions, Chief Veterinarians must be able to review the raw veterinary records (site visit documents, laboratory results, veterinary interpretations, prescriptions, mitigation measures), make interpretations, conduct additional testing as required and have an open dialogue with the veterinarians who conduct the work in the field.

Discussion points

- During the course of practicing veterinary medicine, history collection, examinations and diagnostic tests will be conducted and interpreted by licensed veterinarians. These highly qualified professionals have the training, knowledge and skills to make a diagnosis and make recommendations. The documents generated from these activities are considered veterinary records. If summary documents are required, due to a regulatory program, then veterinarians will interpret the veterinary records and provide a summary document that includes context. These summary documents can then be shared within government, the public or other stakeholders as required under that regulatory program.

- In order to ensure the highest standards of food security and animal welfare, veterinarians must be engaged in the practise of veterinary medicine for the province of NL. Due to the large and diverse geography of this province, private veterinary clinics are not economically viable. Government employed veterinarians are therefore faced with a significant issue when veterinary records are released because the trust with clients is broken and the information does not easily flow impacting the way that veterinary medicine is practiced. Without this trust, veterinarians are not able to fully engage in the practise of veterinary medicine and therefore the quality of veterinary care may become compromised.

- Government employed veterinarians practise veterinary medicine and the records that are obtained are understood to be confidential by both the client and the veterinarian.
- Information Management advises government employees that they only collect relevant information due to the protection and privacy issues. However, when veterinarians engage in the practise of veterinary medicine they must record all information during the case work up to ensure a wholesome history, physical examination and diagnostic picture is collected. Without this piece, they risk missing a diagnosis or a delayed response to a particular issue.
- The public is provided with information through a structured program that provides context such as AP 17 – Public Reporting policy in the Aquaculture Policy Procedures Manual which requires public reporting on Reportable Diseases, sea lice numbers, escapes, mortality events and Incidents. Some other examples include the Canadian Food Inspection Agency website which reports on Reportable Diseases and the DFO website which reports on treatments applied to aquaculture animals.
- Food veterinarians (large animal and aquaculture veterinarians) are difficult to recruit and retain and the veterinarians that currently work for government are already oversubscribed.
- *There are 17 veterinarian positions for the NL government, 12 of which are currently filled. There have been 4 veterinarians who left their position with government within the last year and all 4 have informed NaLVMA that the sole reason or a significant part of the reason for this departure was the way ATIPPA has impacted their ability to practise veterinary medicine. Despite efforts to recruit, there have been 2 open veterinary positions posted on the government website that have remained unfilled for a year.*

Comments on previous ATIPPA review

- The 2015 review indicated that there were no real life examples of how veterinary records are used within a government program or licensing structure:
    - Veterinary records are created when a veterinarian practises veterinary medicine and therefore they are created during the activities listed above including active surveillance and primary veterinary care. The records will include comments and notes related to history (i.e. feeding records, vaccinations records, stocking density), physical examination, diagnostic testing, interpretation and recommendations.
    - Provincial laboratories are licensed veterinary clinics and the records created by the laboratories are also considered veterinary records.

- The 2015 review indicated that business harm is utilized to prevent release of records under ATIPPA.
    - One recent example of how veterinary records were released through ATIPPA (FLR/120/2019) and these were not protected.
        - Negative consequences:
            - Mortality records were provided and the level of mortality prior to the mortality event was a topic of discussion as well the justification of why the farm was not being investigated under the *Animal Health and Protection Act*. The veterinarians who visited the farm know that any animal production system will have acceptable mortality levels based on the species of animal, life stage (or age) of the animal and other similar factors. The mortality level prior to the investigation was considered acceptable and other farms would have had similar numbers but this individual farm was unfairly targeted. Release of veterinary records will lead to misinterpretation and misunderstanding by those who are not licensed to practice veterinary medicine. This is why summary documents from regulatory programs are generated.
            - NaLVMA heard that at least 2 veterinarians left government over this case and the reason reported to NaLVMA was the ethical and moral reasons around this specific ATIPPA release. This resulted in lack of trust for other producers as a result of this breach. Loss of veterinarians directly impact productivity, animal health, public health, food security and animal welfare.

The release of information referred to – FLR/120/2019 – relates to an access request granted by the then Department of Fisheries and Land Resources in December 2019. The information requested was:

> Inspection reports from B.I.A. Farms, Roaches Line, from September 2018 to present. As well as any reports, emails, correspondence in relation to the death of 19,000 chickens at B.I.A. Farms from October 15 to present.

Over 70 pages of documents were released, including numerous Farm Visit Reports, presumably completed by a veterinarian, and various departmental messages concerning public statements. After much departmental discussion, the following media release – included in the response to the access request:

Fisheries and Land Resources

October 25, 2019

Public Advisory: No Human Health or Food Safety Risk Associated with Chicken Mortality at Broiler Farm

The Department of Fisheries and Land Resources was advised today of a mortality that occurred on October 24 at B.I.A. Farms on Roaches Line impacting approximately 19,000 of approximately 160,000 broiler chickens at the site. The mortalities were the result of a computer malfunction affecting operation of the facility's ventilation and fan system.

The Chief Veterinarian Officer for Newfoundland and Labrador has confirmed this is not an infectious disease matter and there is no human health or food safety risk. The company did not violate any compliance requirements associated with the Animal Health and Protection Act, thus no enforcement action is anticipated.

B.I.A. Farms is following normal and established protocols to compost the affected chickens at a designated land fill site in accordance with environmental regulations.

It is regrettable that the release of information related to this mortality incident led – at least to the understanding of the Association – to the departure of two veterinarians from government employment. The press release specifically refutes any suggestion of infectious disease, thus suggesting that this cause may have been the subject of rumours. Whether the ATIPPA-related "ethical and moral" concerns were because of the release of unexplained Farm Visit Reports or because of any other issues arising before or after the issuance of public statements is not clear. However, it does appear almost self-evident that the public interest in access to information concerning the regulatory oversight and inspection of facilities in question would be paramount to the concerns of the veterinarians.

Concerns over context and possible misinformation can, at least to some extent, be addressed by providing that context. I note this exchange at the public presentation:

CHAIR ORSBORN: If for example – and I don't know if you're a government veterinarian or not, but assume for a moment that you were – you were asked for one of these reports and you were concerned about the context. Practically speaking, could you provide that context with the provision of the document?

DR. BULFON: I am actually not a government veterinarian, and I don't want to speak on behalf of them at this point.

> Dr. O'Brien may be able to comment on this.
>
> **DR. O'BRIEN:** I can't really speak specifically to what the government veterinarians would be given as direction in regard to something like that. But, again, releasing the raw data without interpretation leads to mistrust, and not only on the part of the client, but in the public environment as well. (Transcript – January 20, 2021, p. 161)

Ethical considerations arising out of the bylaws adopted by the profession, with respect, cannot and should not prevail over the exercise of a legislated quasi-constitutional right to access information in the possession of a public body. If necessary, amendments could be made in the by-laws to stipulate that a release of information required by law is not a breach of the by-laws.

The harms urged by the Association do not support the exclusion of veterinary medical records from *ATIPPA, 2015*.

The Wells Committee considered a similar presentation from the Association in 2014. The essence of that submission, at p. 293:

> The NLVMA's position was that animal health records in the offices of public bodies should be kept confidential. In their presentation, they recommended that the *ATIPPA* be amended to that effect. The NLVMA feels such an amendment is needed to protect government-employed veterinarians who have the dual role of regulatory duty for the province and the provision of primary veterinary care in regions of the province where there are few veterinarians. They further argued that providing such information through a general access request under the *ATIPPA* would be a violation of their professional oath to keep animal health information confidential.

The Committee's conclusion – at p. 298–99:

> The request of the veterinarians to be excluded from the provisions of the *ATIPPA* appears to be a fairly recent development. It was not until 2013 that the College of Veterinarians By-Law on clinical practices spelled out the obligation of professional confidentiality for client information. …
>
> Decisions by courts and adjudicators suggest that recorded information created by veterinarians enjoys no special status in the interpretation of access to information legislation. This is because it is given to the government representative, the veterinarian, as a necessary part of the conditions under which the establishment, such as a fish farm, is allowed to operate.

> Comparing veterinarians working for the government to physicians remunerated by the public sector is not useful. While physicians treat individual persons, or sometimes families, veterinarians treat various species of animals, which do not have privacy rights under current law. The privacy interest lies rather with the owner of the animal, usually the client. But there appears to be some confusion about whether the client is the animal or the owner of the animal, as the transcript cited above reveals.
>
> A public body that is involved in the health of animals destined for human consumption hires veterinarians to ensure that these health conditions are maintained. In this context, it is difficult to see an exclusive and confidential professional relationship with the owners of establishments raising animals for food. It is also difficult to see how this relationship could be a barrier to all *ATIPPA* requests unless veterinarians working for the government were specifically exempted from the *ATIPPA*.
>
> The Committee is not persuaded that there is merit in the position taken by the Newfoundland and Labrador Veterinary Medical Association.

Additional information has been put before this Committee, including commentary on the loss of government veterinarians due to the effect of *ATIPPA, 2015* on their practice; as noted, the suggestion is that two of those who left did so over concerns with release of records relating to the mortality incident discussed above.

I appreciate the additional effort the Association put into presenting its case. Dr. O'Brien and Dr. Bulfon clearly feel strongly that subjecting veterinary medical records to potential release under *ATIPPA, 2015* is damaging to the work of government veterinarians and to the relationship of those veterinarians with their various clients. They urge that this province adopt the same protection of confidentiality as has Nova Scotia. However, like the Wells Committee, I am unable to conclude that the adverse consequences of information release relied on by the Association supports the total exclusion of veterinary medical records from *ATIPPA, 2015*. In an effort to support non-disclosure, the question may be raised – 'what does the public want anyway with veterinary medical records written by a professional that require explanation and interpretation?' The answer, evident from this report and previous reviews, is that the objectives of public body transparency and accountability are achieved by a right of access to public information which is subject only to defined exceptions. The exercise of the right is not and should not be limited by a 'need to know' requirement.

The foregoing discussion has addressed the request to remove all veterinary records from the ambit of *ATIPPA, 2015*. However, one concern raised by Doctors Bulfon and O'Brien and echoed in the supplementary submission of the Association relates to the confidentiality of records in a more refined context - when treatment is provided to an animal by a veterinarian who is providing primary veterinary care.

The submissions referred to the different roles played by government-employed veterinarians. For ease of reference I repeat the relevant excerpts:

> Primary veterinary care – Veterinarians visit farms; provide veterinary care to academic researchers; provide veterinary care to private citizens who own horses; and provide laboratory services to farms; and privately owned veterinary clinics.
>
> Examples include going to a farm because an owner has a lame horse, a cow is having trouble giving birth or it could be a consult to discuss vaccine protocols, nutrition, biosecurity or farm health plans. …
>
> In order to ensure the highest standards of food security and animal welfare, veterinarians must be engaged in the practise of veterinary medicine for the province of NL. Due to the large and diverse geography of this province, private veterinary clinics are not economically viable. …

The Committee had the benefit of a submission from Dr. Beverly Dawe, the province's Chief Veterinarian. Dr. Dawe's presentation also emphasized the unique role played by government veterinarians in this province. Due to a shortage of private veterinarians, veterinarians employed by government will routinely provide primary medical care to animals owned by individuals or commercial enterprises. A fee is charged for these services.

Clearly, if a private veterinarian were to provide similar services, the medical records maintained by the doctor would not be publicly available. But as the commissioner pointed out in his final submissions, there is nonetheless a public interest in knowing what 'private' services are being provided by public employees, even if a fee is charged. It is not unreasonable to speculate that the fees charged would not cover the cost of providing the services and there is a legitimate public interest in being able to assess the cost to the provice of these 'replacement' services. That public interest would also likely include information such as the number and frequency of 'private care' visits and the time spent by the public employee in providing the service.

But, in my view, the public interest is not unlimited. I consider that the ambit of legitimate public interest does not extend so far as to include the medical record of actu-

al treatment given to a particular animal when the veterinarian is acting, effectively, as a substitute for a private veterinarian. It has been suggested that the medical record may be considered to be personal information of the animal's owner. The Wells Committee pointed out, and I agree, that consideration of an exception on this basis may lead to confusion.

I have been given no compelling reason why the actual medical record created in the course of providing primary 'private' veterinary care should be subject to production. On the other hand, the fact that the record is being created in circumstances where the extent of the public connection or interest is the fact that the only available veterinarian is publicly funded provides a principled basis upon which to exclude such medical records from the application of *ATIPPA, 2015*. I understand that the OIPC is supportive of this conclusion. I recommend that treatment records created by a public body veterinarian for fee for service treatment that would not otherwise be provided by the public body veterinarian if a private veterinarian were available, be excluded from the ambit of *ATIPPA, 2015* through a specific reference in s. 5.

RECOMMENDATION

- That the *Act* be amended to exclude treatment records created by a public body veterinarian for fee for service treatment that would not otherwise be provided by a public body veterinarian if a private veterinarian were available. [Appendix K, s. 5(1)(n)]

SUBMISSIONS OF THE OFFICE OF THE SPEAKER OF THE HOUSE OF ASSEMBLY

The Office of the Speaker made a considered submission dealing primarily with the role played by the Speaker and the House of Assembly Management Commission in making recommendations to the Lieutenant-Governor-in-Council in respect of certain decisions contemplated by *ATIPPA, 2015*; a further issue mentioned was the possible unintentional consequences of the use of the phrase "the end of the next sitting of the House of Assembly" in four sections of the *Act*. The Speaker is also concerned about some uncertainties in the process set out in s. 85 of *ATIPPA, 2015* with respect to the appointment of a new Information and Privacy Commissioner.

SCHEDULE B - THE ROLE OF THE MANAGEMENT COMMISSION OF THE HOUSE OF ASSEMBLY

Section 4:

> *4. When the House of Assembly is not in session, the Lieutenant-Governor in Council, on the recommendation of the House of Assembly Management Commission, may by order amend Schedule B, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.*

A body listed in Schedule B is not a public body for the purposes of *ATIPPA, 2015*. As discussed in the section of the report dealing with the *Public Inquiries Act*, *2006*, SNL 2006 c. P-38.1, s. 4 was called upon to take the Muskrat Falls Inquiry outside the *ATIPPA, 2015* regime. Hansard reveals that the members of the Management Commission held differing views on the matter. The final decision to include the Muskrat Falls Inquiry in Schedule B depended upon the Deputy Speaker casting a tie-breaking vote, the tie having resulted from a vote along party lines. The Speaker, on behalf of the House of Assembly, has asked this review to consider whether or not the Management Commission is an appropriate body to make such a recommendation. From the submission, at pages 1–2:

> **Section 4, Excluded Public Bodies**
>
> - Section 4 of the *Access to Information and Protection of Privacy Act, 2015* ("the Act") currently provides that the Lieutenant-Governor in Council, upon the recommendation of the Management Commission, may by order amend the schedule of excluded public bodies when the House of Assembly is not in session. The section also provides that such an order does

not extend beyond the end of the next sitting of the House, presumably to allow time for a Bill to be brought before the House to effect the change in the Legislature should government wish to do so.

- The House of Assembly recommends that the review committee consider whether the Management Commission is indeed the appropriate body to make a recommendation contemplated by section 4.
- In section 20 of the House of Assembly Accountability, Integrity and Administration Act, ("HOAAIA") the duties and responsibilities of the Management Commission are generally described as follows: "responsible for the financial stewardship of all public money, within the meaning of the Financial Administration Act , that may be voted by the House of Assembly for the use and operation of the House of Assembly and statutory offices, and for all matters of financial and administrative policy affecting the House of Assembly, its members, offices and staff and in connection with them". Paragraphs 20(1)(a) to (g) detail further the responsibilities of the Commission in relation to the foregoing.
- The House of Assembly Management Commission is the non-partisan body which oversees the financial and administrative operations of the House of Assembly. It does not generally make policy decisions or recommendations which are outside the financial and administrative operations of the House of Assembly and statutory offices.
- However, paragraph 20(1)(g) of the HOAAIA also states that the commission shall "exercise other powers given to the commission and to perform other duties imposed on the commission under this or another Act".
- Therefore, while the Commission may make a recommendation further to the power given to it under section 4 of the Act, this is not a matter within the broader mandate of the Commission for financial and administrative oversight of the House of Assembly.
- This issue came to light in 2018 when the Commission was asked to consider an exemption under section 4 of the Act. It was noted to be the first time such a matter was brought before the Commission. Members of the Commission considered the substance of the matter which was complex in nature but also expressed reservations about the Management Commission making such a recommendation outside of the parliamentary processes of the House of Assembly.
- Further, some Members spoke to the fact that, as members of the Commission. they were 'not acting as representatives of their respective caucuses', but as individual members exercising a fiduciary responsibility over the financial and administrative operations of the House of Assembly.
- After a comprehensive debate, an amendment was moved to the resolution to defer the matter to consideration by the whole House, as the House was scheduled to sit within a short period of time. The amendment was deemed out of order.

- The vote on the recommendation resulted in a tie, and the matter was resolved when the deputy chair of the Management Commission exercised a casting vote in favour of the recommendation.

The Management Commission is constituted under s. 18 of the *House of Assembly Accountability, Integrity and Administration Act*:

> *18.(1) The Commission of Internal Economy of the House of Assembly established under the Internal Economy Commission Act is continued under the name of the House of Assembly Management Commission.*
>
> *(2) The speaker, or in his or her absence, the deputy speaker, shall preside over the commission and when presiding, shall vote in the case of a tie .*
>
> *(3) The commission shall consist of*
>
> *(a) the speaker, or, in his or her absence, the deputy speaker, who shall be the chairperson;*
> *(b) the clerk, who shall be the secretary and shall not vote;*
> *(c) the government house leader;*
> *(d) the official opposition house leader;*
> *(e) 2 members who are members of the government caucus, only one of whom may be a member of the Executive Council;*
> *(f) one member who is a member of the official opposition caucus; and*
>
> *(g) one member, if any, from a third party that is a registered political party and has at least one member elected to the House of Assembly.*
>
> *(4) Where there is no third party, the member chosen for the purposes of paragraph (3)(g) shall be an additional member from the official opposition caucus.*

The responsibility of the Management Commission:

> *20.(1) The commission is responsible for the financial stewardship of all public money, within the meaning of the Financial Administration Act , that may be voted by the House of Assembly for the use and operation of the House of Assembly and statutory offices, and for all matters of financial and administrative policy affecting the House of Assembly, its members, offices and staff and in connection with them and, in particular, the commission shall*
>
> *(a) oversee the finances of the House of Assembly including its budget, revenues, expenses, assets and liabilities;*

(b) review and approve the administrative, financial and human resource and management policies of the House of Assembly service and statutory offices;

(c) implement and periodically review and update financial and management policies applicable to the House of Assembly service and statutory offices;

(d) give directions with respect to matters that the commission considers necessary for the efficient and effective operation of the House of Assembly service and statutory offices;

(e) make and keep current rules respecting the proper administration of allowances for members and reimbursement and payment of their expenditures in implementation of subsection 11 (2) of this Act;

(f) annually report, in writing, to the House of Assembly, through the speaker, with respect to its decisions and activities in accordance with section 51 ; and

(g) exercise other powers given to the commission and to perform other duties imposed on the commission under this or another Act.

It is under paragraph 20(1)(g) that the Management Commission is considered to have the authority to make the recommendation contemplated by s. 4 of *ATIPPA, 2015*.

The primary responsibility of the Management Commission is the financing and operation of the House of Assembly and the statutory offices. There would seem to be little value in involving the Management Commission in making a recommendation to the Lieutenant-Governor-in-Council in respect of a Schedule B addition that is temporary only and has no force and effect beyond the end of the next sitting of the House of Assembly.

In its submission to the Committee, the government suggested that temporary Schedule B additions be effected simply by order of the Lieutenant-Governor-in-Council. This is a sensible recommendation which I endorse.

I recommend that s. 4 be amended by deleting the words “on the recommendation of the House of Assembly Management Commission”.

The Speaker raised a number of issues concerning the processes of the Selection Committee, the proper function of the Speaker, and the effect on the process of a minority configuration in the House of Assembly. From the submission, at pages 2–3:

> **Section 85, Appointment of the Information and Privacy Commissioner**
>
> - Section 85 of the Act provides for a process by which a Commissioner, a statutory officer of the House of Assembly, is appointed. This process requires that the Speaker establish a selection committee comprising the Clerk of the Executive Council or his or her deputy; the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly; the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and the President of Memorial University or a vice-president of Memorial University designated by the President.
> - The selection committee is required to develop a roster of qualified candidates and may publicly invite expressions of interest for the position. The selection committee submits the roster to the Speaker of the House of Assembly, at which point the Speaker is required to consult with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission. The Speaker then is required to cause to be placed before the House of Assembly a resolution to appoint as commissioner one of the individuals named on the roster.
> - The issue that arises is how the name of 'one of the individuals named on the roster' is chosen to be put forward in the resolution, in particular where no unanimity exists among the individuals with whom the Speaker must consult.
> - The selection committee is required to provide a roster of candidates to the Speaker, but the Act is silent as to whether the candidates must be ranked. Further, it does not indicate whether the Speaker is bound to put forward the name of a first ranked candidate, if any, in a subsequent resolution. The decision to appoint a statutory officer is a decision of the House, not a decision of the Speaker. If, after consultation, a preferred candidate is not agreed by those with whom the Speaker consults, there is no clear direction in section 85 as to how the Speaker may proceed.
> - With respect to process, the Speaker of the House has no ability to put forward a resolution for the consideration of the House, yet the Speaker is required by the Act to 'cause a resolution to be placed before the House'. Therefore, the matter of moving the resolution must necessarily fall to the Government House Leader, who is responsible for the business of the House.

- One further consideration for a Speaker may be whether the House sits in a majority or a minority configuration, which can result in added complexity if confidence is at issue.
- You may wish to review Hansard respecting the appointment of the Information and Privacy Commissioner in July 2019 for discussion of this matter by Members of the House of Assembly. (Emphasis in submission)

The present section 85:

85. (1) The office of the Information and Privacy Commissioner is continued.

(2) The office shall be filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly.

(3) Before an appointment is made, the Speaker shall establish a selection committee comprising

(a) the Clerk of the Executive Council or his or her deputy;

(b) the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly;

(c) the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and

(d) the President of Memorial University or a vice-president of Memorial University designated by the President.

(4) The selection committee shall develop a roster of qualified candidates and in doing so may publicly invite expressions of interest for the position of commissioner.

(5) The selection committee shall submit the roster to the Speaker of the House of Assembly.

(6) The Speaker shall

(a) consult with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission; and
(b) cause to be placed before the House of Assembly a resolution to appoint as commissioner one of the individuals named on the roster.

The injection of the Speaker into the appointment process resulted from the recommendation of the Wells Committee. The comments of that Committee, at page 216:

> No concern was expressed about the existing manner of initial appointment by the Lieutenant-Governor in Council, after approval of a resolution passed by the members of the House of Assembly. Effectively the decision to approve the appointment is that of the House of Assembly, and in actually making the appointment, the Lieutenant-Governor in Council is the agent implementing the decision of the House of Assembly.
>
> Of course, Lieutenant-Governor in Council" is simply the constitutional name for the Cabinet or the government in power at the time. That government is made up of members of the political party having the majority of members of the House of Assembly. As a result, the political party in power has control of both bodies. However, the requirement for decision by a majority vote in the House of Assembly precludes secret determination by the government. **Requiring approval by resolution of the House of Assembly ensures opportunity for open public debate on the merits or otherwise of the proposed appointee. The Committee is satisfied that this is an appropriate process for initial appointment and should be retained. However, the Committee is of the view that the perception of a Commissioner who is independent from government would be greatly enhanced if the choice resulted from efforts by a selection committee that would identify leading candidates for consideration. Such a committee could consist of persons holding offices such as the Clerk of the Executive Council, Clerk of the House of Assembly, Chief Judge of the Provincial Court, and President of Memorial University.** (my emphasis)

Section 85 contemplates the Speaker acting as somewhat of a conduit between the Selection Committee and the House of Assembly, consulting with the party leaders and, apparently, choosing one name to put before the House. As the statute stands now, it seems that the decision of which name to put forward to the House rests with the Speaker.

The appointment of all other statutory office holders – including the Auditor General – is made simply by the Lieutenant-Governor-in-Council "on resolution of the House of Assembly". However, these appointments are made under the procedures established in the *Independent Appointments Commission Act*, SNL 2016, c. I-2.1. That *Act* provides for an independent committee to conduct a merit-based screening process and to recommend to the Lieutenant-Governor-in-Council three (where possible) persons for the appointment. The Lieutenant-Governor-in-Council is required to consider the recommendations but is not limited to those recommendations in bringing forward a name to the House of Assembly. As such the process following receipt of the committee's recommendations is very much controlled by the executive branch of government.

Government suggested to this Committee that the appointment of the Information and Privacy Commissioner could be subject to the same process. I am not prepared to recommend that. The Wells Committee carefully considered the matter and, recognizing the unique and varied role of the commissioner, constructed an appointment process for the commissioner with significant involvement of the legislative branch. Further, the *Independent Appointments Commission Act* was enacted in 2016, subsequent to *ATIPPA, 2015*. The schedule to the *Independent Appointments Commission Act* includes the other statutory offices; the Information and Privacy Commissioner was not, indicating a clear legislative intention to leave the current appointment process in place. Two appointments have been made since 2015.

There is no reason to establish a new process and, in my view, good reason to maintain the primary involvement of the legislative branch.

The practical concerns raised by the Speaker are valid. It is clear that the process is intended to be a consensual and largely informal one leading to the appointment of an individual who would be considered both excellent for the office and independent of government. But, as the submission points out, the Speaker could conceivably be placed in a position of having to put forward a name without the benefit either of a ranking of the candidates by the Selection Committee or the consensus of the party leaders who have been consulted.

The Speaker, perhaps understandably, did not offer suggestions for change. I appreciate that the choice of name to be put forward and the approval of the appointment of that individual are ultimately political decisions. And as already noted, I am not inclined to recommend substantive modifications to a process intended to function as a good faith effort to select the best candidate for an important and independent statutory office, an office intended to ensure transparency in and accountability of government.

But the Speaker's concerns are real and I believe that it is better to consider and address them before they arise and perhaps disrupt an appointment process.

I suggest that government confirm its commitment to ensuring that any appointment process has the sole objective of appointing an individual who will be an excellent and independent information and privacy commissioner. Further to this, I recommend that the *Act* be amended to provide that the Selection Committee be required to submit to the Speaker from the roster of qualified candidates no more than three names and that the formal responsibility for bringing the resolution to the House of Assembly be that of the Government House leader.

Two points in conclusion. I am recommending that the Selection Committee provide no more than three names to the Speaker. Given the composition of that committee and the nature of the evaluation required, I do not consider it appropriate to include in the *Act* a requirement that the committee provide a ranking of the qualified candidates. But in any particular selection process, should the committee conclude that it would be appropriate and helpful to rank the three names to be put forward, the committee is and should feel completely free to do so. The second concern relates to the confidentiality of the names of the recommended candidates other than the name brought to the floor of the House of Assembly. I do not recommend a specific statutory provision, but I would expect that any disclosure by the Speaker of the names of the recommended candidates during the consultation process, and any subsequent sharing of those names by the party leaders with their members would be on the clear understanding and expectation of confidentiality. The members' knowledge of the other names would permit an informed debate in the House of Assembly, while an assurance of non-public disclosure of the names would avoid unnecessary embarrassment.

THE "NEXT SITTING" OF THE HOUSE OF ASSEMBLY

The Speaker's submission, at pages 3–4:

> - Sections 4, 7, 88 and 89 of the current Act tie various limitations to the 'end of the next sitting of the House of Assembly". Sections 4 and 7 relate to orders made under the Act when the House is not sitting which cannot remain in force beyond the end of the next sitting. Section 88 refers to a suspension of a Commissioner, and section 89 relates to the appointment of an acting commissioner. Neither the suspension nor the appointment can extend beyond 'the end of the next sitting of the House of Assembly."
> - Tying these events to a sitting of the House may be problematic on a number of fronts:
>   - A sitting of the House is not defined in legislation or the Standing Orders of the House.
>   - Technically a sitting is the sitting day, i.e. the period of time from when the Speaker assumes the chair to the daily adjournment. A period of continuous sitting days is more appropriately referred to as a sitting period.
>   - The House of Assembly has two traditional sitting periods – Spring and Fall - which are commonly referred to as the Spring sitting and the Fall sitting.

    - Should the House meet outside these two periods, that period is referred to as an extraordinary sitting. An extraordinary sitting could be a single day or weeks. The timing of an extraordinary is unscheduled and its length is uncertain. As an example, in 2017 there were 2 extraordinary sittings – 1 day and 1 week; in 2019 there was one extraordinary sitting of 3 weeks and in 2020 there have been 4 extraordinary sittings of 1 day, 1 day, 2 weeks and 1 week.

- The Committee may wish to consider the use of the term "sitting" in the above noted provisions. There is a significant possibility that the House could meet for a "sitting", extraordinary or otherwise, resulting in an unintended outcome. For example, an amendment to a schedule could expire more quickly than expected. As well, the use of the term could impact the suspension period or acting appointment period of a commissioner, which shorten the time period during which the recruitment process described in the Act must be conducted.

The submission notes that "sitting" is not defined either in legislation or in the Standing Orders of the House of Assembly.

The term "sitting" is used, in the same time-limiting sense, in the 2016 amendments to the statutory office legislation referred to earlier.

Given the widespread use of the term in other legislation, I do not consider it appropriate or wise to make a firm recommendation.

As a suggestion only, consideration could be given to including a definition of "sitting of the House of Assembly" when used in the legislation respecting statutory offices, including *ATIPPA, 2015*, along the lines of "when this *Act* refers to a sitting of the House of Assembly, it shall be considered as a reference to a traditional sitting or session of the House of Assembly".

RECOMMENDATION

That the *Act* be amended to:

- Provide the Lieutenant-Governor-in-Council with the authority to recommend additions to Schedule B. [Appendix K, s. 4]
- Require the Selection Committee to provide no more than three candidate names to the Speaker when choosing a new commissioner. [Appendix K, s. 85(5)]
- Give the formal responsibility for bringing forward the resolution naming a new commissioner to the government House Leader. [Appendix K, s. 85(6) and (7)]

Suggestions:

- That any disclosure by the Speaker of the names of the recommended candidates during the consultation process, and any subsequent sharing of those names by the party leaders with their members, be on the clear understanding and expectation of confidentiality.
- That consideration be given to including a definition of "sitting of the House of Assembly" when used in the legislation respecting statutory offices, including *ATIPPA, 2015*.

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SUBMISSIONS OF THE STATUTORY OFFICES OF THE HOUSE OF ASSEMBLY

The *ATIPPA, 2015* applies to the House of Assembly and the statutory offices as defined in the *House of Assembly Accountability, Integrity and Administration Act*. That *Act* lists the offices:

> *2. (r) "statutory office" means the office and administrative staff directly serving the*
>
> *(i) Chief Electoral Officer,*
>
> *(ii) Commissioner for Legislative Standards,*
>
> *(iii) Child and Youth Advocate,*
>
> *(iv) Information and Privacy Commissioner,*
>
> *(v) Citizens' Representative,*
>
> *(v.1) Seniors' Advocate, and*
>
> *(vi) other offices of the House of Assembly, with the exception of the office of the Auditor General, that may be established under an Act; and …*

ATIPPA, 2015 thus applies to six established statutory offices, but not to the office of the Auditor General.

Section 41(c) of *ATIPPA, 2015* excepts from disclosure certain records of a statutory office:

> *41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information …*
>
> *(c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.*

This provision was not the subject of much discussion before the Wells Committee. Indeed the only recommendation made by the Committee, following the recommendation of the then commissioner, was to add "or the head of a public body" to the introduction of s. 41 to ensure that records related to the functions of a statutory body, but in the possession of another public body, not be disclosed.

The House of Assembly and statutory offices are not hotbeds of ATIPPA activity. The statistics from the ATIPP Office for 2019–20 show the following requests:

HOA AND OFFICES	ACCESS REQUESTS
House of Assembly	15
Chief Electoral Officer	3
Child and Youth Advocate	2
Office of the Information and Privacy Commissioner	4
TOTAL	24

Records supplied by the coordinator indicate that of these requests, 17 resulted in either full or partial disclosure, four in a denial of access, one disregard, and two denials on the basis that the information was already publicly available. The exceptions relied on for a denial of access were s. 40 and s. 41.

The Speaker of the House of Assembly and each of the statutory offices made a written submission to the Committee. The primary concern of the Commissioner for Legislative Standards, the Child and Youth Advocate and the Office of the Citizens' Representative was the protection of records connected with their investigatory functions and the relationship of s. 41(c) to the mandatory access provision in s. 33.

The Office of the Citizens' Representative said, at pages 2–3:

> Because we are a complaint management organization with a wide jurisdiction, we are privy to, and ultimately act as guardians of a large volume of heightened personal information, including health information. We accumulate thousands of pages of proprietary government information per year in the course of our inquiries and investigations. We receive allegations that are sometimes disturbing. We receive testimony and documents from people who come forward only because of the secrecy and confidentiality provisions in our governing legislation. Their evidence is disclosed to us in the public interest and being able to "speak out safely" is extremely important. Their evidence leads to the correction of misconduct, illegal activity, waste, unhealthy working environments and organizational paralysis due to human resource problems or deficient leadership.
>
> Their identities are protected to prevent reprisals like measures that adversely affect working conditions, demotion, job loss, and threats to their personal

> safety. The confidential information that we produce, and collect as part of our investigatory functions, are given an additional layer of protection by the exemption in 41(c) of the ATIPPA.
>
> In my view, the spirit and intent of the exemption was, inter alia, to preserve the integrity of the investigative processes used by statutory Officers of the House, to shield these offices against filtered evidence, and to provide a measure of comfort for complainants, respondents and witnesses participating in investigations that information will not be dispensed in access requests to my Office.
>
> If for some reason access requests for "investigatory function" documents were enabled or even partially authorized, this would have a chilling effect, and we would have an exceedingly difficult time assuring that both full documentary disclosure and candid witness evidence has been given in investigations. Our investigative powers would thus, be fettered.

Similar sentiments were echoed by the Children and Youth Advocate, at pages 6–7:

> While it would be a rare occasion where an applicant would seek access to the investigatory records connected with the Office of the Child and Youth Advocate, there are concerns with the operation of s.33 of the ATIPPA and the impact it could possibly have upon records in the custody or control of the Advocate. Section 33 of the ATIPPA is entitled "Information from a Workplace Investigation" and creates limited access rights to a party involved in such an investigation. It is not unusual for the Advocate in performing its statutory role to obtain information about the conduct of health care professionals, social workers engaged in child protection and related services, youth corrections staff, and other public servants and third parties. Depending on the circumstances it is possible that some of this information could be characterized as information relevant to a workplace investigation. In such circumstances the ATIPPA should be clear, that notwithstanding s.33 of the ATIPPA, no records connected with the investigatory functions of the Advocate should be disclosed to an applicant.
>
> Additionally, it should be noted that not all investigations result in formal reports being prepared. There are any number of reasons why an investigation may not result in a published report. Section 41(c) should be strengthened to make it clear that irrespective of a report being prepared following an investigation, no access will be provided to the investigative file or the report.

Pursuant to ss. 36–37 of the *House of Assembly Accountability, Integrity and Administration Act*, the Commissioner for Legislative Standards conducts inquiries into the conduct of members of the House of Assembly. A report of an inquiry must be presented to

the House of Assembly which then addresses any sanctions recommended by the commissioner. The commissioner submitted, at pages 5–6:

> Over the last several years the Commissioner for Legislative Standards has performed numerous investigations pursuant to s.36 (1) of the House of Assembly Accountability, and Administration Act into the conduct of members. However, despite the mandatory exception to access that exists in s.41(c), a member has attempted to use s.33 of the ATIPPA to obtain access to the Commissioner's investigative file. This creates several problems for the Commissioner. First, s.41(c) is a mandatory prohibition of access and it does not authorize the disclose of records in the context of a s.33 investigation. Secondly, members of the House of Assembly are not employees and therefore s.33 should not apply to a code of conduct investigation, and thirdly, as the Commissioner is a statutory delegate of the House of Assembly, absent clear and compelling statutory language that abrogates parliamentary privilege,, the Commissioner should not be compelled to provide records associated with or connected to a code of conduct investigation to an access to information applicant.
>
> While many of the issues highlighted above were argued in Dale Kirby v. Bruce Chaulk 2019 OIG 1380, a decision has yet to be provided. Regardless of the decision, statutory amendments would solve any uncertainty regarding s.41 (c).
>
> It is noteworthy that the Auditor General of the Province is excluded from the definition of a public body in s. 2(r)(vi) in the list of statutory offices set out in s.2(r) of the *House of Assembly Accountability, Integrity and Administration Act* S.N.L. 2007 c. H-I 0.1. Given the role the Auditor General plays in holding government financially accountable, that office's exclusion from the ATIPPA helps to preserve the Auditor General's independence. The Commissioner for Legislative Standards performs a similar role in ensuring that our elected officials are held ethically accountable by avoiding conflicts of interests, declaring financial interests, and investigating members where there are reasonable grounds to conduct an inquiry into alleged misconduct. The independence of the Commissioner's office should not be impacted by access to information applicants seeking information contained within the Commissioner's file. Therefore, the removal of the Commissioner for Legislative Standards from s.2(r) would be a relatively simple legislative amendment that would take it outside the ATIPPA. This amendment would also serve a dual purpose, as it would also ensure that there are no issues with conflict between the ATIPPA and parliamentary privilege.

The valid concerns about the right of access granted by s. 33 overriding the exception in subsection 41(c) have been addressed elsewhere in this report. The amendment to s. 33 should alleviate the concern.

I am not persuaded that removal of the Office of the Commissioner for Legislative Standards from *ATIPPA, 2015* is warranted. With appropriate protection for information related to the investigative functions of that office, the administrative and financial aspects of that office should remain subject to *ATIPPA, 2015*.

The submissions of the Chief Electoral Officer reflected different concerns. The essence of his submissions, at pages 1–2:

> One concern of the Chief Electoral Officer is when access to information applicants request records that would not in the normal course be widely distributed outside an election period. While s.55 (4) of the Elections Act states that the list of electors shall not be used for any purpose other than that for which it was prepared or other electoral use prescribed by law, this does not prevent an access to information applicant from requesting same. While the provision of this list would be heavily redacted given the amount of personal information contained in the list, the provision of this list is administratively cumbersome and unnecessary. The Permanent List of Electors should only be disclosed in accordance with the Elections Act and should not be subject to access under the ATWPA.
>
> The issue of "election documents" and "election papers", and the security of the ballot boxes is also addressed in the Elcctions Act. "Election documents and election papers" is defined in s. 3 (b) of the Act and "refers to those documents or papers that are directed by this Part to be transmitted to the Chief Electoral Officer by the returning officer after an election." These records often contain personal information of many individuals and third parties. However, the Act is silent on whether these records are subject to ATIPPA, and by virtue of s.7 of the ATIPPA if a request was made for same the Chief Electoral Officer would have to provide responsive records to the access to information applicant.
>
> The act is silent on the interplay between the Elections Act and the ATTIPA with respect to the security of the ballot boxes. While s.184 requires a judicial order for the inspection or production of election documents or papers, for greater certainty the ATIPPA should not apply to these records. Similarly, s. 185 of the Elections Act addresses the requirement of the Chief Electoral Officer to retain ballot boxes sealed for a period of one year following an election unless otherwise directed by an Order of a judge. Once again, there is nothing in this section addressing the issue of an access to information applicant seeking access to the election documents or papers contained in ballot boxes.
>
> The security of election documents and papers is the exclusive responsibility of the Chief Electoral Officer. These documents and papers should not be subject to ATIPPA and the legislation should be amended to include reference to

> sections 3(r), 55(4), 184 and 185 to the Elections Act in Schedule A. If an issue arises during an election, the remedy is for a justice to order the provision of election documents and records. A clarification to what is subject to ATIPPA in the Elections Act would ensure that the Chief Electoral Officer is not required to apply to court to prevent an applicant for seeking access to these records pursuant to the ATIPPA.
>
> A further issue for the Chief Electoral Officer is the office's audit papers it prepares in reviewing the financial filings of candidates and political parties. The Chief Electoral Officer is of the opinion that the audit papers may fall within the statutory exception to access contained in s.41(c) of the ATIPPA as part of its investigatory file, however clarification of language in that section would be helpful. …

The addition of the word "audit" in s. 41(c) will clarify that the exception extends to records relating to the investigation or audit of the financial affairs, records and accounts of registered political parties and candidates. The public availability of audits and financial statements filed by candidates and political parties under the *Elections Act, 1991*, SNL 1992 c. E-3.1 (s. 277) is not affected by this addition.

I agree that it is appropriate to ensure that the election documents and election papers – as defined in the *Elections Act, 1991* – are protected as contemplated by that *Act*. There is a significant public interest in protecting the security of election-related records.

Government advised during its presentation on May 10, 2021 that the *Elections Act, 1991* is to be subject to a full review and that this review will include consideration of access to information issues. As said elsewhere in this report, where legislation is currently subject to a comprehensive review, I do not consider it productive or appropriate to make a recommendation directed to the relationship between the statute under review and *ATIPPA, 2015*. The method and extent of protection of election-related records are properly part of the planned review of the *Elections Act, 1991*.

OFFICE OF THE AUDITOR GENERAL

The importance of the independence and confidentiality in the performance of the statutory functions of the statutory offices was reaffirmed by Chief Justice J. Derek Green in his 2007 Report "Rebuilding Confidence". He wrote, at page 5–20:

> With respect to statutory offices, I recognize that these offices deal with sensitive and confidential information gained through investigations into the lives of individual citizens who approach them for assistance. That sort of information, often given in an expectation that privacy will be respected, should not be disclosed. Nevertheless, there is no reason why general financial and other information about the operation of the offices themselves and the expenses of the heads of the offices and the staff should not be available.

The office of the Auditor General is not currently subject to *ATIPPA, 2015*.

With respect to this office, the Chief Justice wrote at p. 5–20 of his report:

> The office of the Auditor General should, however, be put in a separate category. At present there is a general obligation of confidentiality imposed on that office by section 21 of the *Auditor General Act* with respect to matters that come to the staff's knowledge in the course of their work. The Auditor General occupies a special – some would say unique – place in the government. This is cause for proceeding slowly before wrapping this office into any system of general reform of the legislative branch. Having said that, I believe a case can be made for subjecting the Auditor General to basic access to information requirements about the financial and administrative organization of the office. The Auditor General is, by law, an officer of the House and is responsible, just as are other officers, for the expenditure of public money. I am aware, however, that some consideration is being given to making substantial revisions to the Auditor General's constituent legislation. The better approach for the present, therefore, is to exempt the office from the reforms being recommended in this report and to recommend that the application of access to information provisions be considered at the time of the general revision of the Act.

I am not aware that the contemplated review of the legislation has taken place.

The submission of the Executive Council expressed a concern about working papers of the Auditor General. At page 5 of the submission:

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

may be subject to an access to information request from that department/agency.

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

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

The Review Committee agreed with the OIPC and stated:

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

Suggestion:

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

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

As I appreciate the concern, it is because the definition of statutory office in the *House of Assembly Accountability, Integrity and Administration Act* does not include the Office of the Attorney General; hence, Attorney General working papers or other records in the possession of a public body may not come within the scope of protection afforded by s. 41. The submission of the OIPC recommended that consideration be given to expanding the scope of *ATIPPA, 2015* to include the records of the Office of the Attorney General. But the submission goes on to recognize that, should the Attorney General be included as a public body for ATIPP purposes, it would need to be clear that information

connected with the audit or investigatory functions of the office be protected from disclosure.

As did Chief Justice Green, I believe it appropriate that information relating to the financial and administrative organization of the office be subject to *ATIPPA, 2015*. As noted, the constituent legislation has not been substantially amended as anticipated by Chief Justice Green. Making the Office of the Auditor General subject to *ATIPPA, 2015* in respect of its financial and administrative organization would put this office on the same footing as other statutory offices in respect of its management and expenditure of public money. This position was not opposed by government.

I also agree with Chief Justice Green that information and records in any way related to the exercise of a statutory office's investigative responsibilities should be protected. The addition of the word "audit" will help to ensure that objective.

I recommend that the statutory Office of the Auditor General be included as a public body. A clarified s. 41(c) – see above – would ensure continued protection of records and reports relating to the statutory obligations of that office. I consider it extremely unlikely that the phrase "records connected with the investigative or audit functions" of the Office of the Attorney General would be interpreted as not including working papers completed in the course of and for the purpose of an audit.

RECOMMENDATION

That the *Act* be amended to:

- Make clear that the exception to disclosure for statutory office records extends to those offices' audit functions. [Appendix K, s. 41(c)]
- Make the Office of the Auditor General subject to *ATIPPA, 2015*. [Appendix K, s. 2(x)(v.1)]

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VACANCY IN THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

The process for appointing the commissioner pursuant to s. 85 is discussed in the section of this report dealing with the submissions of the Speaker of the House of Assembly.

The *Act* also contains provisions for the appointment of an acting commissioner and for a general power of delegation:

> *89.(1) The Lieutenant-Governor in Council may, on the recommendation of the House of Assembly Management Commission, appoint an acting commissioner if*
>
> *(a) the commissioner is temporarily unable to perform his or her duties:*
>
> *(b) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is not in session; or*
>
> *(c) the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is in session, but the House of Assembly does not pass a resolution to fill the office of the commissioner before the end of the session.*
>
> *(2) Where the office of the commissioner becomes vacant and an acting commissioner is appointed under paragraph (1)(b) or (c), the term of the acting commissioner shall not extend beyond the end of the next sitting of the House of Assembly.*
>
> *(3) An acting commissioner holds office until*
>
> *(a) the commissioner returns to his or her duties after a temporary inability to perform;*
> *(b) the suspension of the commissioner ends or is dealt with in the House of Assembly; or*
> ***(c)** a person is appointed as a commissioner under section 85 .* **...**
>
> *103. The commissioner may delegate to a person on his or her staff a duty or power under this Act.*

The OIPC points out that there are no provisions covering the exercise of the commissioner's statutory authority when the office of commissioner is vacant. It's submission, at pages 48–50:

> Although there is a provision for the appointment of an Acting Commissioner in *ATIPPA, 2015*, and provision for the Commissioner to delegate their authority, there is no provision for the exercise of the Commissioner's authority in instances of their incapacitation or if the office is vacated in the absence of such delegation or appointment. There have been two month-long vacancies after the retirement or resignation of a Commissioner, and the failure to appoint an Acting Commissioner on a timely basis represents a serious reputational and legal risk to the OIPC which could also impact complainants, third parties or public bodies. It has been clearly demonstrated that the process for making such an appointment is not sufficient to meet the requirement of ensuring that there is a duly appointed Commissioner in place at all times. …
>
> The *ATIPPA, 2015* is written in such a way that every provision involving the exercise of the oversight role is one where the Commissioner is empowered to do something. In practice, many of these roles are delegated to staff in accordance with section 103. A compelling argument can be made that the oversight function can only legally operate where there is a Commissioner in place. A delegation by a Commissioner to staff arguably cannot survive when the Commissioner's role is vacant. …
>
> It may have been assumed in regard to the appointment process that as long as a statutory deadline for a Commissioner's Report does not pass while the Commissioner's role is vacant, then there are no concerns. This may not be correct.
>
> For example, section 44 outlines the investigative process. Each aspect of the process involves the Commissioner exercising authority under the statute, which is typically delegated to staff. Another highlight would be section 97, which has been contentious at times. We have seen public bodies refuse to cooperate with a demand for records by the Commissioner under this section. This, or another challenging circumstance, could easily occur during a period of Commissioner vacancy. While OIPC staff are knowledgeable in terms of carrying out the Office's oversight functions and are competent to take appropriate steps, without a Commissioner, no one can be said to have been delegated to take those steps. …
>
> In the absence of a Commissioner, OIPC staff have been put in a very difficult position in attempting to continue to carry forward the Office's mandate without the confidence that the necessary authority exists to do so.
>
> A challenge to our authority to operate without a Commissioner is a serious reputational risk to the Office, regardless of outcome. Such a challenge could

> occur directly in relation to our oversight role, or in the legal arena where there are a number of matters to which we are a party at any given time. In the legal arena, it is conceivable that a party could make an application for dismissal or removal of the OIPC as an intervenor on the basis that OIPC counsel is without a client. …
>
> One option to consider would be the designation of a specific position within the OIPC who is authorized by statute to perform the duties of the Commissioner in the case of the Commissioner's incapacity, with no delegation of authority, or vacation of the office where an Acting Commissioner has not been appointed.
>
> An alternative to that approach can be seen in Ontario's *FIPPA*, in which the Commissioner, at section 7.1(1), designates an individual employee of the Office "who shall have the powers and duties of the Commissioner if the Commissioner is absent or unable to fulfil the duties of his or her office or if the office becomes vacant." Unlike a *delegation* process which currently exists in section 103, this is a *designation*, which must be formalized and reported to the Speaker. Other than in narrow circumstances described in 7.2(2), the employee who has been designated in advance by the Commissioner to carry out his or her function upon incapacitation, absence, or vacancy, would continue in that role until the appointment of a new Commissioner for a full term, which ensures stability for the Office.

This is a valid concern. At present, as set out above, there is a provision authorizing the delegation of "a duty or power". If the position of the commissioner is vacant, and no acting commissioner has been formally appointed, an inability to exercise the statutory authority specifically attached to the office could have serious consequences.

The statutes governing the other statutory offices contain provisions similar to s. 103, generally providing for the delegation of a statutory power.

Elections Act, 1991, SNL 1992, c. E-3.1

> *7.(4) In carrying out his or her duties under this Act the Chief Electoral Officer may delegate to members of his or her staff those powers and duties of the Chief Electoral Officer that are necessary for the efficient administration of this Act.*

Citizens' Representative Act, SNL 2001, c. C-14.1

> *14.(1) The Citizens' Representative may in writing delegate to another person his or her powers under this Act except the power to make a report under this Act.*

> *(2) A person purporting to exercise the power of the Citizens' Representative by virtue of the delegation under subsection (1) shall produce evidence of his or her authority to exercise that power when required to do so.*

Child and Youth Advocate Act, SNL 2001, c. C-12.01

> *14.(1) The advocate may in writing delegate to another person his or her powers under this Act except the power to make a report under this Act.*
>
> *(2) A person purporting to exercise the power of the advocate by virtue of the delegation under subsection (1) shall produce evidence of his or her authority to exercise that power when required to do so.*

However, the *Auditor General Act*, SNL 1991, C.-22, contains provision for the Auditor General to appoint an acting Auditor General in defined circumstances:

> *26. The auditor general may delegate in writing to an employee of the office authority to exercise a power or perform a duty of the auditor general other than reporting to the House of Assembly.*
>
> *27. The auditor general may appoint an employee of the office as acting auditor general while the auditor general is absent from the province.*

There is benefit in specifically addressing the 'vacant office' circumstance in *ATIPPA, 2015* and avoiding potential unnecessary uncertainty and argument.

I recommend that a formal designation process be provided.

RECOMMENDATION

- That the *Act* be amended to allow the commissioner to designate a person who will assume their powers and duties in the event of their absence or a vacancy in the office of commissioner. [Appendix K, s. 103.1]

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER AS A PUBLIC BODY

The OIPC's primary role under *ATIPPA, 2015* is that of ombuds – overseeing the operation of the *Act*, including handling complaints and approving various actions taken by public bodies. But the OIPC is also a statutory office and public body in its own right for the purposes of the *Act*, receiving and dealing with access and correction requests and, at least potentially, receiving complaints about its decisions on those requests. When the OIPC is in the position of acting as a public body, how and by whom should any approval and oversight functions be performed?

The OIPC addressed this issue generally in its submissions, at pages 72–73:

> *ATIPPA* was amended subsequent to the Green Report to designate the Office of the Information and Privacy Commissioner as a public body subject to the *Act*, along with other statutory offices. We believe that was an appropriate step, and with section 41 having been added at the same time, being a public body has represented no interference with our independent statutory oversight role. Since that time, the OIPC has received 25 access to information requests, all of which have been responded to within 20 business days.
>
> There is, however, one significant issue regarding our position as a public body which we hope to see remedied, which finds us in a unique position among other public bodies. Sections 21 (disregarding a request), 23 (extension of time limit) and 24 (extraordinary circumstances) are necessary and important features of *ATIPPA, 2015* that provide flexibility when difficult requests or other circumstances arise that prevent a public body from complying with the ordinary deadlines and requirements of the *Act*. All of these features require an application to and approval of the Commissioner. However, it is our interpretation that the head of our public body, the Commissioner, cannot apply to themselves for such an approval, and that it would be inappropriate to do so.
>
> Thankfully, to date, there have been no circumstances in which we have received a request that would warrant an application to disregard a request. We have, however, processed one request which was very difficult to complete within the 20 business day statutory time period, and it is conceivable that we could encounter another request that could not be responded to within that period.
>
> In the one challenging circumstance, there were persistent, novel technical issues with conversion of requested electronic documents to a usable format so that all of the information in the record could be accessed for review, redaction, and provision to the applicant. This also involved a large number of rec-

ords - in excess of 1000 pages. In order to respond by the deadline, this process involved several of our staff who were involved in working through the technical issues, consulting outside the office to find solutions, reviewing the records once the issue was resolved, in addition to applying redactions, communicating with the applicant and other normal administrative processes. Ultimately the response was issued on time, but at the risk of impacting our other statutory responsibilities.

[OIPC's] Recommendation 16.7: Amend *ATIPPA, 2015* to allow the Commissioner to apply *ex parte* to the Trial Division for approval in regard to sections 21, 23 and 24 in the same way and for the same circumstance that would ordinarily see a public body apply to the Commissioner for such approval.

As the *Act* now stands, and if the recommendations in this report are accepted, there are a number of situations in which this issue could arise:

1. Where the Act requires the prior approval by the commissioner of the proposed decision of a public body, as follows:
   (i) approval of a decision to disregard a request – carries a right of appeal to the Supreme Court if the commissioner approves the disregard request (s. 21);
   (ii) approval to extend the time limit for a response to a request (s. 23) (no right of appeal)
   (iii) approval to vary a procedure or time requirement because of extraordinary circumstances (s. 24). (no right of appeal)
2. Where the OIPC, as a responding public body, provides a cost estimate to an applicant and/or denies an application to waive the costs and the applicant wishes to avail of the revision and review provisions of s. 26.
3. Where the OIPC as a public body makes its own decision to disregard a request (recommended s. 21.1).
4. Where the OIPC wishes to seek a declaration that an applicant is a vexatious applicant (recommended s. 21.2).
5. Where an applicant wishes to make a complaint under s. 42 with respect to a decision or failure of the OIPC to comply with an obligation under the *Act*.

The OIPC suggests that, in such situations, the Supreme Court could step into the shoes of the commissioner and make the necessary determinations. This suggestion is

generally endorsed by government. Another option raised for consideration may be to provide that the Office of the Citizens' Representative act in place of the commissioner.

I am reluctant to involve the Supreme Court directly in the administrative processes of the *Act* – situations where approvals are required and there is no right of appeal or complaint. This concern is not as great when the *Act* contemplates the commissioner acting as a decision-maker relating to the substantive rights of the *Act*.

It should also be recognized that where a complaint is made concerning an access or correction decision where the OIPC is in fact the responding body, there is no other body with the resources or expertise of the OIPC to meaningfully engage in and conduct the investigation, informal resolution processes, and recommendations set out in the *Act*.

Most fortunately, the issues arising from the OIPC's activity as a public body under ATIPP arise very infrequently. And as the commissioner pointed out, as a matter of both practicality and perception, the OIPC is extremely reluctant to be placed in a situation where an approval under the *Act* is required or where an applicant might otherwise have cause for complaint.

Nonetheless, the matter has been raised and must be addressed. In the hope that the circumstances under consideration do not rise at all, I recommend that where the OIPC is responding to a request in its capacity as a public body, procedural or administrative matters that would otherwise be referred to the OIPC be referred to the Office of the Citizens' Representative and that matters requiring a level of adjudication be referred to the Supreme Court. I recognize that the recommendations do not create a perfect parallel with the situation for other public bodies and for applicants dealing with those bodies, but I believe that the fundamental concerns raised have been satisfactorily addressed.

RECOMMENDATION

- That the *Act* be amended to provide that where the OIPC is responding to a request in its capacity as a public body, procedural or administrative matters that would otherwise be referred to the OIPC be referred to the Office of the Citizens' Representative and that matters requiring a level of adjudication be referred to the Supreme Court. [Appendix K, s. 51.1]

COMPELLABILITY OF OIPC PERSONNEL AS WITNESSES

Section 99(2) provides that OIPC personnel are competent, but not compellable witnesses concerning information acquired in the course of performing their duties. This includes prosecutions under the *Act* or for perjury. Subsection 99(2):

> *99.(2) The commissioner, and a person acting for or under the direction of the commissioner, shall not be required to give evidence in a court or in a proceeding about information that comes to the knowledge of the commissioner in performing duties or exercising powers under this Act.*

The Department of Justice and Public Safety suggests that OIPC witnesses should be compellable with respect to proceedings dealing with offences under the *Act*. Their submission, at pages 13–14:

> Issue
>
> Section 99(2) of the ATIPPA, 2015 prevents the Information and Privacy Commissioner or individuals acting for or under the direction of the Commissioner from being called to give evidence with respect to an offence as described in s. 115.
>
> Section 115 of the Act sets out the circumstances where an offence has occurred under the Act. Once there is a decision to proceed with prosecution of an alleged offence, the matter is referred to the Department of Justice and Public Safety (Public Prosecutions) for prosecution.
>
> If an offence as described in s. 115 proceeds to litigation, and is not resolved by way of guilty plea, the provincial prosecutor assigned the file must prove the offence beyond a reasonable doubt and in compliance with the standards for evidence as set out in s. 99 of the Act. Section 99(2) prohibits a prosecutor or another individual involved in litigation under the Act from calling the Commissioner or any individual acting under the Commissioner to give evidence in court.
>
> The Office of the Information and Privacy Commissioner is responsible for carrying out investigations of alleged offences under the Act and ultimately determines whether a charge should be laid pursuant to s. 115. In the course of an investigation by the OIPC, the investigator has the ability to critically analyze evidence collected and determine what further evidence may be required to prove an offence. In the course of an investigation an OIPC investigator may interview witnesses, examine computer systems, check work-logs, etc. The OIPC investigator will determine, based on information available or

> not available to them, whether there are reasonable grounds to lay a charge under the Act.
>
> As such, investigations under the Act are largely dependent on circumstantial evidence, particularly offences that fall under s. 115(2)(a). In a prosecution of an offence under this section, information that rules out alternate theories about a possible offence are as important as information that would confirm that a certain individual is responsible for a breach and offence as charged. In many instances, the OIPC investigator would best be able to speak to the circumstantial nature of the offence and why certain information is or is not important, or why emphasis should be placed on certain information or lack thereof. Not having the ability to call an OIPC investigator as a witness to speak to an offence under the ATIPPA, 2015 has a direct impact on all prosecutions under the Act, and the success of those prosecutions.
>
> In the normal course of criminal prosecutions, investigators are frequently called to testify and explain the process they took while investigating a matter and why certain decisions were made in the course of an investigation. The evidence given on behalf of investigators in criminal prosecutions is critical and is frequently used as a means to complement and/or bolster additional witness evidence and the theory of the prosecution's case.
>
> A jurisdictional scan was completed and Ontario and Nunavut are the only other jurisdictions that have legislation that prohibits their respective OIPC offices and/or investigators from being called to court as witnesses. All other provinces are either silent on calling their respective OIPC investigators or have provisions that only allow their OIPC investigators to be called as witnesses for offences under their respective legislation.
>
> JPS's Recommendation
>
> Consideration should be given to removing s. 99(2) from the Act.
>
> In the alternative, s. 99(2) should be amended to allow OIPC investigators to be called as witnesses for offences under the Act.

Section 99 has been in the *Act* since at least 2002. It was not the subject of comment by the Wells Committee.

In its supplementary submission, the OIPC noted the rarity of prosecutions under the *Act* and commented on the potential effect of the compellability of OIPC personnel. Its submission, at pages 27–28:

> In the case of the OIPC, involvement by one of our Analysts with an investigation that leads to a prosecution is not something they do on a frequent basis,

> and certainly testifying in Court is not part of their job duties at present. Unlike Wildlife Enforcement Officers, our Analysts are not first-hand witnesses of any of the activities under investigation. In every case, as noted above, the information that has led to successful prosecutions and guilty pleas has come directly from managers and IT staff of public institutions, as well as the records of computer access audits conducted by public body IT staff, and other public body documents such as computer access or HR policies. Our Analysts are not experts in the IT systems or management practices of public bodies. This information is best made available to the Court by the experts who can answer questions to allow the evidence to be probed and considered. The only statutory role for the OIPC at present regarding prosecutions is found in section 102(4), which provides that the Commissioner may disclose information about the commission of an offence to the Attorney General.
>
> In fact, the vast majority of the work of Analysts involves informal contact with public body coordinators and other officials, access to information applicants, etc. This informal contact occurs during the informal resolution of complaints, but also in phone calls and emails seeking guidance on privacy impact assessments, privacy breach responses, new public body initiatives that could impact privacy, potential complaints that might be filed – the list is endless. The reality is that the major portion of the OIPC oversight role comes not from Commissioner's Reports, but from these day to day interactions which supports public body compliance and informs other stakeholders about requirements and expectations under *ATIPPA, 2015*. If the statute were amended such that OIPC staff could be called as witnesses in Court, it could put a chill on the willingness, particularly on the part of public body officials, to disclose their concerns about privacy or access to information, and thus impair our ability to carry out the many informal interventions that occur to support compliance with the statute. As a final point, we believe section 99(2) can be waived by the Commissioner in appropriate circumstances. This is a discussion that can be had with the Crown.

It is fair to assume that a prosecutor would only require a member of the OIPC to testify if that individual could offer relevant admissible evidence. And as the OIPC submission points out, there is no prohibition against OPIC personnel testifying voluntarily – the issue is compulsion. In the limited circumstances involving a prosecution under the *Act* or a charge of perjury, I consider that the need for the Crown, in the public interest, to be able to produce all appropriate evidence is paramount to concerns about the willingness of individuals to divulge information to OIPC personnel.

I recommend that s. 99(2) be amended accordingly.

RECOMMENDATION

- That the *Act* be amended to remove the non-compellability of OIPC personnel as witnesses in proceedings involving an offence under the Act or a charge of perjury. [Appendix K, s. 99(3)]

OIPC INVESTIGATIONS AND SECTION 8.1 OF THE *EVIDENCE ACT*

There seems to be considerable doubt over what is accomplished by s. 101.

> *101.* *Section 8.1 of the Evidence Act does not apply to an investigation conducted by the commissioner under this Act.*

This section, with a change from "review" to "investigation" was carried over from the 2002 *Act*. It was not the subject of comment by the Wells Committee. Section 8.1 of the *Evidence Act* is reproduced and discussed in the section of this report dealing with its inclusion in Schedule A to *ATIPPA, 2015*.

Only the OIPC commented on s. 101 – from its initial submission, at pages 74–75:

> ATIPPA, 2015 and the Evidence Act
>
> The reference in section 101 to section 8.1 of the Evidence Act is somewhat obscure and does not arise in day-to-day application of ATIPPA, 2015. Section 8.1 of the Evidence Act is a provision that specifically prohibits records of quality assurance and similar committees (typically in the context of the health care system) from being produced as evidence in legal proceedings. The intention of section 8.1 appears to be to give medical professionals and their regulatory bodies the freedom to investigate complaints or incidents involving patient safety, with the objective of learning from mistakes and making improvements to medical practice, without risking statements or opinions being used in litigation. In one sense the purpose of section 8.1 may be analogous to section 29 of ATIPPA, 2015, which facilitates the free flow of advice among government officials, allowing frank discussion to occur without fear of disclosure. Without the protection of section 29, officials would be constrained from offering frank advice or addressing controversial subjects.
>
> In section 8.1 "legal proceeding" is defined broadly, and could arguably include an OIPC investigation. The inclusion of section 101, stating that section 8.1 of the Evidence Act does not apply to our investigation, means our inves-

> tigation is not a "legal proceeding" under s.8.1, and that our Office may therefore require the production of the kind of records to which section 8.1 applies, if they are relevant to our investigation.
>
> Importantly, however, it does not mean that such information would necessarily be disclosed to n access to information applicant. The exceptions in Part 1, Division II are available to public bodies that wish to withhold any records subject to an access request.
>
> If further clarity is required, an option might be to amend the existing section 101, or add a paragraph to section 97(1): "(e) notwithstanding section 8.1 of the Evidence Act" to make it clear that s.8.1 does not affect our investigatory powers. This may not be necessary, however, because the entire matter is not a pressing issue. When ATIPPA first came into force in 2005 it may have been more relevant, because the Personal Health Information Act (PHIA) had not yet come into existence. That Act was passed in 2008 and proclaimed in 2011, at which point personal health information that had formerly been subject to ATIPPA, 2015 was now subject to PHIA.
>
> Section 58(1)(c) of PHIA provides a mandatory exception to the right of access, in summary, for records that are applicable to section 8.1 of the Evidence Act. In our view, a similar exception is not necessary for ATIPPA, 2015 because records of personal health information are already excluded from ATIPPA, 2015 by section 6. The latter exclusion is likely the reason there has been no application of section 101 over the years, but section 101 may still be necessary to fill the gap that would otherwise exist if our Office were to need to examine records that related to a quality assurance committee, but did not consist wholly of personal health information.
>
> **Recommendation 16.9: No amendment is required to section 101.** (Emphasis in original)

In the public hearings, the commissioner acknowledged that the section is probably not needed but that, out of an abundance of caution, it should remain in the *Act*. I agree that there is no likely harm in leaving the section as it is. It was suggested by the OIPC that disclosure of quality assurance committee records – other than personal health information – could conceivably be required at some point. This is of course speculative. This combination of speculation and the unlikelihood, in my view, of an OIPC investigation being considered as a legal proceeding "in which evidence is or may be given before a court, tribunal, board or commission", persuades me that this section should not remain in the *Act*.

RECOMMENDATION

- That the *Act* be amended to repeal section 101. [Appendix K, s. 101]

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MUNICIPALITIES

The Terms of Reference require the Committee to examine "whether the provisions of the *ATIPPA, 2015* are effective for local government bodies".

Local government bodies are defined in the *Act* as the Cities of Corner Brook, Mt. Pearl and St. John's, municipalities as defined in the *Municipalities Act, 1999,* SNL 1999 c. M-24, and a body designated as such pursuant to regulations made under s. 116 of *ATIPPA, 2015*.

The Wells Committee made a number of recommendations concerning municipalities. Those recommendations, together with the comments on the implementation table as of July 2019:

RECOMMENDATIONS	IMPLEMENTATION	COMMENTARY
Recommendation #71: MIGA [Dept. of Municipal and Intergovernmental Affairs], in consultation with OPE and the Information and Privacy Commissioner, to develop a standard for public disclosure.	In progress	Some consultations occurred in 2016 and a draft standard was prepared. It was felt that additional consultations would be necessary as changes would be applicable to various pieces of municipal legislation. As part of the ongoing municipal legislative review, Municipal Affairs and Environment consulted on ways to modernize the legislation. With the forthcoming amendments to this legislation, government is intending to include additional provisions to increase transparency in municipal processes and information management. Privacy and access to information will also be a significant components of the training that will be developed for implementation of the new Act. The department will assess the need for any additional municipal standards as the new legislation is drafted.
Recommendation #72: The standard referenced in recommendation 71 should be enacted in the Municipalities Act, 1999, and ATIPPA be amended to add that provision to the legislative provisions that prevail over	In progress	See above; new municipal legislation is being developed. Whether it is necessary to amend ATIPPA to ensure that the new municipal legislation prevails is to be determined once drafted.

ATIPPA.		
Recommendation #73: Definition of public body be expanded to include municipally owned and directed corporations.	Complete upon Royal Assent (June 1, 2015) Came into effect on August 1, 2015	ATIPPA, 2015 expands the definition of public body to include certain entities in the municipal sector created by or for municipalities. This provision came into effect on August 1, 2015 to provide municipalities with a chance to identify such entities and, with Office of Public Engagement advice, prepare them for their obligations under the Act.
Recommendation #74: OPE formalize and provide support to assist municipalities in conforming with ATIPPA including a: • Help desk at the ATIPP Office; • Refresher courses offered through webinars or regional meetings; • ATIPPA guidance web pages on municipal council websites.	Complete	The help desk has been established and training is provided regularly to municipalities. ATIPPA guidance web pages on municipal council websites have been developed and are available on the ATIPP Office website. ATIPP Office has hired a Municipal Analyst to support municipalities.
Recommendation #75: Municipal access to information and protection of privacy policies be developed in line with the suggestion in the Municipal Handbook 2014 and be published on municipal council websites.	Complete	Templates completed and available on the ATIPP Office website.
Recommendation #76: Urgent that thorough and adapted training be provided to municipal ATIPP coordinator throughout the province and OPE consult with MIGA and the Office of the Information and Privacy Commissioner when updating training and resources.	Complete	ATIPP Office has presented at Professional Municipal Administrators and Municipalities NL conferences; updated Municipality Guide; and developed municipal specific training. ATIPP Office has hired a Municipal Analyst to support municipalities.
Recommendation #77: Final version of the Office of Public Engagement's ATIPP Municipalities Guide be completed as soon as possible in consultation with Municipal and Intergovernmental	Substantially Complete	The ATIPP Municipalities Guide has been updated to reflect comments by the ATIPPA Review Committee and the provisions in ATIPPA, 2015. Final version of the Guide is pending reviewing of legislation set out herein (see rec-

Affairs and the Office of the Information and Privacy Commissioner.		ommendations 71 and 72).
Recommendation #78: Removal of the requirement to publish in a newspaper an individual's right to request their information not be used for fundraising by post-secondary educational bodies	Complete upon Royal Assent (June 1, 2015)	
Recommendation #79: The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the Management of Information Act, not ATIPPA	In Progress	Simultaneous implementation of the ATIPP, 2015 recommendations and Duty to Document required the same IM staff/resources. OCIO's initial focus has been on helping departments and agencies build their IM capacity and maturity. In preparation for duty to document, OCIO is working diligently to assist public bodies in building their IM capacity by providing IM supports including; IM policy development and guidance, training sessions including transitory records, IM Self Assessments, and increasing awareness of IM responsibilities. This work is ongoing. As well, broad research and consultation is needed prior to implementing and this work is not yet complete.

It is apparent that much has been done by the ATIPP Office – and by the OIPC – to support the efforts of municipalities to administer the ATIPP legislation in their respective jurisdictions. This ongoing commitment and significant effort must be recognized and commended. But concerns remain, particularly with the imbalance of ATIPP demands and the resources available to meet those demands.

The following discussion addresses only the smaller municipalities that are established under the *Municipalities Act, 1999*. There are 275 incorporated municipalities in the province, encompassing some 87% of the province's population. 17 municipalities have a population of less than 100.

Is *ATIPPA, 2015* effective for these particular public bodies? The answer is no.

A former speaker of the United States House of Representatives, Tip O'Neill, is said to be responsible for the phrase "all politics is local". Based on submissions to the Committee, it is fair to conclude that, as communities get smaller, the interactions between residents, elected officials and town staff may become more frequent, more personal and, not infrequently, antagonistic. This does not create an ideal environment in which to process ATIPP requests. But access to information is vital, particularly since the actions of a municipal council frequently and directly affect the daily lives of residents. As the Wells Committee said, at page 286 of its report:

> Access to such information is a critical factor in achieving harmony and citizen confidence in the fair management of the municipality.

The ATIPP Office – the office charged with providing guidance and support of an operational nature to public bodies provided a thoughtful submission regarding the issues faced by smaller municipalities.

The introduction, at pages 36–37:

> The ATIPP Office works with municipalities throughout the Province providing training, guidance, and support in relation to the Act. In this regard, the Office is aware of issues common to municipalities in relation to the Act. While it would be ideal for the Committee to hear directly from municipalities, given the limited resources of many and the lack of submission provided during the 2014 review of the Act, this Office felt it would be prudent to provide some insights into the issues facing municipalities in relation to fulfilling their obligations under the Act.
>
> Compliance with the privacy provisions of the Act can be challenging for smaller municipalities. In recent years there appear to have been an increase in the number of privacy complaints involving municipalities, the majority of which result from the actions of council rather than staff. While the Office recognizes that this is of concern, the focus of this section of our submission will be on the access provisions of the Act and how they affect municipalities. While capacity and resourcing issues are affecting municipalities' ability to meet their obligations under both the access and privacy provisions of the Act, there do not appear to be solutions in relation to the former that can easily be resolved through amendments of the Act. In regards to the privacy provisions of the Act, the primary issue appears to be a lack of awareness or understanding of what these provisions entail. This primary issue could better be resolved through training if municipalities choose to avail of it. This can also pose challenges, however, as noted above, is not the focus of this submission.
>
> As with most other public bodies, municipalities have seen a significant increase in the number of requests received each fiscal year. In reviewing the

ATIPP Office Annual Reports, the five year period prior to the amendments (fiscal years 2010-11 to 2014-15), municipalities received an average of 81 requests in total per year. For the equivalent period under the current Act, municipalities received an average of 308 requests in total per year (a 280% increase).

Some municipalities were impacted to a greater degree than others. One of the most glaring examples is Portugal Cove-St. Philips. In the five years prior to 2015, this town received an average of 10 requests annually, with 14 being the most received in a single fiscal year. Since 2015, it has averaged 53 requests annually, receiving 103 requests during the 2017-18 fiscal year.

The submission continues, at page 37:

Issue

The primary issues faced by small and in particular, rural, municipalities in the Province with respect to Act, are capacity related, rather than legislative. Budgetary and operational issues are obstacles to fulfilling the legislative requirements laid out in the Act. There are no other jurisdictions with a comparable per-capita prevalence of incorporated municipalities, so comparisons are difficult.

There are 275 incorporated municipalities in the Province, all of which are public bodies subject to the Act. Many of these municipalities are very small. In the Population and Dwelling Count Highlights Tables from the 2016 Census completed by Statistics Canada:

- the median population of municipalities, excluding three cities, was 427;
- 41 municipalities had populations between 100 and 200;
- 17 had populations under 100, with the smallest having a population of five

In Municipalities NL 2011 Census of Municipalities in Newfoundland and Labrador 63 municipalities indicated having no full time employee. A significant number have currently only one full time, or one part time employee. In the majority of cases, the Town Clerk acts as the ATIPP coordinator.

Suggestion

Consider whether it would be appropriate to legislate a threshold based on either population (for instance less than 100 residents) or budgetary (for instance less than $50,000) for exclusion from the access provision of the Act.

> Given the Act may be the only oversight mechanism in place for municipalities in the province, in may be inadvisable to exclude smaller municipalities for the access provisions of the Act.

As said elsewhere in this report, and as recognized in the submission of the ATIPP Office, excluding any resident from the access provisions of *ATIPPA, 2015* because of the limited capacity of a public body must not be considered acceptable. The rights granted by the *Act* are real and their responsible exercise by all residents must be facilitated.

Some comments from the anonymous survey of coordinators of municipalities – of varying populations – illustrate the issue:

> What is the most challenging aspect of your role as an ATIPP Coordinator?
>
> There are a couple of challenges that I face as an ATIPP Coordinator
>
> ———————————
>
> #1 – Locating records in a timely manner – After taking over this position, mismanagement of files make it very difficult to find records that are located. Sometimes it is almost impossible to locate.
>
> #2 - Being a smaller municipality, when we get a significant amount of requests, the lack of staffing causes difficulty. ATIPP can be very time consuming, so working with minimal work poses a strain.
>
> ———————————
>
> Meeting the demands of my job is the most challenging part of my role as ATIPP Coordinator. I have watched the workload steadily increase over the years and there will soon come a time where those demands will not be able to be met unless the resources in place increase. Information requests are more frequent (and often more complicated/broad); privacy concerns and the need for privacy assessments more prevalent; and my role more recognized and utilized throughout the organization. In my opinion, this is all very positive; however, the demand is quickly becoming too great to meet deadlines, adequately train staff, properly assess projects for privacy compliance, etc.
>
> Would you recommend any changes in (i) timelines; (ii) fee/cost structure?
>
> As a small town we have felt the financial impact of numerous ATIPP requests this year on our office supplies budget. Perhaps applicants could be charged admin. Fees especially when they submit multiple requests.
>
> ———————————

> Time lines for sure, when there is only one person in an office in a small town being a jack of all trades.
>
> Do you feel you have received the training necessary for the role of coordinator?
>
> I don't feel that there is enough understanding of how municipalities have to handle these request. We are more involved in the everyday life and make decisions that affect the regular person. Training is more geared toward government departments and that's not accurate for us.
>
> If you could change one thing: (i) In your role as Coordinator; (ii) In the Act itself, what would it be?
>
> More training is a must, not only for Coordinators, but for C ouncillors as well.
>
> Are there any other comments/suggestions you would like to share?
>
> Just to reiterate the increased demand that I have observed in my role. I have been working in this area for a number of years and within that time all aspects of my job have grown significantly. Access to information requests have become much more frequent and involved. Privacy concerns/awareness and technology advances have increased the need for training, consultation, and assessments. Generally, the importance of ATIPP has become much more recognized. All of this, while the deadlines and resources available remain the same - it is not sustainable.

I refer, by way of example only, to two submissions received from municipalities which address the practical difficulties that face small municipalities dealing with what may be considered unreasonable ATIPP requests:

> I am writing you with a very important issue as it relates to atippa request. I am the Mayor of the Town of St. Georges on the west coast of the province and we are at the breaking point of handling atippa request, we received on average between 70 to 100 request per year through our office. And 99% of the request comes from a single individual and all the relevant information about our staff who he is trying to intimidate is then posted on social media. We are a town of 1200 people and we are taking very valuable dollars and trying to meet these request, and provision to have a fee charged for this services is not allowed, we need some avenues created in order to stop these witch hunt request. the request usually happens after we deal with a individual at our regular council meeting, an example is in our first meeting of 2021 on January 11 which all minutes are posted,we received 11 request on Janu-

> ary 14 which will take on average 8 hours each which will be 2 full weeks for 1 employee to fill these request we only have 2 office staff on payroll so it's putting our town in jeopardy and these actions may force myself and council to resign our positions as it's becoming unbearable to handle for volunteers. We are taking peoples tax dollars for this wastage and we are not even allowed to say no to this individual who has been barred from any in person visiting at our office because we are obligated to provide a respectful and safe workplace for our staff and this individual actions prompted us to do this so in your deliberations could you possibly provide an avenue for us to cope with this issue, examples would be
>
> 1, Nusisance clause
>
> 2, ability to charge after 1 hour per request 3. Limit the amount of request per individual etc.

In later communications, the mayor clarified that the number of requests received included email requests that did not formally engage the ATIPPA process.

And from a second community – a plea for help:

> I have been the Atippa coordinator for the town of Portugal Cove-St. Philip's for 4 years. Before I even started my job I was warned about one resident that is submitting a large amount of requests and that it would take up considerable amounts of my workday. Our town is in a very unique position with the number of requests we were receiving. The majority of these were simple questions the applicant could have asked town staff however he wanted to remain anonymous and went through ATIPPA so he was able to do so. It just took a lot more time for the administration and locating records verses a phone call to discuss.
>
> After tracking the 2017 requests, we learned that with all staffing times combined, it took more than a ½ a year's worth of one staff members time to complete. We calculated 668 hours on Access to Information requests plus the time it took to deal with 35 complaints via OIPC. We counted the number of questions and determined that the town received 350 questions in 2017. Of those 350 questions, 304 of them were from one person. In addition to his 304 questions, we also had 33 OIPC complaints from this person to deal with. This tracking didn't include the time the ATIPPA Office and OIPC staff used on these 350 requests and 35 complaints.
>
> So the amount of time spent on Access to Information was overwhelming; Protection of Privacy was extremely minimal. Like most municipalities, I do not have a backup person to help. The Head is extremely busy so I only give him an overview of each request. The largest issue I see is that we are not bound by the Management of Information Act, 2005. Although I've asked di-

rectors with the Information Management department of GNL, municipal staff are still not permitted to attend the MOI community of practice and have no insight to MOI. I tell you about this because the amount of information lost or buried in emails in municipalities is vast and great. The ATIPPA coordinators must rely on other staff to preform searches and I know records are missed when sending the responses. Considering Councillor's leave every four years, there is no access to Councillor emails unless you are like the town of PCSP and have the ability to call an I.T. company to do a search of the backup archives. My ex-CAO was fired and we have no I.M. exit plan so I have to keep his emails for ATIPPA searches. Do other towns search emails with records that aren't saved to their network? The records to be searched is a very grey, and uneven, policy in ATIPPA. I would like to see I.M. more prescriptive in an updated Act. Being directed by the Management of Information Act would also help in retention and destruction.

The other issue is if one resident can take up ½ a years' worth of a staff persons time, then what would a town with one staff person town (which over 50% of municipalities are) do if they ever had 2 residents working this way? One staff person towns are busy enough doing Public Works, Asset Management, Contracts, Funding, Accounting, Customer service, Planning & Development/permits, assessments, recreation, security, etc. I would like to see that requests cannot have unrelated topics in the same request; I sometimes had 15 questions on one request. I would also like to see a fee implemented for multiple requests at the same time. That would deter multiple requests from one individual and give us 20 days to deal with one request at a time from one individual. Even if we have 11 people at the same time (like PCSP did), it would cut back on the amount of time dedicated to ATIPPA. Time management is sometimes unrealistic and then the OIPC put out a solution for us overwhelmed coordinators – towns should hire more staff to deal with ATIPPA. That is an unrealistic solution. When there are multiple requests, we have no time to do our daily work and when there are no requests, what would a dedicated ATIPPA coordinator do with their time?

Another issue we have had, is similar requests being asked, just to ensure we gave all the records. Almost like trying to trick us. It is very time consuming and when you have 20 requests on our desk, you don't have the time or the coordination to realize they're duplicate until you ask the same person and they let you know.

I find the OIPC very helpful in closing a request, although a complaint takes four times the amount of time the access to information requests take. On the other hand, I was frustrated with the Commissioner while the OIPC accepted complaints without an ATIPPA request done first, or after the deadline for complaints had past. They knew most of these complaints were frivolous and not required but they went ahead and accepted them anyway. Our frequent requestor would also start circling around the question which usually opened up to being a side bar conversation or side complaint that turns into a whole

other topic. This evolution from the question in ATIPPA to other topics was a problem with our frequent requestor. I would be remiss to not mention the amount of help the staff at the ATIPPA office provide. They are willing to put their comments in a written response and answer you directly. You will sometimes get an occasional "get a legal opinion" but only after they give you their opinion and thoughts. Another issue is the staff at ATIPPA do not interpret the legislation the same as the staff at OIPC. We can use petitions for an example: ATIPPA says release; OIPC says don't release. ATIPPA office needs to communicate with OIPC office on some issues before replying to coordinators.

On our website we try to proactively post all we can but that is dependent on the buy-in from management. Perhaps all public bodies should proactively disclose all the records in s.215 of the Municipalities Act.

Another observation is redaction. I think there should be a tool for all coordinators to use. Some use hard copy, some use software and others use Abode Pro. Perhaps the procurement agency could put out a Master Standing Offer RFP for all towns and cities to purchase a standard tool.

And finally I would like typical municipal record series, (building applications, real property reports, tenders, correspondence, etc) be laid out as to what is releasable and what isn't. This is a real struggle in Planning & Development to know what we should release or not.

Thank you for you time. I hope you can take this information into consideration, as a town that once had more requests than RNC and CNA combined, we need help with our everyday work load with ATIPPA on top of the main role.

On the other hand, from one frequent user of ATIPPA:

I did not expect to read so many problems about this act.

I am one who makes many requests to towns. I understand they see a problem with costs and time. Really why?

They have made no effort to try and deal with their problems. Many documents have gone from hard copy to electronic.

For some reason I have found towns to be disorganized to their documentation. They over state the hard work they so do.

Government and etal should get themselves more organized. The employees do not own their organization. They are accountable to the public. I have seen

where business know from day to day, mo to mo etc where they are going operational yet we see such slow movement on part of government in their financial activities.

Can say towns be more organized? Yes

Take documents under sec 215 of municipalities act. Why are they not on town website for public viewing? This would cut our many Attip requests.

Being transparent will reduce fraud and mismanagement.

Electronic documents reduces physical storage space.

Electronic makes it easier to access and transmit documents.

If records are more organized Attip requests time can be reduced.

If more records stored by electronic less danger of lost of records.

I can go on.

Do I hear say banks crying about electron records. No.

If you already have many records stored electronically it is not difficult to make available to public.

If government and others make more of their records available to the public I am sure Attip requests will be reduced.

One issue I find is that of legal opinions.

I always through this was a process for law , procedure, action required etc. For advise.

What I find now in towns, school boards et al it is a report or engagement to have a report or investigation done up as these organizations do not want to take responsibility but have lawyers be the decision maker. I have reviewed several conflict of interest so called legal opinions that are in reality a report or committee presentation that analyze all facts, review past cases, comment on statute and arrive at a conclusion. These are about 3 pages in length. They are suppose to be subject to solicitor – client privilege but yet copy usually given to the person who has the allegations against the person. I note in CCC cases legal advise not shared with all parties.

> These so called legal advise should be released except where the report may contain a principle of law or privacy matter.
>
> It seems the definition of legal opinion has changed.
>
> ---
>
> I find many so called legal opinions are not really that.
>
> They seem to represent a report or committee engagement.
>
> I am a bit familiar with the ones dealing with conflict of interest in municipalities. As many do not want to do their homework they engage a law firm to get all the facts, analyze cases, make some comments then arrive at a conclusion.
>
> They even give copy to the alleged person.
>
> The original legal advise concept has changed to become one of engagement assignments.
>
> So, most these reports should be released to attip requests.
>
> ---
>
> If Towns et al feel the matter is vexes and nuisance they should complain to office of access to information.
>
> The office then can inform the person making request.

Given the comments from the mayor of the town, I will refer to St. George's for the purpose of illustration only. The Town of St. Georges, according to the census, has a population of 1203. It has an office staff of two, public works staff and a volunteer mayor, deputy mayor and councillors. Its budgeted expenditures for the calendar year 2021 are just over $1 million. Its revenue includes $218,000 in government transfers. The Town is subject to the *ATIPPA, 2015* legislation as is, for example, Memorial University, Eastern Health, and the Department of Industry, Energy and Technology. The residents of the town enjoy the same rights of access to information and protection of privacy as does every other resident of the province.

The town maintains a website on which are posted details of town staff, council minutes, policies and regulations, forms and applications, permits issued, municipal planning, tax structure budget and newsletter. The website is a commendable attempt to meet the document availability requests of s. 215(1) of the *Municipalities Act, 1999*.

It is beyond dispute that the resources available to a small municipality to meet whatever ATIPP demands may arise – and whenever they may arise – are at best minimal.

In a small municipality, it is not feasible to provide dedicated ATIPP resources; the town staff – often part-time – have to act as the ATIPP coordinator, and perhaps also as the head of the public body, along with their other duties. And, as coordinator, they are expected to be familiar with the *Act*, its access rights, timelines, exceptions to access and protection of privacy provisions.

In short, there is a mismatch between a resident's ability to exercise a right to access information and to the protection of their privacy and a small municipality's ability to respond as and when may be required.

The ATIPP Office website includes a comprehensive Guidance for Municipalities: https://www.gov.nl.ca/atipp/. The OIPC website also contains, in addition to general advice and information, specific guidance for municipalities on privacy breaches, designating a "head" for ATIPPA purposes, advice for municipal councillors on the functioning of *ATIPPA, 2015*, including the duty to protect personal information, the records that are subject to the *Act*, and the designation and role of the coordinator. The responses from the coordinators were uniform in their recognition of the invaluable support provided by both the ATIPP Office and the OIPC. These proactive efforts of the OIPC and the ATIPP Office, coupled with their ready availability to provide advice on specific issues as they arise, are to be commended.

From the submissions to the Committee, it is apparent that there are two primary issues of concern to smaller municipalities.

The first is the potential for abuse of the ATIPP system. While this potential may be most apparent in the more confined environment of a small municipality, it is an issue that has been raised by other public bodies and discussed elsewhere in this report. The recommended amendments to the *Act* providing for a modification of the disregard process and for an opportunity to have the OIPC control the activity of a requestor found to be vexatious should, it is hoped by the Committee, provide some opportunity for relief.

The other primary concern is that of resources, both human and technical. It is critical, when considering the ability of very small public bodies to effectively and efficiently manage their ATIPP responsibilities, that government accept and acknowledge that access to information and the protection of privacy is a province-wide responsibility,

a responsibility to ensure that all residents of the province enjoy, insofar as reasonably possible, equal enjoyment of the rights. In other words, government – in the sense of the government of the province – should accept that its obligation under the legislation extends to all residents, whether a request for access to information or an issue of privacy protection involves the Executive Council or the Department of Finance or towns such as Burgeo, Gambo or Pinware.

Ensuring that all residents of the province have the opportunity for meaningful exercise of their quasi-constitutional rights is, in today's democracy, a core responsibility of government.

Carrying out this responsibility is not an easy task. Referring specifically to financial issues, the cost to small municipalities of providing ATIPP requests cannot be ignored. Particularly in a paper-based environment, the out-of-pocket (marginal) costs of processing legitimate requests can strain the resources of a small municipality. The projected demand for ATIPP requests is not predictable, making forecasting future costs difficult.

Recognizing and reinforcing the core central government's responsibility to ensure access to the *ATIPPA, 2015* rights for all residents, I recommend that an administrative 'cost-reimbursement process' be developed whereby municipalities established pursuant to the *Municipalities Act, 1999* are able to seek from government periodic reimbursement for ATIPPA-related marginal costs, including additional staff time, perhaps over a minimum amount. Such costs may include, for example, legal costs associated with the application of an exception or with the complaint and appeal process. While resort to such cost reimbursement might be rare, it's availability would provide some level of comfort to a small municipality faced with an unusual level of expenditure. The development and design of this process should be included in the mandate of the municipalities 'Team' referred to shortly.

Looking more generally at the ATIPPA environment for small municipalities, it is beyond the scope and ability of this review to recommend specific improvements to address the various issues faced by the over 270 municipalities in administering the ATIPPA regime in their jurisdictions.

Given the number of municipalities and the population they serve, a comprehensive and coordinated approach is needed to ensure that, insofar as reasonably possible and practicable, they are equally equipped, as democratic bodies, to fulfill the objectives of the *Act*.

Having considered all of the views presented to the Committee, I recommend that a Municipality ATIPPA Team be constituted to determine, and periodically review as required, what is reasonably needed by municipalities in order to meet their responsibilities under *ATIPPA, 2015*. The mandate of this Team should include consideration of the administrative recommendations of this report relating to small municipalities.

The Team should be under the direction of the ATIPP Office, with representation from at least the Department of Environment, Climate Change and Municipalities, OCIO and the OIPC. If thought appropriate, Municipalities NL could be invited to participate. The areas for consideration should include but not be limited to:

- Training for coordinators – recognizing that much progress has already been made;
- Orientation for new coordinators and councillors;
- Information Management systems and support, including disposal of transitory records;
- Information Technology systems and security;
- Request processing issues, including redaction, the use of appropriate software and record format;
- Development of cost-reimbursement mechanism for marginal costs of request processing;
- Protection of privacy and the need for privacy impact assessments when considering any new program or service;
- Proactive disclosure, including compliance with s. 215 of the *Municipalities Act, 1999*;
- Assistance in establishing practices, policies and procedures for the protection of personal information (see recommended amendment to s. 72.1);
- Dealing with the vexatious applicant;
- Availability of continuing support.

I appreciate that this recommendation is a somewhat 'soft' non-legislated recommendation that will involve additional work for already busy individuals. Some modest financial assistance may be needed and additional resources may be required, perhaps to the point of providing, probably within the ATIPP Office, additional persons dedicated to the support of municipalities. (The July 2019 implementation update indicates that one Municipal Analyst has already been added to the staff of the ATIPP Office.)

In 2019-20 the municipalities received 127 general requests for information. This is a small number in the absolute sense, but as noted by the coordinators, and depending on the timing and nature of requests, even a couple of requests can heavily tax the limited resources of a small office. It must not be forgotten that each of these requests is, to the applicant, as important as one made by the media to a government department. ATIPP requests to small municipalities must be afforded the same degree of importance as those to other public bodies.

I have not elsewhere in this report recommended the application of additional resources but, to repeat, managing an effective ATIPP regime – a core responsibility – is part of government's cost of doing the people's business. The likely modest cost of ensuring that small municipalities are able to respect their residents' requests and provide the required level of personal information security is a small price to pay.

Two issues raised in the ATIPP Office submission require comment here. They may be considered together – at pages 41–42:

> Designation of head by a local public body (s.109)
>
> Issue
>
> Section 109 of the Act notes that a local public body shall designate a person or a group of persons as the head of the local public body for the purposes of the Act; however, it makes no reference to who may be appointed. Ideally, the head of the public body would be the most senior employee, however in municipalities where there is only one employee a councillor may be assigned the role. This arrangement may undermine the apolitical intentions of the legislation, whether real or perceived; however, with smaller municipalities where there is only one employee it may be unavoidable. In practice the ATIPP coordinator may serve as both the coordinator and head of the public body, however this places significant responsibility on one person. While situations as described above may require an elected official to be the head of the public body, this should only be done in unavoidable circumstances.
>
> Further, allowing "groups" of individuals to be appointed as head of the public body is problematic. Some municipalities have appointed committees or the entire council as "head", including in municipalities where there are sufficient staff within the town to fulfil this duty under the Act. In addition to complicating the process and potentially undermining the intended apolitical process, it also has the effect of necessitating an entire council review personal information requests which are often highly sensitive. This can be particularly troublesome in municipalities where "everyone knows everyone" and there

are interpersonal dynamics at play between the applicant and various councillors who make up the position of the "head".

Suggestion

Consider amending section 109 to require the head of the public body to be a member of the staff, except in exceptional circumstances, and remove the ability for the head of public body to be a group of people.

Designation of ATIPP coordinator (ss.110(1))

Issue

Subsection 110(1) of the Act requires that the head of a public body designate a person on the staff of the public body as the coordinator. As noted, a large number of municipalities have only one part-time or full-time employee. In other cases, medium sized municipalities receive extraordinarily high number of requests.

In these cases it would seem reasonable for municipalities to use an ATIPP coordinator who was not a member of the staff of the public body, such as a solicitor or a coordinator seconded from another municipality, with the head of public body retaining final authority. It would also allow municipalities to avoid potential for conflict of interests.

Suggestion

Consider whether it would be appropriate to amend the legislation to allow the ATIPP coordinator to be an individual not on the staff where necessary (perhaps in extraordinary circumstances or with approval of the OIPC).

The present provisions:

109. (1) A local public body shall, by by-law, resolution or other instrument, designate a person or group of persons as the head of the local public body for the purpose of this Act, and once designated, the local public body shall advise the minister responsible for this Act of the designation.

(2) A local government body or group of local government bodies shall

(a) by by-law, resolution or other instrument, designate a person or group of persons, for the purpose of this Act, as the head of an unincorporated entity owned by or created for the local government body or group of local government bodies; and

(b) advise the minister responsible for this Act of the designation.

110. (1) The head of a public body shall designate a person on the staff of the public body as the coordinator to

(a) receive and process requests made under this Act;

(b) co-ordinate responses to requests for approval by the head of the public body;

(c) communicate, on behalf of the public body, with applicants and third parties to requests throughout the process including the final response;

(d) educate staff of the public body about the applicable provisions of this Act;

(e) track requests made under this Act and the outcome of the request;

(f) prepare statistical reports on requests for the head of the public body; and

(g) carry out other duties as may be assigned. …

These provisions were carried over from previous legislation and were not discussed by the Wells Committee.

The suggestions concerning limiting the designation of the head of a local public body to one person and requiring the head of the public body to be on the staff of the public body are recommendations borne of experience. The concerns about dissemination of personal information are real and should be addressed. Further, the independence, and the perception of the independence, of the head of the public body, in terms of freedom from political and other influences in ATIPP related matters must be protected.

With respect to the second recommendation, the difficulties that can present to a small local public body coordinator are not difficult to appreciate. But, since the information – or privacy issue – in question is solely that of the local public body in question, 'contracting out' the responsibility of the coordinator is a solution to workload issues that should only be considered as a last resort. However, the question of capacity is real; as I have said before, the demand is unregulated and unpredictable and I do not consider it prudent to ignore practical realities.

I recommend that, in exceptional circumstances and with the prior approval of the commissioner, the head of a public body may appoint a person not on the staff of the local public body as a coordinator or backup coordinator. Any coordinator so appointed

must be given the coordinator's mandate letter signed by the head of the local public body. Further, and again in exceptional circumstances and with the approval of the commissioner, I recommend that a local public body may designate a person not on the staff of the local public body to be head of that body for the purposes of *ATIPPA, 2015*.

Any such appointments should be for no longer than one year but should be able to be renewed on the same basis – including OIPC approval – as the original appointment.

RECOMMENDATION

That the *Act* be amended to:

- Provide that only one person can be designated as the head of a local public body. [Appendix K, s. 109(1), (2)(a), (3) and (4)]
- Allow local public bodies to designate a person not on staff as a coordinator or as the head of the public body under exceptional circumstances, when approved by the commissioner. [Appendix K, s. 110(3) and (4)]

Administrative:

- That Government develop a cost-reimbursement process whereby municipalities established under the Municipalities Act, 1999 may be reimbursed for all or a portion of the marginal costs incurred in responding to ATIPP requests.
- That Government establish a Municipality ATIPP Team to determine and review as required the resources reasonably needed by municipalities to administer ATIPP in each municipality.

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RECOMMENDATIONS 4 AND 16 OF THE MUSKRAT FALLS INQUIRY

The Committee's Terms of Reference require it to consider "Recommendations 3, 4 and 16 arising from the report issued by the Honourable Richard D. LeBlanc, Commissioner of the Commission of Inquiry Respecting the Muskrat Falls Project" and to "report on conclusions with respect to those recommendations".

Recommendation 3 is addressed in the section of this report dealing with Schedule A of the *Energy Corporation Act*.

Recommendation 4:

> 4. Nalcor should not be entitled to withhold information from the Premier, the Minister of Natural Resources, the Minister of Finance or the Clerk of the Executive Council on the grounds of legal privilege or commercial sensitivity. Persons holding the aforementioned government positions should only be entitled to withhold this information from public disclosure if such action is permitted pursuant to the *Access to Information and Protection of Privacy Act* or the *Energy Corporation Act*.

This recommendation speaks to the obligation of Nalcor to provide information to the Crown, its controlling shareholder. What information the representatives of the shareholder may require Nalcor to produce to the shareholder is a matter of government policy and corporate governance rather than an *ATIPPA, 2015* issue.

Underlying Recommendation 4 is, I believe, a concern of Justice LeBlanc's that, although Nalcor is a Crown corporation owned by and operated for the benefit of the residents of the province, the principles of public body transparency and accountability have not been fully reflected in practice. In light of this concern and the specific direction to this Committee, I recommend that government consider an amendment to the *Energy Corporation Act ("ECA")* that would require Nalcor, on the request of the responsible minister, to disclose to the minister such information as may be requested. This broader authority, outside the context of an ATIPP request, is of course a matter of government policy, but if established would reflect a clear acceptance of Recommendation 4. Any information so provided to government would be subject to the exception provisions of *ATIPPA, 2015* rather than to those of the *ECA*.

Recommendation 16 – the *Public Inquiries Act, 2006:*

16. To improve the ability of future Commissions of Inquiry to fulfill mandates given pursuant to the Public Inquiries Act, 2006, the Act should be amended to provide for the following:

a. A Commission should be exempted from the Access to Information and Protection of Privacy Act legislation so that its investigations can be conducted fully and without potential interference or influence. This exemption should continue at least until each Commission files its final report.

b. Documents received from third parties on a confidential basis should be returnable to those third parties without the Commission retaining copies, if such is determined necessary by the Commissioner.

c. Documents that have been entered at Commission proceedings as "Confidential Exhibits" or that have been sealed by the Commissioner should not be subject to further disclosure, even subsequent to the fulfilment of the Commission's mandate.

The Department of Justice and Public Safety commented on these recommendations, at pages 17–19:

> The Report of the Muskrat Falls Inquiry has recommended that commissions of inquiry be exempted from ATIPP legislation. The Inquiry itself was exempted from the ATIPPA, 2015 by its inclusion in Schedule B of the Act. Bodies listed in Schedule B are not considered "public bodies" and therefore are not subject to the Act. For the reasons below, JPS suggests that commissions of inquiry be exempted from access to information legislation while those commissions of inquiry are ongoing, prior to the release of a final report.
>
> Describing the role of commissions of inquiry in his text *The Conduct of Public Inquiries: Law, Policy, and Practice*, Ed Ratushny states:
>
> > …a commission of inquiry is a unique institution serving special purposes in our political-legal system. As (then) Justice Antonio Lamer stated: "There is no doubt that commissions of inquiry at both the federal and provincial levels have played an important role in the *regular machinery of government*…[and]…in particular serve *to supplement* the activities of the mainstream institutions of government. Justice Cory explained why commissions of inquiry are able to make a special contribution to the role of government: "As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed…." They have now become "an integral part of our democratic culture."

As described by Ratushny, a commission of inquiry is a useful tool in our political-legal system as it is generally free of the constraints that can hinder the expeditious operation of government. The application of access to information legislation to an ongoing commission of inquiry defeats this purpose as the process of responding to access requests while a commission of inquiry is in operation unnecessarily disrupts the functioning of the commission of inquiry. It can impede the work of the commission staff, including the Commissioner; interfere with ongoing investigations conducted by the commission; and expend unnecessary time and personnel resources which would be more appropriately utilized to fulfill the commission of inquiry's mandate.

[JPS] Recommendation

JPS recommends that, similar to the way in which the Court of Appeal is exempted from the ATIPPA, 2015, commissions of inquiry established pursuant to the *Public InquiriesAct,2006* be exempted from the definition of "public body" while the commission is ongoing and up until the release of the final report.

Issue

In its Report, the Muskrat Falls Inquiry also recommended that confidential third party information received at a commission of inquiry be returned to the third party without retaining copies and that confidential exhibits not be subject to further disclosure, even at the conclusion of the commission of inquiry.

Section 28 of the *Public Inquiries Act, 2006* states:

28. The Lieutenant-Governor in Council shall adopt policies and procedures for the preservation of the records of a commission or inquiry and shall ensure that confidentiality is preserved for information that is confidential or privileged.

However, upon conclusion of a commission of inquiry, generally, all materials are returned to government. When this information is returned, it is subject to the same access to information rules as all other government information, regardless of any order made by a commissioner. This raises the concerns noted above relating to third party information and information provided to a commission of inquiry on a confidential basis. There must be a balance between a third party's right to privacy and the transparency and public interest associated with commissions of inquiry.

[JPS] Recommendation

JPS recommends that s. 28 of the *Public Inquiries Act, 2006* be included in Schedule A of the ATIPPA, 2015.

There were no other submissions dealing with Recommendation 16 of the Muskrat Falls Inquiry.

The definition of public body in s. 2(s)(ix) excludes "a body listed in Schedule B". The Muskrat Falls Inquiry was included in Schedule B through the operation of s. 4 of *ATIPPA, 2015*. (The proceedings of the House of Assembly Management Commission dealing with this inclusion are referred to in footnote one of the submission of the Speaker of the House of Assembly to this review.)

Section 4 of *ATIPPA, 2015*:

> *When the House of Assembly is not in session, the Lieutenant-Governor in Council, on the recommendation of the House of Assembly Management Commission, may by order amend Schedule B, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.*

Given that the Muskrat Falls Inquiry is now complete, the OIPC recommended the removal of the Inquiry from Schedule B. The formal termination of an inquiry is a matter for the Lieutenant-Governor-in-Council under s. 3 of the *Public Inquiries Act, 2006*. Once the inquiry is so terminated, Schedule B may be amended pursuant to s. 4 of *ATIPPA, 2015*. No recommendation from this Committee is required.

The Office of the Chief Information Officer commented on the relationship between the collection of information for the purpose of an inquiry and public requests for the same information during the currency of the inquiry, at page 2:

> Government periodically calls a commission of inquiry to address events of significant public interest. Throughout the inquiry process, ATIPP coordinators are heavily involved in the collection and assessment of relevant records. It would be unnecessarily repetitive for ATIPP requests to be completed on these records during the inquiry. All public ATIPP requests in relation to the subject matter of the inquiry should be temporarily put on hold until the final inquiry report is released.
>
> Recommendation: It is recommended that, an appropriate communication be prepared to confirm that ATIPP requests made in relation to the subject matter of an inquiry be temporarily put on hold until the final inquiry report is released.

A public inquiry or 'commission of inquiry' is created under s. 3 of the *Public Inquiries Act, 2006*:

3. (1) The Lieutenant-Governor in Council may by order establish a commission of inquiry to inquire and report on a matter that the Lieutenant-Governor in Council considers to be of public concern.

(2) Where a commission is established under subsection (1), the Lieutenant-Governor in Council shall, in the order,

(a) appoint the members of the commission in accordance with section 21 ;

(b) establish the jurisdiction of the commission by setting terms of reference for the inquiry;

(c) designate the minister responsible for the inquiry; and

(d) fix a date for the termination of the inquiry and for the delivery of the commission's report.

(3) Where it is in the public interest, the Lieutenant-Governor in Council may by order revise the terms of reference for the inquiry and revise the dates set for the termination of the inquiry and delivery of the commission's report.

As one might expect from the title of the statute, there are provisions which emphasize the public nature of the inquiry process:

4. (1) A commission shall deliver its report in writing to the minister designated by the Lieutenant-Governor in Council by the date fixed for delivery of the report under section 3 .

(2) The minister referred to in subsection (1) shall release the report to the public.

…

6. (1) A commission may decide whether evidence presented to the inquiry or a representation to the inquiry is to be oral or in writing.

(2) Where a commission holds an oral hearing it shall be conducted in public, but a commission may exclude the public from a hearing, or from part of it, where it decides that the public interest in holding the hearing, or a part of it, in public is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of a person to a fair trial.

7. (1) A commission may arrange for the publishing or broadcast of its proceedings.

(2) A commission may by order restrict or prohibit the public reporting of its proceedings and the publishing of evidence at the inquiry where the commission de-

cides that the public interest in reporting or publication is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of a person to a fair trial.

There are also disclosure provisions:

12.(1) A person has the same privileges in relation to the disclosure of information and the production of records, documents or other things under this Act as the person would have in relation to the same disclosure and production in a court of law.

(2) Notwithstanding subsection (1) but subject to subsection (4), a rule of law that authorizes or requires the withholding of records, documents or other things or a refusal to disclose information, on the grounds that the disclosure would be injurious to the public interest or would violate Crown privilege, does not apply in respect of an inquiry under this Act.

(3) Notwithstanding subsection (1) but subject to subsection (4), a person shall not refuse to disclose information to a commission or a person authorized by a commission on the grounds that the disclosure is prohibited or restricted by another Act or regulation.

(4) Notwithstanding another provision of this section, subsections (2) and (3) do not apply to quality assurance information as defined in the Patient Safety Act in a proceeding in which evidence is or may be given before a committee of a governing body of a regulated health profession.

13.(1) A person may apply to the court for an order excluding a person or a record, document or thing from the operation of subsections 12 (2) and (3), and the court may, after considering the application and the submission of the commission and other interested parties, order that

(a) the person may refuse to disclose information;

(b) a record, document or thing may be withheld from the commission; or

(c) the information shall be disclosed or the record, document or thing produced on conditions that the court may provide.

(2) There is no right of appeal from a decision of a judge made under this section.

…

24.1(1) Where the Crown or a person designated under subsection (3) discloses to a commission or inquiry, either voluntarily or in response to a request or summons, any information over which immunity or privilege, including solicitor-

client privilege, is asserted, the immunity or privilege is not waived or defeated for any purpose by the disclosure.

(2) Where a commission or inquiry determines that it is necessary to disclose information over which the Crown or a person designated under subsection (3) asserts immunity or privilege, including solicitor-client privilege, the immunity or privilege is not waived or defeated for any purpose by the disclosure.

(3) The Lieutenant-Governor in Council may designate persons to whom subsections (1) and (2) apply.

28. The Lieutenant-Governor in Council shall adopt policies and procedures for the preservation of the records of a commission or inquiry and shall ensure that confidentiality is preserved for information that is confidential or privileged.

Whether or not an inquiry should be considered a public body for the purposes of *ATIPPA, 2015* was not considered by the Wells Committee. At pages 304–306 there is a brief reference to the 2009 Commission of Inquiry on Hormone Receptor Testing. The references are in relation to medical peer review, disclosure to patients and s. 8.1 of the *Evidence Act*, RSNL 1990 c. E-16. These issues were addressed by the subsequent passage of the *Patient Safety Act*, SNL 2017 c. P-3.01.

A commission of inquiry or other inquiry may be established for any reason the government of the day considers appropriate. As pointed out by Ed Ratushny, an inquiry is a unique *ad hoc* institution that supplements the activities of government free of the constraints of "institutional impediments". An inquiry is intended to be conducted in public and to produce a report which must be made public. The *Public Inquiries Act, 2006*, amended as recently as 2018, provides a clear direction on how the public interest is to be reflected in all aspects of the inquiry.

A commission of inquiry is a self-contained limited-time vehicle tasked with publicly examining a certain topic. The staffing and other resources marshalled for an inquiry are provided to fit the objectives of the inquiry. They are not, generally speaking, equipped to deal with the various issues which may arise from ATIPP requests. Counsel for the Muskrat Falls Inquiry, appearing before the Management Commission of the House of Assembly, estimated that the cost of the Inquiry responding to ATIPP requests during its term would be in the range of $300–$400,000 or more.

An inquiry has coercive powers, including the ability to require the production of third party documents and the attendance of witnesses. It functions more like a court, well outside the "mainstream institutions" of government. It is a practice that those ap-

pointed to conducting inquiries are persons considered to be independent of government, thus emphasizing the separation between a commission of inquiry and government.

In my assessment, and consistent with recommendation 16 of the Muskrat Falls Inquiry, an inquiry is ill-suited to be considered a public body for the purpose of *ATIPPA, 2015*. The objectives of *ATIPPA, 2015* are met by the very constitution of an inquiry – the public examination of information in a transparent manner and with a view to accountability.

A commission of inquiry or other inquiry established under the *Public Inquiries Act 2006* should be specifically excluded from the definition of a public body in *ATIPPA, 2015*. It has been suggested that any such exclusion should last until the inquiry's final report is delivered. This, in the Committee's view, would cause unnecessary confusion. The inquiry is in existence until it is terminated on the date set by the Lieutenant-Governor-in-Council pursuant to s. 3(2) of the *Public Inquiries Act, 2006*. While the inquiry exists it should not be considered a public body. Once it is terminated, there is obviously no issue.

I recommend that the definition of public body in s. 2 of *ATIPPA, 2015* be amended accordingly.

I do not agree with the suggestion from the OCIO that public requests for access to information that may also be sought by an inquiry be suspended while the inquiry is ongoing.

The concern about additional workload for coordinators is valid. But while the Committee considers it appropriate that the inquiry not be considered a public body for the purposes of *ATIPPA, 2015*, suspending all public access to 'inquiry-related' information in the possession of public bodies cannot be supported on the basis of workload. To do so would be a serious restriction on the rights granted by *ATIPPA, 2015*; further, as a practical matter, the dividing line between 'inquiry-related' information and other information would be exceedingly difficult to draw and would undoubtedly lead to confusion and inquiries from the coordinators.

Recommendation 16 of the Muskrat Falls Inquiry also directs attention to the return of documents to third parties and to access to documents, presumably in the possession of government, after termination of the inquiry.

To the extent that this recommendation speaks to the disposal of inquiry documents during the life of the inquiry, the Committee's view is that this is not a matter for this review but rather for the inquiry itself, and perhaps for the *Public Inquiries Act, 2006*.

With respect to records transferred to government following termination of the inquiry, s. 28 of the *Public Inquiries Act, 2006* requires the Lieutenant-Governor-in-Council to address the issue of preservation of records and the preservation of confidentiality for records that are confidential and privileged. For ease of reference:

> *28. The Lieutenant-Governor in Council shall adopt policies and procedures for the preservation of the records of a commission or inquiry and shall ensure that confidentiality is preserved for information that is confidential or privileged.*

The Department of Justice and Public Safety has recommended s. 28 be included in Schedule A of *ATIPPA, 2015*.

The objective of the recommendation is to ensure that confidential information submitted to an inquiry in the course of its work and subsequently transferred to government remains confidential if considered necessary by the Lieutenant-Governor-in-Council. It recognizes the fact that once the inquiry is terminated, the public nature of the process is at an end. A report will have been submitted and, presumably, made public.

A public inquiry such as the Muskrat Falls Inquiry will involve thousands if not millions of documents, most of them in electronic form. The information will have been supplied mostly by third parties not for their own purposes or to comply with regulatory requirements of their businesses. Information is supplied to an inquiry, under compulsion or otherwise, to advance the mandate of the inquiry, a public vehicle created for a particular purpose. Further, notwithstanding the coercive authority of an inquiry, much of the information received will have been provided voluntarily by third parties on the strength of assurances of confidentiality. This information, in my view, has a somewhat different character than the third party information commonly considered in the context of *ATIPPA, 2015*. This is the reality which I believe is addressed by Recommendation 16(b) and (c) of the Muskrat Falls Inquiry.

The management and storage of this information will, because of the necessity for information management expertise and related resources, require the close involvement of the OCIO. This to my understanding was the case with the Muskrat Falls Inquiry.

Section 28 of the *Public Inquiries Act, 2006* requires that information transferred to government following the termination of an inquiry be subject to review by the Lieutenant-Governor-in-Council. Where appropriate, this review should be assisted by those who have acted as counsel to the inquiry. It is perhaps inevitable that with a significant volume of information and with the OCIO operating essentially as an arm of the inquiry, information in the custody or control of the OCIO as a public body – which custody may survive the inquiry – will include information provided to the inquiry on a confidential basis. This will likely be the case despite the inquiry's best efforts, before its termination, to return information to the submitting parties.

What conditions, if any, will govern future disclosure of the information must be prescribed. These conditions will of course be tailored to the information involved and to the circumstances under which the information came into the custody of the inquiry and government.

Section 28 of the *Public Inquiries Act, 2006* directs the Lieutenant-Governor-in-Council to "ensure that confidentiality is preserved …". This provision, as part of the statutory scheme that governs the creation, conduct and termination of public inquiries, is a clear expression of legislative intention to consider the confidentiality of inquiry information as part of the 'public inquiry package'. That intention and consideration of all the factors discussed above satisfy me that it is appropriate to recommend that s. 28 be included in Schedule A to *ATIPPA, 2015*.

So doing will ensure that the work of future inquiries will not be hindered in their efforts to gather information by the fear of a potential loss of confidentiality, an objective that I consider sufficiently important to warrant avoiding recourse to the exceptions in *ATIPPA, 2015* in an effort to prevent disclosure.

Implicit in the decision to include s. 28 in Schedule A is the understanding that the authority of the Lieutenant-Governor-in-Council to determine the regime of confidentiality in any given case will be exercised fairly and objectively, and with full consideration of whatever competing interests may be involved. Further, the consideration by the Lieutenant-Governor-in-Council should, for each inquiry, include an assessment of whether the provision of a sunset clause is desirable in the public interest. If it is determined that a degree of confidentiality of some or all of the information transferred to government should be maintained, the principles underlying *ATIPPA, 2015* require that the confidentiality remain only as long as is reasonably necessary to avoid the reasonable expectation of harm that would follow the disclosure. Of course, once any sunset clause expires, the disclosure of information in question would be subject to the provisions of *ATIPPA, 2015*.

RECOMMENDATION

That the *Act* be amended to:

- Provide that a public inquiry is not a public body for ATIPP purposes. [Appendix K, s. 2(x)(x)]
- Include s. 28 of the *Public Inquiries Act, 2006* in Schedule A. [Appendix K, Schedule A (o.1)]

Suggestion: That government consider amending the *Energy Corporation Act* to provide that the corporation is required to provide to the responsible minister such information as may be requested by the minister.

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DUTY TO DOCUMENT

ATIPPA, 2015 provides a right of access to information contained in a record. If there is no record, there can obviously be no access.

The submission of the OIPC includes a lengthy section supporting its recommendation that the *Management of Information Act* be amended to include a duty on some or all public bodies to document decisions. The recommendation, at page 22:

> Recommendation 3.1: Amend the *Management of Information Act* to legislate a Duty to Document for entities subject to that legislation, providing for OIPC oversight. Consider whether to broaden the scope of public bodies to which the Duty to Document would apply, to all public bodies subject to *ATIPPA, 2015* except those that are subject to the *Municipalities Act, 1999*.

This recommendation was supported by Paul Lane:

> I fully concur with the province's Privacy Commissioner that we should have Duty to Document Legislation. I believe that what we witnessed at the Muskrat Falls inquiry should justify this. It is well known throughout Govt that there are far too many verbal reports being made on any number of important matters in order to avoid having that information subject to ATIPPA requests. This must stop.

The Wells Committee considered in depth the relationship between access to information and the record keeping of public bodies. At page 309:

> The connection between quality record keeping and the successful completion of access requests is well documented. …
>
> 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. Information management was a concern raised by just a few submissions, mostly in the context of the discussion of the duty to document. …

At page 313, quoting from a report by the British Columbia Information and Privacy Commissioner:

> Without the proper creation and management of records, any statutory right of access to records will prove unenforceable in practice. Good records management goes beyond the ability to locate records efficiently. It is also concerned with how and which records should be created, how long they should

be retained, and with their ultimate disposition – usually destruction or transfer to the archives.

And further:

> Public bodies do not have a choice about complying with the *ATIPPA*. They have a legal obligation to do it. If some public bodies do not have the necessary resources for a strong information management system, senior leaders have a responsibility to assign the necessary resources to fix the problems. The same holds true for the assessment of the information management system that is being undertaken through the IMSAT tool. The OCIO is confident in the quality of the tools it has developed, and the result should provide sound feedback and advice so that public bodies can develop stronger systems. … (page 314)

> As of January 2015, the *ATIPPA* has been in place for a decade. Most of the public focus has been on the provisions of the *Act* that provides or restricts access, and on the practices around its administration. However, it must be realized that the ultimate success of the ATIPP system rests on its ability to manage and protect information. Senior officials must ensure that appropriate resources are allocated to do the job completely, and that all public bodies understand the essential role that information management plays in ATIPP. (page 315)

The 2015 report specifically addressed the duty to document:

> … the *duty to document* is a term gaining status in government and information management circles. It has become a rallying cry for Information and Privacy Commissioners and, it seems, for good reason: how can Information and Privacy Commissioners properly oversee access to information and privacy law in the absence of good records or, in some cases, no records at all? … (p. 309)

> … it would be logical to assume that all public officials should feel the responsibility to record their decisions and plans. Such a practice is not only useful for the ATIPP system, but provides an accurate record for others who need to take direction from officials. Indeed, it would be irresponsible to expect officials to proceed on matters of public importance only on the basis of oral instructions, and without any documentary backup. (p. 315)

The recommendations of the Wells Committee, at page 315:

> 79. The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the *Management of Information Act,* not the *ATIPPA*.

80. Implementation and operation of this new section of the *Management of Information Act* be subject to such monitoring or audit and report to the House of Assembly by the OIPC as the Commissioner considers appropriate.

81. Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems.

The present Committee was given an implementation table showing, as of July 2019, government's response to the Wells Committee's recommendations. With respect to Recommendations 79–81:

RECOMMENDATION	IMPLEMENTATION	COMMENTARY
Recommendation #79: The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the Management of Information Act, not ATIPPA	In Progress	Simultaneous implementation of the ATIPP, 2015 recommendations and Duty to Document required the same IM staff/resources. OCIO's initial focus has been on helping departments and agencies build their IM capacity and maturity. In preparation for duty to document, OCIO is working diligently to assist public bodies in building their IM capacity by providing IM supports including; IM policy development and guidance, training sessions including transitory records, IM Self Assessments, and increasing awareness of IM responsibilities. This work is ongoing. As well, broad research and consultation is needed prior to implementing and this work is not yet complete.
Recommendation #80: Implementation and operation of this new section of the Management of Information Act be subject to such monitoring or audit	Not commenced	This is subject to subsequent amendments to the Management of Information Act. Broad research and consultation is needed prior to implementing and

and report to the House of Assembly by the Information and Privacy Commissioner as the Commissioner considers appropriate		implementation is dependent upon completion of the work required for Recommendation #79.
Recommendation #81: Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems	Complete	The OCIO has completed its IM Self Assessments (IMSATs) with core departments. All were provided with a review of existing IM resource strengths/weaknesses. OCIO provides IM advisory services with extensive materials and courses as well as in-person training and three government-wide discussion forums to assist public bodies and IM resources in building their IM capacity.

It is interesting to note the comments in the implementation table immediately following receipt in 2015 of the Wells Committee report:

> **Recommendation #79**: The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the *Management of Information Act*, not the ATIPPA.
>
> A legislated Duty to Document would be a first for a Canadian government. Careful policy work and consultation is required before legislation is amended. This work is underway.
>
> **Recommendation #80**: Implementation and operation of this new section of the *Management of Information Act* be subject to such monitoring or audit and report to the House of Assembly by the Information and Privacy Commissioner as the Commissioner considers appropriate.
>
> Action on this recommendation will follow implementation of Recommendation 79.
>
> **Recommendation #81**: Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems.
>
> An approach to this recommendation has been agreed upon. This will become part of the ongoing work plan of the OCIO IM Services Division through the Information Management Self-Assessment tool and outreach and advisory services to public bodies.

(I note that the submission of the OIPC at pages 20–21 refers to 2017 legislation in British Columbia addressing the provision of "an adequate record of a government body's decision".)

Recommendation 15 of the Muskrat Falls Inquiry also addresses this issue:

> 15. Government should legislate and fully implement a "duty to document" policy within six months of the submission of this Report. The duty to document should also apply to Crown corporations and agencies.

Although a duty to document is inextricably linked to access to information and transparent and accountable democratic governance, the issue is not specifically included in this Committee's Terms of Reference. Those terms include consideration of Recommendations 3, 4 and 16 of the Muskrat Falls Inquiry, but not Recommendation 15. In light of the recommendation of the Wells Committee and its apparent acceptance by government, and with the repeat of that recommendation by the Muskrat Falls Inquiry, it was not necessary to include consideration of the duty to document in this Committee's Terms of Reference. Everything that needs to be said has been said.

It is a fair comment of government that careful policy work and consultation is required before legislation is enacted. But the Wells Committee report was provided to government in March 2015. The views of that Committee bear repeating, at page 315:

> … it would be logical to assume that all public officials should feel the responsibility to record their decisions and plans. Such a practice is not only useful for the ATIPP system, but provides an accurate record for others who need to take direction from officials. Indeed, it would be irresponsible to expect officials to proceed on matters of public importance only on the basis of oral instructions, and without any documentary backup.

In its oral submission at the conclusion of the Committee's hearings, government advised that the enactment of a duty to document is presently under consideration as part of the review of the *Management of Information Act*:

> In response to the Muskrat Falls inquiry report, government advised that it would be implementing a duty to document. So there has been work ongoing within government to develop this legislation, there have been significant consultations held within government departments and public bodies, including the OIPC. Duty-to-document legislation is anticipated to be finalized this year. Included in that is, they're considering whether there will be reporting obligations to the House or not. (Transcript of May 10, 2021, p. 253)

I make only one comment – enough time has passed.

PUBLICATION SCHEMES, INFORMATION DIRECTORIES AND PROACTIVE DISCLOSURE

PUBLICATION SCHEMES AND INFORMATION DIRECTORIES

Section 111 of the *Act* sets out a protocol for the publication by public bodies of general information about the public body in question and about the information, including personal information, in the custody or control of that body:

> *111. (1) The commissioner shall create a standard template for the publication of information by public bodies to assist in identifying and locating records in the custody or under the control of public bodies.*
>
> *(2) The head of a public body shall adapt the standard template to its functions and publish its own information according to that adapted template.*
>
> *(3) The published information shall include*
>
> *(a) a description of the mandate and functions of the public body and its components;*
>
> *(b) a description and list of the records in the custody or under the control of the public body, including personal information banks;*
>
> *(c) the name, title, business address and business telephone number of the head and coordinator of the public body; and*
>
> *(d) a description of the manuals used by employees of the public body in administering or carrying out the programs and activities of the public body.*
>
> *(4) The published information shall include for each personal information bank maintained by a public body*
>
> *(a) its name and location;*
>
> *(b) a description of the kind of personal information and the categories of individuals whose personal information is included;*
>
> *(c) the authority and purposes for collecting the personal information;*
>
> *(d) the purposes for which the personal information is used or disclosed; and*

> *(e) the categories of persons who use the personal information or to whom it is disclosed.*
>
> *(5) Where personal information is used or disclosed by a public body for a purpose that is not included in the information published under subsection (2), the head of the public body shall*
>
> *(a) keep a record of the purpose and either attach or link the record to the personal information; and*
>
> *(b) update the published information to include that purpose.*

This publication scheme provision reflects the considerations and the discussion of the Wells Committee – at pages 323–326:

> The Committee believes that use of publication schemes is the best way to ensure consistent and appropriate publication of information by public bodies. This section also discusses what should be the Commissioner's role in that process.
>
> A publication scheme is an outline of the classes of information each public body will publish or intends to publish so it may be read easily by the public. The publication scheme also specifies whether the information is free, or if there is a charge. …
>
> The publication scheme finds an echo in section 69 of the *ATIPPA*, which mandates the creation of an extensive directory of information about public bodies and the information they hold. The government has not, at any time since the *Act* came ino force in 2005, completed a directory of information. The deputy minister of the Office of Public Engagement stated that extensive work on a directory of information was done in mid-2000s but became quickly outdated and was abandoned. …
>
> Even if the Commissioner were to play a role like the UK Commissioner and define the information that should be published by different public bodies, it is not clear how consigning such a responsibility to the Commissioner can co-exist with the government's announced Open Government Initiative.
>
> Open government in general aims to put the knowledge that exists within government, but that is not yet publicly available, into the open, in a usable format. There it can be used to create more knowledge and thus add value to public and private innovation and the general welfare of society. The Government of Newfoundland and Labrador has already created an open information website where it posts "information that is routinely or proactively disclosed by specific departments. …

> The Office of Public Engagement stated at the public hearings of August 2014 that it would be publishing in the coming months an outline of its intended publication of information held by government.
>
> There is evidently a tension between a suggested proactive role of the Commissioner in this area and ongoing open government initiatives which are at the discretion of ministers. …
>
> Section 69 of *ATIPPA* should be revised to shift the responsibility for publishing information from the minister responsible for the administration of the *Act* to the head of each public body with the Minister remaining generally responsible for compliance. He should advise Cabinet to make regulations to specify which public bodies must make their information available and when. This would allow a gradual coming into force of the practice of publishing information, the larger public bodies presumably being able to comply most readily.
>
> As in the UK, the Commissioner could develop a model publication scheme and set out what minimal information is necessary, including lists of personal information databases. Much of this is already set out in section 69 of the *Act*. The model publication scheme would be a standard template which each public body would adapt to its particular functions. The responsibility for developing the model should be added to the Commissioner's list of powers and duties.

The Wells Committee's recommendations, at page 326:

> The Committee recommends that
>
> 84. Section 69 of the *ATIPPA* should be revised to:
>
> (a) give the Commissioner the responsibility for creating a standard template for the publication of information by public bodies;
>
> (b) give each public body the obligation of adapting the standard template to its functions and publishing its own information.
>
> 85. A new regulation-making power be added to the *Act* to enable Cabinet to prescribe which public bodies are required to comply with Section 69 of the *Act*.

The *Act* includes the regulation-making power intended to specify and prescribe which public bodies will be subject to the publication scheme obligation:

> *111. (6) This section or a subsection of this section shall apply to those public bodies listed in the regulations.*

Unfortunately the reasonable expectations of the Wells Committee have not been realized. No regulations have yet been passed.

The implementation table of the Wells Committee report provided to this Committee shows, as of July 2019:

RECOMMENDATION	IMPLEMENTATION	COMMENTARY
Recommendation #84: Revise section 69 of ATIPPA to give the Commissioner a leading role in overseeing the publication of information held by public bodies – responsible for creating a standard template for the publication of information and give each public body the obligation of adapting the tepmplate to its functions and publishing its own information and to monitor said publication	Complete upon Royal Assent (June 1, 2015)	The Committee suggested a phased implementation for this recommendation. The development of the template is anticipated to begin following the coming into force of *ATIPPA, 2015*.
Recommendation #85: A new regulation making power be added to the Act to enable Cabinet to prescribe which pubic bodies are required to comply with section 69.	Complete upon Royal Assent (June 1, 2015)	[Blank in Table]

The submission of the OIPC to the current review contains further background, at page 59:

> Publication schemes were introduced into our legislation in 2015 at the recommendation of the 2014 Statutory Committee, replacing a requirement in the original *ATIPPA* for public bodies designated by regulation to create a "directory of information." The Review Committee defined a publication scheme to be "an outline of the classes of information each public body will publish or intends to publish so it may be read easily by the public" and expressed its believe that the use of publication schemes is the best way to ensure consistent and appropriate publication of information by public bodies."
>
> Section 111 of *ATIPPA, 2015* required this Office to create a template for the publication scheme. This task was completed in January 2016, however a publication scheme has yet to be enacted by government. A draft *Guide to Publication Schemes* was shared with this Office by the ATIPP Office in August 2018, however it has never been put into practice, as no public body has been listed in the regulations for that purpose in accordance with section 111(6). …

> A right of access to information held by public bodies is substantially facilitated when citizens can learn which public body has particular records in its custody. Furthermore, when records are published proactively it can relieve the burden on ATIPP Coordinators to provide access through the formal request process. A functional publication scheme for each public body is therefore an important cornerstone to the right of access.

The submission continues, at page 62:

> *ATIPPA, 2015* clearly recognized, in section 111(6), that a phased introduction would have practical advantages, however Government has failed to deliver on this. It might be preferable instead to delete such a provision, and instead put in place, in advance, a particular period of delayed proclamation of perhaps one year to allow public bodies to comply. …
>
> It has been widely recognized that a provision akin to section 111 has value, as evidenced from its inclusion in so many statutes. In jurisdictions such as Scotland and Bermuda, however, it clearly plays a much bigger role in the access to information system. At a time when public resources are strained, finding a way to lighten the load of ATIPP Coordinators would be a worthwhile endeavour, by making more information proactively available on a routine basis, and furthermore, by informing the public about personal information databases that exist. Make no mistake, however, that this involves an investment of time and effort at the front end, through the creation of a workable publication scheme, which will later pay dividends. …
>
> … it is clear that publication schemes benefit from specific oversight provisions to ensure compliance. Furthermore, it is also clear that publication schemes will not become a reality if we continue to await a decision from government as to when the first public body will become subject to such a provision. …

The OIPC recommendation, at page 65:

> Recommendation 15.1: Section 111(6) should be deleted, and public bodies be given one year from the coming into force of any amendments to *ATIPPA, 2015* to prepare a publication scheme as required in section 111.
>
> Recommendation 15.2: A requirement should be added to *ATIPPA, 2015* that public bodies must submit a completed publication scheme to the Commissioner for review and comment prior to that one year period.
>
> Recommendation 15.3: The *Act* should be amended to provide the Commissioner with authority to require any deficiencies in the publication scheme to be addressed within a reasonable period of time to be determined by the Commissioner.

Recommendation 15.4: The *Act* should be amended to require that publication schemes must be updated at least annually.

Recommendation 15.5: All classes of public bodies should be subject to the requirements of section 111, except local government bodies other than the City of Mount Pearl, the City of St. John's, and the City of Corner Brook, and any other public body designated in the regulations as exempt from this requirement on the basis of its small capacity and lack of information holdings.

The only public body to address this issue was the Department of Health and Community Services. Its thoughtful submission, at pages 4–5:

> While not explicitly referenced in the mandate of the Statutory Review, the inclusion of a publication scheme within the Act would be consistent with Canada's National Action Plan on Open Government as means to allow citizens easier access to information held by public bodies.
>
> A publication scheme emphasizes proactive disclosure while providing clear guidelines for all public bodies to follow. Legislative guidance on these schemes would ensure a framework is maintained so that government procedures match the public interest. This consideration would be consistent with recent amendments to the federal **Access to Information Act** which, pursuant to subsection 5(1), includes a mandate of federal bodies to release a publication containing:
>
> (a) a description of the organization and responsibilities of each government institution,including details on the programs and functions of each division or branch of each government institution;
>
> (b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Part;
>
> (c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and
>
> (d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Part should be sent.
>
> The department recommends consideration of the addition of a publication scheme into the Act that is consistent with the federal legislation in granting citizens more efficient access to information.

The provisions suggested above generally reflect subsection 111(3) of *ATIPPA, 2015*.

The Wells Committee referred to the government's "Open Government Initiative". That initiative included a goal "to increase the amount and types of information that is made available to the public" and to improve the organization of available information by creating an online platform for the public to access open information. The open information portal was created in 2014 and was last updated in 2017. (www.open.gov.nl.ca/information/default.html)

Not a lot needs to be said about this issue.

The benefits of a publication scheme information directory are beyond dispute. They provide the basic information needed by a citizen of the province who wishes to formulate a clear request for information and send it to the appropriate public body.

Too much time has passed since the Wells Committee report. I recommend that s. 111 be amended to require the establishment of a publication scheme/information directory giving a general description of the responsibilities of the public body, the records under the control of the public body and administrative information about the public body. Such a publication scheme should be required of all public bodies other than small municipalities and any other public body exempt from the application by regulation. The coming into force of this recommendation should be delayed until January 1, 2023. As an administrative recommendation, prior to the decision coming into force, public bodies should complete a proposed publication scheme and submit it to the OIPC for review and comment. Since much of this information may already be available on a public body website, the task may not be as daunting as it may first appear.

Once the provision comes into force, the OIPC may review the publication scheme of a public body and may recommend modifications. I am not prepared to go so far as to recommend that the OIPC have the authority to order amendments to a publication scheme. Publication schemes should be updated regularly, but no less frequently than every two years.

PROACTIVE DISCLOSURE

A defining characteristic of a culture of transparency and accountability and a commitment to excellent democratic governance is the routine release by public bodies

of information without the need for a specific access to information request. Apart from demonstrating the reality of such a culture, the routine release of information, as pointed out by the OIPC, would lessen the number of requests and relieve the burden on coordinators.

The publication scheme contemplated by the present s. 111 informs the public of the classes and nature of information held by public bodies. The discussion by the Wells Committee suggests that, in addition, the concept of a publication scheme includes the routine publication of certain information included in the list of classes. This is referred to as proactive disclosure. A publication scheme and proactive disclosure are two sides of the same coin. The common intention is to advise the public of the information held by government and to routinely disclose specified classes of that information to the public without the need for a request.

In its report, and as noted earlier, the Wells Committee referred to the then government's Open Government Initiative and of the plan for proactive disclosure, at page 320:

> The minister of OPE [Office of Public Engagement], Sandy Collins, addressed the government's Open Government Iniative. He talked about releasing information proactively, without waiting for access to information requests.

Its recommendation was directed to Cabinet material:

> 19. Consistent with its Open Government policy, the Government should proactively release as much Cabinet material as possible, particularly materials related to matters considered routine.

The implementation table's reference to the progress of this recommendation, as of July 2019:

RECOMMENDATIONS	IMPLEMENTATION	COMMENTARY
Recommendation #19: Consistent with its Open Government policy, Government proactively release as much Cabinet material as possible, particularly matters considered routine.	Ongoing	The Government of Newfoundland and Labrador routinely considers the public release of Cabinet related materials, while balancing the requirement to protect Cabinet confidences. For example, since April 2013, Executive Council –

Cabinet Secretariat has proactively disclosed Orders in Council (OCs) on the Executive Council – Cabinet Secretariat website. An Order in Council is a legal instrument made by the Lieutenant Governor, acting on the advice of the Cabinet or Premier.

Executive Council – Cabinet Secretariat continues to update the website as OCs are issued. The website contains OCs from 2007 to present. OCs issued previous to 2007 will be posted based on available resources

A considerable quantity of information is already required to be made available or published. See for example s. 22 of the *Public Procurement Act*, s. 30 of the *Public Procurement Regulations* and s. 215 of the *Municipalities Act, 1999*.

However, many requests are made for information which could, as a matter of course, be published without the need for a request. Ministerial briefing notes and expense reports are but two examples. Appended to this report is a summary of ATIPP responses to requests from January 3 to April 3, 2019 (Appendix J). This summary gives some indication of the repeated nature of requests.

I recognize that proactive disclosure would not avoid a number of these requests. A request for "a list of all change orders, including the reasons for change order, and the total cost of change order", or for "any briefing notes, information notes, reports, emails or any other records which include an evaluation of the current Atlantic Accord Framework and/or Equalization formula conducted since January 1, 2016" or for "Information on the lack of exit from the second floor of the control house to the outside on the Sir Ambrose Shea lift bridge on Placentia Gut, and the use of access scaffolding and ladder(s) to provide exits to ground in front of control house" cannot reasonably be anticipated.

But a start should be made, a modest start perhaps, but a start nonetheless.

I recommend that the *Act* be amended to require all public bodies other than local public bodies to develop and publish categories of records and information that will be published routinely, and to regularly publish such records and information. I am comfortable with recommending that ministerial briefing notes, executive travel expense reports and records presently listed in paragraphs 29(2)(b) to (k) should be specficially included, but beyond that, the categories of records and information to be published should be left to regulation. The primary consideration for publication should be whether or not the information would be useful to the public. To avoid any uncertainty, subsection 95(1) should be amended to provide the commissioner with the specific authority to monitor compliance with the proactive disclosure obligation and, where necessary, recommend improvements to the disclosure process.

As with the publication scheme provision, the coming into force of this recommended amendment should be delayed until January 1, 2023.

RECOMMENDATION

That the *Act* be amended to:

- Require the creation of publication schemes by all public bodies other than small municipalities and others exempted by regulation. [Appendix K, s. 111]
- Require public bodies other than local public bodies to develop and publish categories of records and information that will be published routinely. [Appendix K, s. 111.1]
- Provide that the categories for proactive disclosure will include ministerial briefing notes, executive travel expense reports, records presently listed in paragraphs 29(2)(b) to (k), and others specified by regulation. [Appendix K, s. 111.1(5)]
- Allow the commissioner to comment on and recommend improvements to publication schemes and proactive disclosure. [Appendix K, s. 95(1)(i)]
- Delay the coming into effect of the publication scheme and proactive disclosure provisions until January 1, 2023.

Administrative:

- That public bodies should complete a proposed publication scheme and submit it to the OIPC for review and comment prior to the requirement coming into force.

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POLICIES AND PROCEDURES FOR THE PROTECTION OF PERSONAL INFORMATION

The protection of personal information in the custody or control of public bodies is one of the fundamental objectives of the *Act*. It is not a matter that should admit of varying degrees of compliance.

Section 64(1) of the Act sets out the overriding obligation:

> *64. (1) The head of a public body shall take steps that are reasonable in the circumstances to ensure that*
>
> *(a) personal information in its custody or control is protected against theft, loss and unauthorized collection, access, use or disclosure;*
> *(b) records containing personal information in its custody or control are protected against unauthorized copying or modification; and*
> *(c) records containing personal information in its custody or control are retained, transferred and disposed of in a secure manner.*

The submission of the OIPC urges that the generality of 'reasonable steps' be refined and that public bodies be required to develop and publish the policies and procedures intended to comply with the requirements of s. 64. It points to other legislation already directed to this end. Its submission, at pages 22-23:

> The Information Practices section of *PHIA*, section 13, requires custodians of personal health information to "establish and implement information policies and procedures" to facilitate compliance with the *Act*. A requirement to have all public bodies implement information policies and procedures would go a long way to codifying the requirement in section 64 to take "reasonable steps" to protect information held by a public body. Written policies and procedures would help public bodies clearly communicate best practices to their staff to help prevent breaches of privacy. Based in *ATIPPA, 2015*, such policies could address: protecting confidentiality, restricting access to information by employees to those who need it to perform their duties, and providing for the secure storage, retention and disposal of personal information. Such policies could reflect what is "reasonable in the circumstances" in accordance with section 64, and having a requirement for written policies and procedures would cause heads of public bodies to turn their attention to the issue of privacy. Furthermore, with clearer expectations we believe that compliance issues are likely to be fewer.

> Regarding potentially requiring policies for retention and disposal of records, it should be borne in mind that the *Management of Information Act (MOIA)* contains a restrictive definition of "public body" such that while it applies to a number of public bodies subject to *ATIPPA, 2015*, it does not apply to many other public bodies, including municipalities, educational bodies or health care bodies. Furthermore, having such a requirement in *ATIPPA, 2015* would not necessarily create a conflict, because a public body that is compliant with the requirements of *MOIA* would also be in compliance with a similar provision in *ATIPPA, 2015* if similar language is chosen.
>
> Keeping the public informed of the policies and procedures of the public body would build confidence in the security of personal information in the custody or control of public bodies. A requirement similar to that in section 19 of *PHIA* for public bodies to make available a general description of the public body's information policies and procedures, and to provide contact information to ask questions and obtain information about how to make a complaint would achieve this goal. The OIPC has already developed a resource for public bodies about how to establish appropriate privacy policies as part of our step-by-step Privacy Management Program guidance.
>
> **Recommendation 4.1: Add a requirement to Part III, Division 1 of the *Act* for public bodies to develop information policies and procedures and to make them public.**

I agree with the intent of this recommendation and recommend accordingly. Requiring all public bodies, as one of the s. 64 'reasonable steps' to establish and implement their policies and procedures for the protection of personal information may seem onerous but it is not new ground. It is complementary to the provisions of the *Management of Information Act* and the *Personal Health Information Act*, SNL 2008 c. P-7.01. In a sense, the recommended amendment to *ATIPPA, 2015* is simply filling in the gaps. I would expect that there would be a high degree of similarity of such policies and procedures across public bodies and that by referring to work already done and with the assistance of the ATIPP Office, the OIPC and OCIO, complying with this requirement will not be as burdensome as it might first appear. The Protection of Privacy Policy and Procedure Manual developed by the ATIPP Office would provide a useful foundation for such work. Once the policies and procedures are developed, the public body should publish a general description and summary of them and make provision for periodic updating.

Similar to the recommendation relating to privacy impact asssessments, subsection 95(1)should include a provision confirming the authority of the commissioner to monitor compliance and recommend improvements.

Given the preparation that I expect will be needed, these requirements should not become effective until January 1, 2023.

I add that the intent of this recommendation is not to require a public body to develop specific information protection policies and procedures for every individual program or service, but rather to identify and publish the general overall privacy protection regime in place in the public body. Should a privacy impact assessment determine that a particular program or service requires its own unique privacy protection, then in such case a separate and specific policy should be developed.

RECOMMENDATION

- That the *Act* be amended to require a public body to develop and publish policies and procedures for the protection of personal information. [Appendix K, s. 72.2]

PRIVACY IMPACT ASSESSMENTS

A privacy impact assessment is a well-recognized tool used to determine whether a current or proposed program provides the necessary protection of personal information.

The discussion of the Wells Committee, at pages 236–238:

> The current Act is silent on privacy impact assessments (PIA). A PIA is an internationally recognized assessment method that can be applied to proposed programs or policies to identify potential privacy problems. PIAs examine whether the proposed program or policy collects more personal information than is needed to meet the objectives of the initiative. They also examine the sharing of the personal information collected, the access, storage, correction, and disposal of personal information, and the proposed duration of the program or policy. With the benefit of a PIA, the public body may then undertake a full review of the policy or program. …
>
> The OIPC recommended that all PIAs related to a common or integrated program or activity or a datalinkinginitiative or any disclosure under section 39(1)(u) be forwarded to the OIPC for the Commissioner's review and com-

> ment. Moreover, the OIPC recommended that the ATIPPA be amended to include a requirement that public bodies complete a PIA on all new enactments, systems, projects, programs or activities to be submitted for approval to the minister responsible for the ATIPPA. …
>
> Public bodies in Newfoundland and Labrador are gaining experience in preventative privacy exercises. A PIA is increasingly becoming a standard procedure before new ways are devised to collect, share, or disclose personal information. It is important that it be mandated here as well. …
>
> The Committee concluded that prevention is the optimal way of protecting personal information, and it can be achieved by clearly spelling out in the ATIPPA the following statutory obligations. The first requirement is for departments to carry out privacy impact assessments where personal information is involved in the development of new government programs and services and to submit them to the minister responsible for the ATIPPA for review and comment. Second, PIAs would also be forwarded to the Commissioner for his review and comment if they pertain to departments that address a common or integrated program or service for which disclosure of personal information may be permitted under section 39(1)(u).

As the Wells Committee pointed out, protection of personal information is best achieved by prevention. When programs, activities or other initiatives are first contemplated by public bodies, it is critical that serious and organized thought be given to the personal information 'element' in such programs.

ATIPPA, 2015 mandates such forethought, analysis and oversight through the use of what is referred to as a Privacy Impact Assessment ("PIA").

> *2(w) "privacy impact assessment" means an assessment that is conducted by a public body as defined under subparagraph (x)(i) to determine if a current or proposed program or service meets or will meet the requirements of Part III of this Act; …*
>
> *72. (1) A minister shall, during the development of a program or service by a department or branch of the executive government of the province, submit to the minister responsible for this Act*
>
> *(a) a privacy impact assessment for that minister's review and comment; or*
>
> *(b) the results of a preliminary assessment showing that a privacy impact assessment of the program or service is not required.*
>
> *(2) A minister shall conduct a preliminary assessment and, where required, a privacy impact assessment in accordance with the directions of the minister responsible for this Act.*

(3) A minister shall notify the commissioner of a common or integrated program or service at an early stage of developing the program or service.

(4) Where the minister responsible for this Act receives a privacy impact assessment respecting a common or integrated program or service for which disclosure of personal information may be permitted under paragraph 68 (1)(u), the minister shall, during the development of the program or service, submit the privacy impact assessment to the commissioner for the commissioner's review and comment.

Section 72 imposes two obligations. The first is, during the development of any program or service, to assess whether or not privacy (Part III) interests are engaged and, if so, to prepare a formal PIA. The second obligation is to notify the OIPC when a common or integrated program or service is being developed and, if the assessment contemplates the disclosure of personal information under s. 68(1)(u), to seek the OIPC's review and comments on the assessment. The *Act* does not define common or integrated program or service.

Through the restricted definition of public body referred to in s. 2(w), public bodies such as educational bodies, health care bodies, municipalities and the Royal Newfoundland Constabulary are not subject to s. 72. The Wells Committee did not discuss this limitation.

However, as mentioned by the OIPC in its submission set out below, s. 68(1)(u), in the context of permissible disclosure of personal information related to a common or integrated program or service, extends to all public bodies:

68.(1) A public body may disclose personal information only …

(u) to an officer or employee of a public body or to a minister, where the information is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or minister to whom the information is disclosed; …

The ATIPP office and the OIPC each provide comprehensive and valuable guidance in conducting a PIA. Undertaking such an assessment requires considerable effort. The template PIA suggested by the ATIPP office gives an indication of the considerations that must be included in a PIA:

- Type of personal information to be disclosed
- Purpose of disclosure

- Whether disclosure is necessary to achieve purpose
- Consent criteria
- Potential risks with disclosure
- Risk mitigation strategies
- Physical, administrative and technical safeguards
- Privacy breach risk analysis

The OIPC's resource "Privacy Impact Assessments" builds on this for PIAs that must be reviewed by the commissioner, at pages 3–4:

> The provincial Access to Information and Protection of Privacy (ATIPP) Office has issued directions to public bodies on how to complete a PIA. If a PIA is respecting a common or integrated program or service, ATIPPA, 2015 requires the Minister to submit the PIA to the OIPC during the development of the project. Although the ATIPP Office provides directions on how public bodies must complete PIAs, the OIPC may require additional information when it reviews a PIA.
>
> For example, the OIPC will require:
>
> 1. a detailed description of the project, including:
>
>   i) the project name;
>
>   ii) the expected project implementation date; and
>
>   iii) the contact information of the person responsible for completing the PIA;
> 2. a copy of your letter to the Commissioner providing early notice of the initiative;
> 3. a proportionality analysis explaining how the benefits of the project outweigh the risks to privacy;
> 4. an information flow diagram and legal authority for each data flow;
> 5. privacy risk assessment and mitigation plans; and
> 6. monitoring and/or audit plans.
>
> Key Questions
>
> - Has the public body identified and appropriately assessed risks to individuals, not just the organization?
> - Have all data fields been identified?
>   - Are they specific (individual fields versus mailing address, for example)?

    - Is the authority under which each field may be collected identified?
    - Does the PIA explain how each data field contributes to and is essential to achieve the identified purpose?
- Once the risks were identified, if there are a number of moderate to high risks, did the public body conduct an analysis based on the four part test of R. v. Oakes?
- Is the measure demonstrably necessary to meet a specific need?
- Is it likely to be effective in meeting that need? □ Is the loss of privacy proportional to the need?
- Is there a less privacy-invasive way of achieving the same end?
- Did the public body include enough detail about the overall operating environment and affiliate programs to conduct a thorough analysis? For example:
    - if end users are able to access information remotely through their own devices, details of the Bring Your Own Device (BYOD) program should be included;
    - if the program is depending on the general information protection education program for training, details of this program should be included;
    - if the program is in compliance with the information security infrastructure of the Department, details of this environment should be included.
- Did the public body include samples of materials developed to mitigate risks, such as privacy notices and consent forms?

As is the case with responding to access to information requests, some public servants may consider such a task as diverting time and energy from the 'real work' of the public body. Any such views are unfortunate and counterproductive. A visible and consistent public body culture which recognizes and supports the right to privacy will, hopefully, dispatch these views to perish in the wilderness.

Two primary issues were raised in the submissions to the Committee – the need for a definition of a common or integrated program and whether the requirement to prepare and submit privacy assessments should be extended to other public bodies.

DEFINITION OF COMMON OR INTEGRATED PROGRAM OR SERVICE

The submission of the OIPC, at pages 29–31:

While some public bodies share courtesy copies of PIAs with the OIPC to seek informal feedback, the only mandatory submission of a PIA to the OIPC is when a minister identifies a program or service as being common or integrated. The concept of common or integrated programs or services first appeared in *ATIPPA* with the Bill 29 amendments. That amendment to the disclosure of personal information provision (then section 38(1)(u), now 68(1)(u)) is as follows:

> *68(1) A public body may disclose personal information only…*
>
> > *(u) to an officer or employee of a public body or to a minister, where the information is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or minister to whom the information is disclosed.*

Note that 68(1)(u) authorizes disclosure of personal information by any public body. Unlike section 72, it is not limited to departments of executive government. We therefore have a circumstance where a disclosure is permitted in 68(1)(u), however the protection factor in the form of a section 72 PIA only applies to departments or branches of executive government. …

That Bill 29 amendment increased data-sharing possibilities in section 39, meaning that new programs could be created and information disclosed that was collected for another program and for another purpose, without an assessment as to the impact this would have on personal privacy.

The OIPC, in its initial submission to the 2014 *ATIPPA* Statutory Review Committee, pointed out this change, and requested that a PIA be required for such disclosures and that the Commissioner's Office review the PIA**. …**

The Committee made the recommendation, starting on page 68 of the Executive Summary, that:

> 65. With respect to the role of the Commissioner in protection of personal information that the Act provide for: e. The Commissioner having the duty to review a privacy impact assessment developed by a department of government for any new common or integrated program or service for which disclosure of personal information may be permitted under section 39(1)(u).

The result was section 72, which represents a step forward in privacy protections. However, the term "common or integrated" is not defined in the *Act*, which has led to differing interpretations. After extensive research, the OIPC adopted the definition contained in British Columbia's *Freedom of Information and Protection of Privacy Act*, while the ATIPP Office adopted a definition de-

> veloped by Service Alberta in FOIP Bulletin #8. This represents an ongoing disagreement which could be resolved through greater clarity in the statute. …
>
> We suspect that some initiatives are not being recognized as common or integrated because of the lack of a clear statutory definition.

A definition would provide clarity on when a PIA must be submitted to the OIPC and on when disclosure of personal information is permitted under s. 68(1)(u). A number of other jurisdictions include such a definition in their legislation. Those definitions are not complex and are generally similar. Care must be taken to ensure that a PIA is not required unnecessarily – for example, when one public body simply provides a service to another public body. For example, assistance provided to government departments by the OCIO or the Communication and Public Engagement Branch in order to help a 'client' department with a program or service of that department would not represent the provision of a joint program and should not trigger the requirement of a PIA. I find the commentary in the Alberta FOIP Bulletin No. 8 helpful:

> A "common or integrated program or service" means a single program or service that is provided or delivered by two or more public bodies. The program or service may have several distinct components, each of which is provided or delivered by a separate public body. These components together comprise the common program or integrated service.
>
> Each public body partner must be integral to the program or service. For example, a nursing practicum program requires the participation of both the post-secondary institution, and the health care body; the program would not function without the services of each body. In constrast, an arrangement where several public bodies contract with the same IT service provider is *not* a common or integrated program or service.
>
> Public bodies may have clients in common, but that factor alone does not make a program or service common or integrated.

I recommend that the *Act* include a definition of common or integrated program or service.

APPLICATION TO OTHER PUBLIC BODIES

This issue is more complex.

The OIPC's submission – at pages 27–28:

> A PIA is an extremely useful tool in ensuring and documenting compliance with the requirements of the *Act*, and it is one that we often recommend as a best practice. At times, a PIA can be one of the steps that are "reasonable in the circumstances" to protect personal information in accordance with section 64. It is therefore important that the definition of Privacy Impact Assessment stand on its own in a separate provision, rather than being tied directly to a specific group of public bodies which may be required to conduct them under certain circumstances. It is our view that even if a PIA is not required under section 72, conducting one for certain types of projects might be consistent with the requirements of section 64, or simply a best practice that we would encourage. …
>
> Section 72 in its current form misses many significant public body initiatives involving the collection, use and disclosure of personal information because of its limited application to departments and branches of executive government. This is partly due to the current definition which limits privacy impact assessments to a department or branch of executive government, combined with the language in section 72 that refers exclusively to the role played by "a" minister or "the" minister. This excludes major public bodies such as the Royal Newfoundland Constabulary; educational bodies, such as the Newfoundland and Labrador English School District; health care bodies, such as the Regional Health Authorities; and major municipalities, such as the City of St. John's. Many of these public bodies handle large volumes of personal information, some of which would likely be considered sensitive.
>
> Section 72 should therefore be expanded to include all public bodies, with the exception of public bodies that are municipalities subject to the *Municipalities Act*. Options for how this can be done will be discussed further below. The large municipalities in the province, including Mount Pearl, St. John's, and Corner Brook, have their own individual statutes. In Newfoundland and Labrador, sizes of municipalities vary greatly, from the smallest (Tilt Cove with a population of 5 in 2016) to our three incorporated cities. It is reasonable to expect the larger municipalities to have the ability and resources to conduct robust privacy assessments when required. Further, the larger municipalities tend to deliver a greater variety of programs and services, and hold larger amounts of personal information of residents. On the other hand, the smaller municipalities handle smaller volumes of personal information and some do not have the capacity or expertise to complete a PIA. Some small municipalities do not even have full-time staff.
>
> As all public bodies are already expected to be in compliance with the privacy provisions of *ATIPPA, 2015*, such an expansion should not create significant additional hardship, and the exclusion of municipalities subject to the *Municipalities Act* should not create too large a gap. A requirement for public

> bodies to conduct privacy assessments in order to identify and mitigate privacy risks in their programs or activities would likely improve compliance with *ATIPPA, 2015* and thereby protect the privacy of citizens. Doing so also has the benefit of documenting those assessments, which ensures that they are able to demonstrate good faith compliance efforts in case of a privacy complaint or breach.

The suggested extension of s. 72 to cover all but small municipalities is not a straightforward matter. The larger 'non-government' public bodies already have in place privacy assessment protocols specific to their particular environment.

For example, from the February 12, 2021 supplemental submission of Memorial University, at pages 7–8:

> Memorial University's Procedure for Checking Privacy Compliance is attached to its Privacy policy. The Privacy policy and related procedures were adopted by the Board of Regents in 2008.
>
> The policy states:
>
> *8. To monitor compliance with the Privacy Policy, all projects involving personal information must be reviewed using the Privacy Compliance Checklist, in accordance with the Procedure for Checking Privacy Compliance. This may determine that a Privacy Impact Assessment is required. This compliance requirement does NOT apply to research projects involving human participants which have received ethics approval from a duly-constituted research ethics board, including a research ethics body under the Health Research Ethics Authority Act.*
>
> The Procedure for Checking Privacy Compliance contains two steps:
>
> - Privacy Compliance Checklist (equivalent to the "Preliminary Privacy Impact Assessment" used by the Government of Newfoundland and Labrador and referenced in s.72 of the *ATIPPA 2015*)
> - The University Privacy Officer may decide, on review of the Privacy Compliance Checklist, that a Privacy Impact Assessment is required but will first consult with the university's IAP Advisory Committee
>
> The Procedure for Checking Privacy Compliance states:
>
> *Completed checklists must be submitted to the University Privacy Officer who will complete a review of the checklist results and may make recommendations to the responsible unit head regarding actions that may need to be taken to reduce any privacy risks identified and to ensure compliance with the legislation, the University's privacy policy, or related procedures. If Checklist results contain significant*

> *privacy risks, the University Privacy Officer will consult with the IAP Advisory Committee. …*
>
> *Based on a review of Privacy Compliance Checklist results and other factors, the University Privacy Officer may determine that a full PIA is required. The University Privacy Officer will consult with the IAP Advisory Committee before rendering a decision regarding the need for a PIA. Although the University Privacy Officer may overrule the recommendation of the IAP Advisory Committee, he or she would do so only upon very careful consideration of the issues involved.*
>
> Privacy Compliance Checklists are required to be approved by the head of the relevant university unit. On review of the Privacy Compliance Checklist, the University Privacy Officer, in collaboration with the Director of Information Management and Protection, provides advice and recommendations to the unit to mitigate any privacy and security risks identified. Additionally, they work with the Office of General Counsel to review and negotiate agreements and contracts, if the project involves outsourcing, to ensure the university's obligations under the *ATIPPA 2015* are met. Additionally, in accordance with the Procedure for Administering Privacy Measures within a Unit, all such contracts must have a Privacy Schedule appended.
>
> Memorial has in accordance with policy conducted privacy compliance assessments of projects and programs since 2008.

The submission goes on to provide some insight into the complexity of the operational environment – at pages 9–11:

> … as a large and diverse higher education institution, the university's multiple campuses and units are engaged in numerous programs that, depending on how the term is defined, could be viewed as common or integrated programs. …
>
> To illustrate the scope and type of "common or integrated programs" at Memorial University, the examples below are categorized under Administrative and Academic Programming:
>
> *Administrative (with other NL public bodies)*
>
> 1. Memorial University and College of the North Atlantic are partners in the annual Career Eco Job Fair in which students and graduates of both institutions and employers and other organizations can carry out recruitment, networking and promotion activities
>
> 2. Registrar's Office – Department of Education in which personal information is shared by Education (EDU) with Memorial University for the purpose(s) of receiving and assessing high school transcript information

for MUN applicants to determine admission and entrance scholarship eligibility; supporting student success initiatives; tracking participation rates at MUN (high school graduates from the provincial school system entering first semester studies immediately following graduation).

3. Faculty of Medicine and College of Physicians and Surgeons of Newfoundland and Labrador and Regional Health Authorities in connection with Practice Ready Assessments for eligible candidates to assess readiness to practice in Canada

Administrative (pursuant to legislation)

4. Memorial is required by legislation to share personal information pursuant to numerous legislative requirements, for example:

- Registrar's Office/Cashier's Office/Scholarships Office and NL Student Aid in *Student Financial Assistance Act*

- Registrar's Office and Statistics Canada, pursuant to the *Statistics Act*

- Human Resources and Health and Safety and WorkplaceNL (in connection with workers compensation; incident (injury) reports) pursuant to NL *Occupational Health and Safety Act* and Regulations

- Support Enforcement Agency in connection with *Support Orders Enforcement Act*

- Human Resources and NL's Essential Workers Support Program

- Facilities Management and Provincial Apprenticeship and Certification Board, concerning employees designated for certification, pursuant to the *Apprenticeship and Certification Act*

- Canada Revenue Agency for tax purposes

- College of Physicians and Surgeons pursuant to the *Medical Act, 2011*

- Health and Safety and Service NL, OHS Division, in connection with XED dose/scatter surveys and incident investigations, pursuant to the *Occupational Health and Safety Act* and Regulation and the *Nuclear Safety and Control Act*

- Health and Safety and Canadian Nuclear Safety Commission in connection with dose monitoring/registrations, pursuant to the *Nuclear Safety and Control Act*

- Health and Safety and Public Services and Procurement Canada, in connection with the *Human Pathogen and Toxin License Human Pathogens and Toxins Act* (HPTA) and the *Health of Animals Act* (HAA)

- Health and Safety and the Canadian Association Underwater Diving, in connection with scientific divers pursuant to the NL *Occupational Health and Safety Act* and CAUS standards

- Health and Safety in connection with controlled goods, pursuant to the *Canada Defense Productions Act* and the *Controlled Goods Act*

Academic Programming

5. Memorial's Faculty of Nursing, together with the Eastern Regional Health Authority's Centre for Nursing Studies and the Western Regional Health Authority's Western Regional School of Nursing offer collaborative nursing education. Students of all three schools are students of Memorial University and have a joint admission process.

6. With public bodies, government organizations (national and international), indigenous community sponsors and others that sponsor students

7. With Government of Newfoundland and Labrador in connection with tuition vouchers program

8. With Immigration, Refugees and Citizenship Canada for verification of international students

9. Memorial University (Marine Institute) and College of the North Atlantic certificate of aquaculture joint program offering

10. Memorial University (Marine Institute) and College of the North Atlantic for bridging into Memorial University programs

    A large number of Memorial's educational programs offer or require internships, field placements, residencies, practicums, etc.

11. All faculties on all campuses in which students do field placements, research and applied research internships, masters and doctoral internships, international youth internships, international indigenous internships, practicums, residencies, co-operative education, and clinical placements (these are examples, not a comprehensive list):

    a. Faculty of Medicine

    b. Faculty of Nursing

    c. School of Pharmacy

    d. School of Social Work

e. Faculty of Engineering

f. Faculty of Business

g. Faculty of Education

h. School of Human Kinetics and Recreation

i. Faculty of Science (e.g., Computer Science, Psychology)

j. Faculty of Humanities and Social Sciences (e.g., Archaeology, Political Science, Sociology)

k. Environmental Policy

l. Diploma Programs (e.g., Police Studies, Performance and Communications Media, Geographic Information Sciences, Applied Ethics, Professional Writing)

12. Memorial University has agreements with many universities and organizations nationally and internationally. Indeed, it would not be a reach to say that every academic department and faculty has one or more MOUs with universities nationally and internationally, and even with other countries, to facilitate student exchanges.

Given the above, complying with 72(3) and 72(4) for agreements in academic programming and disclosures/sharing of information pursuant to requirements of provincial and federal legislation is impractical and would require unreasonable, extensive additional resources.

The educational and health care bodies, municipalities, and public bodies engaged in commercial activities are essentially self-governing entities, subject of course to any particular legislation. For these bodies, and for the Royal Newfoundland Constabulary, the environments in which they work are not those of a 'traditional' department of a central government. But these public bodies do collect, store and use personal information. In the course of their operations, programs and services that contemplate collaboration with other public bodies and require the sharing of personal information may arise for consideration.

I see no reason why the public bodies not now subject to s. 72 should not be required by the *Act* to adopt the salutary practice of considering the privacy impact of any new program or service, preparing and submitting to the head of the public body a preliminary assessment and, if necessary, a PIA. I recommend accordingly. It may be, as demonstrated by the submission of Memorial University, that these other public bodies are already doing this as a matter of course; a statutory requirement to do so would ensure province-wide application.

I am not prepared to recommend that the non-government public bodies be required to notify the OIPC when any common or integrated program or service is being developed. Requiring these other public bodies to be subject to the full import of s. 72 is not what I would consider to be a wise first step. With the exception of the submission from Memorial University, the Committee received little information on the diversity of functions engaged and is not prepared to make broad recommendations without a better appreciation of their effect. Requiring a PIA, where appropriate, to be submitted to the head of the public body is consistent with the obligation of government departments. But the potential complexity and scope of common or integrated programs and services, and the limited information presently available to this Committee persuade me that, as a first step, the OIPC notification and review protocol for PIAs of such programs should not be imposed.

Memorial University suggested that the other public bodies could be subject to a requirement that they notify the OIPC if a planned common or integrated program or service involved "administrative matters" and that they submit the PIA to the OIPC if disclosure of personal information is contemplated in such programs.

I appreciate this suggestion. But the imprecision of "administrative matters", particularly in the context of a mandatory requirement, would lead to uncertainty and non-productive differences of opinion over whether the involvement of the OIPC was required in any given circumstance.

However, and in light of the general disclosure provision in s. 68(1)(u), any such body that is developing a common or integrated program or service for which disclosure of personal information may be permitted under that section should be able to submit the relevant assessment to the OIPC for review and comment. The common program PIA provisions in the *Act* are not adjudicative, investigative, or reflective of opposing interests. They are a means of achieving a common and worthwhile goal, a means through which public bodies can avail of special expertise and experience. When the objective is ensuring the protection of privacy as a necessary element of a new program involving other public bodies, surely 'two heads are better than one'. Although not subject to the mandatory requirement, public bodies should not hesitate to avail of the expertise of the OIPC.

Experience has already shown that public bodies view the available expertise as helpful in reaching a common objective and are willing to work with the OIPC in good faith. The OIPC's submission, at page 31:

> … the provincial government has initiated a shared health model under which certain public bodies within the health sector are leading initiatives on behalf of the others. A common procurement service is being led by Central Health on behalf of all four Regional Health Authorities (RHAs) and the Newfoundland and Labrador Centre for Health Information (NLCHI). NLCHI, in turn, is leading the Health strategy and, as part of that initiative, is developing such things as a Workforce Management System. To be clear, we have been consulted on both of these initiatives and this is a testament to the good relationship that the OIPC has with these entities. The point here is that, as they are not departments of the executive branch of the provincial government, there is no statutory obligation for them to do a PIA or consult this Office on it. With more innovative approaches to public services being explored involving greater collaboration between public bodies, we anticipate that there will be more such examples.

In its submissions, the OIPC points out the practical considerations for the smaller municipalities. The smaller range of programs and services, the smaller volume of personal information held and the limited staff and other resources suggest that they should not be subject to the PIA-related obligations. I appreciate this concern, but I prefer an approach that puts the protection of privacy on an equal footing for all residents of the province. The suggestions elsewhere in this report regarding assistance to small municipalities may help; further, I suggest that when considering the privacy impacts of any program or service, common or otherwise, these public bodies will recognize their lack of expertise and will seek guidance from the ATIPP Office and the OIPC as needed.

With respect to oversight of compliance with this new statutory responsibility, I recommend that in order to avoid any uncertainty about the scope of the commissioner's authority to "monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities and duties under this *Act*", subsection 95(1) include the specific authority for the commissioner to monitor compliance with the requirement to conduct privacy assessments and to make recommendations for improvement.

There is also expertise available in the ATIPP Office. As a suggestion only, a public body within the scope of s. 72.1 developing a common or integrated program or service should seriously consider both notifying the ATIPP Office at an early stage of the development of the program or service and also submitting the PIA to that office for its review and comment.

RECOMMENDATION

That the *Act* be amended to:

- Define "common or integrated program or service". [Appendix K, s. 2(e.1)]
- Require non-departmental public bodies to prepare preliminary assessments and, if required, privacy impact assessments, with the option of submitting them to the commissioner for review and comment. [Appendix K, s. 2(w), s. 72.1]
- Specify that the commissioner has the authority to monitor compliance with the requirement to conduct privacy assessments and to make recommendations for improvement. [Appendix K, s. 95(1)(h)]

Administrative:

- That privacy impact assessments received by heads of non-departmental public bodies may optionally be also sent to the ATIPP Office for review and comment.

Suggestions:

- That smaller public bodies seek guidance from the ATIPP Office and the OIPC as needed when considering the privacy impacts of any program or service.
- That a public body developing a common or integrated program or service should consider both notifying the ATIPP Office at an early stage of the development of the program or service and also submitting the PIA to that office for its review and comment.

INFORMATION SHARING AGREEMENTS

The protection of privacy becomes more complex when a proposed program is common or integrated and involves the sharing of personal information between different bodies.

British Columbia, Saskatchewan and New Brunswick have statutory requirements for public bodies providing a common or integrated service to enter into a formal agreement governing the sharing of information. In its submission, the OIPC describes this agreement:

> Key components of any such agreement include a description of the initiative, including the purpose and expected outcome of the initiative; identification of the personal information involved; provisions regarding expected safeguards and future use and/or disclosure of information obtained as part of the initiative; description of the roles and responsibilities for participating entities; provisions surrounding any withdrawal from the initiative or termination; the effective dates for the information sharing; and any other information deemed appropriate for the initiative. The final agreement should be signed by individuals in positions of authority, typically the head of the public bodies participating in the initiative.

As acknowledged by the OIPC in its submission, there is considerable overlap between the information in a properly done privacy impact assessment and an information sharing agreement.

The expansion of the requirement for privacy impact assessments to be completed by all public bodies is a significant step. I am not prepared to make the further recommendation that the preparation of an information sharing agreement be mandatory. I recommend as a matter of administrative best practice that in the course of conducting a privacy impact assessment involving a common or integrated program or service, a public body consider whether an information sharing agreement is reasonably required for the protection of personal information the disclosure of which may be permitted under paragraph 68(1)(u).

RECOMMENDATION

Administrative:

- That in the course of conducting a privacy impact assessment involving a common or integrated program or service, public bodies consider whether an information sharing agreement is reasonably required for the protection of personal information the disclosure of which may be permitted under paragraph 68(1)(u).

ARTIFICIAL INTELLIGENCE

The Committee's Terms of Reference require an examination of whether there are types of information that require greater protection than that currently required by *ATIPPA, 2015*. Combining this direction with one of the primary purposes of *ATIPPA, 2015* – the protection of privacy – makes necessary consideration of the extent to which *ATIPPA, 2015* should address the rapidly increasing use of artificial intelligence – or automated decision systems – in the public sector. Related to this is the question of how to achieve transparency in decision-making when decisions are the result of an automated process.

The Encyclopaedia Britannica offers this definition of and comment on artificial intelligence:

> **Artificial intelligence (AI)**, the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings. The term is frequently applied to the project of developing systems endowed with the intellectual processes characteristic of humans, such as the ability to reason, discover menaing, generalize, or learn from past experience. Since the development of the digital computer in the 1940s, it has been demonstrated that computers can be programmed to carry out very complex tasks – as, for example, discovering proofs for mathematical theorems or playing chess – with great proficiency. Still, despite continuing advances in computer processing speed and memory capacity, there are as yet no programs that can match human flexibility over wider domains or in tasks requiring much everyday knowledge. On the other hand, some programs have attained the performance levels of human experts and professionals in performing certain specific tasks, so that artificial intelligence in this limited sense is found in applications as diverse as medical diagnosis, computer search engines, and voice or handwriting recognition.
>
> Article Title: Artificial intelligence
> Website Name: Encyclopaedia Britannica
> Publisher: Encyclopaedia Britannica, Inc.
> Date Published: 11 August 2020
> URL: https://www.britannica.com/technology/artificial-intelligence

As the submission of the OIPC set out below says, the premise of artificial intelligence is that the more data there is, the better will be the automated decision making.

Although the recommendations I propose represent only the foundation of the structure that will be necessary to ensure that privacy and access are properly considered when artificial intelligence applications are contemplated, I recognize that, at least in the oversight aspect, they may push the present boundaries of the *Act*.

But since the OIPC is the only privacy oversight body in the public sector, and given that the creation of an additional oversight commissioner is unlikely, it is appropriate to now suggest amendments to *ATIPPA, 2015* that authorize a level of oversight for proposed artificial intelligence applications. Some may argue that allowing the OIPC to comment on the "ethical implications" of a proposed automated decision system – that is, commenting on issues not directly related to access and privacy – takes the *Act* outside its present intended scope. There is merit to that argument, but, at least until there is specific legislation governing all aspects of development and application of automated decision systems, the most appropriate – indeed perhaps the only – means of ensuring consideration of these issues lies within *ATIPPA, 2015*.

As noted, it is not only privacy concerns that must be addressed. An automated decision system takes decisions out of the realm of human assessment into the arena of computers, software and software developers. Information to support a particular decision – in the sense of "information required to participate meaningfully in a democratic process – will be contained in an inscrutable black box unwilling to provide a rational response to questions. While human decisions may on occasion be incomprehensible, the present provisions of *ATIPPA, 2015* are intended to encourage public servants to take actions that will stand up to public scrutiny. The black box of automated decision-making feels neither shame nor pride and is not subject to the same influences as human public servants. Accordingly, automated decision systems require some degree of enforced transparency and oversight in order to approach the level of accountability that is expected from public servant decision-makers.

The submission of the OIPC, at pages 35–38:

> Artificial Intelligence, or AI, is a term used to describe an evolving approach to technological solutions which includes the use of automated decision-making processes. Businesses and governments around the world have begun to use AI in their decision-making processes, including examples such as medical treatments, applications for government aid, or even sentencing in criminal cases. It has also been the subject of a great deal of scrutiny in the academic world. For example, in September 2020 the Citizen Lab at the University of Toronto published a report containing a critical analysis of the use of AI in law enforcement, entitled: To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada. We do not know at present whether a public

body in this province has or intends to implement AI, or if any such plans are on the drawing board. What we do know is that our privacy oversight counterparts across Canada and around the world are beginning to see such initiatives and are paying close attention. The Global Privacy Assembly, representing membership of privacy oversight bodies around the world, passed a unanimous resolution on Accountability in the Development and Use of Artificial Intelligence during its annual conference (held online) in October 2020. The entire resolution is captured in Appendix F, however part 4 of the resolution specifically refers to the need to create a statutory regime to protect privacy and human rights in the development of AI:

> 4. Encourage governments to consider the need to make legislative changes in personal data protection laws, to make clear the legal obligations regarding accountability in the development and use of AI, where such provisions are not already in place

Canada's federal Office of the Privacy Commissioner (OPC) initiated a broad consultation process on the subject in early 2020, and on November 12 released its recommendations for a regulatory framework for Artificial Intelligence to be implemented as reform of the Personal Information Protection and Electronic Documents Act (PIPEDA) which covers private sector organizations.

One of the challenges of AI is that while its implications encompass privacy issues, those implications are also much broader than privacy, and in fact part of the premise of AI is diametrically opposed to one of the foundational principles of privacy. For example, the principle of data minimization, which has long been entrenched in privacy laws, means that entities should only collect, use, and disclose the minimum amount of personal information necessary for the intended purpose. AI, however, generally works on the premise that it has a massive amount of data to work with in order to discern patterns and, through automated decision-making, make choices based on that data. In theory, the more data, the better the decision.

If we were to adopt an approach purely from a privacy perspective, AI would be a non-starter based on data minimization alone. We do, however, recognize that AI promises not only risks, but great benefits to society. On that basis, privacy and AI experts the world over are attempting to develop a framework that works for both.

In April 2019 the Government of Canada implemented a new Directive on Automated Decision-Making. The Directive sets out minimum requirements for federal government departments that wish to use an Automated Decision System – essentially technology that either assists or replaces the judgement of human decision-makers. Among other things, the Directive requires that an Algorithmic Impact Assessment be conducted prior to the implementation of any automated decision-making process. The objective is to ensure that such

technology is deployed in a manner that reduces risks to Canadians and federal institutions, and leads to more efficient, accurate, consistent and interpretable decisions. The directive is intended to achieve the following results:

- Decisions made by federal government departments are data-driven, responsible, and comply with procedural fairness and due process requirements.
- Impacts of algorithms on administrative decisions are assessed and negative outcomes are reduced, when encountered.
- Data and information on the use of Automated Decision Systems in federal institutions are made available to the public, where appropriate.

The Government of Canada has also proposed the idea of creating a Data Commissioner. Although the scope of that role has not been determined, it could potentially serve a function adjacent to the Federal Privacy Commissioner, but beyond privacy, and it could oversee broader implications for the use of data, such as those implications intended to be assessed by an Algorithmic Impact Assessment.

Realistically, in Newfoundland and Labrador, we are unlikely to see the creation of a separate Data Commissioner in the foreseeable future. We are, however, likely to see AI and automated decision-makingat some point, and perhaps sooner rather than later, in light of the rate of expansion of this technology around the world. In a small jurisdiction, one often needs to wear several hats. While AI creates substantial challenges for effective oversight of legal and ethical implications, there is already a substantial overlap with privacy oversight that positions the OIPC well to take on that role. Some of the challenges inherent in attempting to apply a traditional privacy lens to AI, without alteration or augmentation, was captured recently by Ontario's Information and Privacy Commissioner in her comments on the creation of a new privacy statute in that province:

> While Purpose Specification, Consent, and Collection Limitation continue to be relevant principles, a more modern private sector privacy law would need to reconsider the weight ascribed to them relative to other principles in certain circumstances. For example, in an era of artificial intelligence and advanced data analytics, organizations must rely on enormous volumes of data, which runs directly counter to collection limitation. Data are obtained, observed, inferred, and/or created from many sources other than the individual, rendering individual consent less practicable than it once was. The very object of these advanced data processes is to discover the unknown, identify patterns and derive insights that cannot be anticipated, let alone described at the outset, making highly detailed purpose specification virtually impossible.

It will likely be necessary, as AI matures, for each jurisdiction to develop purpose-built legislation around AI, however we believe it is advisable to start

now with some very basic legislative provisions so that the first AI in use by a public body can be required to consider and mitigate any potentially negative implications of such a program, and also to be subject to independent scrutiny. At the same time, some basic oversight functions in ATIPPA, 2015 could ensure that there is some level of independent scrutiny available and potentially required before AI initiatives become a reality here.

Some collections, uses or disclosures in an AI system, would, as noted above, conflict with current privacy laws. In order to implement an AI program in such a way that they would not be contrary to ATIPPA, 2015, in the absence of a comprehensive legislative scheme that incorporates privacy protection while facilitating the development of AI (which as far as we know does not exist anywhere) it is likely that legislation would have to be created specifically for the purpose of facilitating individual AI applications. If this were to occur, the OIPC would be consulted in accordance with section 112. It is unusual for us to receive a draft bill earlier than a week prior to it being tabled in the House, so while we find that process useful and we have been able to effect significant privacy-protective changes in legislation even at that late stage, if government has substantially invested in planning a program that a new bill will be the last step in implementing, it is not likely to be a sufficient process in terms of meaningful engagement and oversight. Furthermore, prior to oversight, it is much more important that clear guardrails are put in place before major political and financial investments in AI are committed.

For those reasons, and in light of the issues described above, it is recommended that ATIPPA, 2015 be amended to do the following:

> OIPC Recommendation 7.1: Incorporate a definition of artificial intelligence into ATIPPA, 2015.
>
> OIPC Recommendation 7.2: Require algorithmic assessments to be conducted by any public body prior to implementation of a program involving the use of artificial intelligence.
>
> OIPC Recommendation 7.3: Require a public body intending to develop and implement a program involving the use of artificial intelligence to notify the Commissioner of that intention and engage the Commissioner at an early stage of the development of that program, including providing to the Commissioner a copy of an algorithmic assessment for review and comment by the Commissioner prior to implementation of the program.
>
> OIPC Recommendation 7.4: In addition to privacy and access to information issues, in its review and assessment, the OIPC should be entitled to comment on all implications for the use of AI in the proposed program, including data ethics factors such as proportionality, fairness and

equity, in a manner comparable to a Data Commissioner; to this end, amendments to the purpose of the ATIPPA, 2015 would be required to reflect the added mandate for an independent oversight agency that is empowered to review and comment on the implications, including privacy and data ethics implications, for the implementation of artificial intelligence in public body programs. Comparable powers or duties would need to be added to section 95.

These recommendations are compatible with, but less detailed than, those proposed by the federal Office of the Privacy Commissioner, as referenced above, that if implemented would cover the private sector alongside ATIPPA, 2015 coverage of the provincial public sector. In particular, the recommendation to require that public bodies complete an Algorithmic Impact Assessment for AI applications, with mandatory review by the OIPC, is consistent. As noted above, however, we do not at this time make detailed recommendations for a comprehensive regulatory regime including such things as a right to meaningful explanation (the right of an individual to know how an AI made a decision) and a right to contest (the right to appeal such a decision). While these are important principles, our perspective at this time is that without examples of AI to inform us, developing a regime would be premature and speculative. We anticipate that the proposed Algorithmic Impact Assessment and review process, alongside our existing authorities to conduct complaint-based and own-motion investigations related to privacy, will provide sufficient safeguards at this stage.

This said, the OPC does make important recommendations about demonstrable accountability and traceability that deserve attention and relate to our Recommendation 3.1 about Duty to Document. We recommend on this subject that a legislative duty to document be created, with OIPC oversight, and that it be high-level and principle-based, with implementation at the public body level to be policy-based but appropriate for its operations and context. As it relates to AI, the key is to require a granular level of documentation of processing to ensure that, if a public body's decision has been automated, then there is an ability to understand and potentially contest that decision. The OPC cites Article 30 of the European Union's General Data Protection Regulation as an example of a legislative model addressing this topic. Quebec's Bill 64 (section 102) is a new Canadian example of a statute that contains provisions that address a number of the topics referenced, including record keeping but also the right to an explanation and the right to contest. Bill C-11 at section 63(3) also contains a transparency requirement for automated decision-making, with "automated decision system" being a defined term in the Bill.

OIPC Recommendation 7.5: Introduce a special Duty to Document requirement for Artificial Intelligence applications that requires that records of processing activities be maintained.

Although the duty to document does not, as a general matter, come within the mandate of this review, the attributes and uses of artificial intelligence are so inextricably interwoven with concerns over the protection of privacy and accountability for decisions that I consider it appropriate to include it in my recommendations.

With respect to artificial intelligence, the future is already here. It is interesting to note that, during this review, it was reported that health care authorities in the province have negotiated a contract with a company to provide software that will assist with scheduling and is intended to result in "improve operational efficiency and anticipated cost savings". From that company's website:

> Change Healthcare is using artificial intelligence (AI) and machine learning (ML) to identify inefficiencies and drive them out of administrative processes in the healthcare system and, as a result, help reduce costs and improve outcomes for payers, providers, and patients.

I do not know whether or not this initiative involved an algorithmic assessment. Such an assessment would help to assess and mitigate any impacts associated with the automated decision system and would ensure that the principles of transparency and accountability in public body decision making are respected in the design and operation of the system. Requiring any public body contemplating the introduction of an automated decision system to address these issues is well within the spirit of *ATIPPA, 2015*. I recommend that a public body in such circumstances be required to complete an algorithmic assessment. Respect for the objectives of transparency and accountability also requires that once an automated decision system is brought into operation, records of processing activities should be maintained and retained in sufficient detail to allow any automated decision to be understood and potentially contested. I recommend accordingly. These recommendations for completing an algorithmic assessment and for maintaining records of processing activities apply to all public bodies.

A degree of oversight of the development and use of automated decision systems is a necessary pre-condition if the ATIPP obligations of the protection of personal information and accessibility of information are to be met. I do not consider it appropriate at this early stage to extend the oversight function beyond the borders of the central functions of government. I recommend that a level of oversight be provided by requiring that departments of government notify the commissioner of a planned automated decision system at an early stage of development and, if requested by the commissioner, provide the algorithmic assessment to the commissioner for review and comment.

While the oversight recommendation is limited, as with other initiatives, there is no reason why other public bodies could not seek the assistance and advice of the OIPC when considering the introduction of an automated decision system. Indeed, and referring again to the common objectives of transparency, accountability and the protection of privacy, I hope that requesting such assistance will become a matter of course.

These recommended amendments represent what I consider to be a start on the road to incorporating automated decision-making into the ATIPP world of transparency, accountability and privacy. Consideration of modifications and further amendments should not wait until the next review. Recognizing the pace of development and increase in the use of automated decision systems, and unless and until there is a public sector entity with a specific responsibility to monitor developments in the field of automated decision systems, I recommend that the OIPC have the specific statutory authority to monitor the use of automated decision systems in public bodies and to keep up to date with developments in the field of artificial intelligence. The OIPC should further have the authority to recommend to a public body or to the minister responsible such legislative or other changes as may be necessary to ensure adherence to the objectives of the *Act*. This authority would be in addition to its statutory ability to comment on the privacy and other ethical implications of the use of a particular automated decision system.

Although Newfoundland and Labrador is a small province, there is no reason, with the resources available, why Newfoundland and Labrador cannot be a leader in the excellent design, operation, management and regulation of artificial intelligence applications in public bodies.

RECOMMENDATION

That the *Act* be amended to:

- Define "automated decision system". [Appendix K, s. 2(a.2)]
- Define "algorithmic impact assessments" and require that any public body planning to implement an automated decision system complete one and, if requested, provide it to the commissioner. [Appendix K, s. 2(a.1)]
- Require that public bodies notify the commissioner when developing a program or service using automated decision systems. [Appendix K, s. 95(1)(f) and (g)]
- Require public bodies to keep records of the decision-making processes of automated decision systems. [Appendix K, s. 72.3]
- Include monitoring and commenting on automated decision systems in the general powers and duties of the commissioner. [Appendix K, s. 72.3(4)]

PRIVACY BREACH REPORTING

Section 64 of *ATIPPA, 2015* includes provisions requiring the head of a public body to notify an affected individual and the OIPC when there are specified unauthorized disclosures of personal information:

> *64.(3) Except as otherwise provided in subsections (6) and (7), the head of a public body that has custody or control of personal information shall notify the individual who is the subject of the information at the first reasonable opportunity where the information is*
>
> *(a) stolen;*
>
> *(b) lost;*
>
> *(c) disposed of, except as permitted by law; or*

(d) disclosed to or accessed by an unauthorized person.

(4) Where the head of a public body reasonably believes that there has been a breach involving the unauthorized collection, use or disclosure of personal information, the head shall inform the commissioner of the breach.

(5) Notwithstanding a circumstance where, under subsection (7), notification of an individual by the head of a public body is not required, the commissioner may recommend that the head of the public body, at the first reasonable opportunity, notify the individual who is the subject of the information.

(6) Where a public body has received personal information from another public body for the purpose of research, the researcher may not notify an individual who is the subject of the information that the information has been stolen, lost, disposed of in an unauthorized manner or disclosed to or accessed by an unauthorized person unless the public body that provided the information to the researcher first obtains that individual's consent to contact by the researcher and informs the researcher that the individual has given consent.

(7) Subsection (3) does not apply where the head of the public body reasonably believes that the theft, loss, unauthorized disposition, or improper disclosure or access of personal information does not create a risk of significant harm to the individual who is the subject of the information.

(8) For the purpose of this section, "significant harm" includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property.

(9) The factors that are relevant to determining under subsection (7) whether a breach creates a risk of significant harm to an individual include

(a) the sensitivity of the personal information; and

(b) the probability that the personal information has been, is being, or will be misused.

A number of submissions suggested that the reporting requirement should be relaxed to require only periodic reporting of what were referred to as “minor” breaches. For example, the submission of the City of St. John’s, at page 1:

> Consideration should be given to the current practice of mandatory breach reporting as, it appears, we are the only jurisdiction required to do the same. Public bodies should certainly track their own breaches and perhaps provide

> annual statistics to the ATIPP Office and OIPC, but unless the breach is material, warranting notification under section 64(3), notifying the OIPC and ATIPP Office of every breach can he onerous, even for public bodies with small numbers of breaches each year.

A submission from the College of the North Atlantic suggested that incidents such as a misdirected email or a letter of no consequence mailed to the wrong person are not breaches of such significance as to require immediate reporting to the OIPC.

The *Act* contains two notification requirements. The first is a requirement, in the listed circumstances, to notify the individual concerned. It does not apply when the head of a public body reasonably believes that no risk of significant harm has been created by the unauthorized disclosure. This provision is directed to the interests of the individual; it is unlikely that 'minor' breaches will trigger the requirement that the individual be notified.

The requirement to notify the commissioner does not depend on the potential for adverse consequences to the individual. Any "unauthorized collection, use or disclosure of personal information" must be reported to the commissioner. This direction is in the interest of the operation of the public body and its systems for ensuring that personal information is properly protected.

The regime for reporting data breaches to the OIPC is the result of the consideration of this issue by the Wells Committee. Prior to *ATIPPA, 2015*, public bodies were required in practice, but not in law, to report privacy breaches to the ATIPP office in the then Office of Public Engagement. From the 2015 Report, at page 175:

> Since 2013, reporting and addressing privacy breaches has become standard policy. Minister Collins advised:
>
> > Between January 2013 and June 2014, 39 privacy breaches were reported to the Office of Public Engagement and of these, 30 (77 per cent) were minor in nature, involving limited amounts of personal information; while nine were serious involving sensitive personal information (e.g., social insurance number).

The only provision then in legislation spoke generally of the obligation to protect personal information, at page 176:

> The head of a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

The 2015 report continues, at page 176:

> This reference in the *Act* to data breaches is no longer adequate, since public bodies other than those in the health sphere hold information of great interest to ill-motivated persons inside and outside the public service. It is time for a serious examination of how the present legislation and its application deal with inevitable breaches in security of personal information. …
>
> The OIPC discussed the question of breach reporting at both its appearances before the Committee. In June 2014, it suggested a statutory requirement for breach reporting to both the Commissioner and the affected individual. But it suggested further study as to the severity of a breach which would merit this treatment.
>
> In its supplementary submission to the Committee in late August 2014, the OIPC stated that all privacy breaches experienced by a public body should be reported to the Commissioner because this would add to the body of expertise on how to deal with data breaches:
>
> > Having knowledge of the types of breaches and the actions being taken by public bodies to respond to these breaches would be helpful to our Office in discharging our oversight function, because it would allow us to identify trends and problems and to address such issues from an oversight perspective.
> >
> > The OIPC also stated that, given the current policy of the OPE that all privacy breaches be reported to their ATIPP Office, "we see no additional burden for the public body to make the same report to the Commissioner".

The Committee's conclusion, at page 177:

> Since relatively few data breaches from public bodies are documented, the optimal requirement would be to report all breaches to the Commissioner, who could recommend any necessary follow up, notification of the affected parties if that has not already been done, preventative measures for the future, and so on. While this would place an administrative burden on the Commissioner which the circumstances of each breach may not warrant, the Committee agrees with the OIPC's recommendation in this respect.
>
> Data breach reporting better informs and protects individuals who may be the victims. It also sensitizes the public body and its personnel to the importance of data security at all times. Now that information held by public bodies is under increasing pressure from data predators, a workable notification scheme for data breaches is essential. The Commissioner addressed the value of reporting breaches:

> While some public bodies have voluntarily reported significant breaches to this Office, such reporting is not required by law, and it tells us nothing about the state of overall privacy compliance. We are unable to spot trends or systemic issues, and therefore are unable to recommend steps to help prevent further breaches in the future.

> Given these comments, and with the new powers recommended for the Commissioner in chapter 7, including the authority to audit and produce special reports, it is necessary that he be informed of all privacy breaches. Since details of all breaches are already collected by the Office of Public Engagement, it would simply be a matter of transferring the information to the Commissioner.

> The recent government policies encouraging the reporting of data breaches should be incorporated into law and added to the *ATIPPA*. With respect to notification of affected individuals, the Committee believes this should be done only in cases where the privacy breach would create a risk of significant harm.

The recommendation to notify the commissioner of all privacy breaches is amply supported by the Committee's reasoning.

This reporting requirement is a necessary corollary to the oversight function of the OIPC. Should, based on the reporting, it become apparent that there is a 'systemic' issue with a public body's control of personal information, the OIPC would then be expected to work with that public body to address the problem. Indeed, it may be that even a minor breach may warrant immediate attention.

I have some sympathy for the submissions of the public bodies concerning workload but, as I have said elsewhere in this report, in matters of the protection of privacy I will err on the side of caution rather than convenience. I would add that the fact that even breaches considered minor must be reported may well serve as reminder to public bodies of their responsibility to guard against both intentional and unintentional disclosures of personal information. I do not recommend relaxing the reporting requirement.

The submission from the ATIPP office also points to the potential confusion arising from the different wording for breach notifications in s. 64(3) and s. 64(4), at pages 33–34:

> Subsections 64(3) and 64(4) outline under what circumstances a public body must either notify an individual affected by a privacy breach or the OIPC. Under subsection 64(3) a public body must notify an affected individual (except as otherwise provide in subsections (6) and (7)) when:

- Personal information that is stolen;
- Personal information that is lost;
- Personal information disposed of, except as permitted by law; or
- Personal information disclosed to or accessed by an unauthorized person.

Subsection 64(4) requires public bodies to notify the OIPC where a breach involves the unauthorized collection, use or disclosure of personal information.

The variances in these subsections can cause confusion as to when notification is required. For example, if information is lost, but there is no indication that it has been accessed by anyone, or has been disposed of inappropriately, notification is required under subsection 64(3), but would not be required under subsection 64(4). Alternatively, if personal information is collected without authorization, a notification is required under subsection 64(4), but not under subsection 64(3).

The particular wording of subsections (3) and (4) was not discussed by the Wells Committee. However it appears that it was chosen to reflect that used in the 2008 *Personal Health Information Act*, SNL 2008 c. P-7.01, at sections 15(3) and 15(4). Of some interest is that, in the *Personal Health Information Act*, the requirement to notify the commissioner is triggered only by a material breach.

> *15. (4) Where a custodian reasonably believes that there has been a material breach as defined in the regulations involving the unauthorized collection, use, or disclosure of personal health information, that custodian shall inform the commissioner of the breach.*

Section 5 of the *Personal Health Information Regulations* NLR 38/11:

> *5. The factors that are relevant to determining what constitutes a material breach for the purpose of subsection 15(4) of the Act include the following:*
>
> *(a) the sensitivity of the personal health information involved;*
>
> *(b) the number of people whose personal health information was involved;*
>
> *(c) whether the custodian reasonably believes that the personal health information involved has been or will be misused; and*
>
> *(d) whether the cause of the breach or the pattern of breaches indicates a systemic problem.*

The view of the Wells Committee that all privacy breaches under *ATIPPA, 2015* should be reported to the OIPC is consistent with the absence of "material breach" wording in s. 67(4) of *ATIPPA, 2015*.

Given the differing reporting standards in the two statutes, I see no prejudice in recommending that, in the interests of clarity and consistency of administration, *ATIPPA, 2015* be amended to clarify that the breaches that trigger the notification requirements should be the same for both the individual and the OIPC.

The ATIPP Office has a further recommendation regarding reporting, at page 34:

> The Minister of the Department of Justice and Public Safety is responsible for the overall administration of the ATIPP Act. The ATIPP office assists with this mandate by providing guidance and assistance to public bodies that are subject to the Act, including through training and the development of policies, procedures and other guidance materials to assist public bodies with both the access and privacy provisions of the Act.
>
> Under subsection 64(4) of the Act, public bodies are required to report any unauthorized collections, uses or disclosures of personal information to the OIPC. Under policy, government departments are required to also report privacy breaches to the ATIPP Office, and many other public bodies do as a courtesy. The office reviews these reports to determine if there are particular trends in the type of breaches occurring and which public bodies to which the breaches are in relation. This assist our Office in the development of training materials and whether it would be appropriate to reach out to a particular public body to assist with training, etc. If public bodies were required to report breaches to the ATIPP Office it would assist the Office in fulfilling its mandate.

This reflects the practice prior to the 2014 review. I agree that reporting to the ATIPP Office would be beneficial as it works to promote excellence by public bodies in their protection of personal information. Little additional effort would be required to include the ATIPP Office in the required notification. However, given that most public bodies do not fall under the 'line' authority of the provincial government, I am reluctant to recommend a legislated obligation to notify the ATIPP Office. However, I recommend that, as a matter of policy and best practice, all public bodies report privacy breaches concurrently to the OIPC and to the ATIPP Office. So doing can only assist in the development and maintenance of an excellent province-wide approach to the protection of personal information.

The submission of the ATIPP Office refers to an issue which arises only infrequently but which warrants attention. Page 33:

> Subsection 64(3) of the Act requires a public body to notify an individual if their personal information has been involved in a breach, except as otherwise provided under subsections (6) and (7). Based on a reading of these subsections, a public body is required to notify if there is a significant risk of harm. While in most circumstances this is reasonable, it is possible that some circumstances could arise where the notification of a breach could potentially adversely affect the person or another person's health or safety.
>
> Suggestion
>
> Consider amending section 64 to preclude public bodies from being required to notify in limited circumstances where otherwise they would be required to do so. For example, where there are compelling circumstances that could affect the person or another person's health or safety.

The submission goes on to point out the possibility of some confusion in the requirements for notification of a privacy breach. At pages 33-34:

> Subsections 64(3) and 64(4) outline under what circumstances a public body must either notify an individual affected by a privacy breach or the OIPC. Under subsection 64(3) a public body must notify an affected individual (except as otherwise provide in subsections (6) and (7)) when:
>
> • Personal information that is stolen;
>
> • Personal information that is lost;
>
> • Personal information disposed of, except as permitted by law; or
>
> • Personal information disclosed to or accessed by an unauthorized person.
>
> Subsection 64(4) requires public bodies to notify the OIPC where a breach involves the unauthorized collection, use or disclosure of personal information.
>
> The variances in these subsections can cause confusion as to when notification is required. For example, if information is lost, but there is no indication that it has been accessed by anyone, or has been disposed of inappropriately, notification is required under subsection 64(3), but would not be required under subsection 64(4). Alternatively, if personal information is collected without

authorization, a notification is required under subsection 64(4), but not under subsection 64(3).

Suggestion

Consider amending subsections 64(3) and 64(4) to include similar language in outlining the circumstances under which notification is required.

I agree with these suggestions. The *Act* should be amended to provide consistent reporting requirements. A further amendment should be made to allow the head of a public body, upon notification to the commissioner, to refrain from notifying the individual whose privacy has been breached if there is a risk of significant harm to another person.

RECOMMENDATION

- That the *Act* be amended to reflect consistency in the requirements to report a privacy breach to the commissioner and to the affected individual and to allow the head of a public body, on notification to the commissioner, to refrain from notifying the individual concerned if there is a risk of significant harm to another person. [Appendix K, s. 64]

Administrative:

- That all public bodies report privacy breaches to the ATIPP Office as well as to the OIPC.

PROSPECTIVE AND THIRD PARTY PRIVACY COMPLAINTS

Section 73 of the *Act* provides for the filing of a privacy complaint if an individual reasonably believes that their personal information has been collected, used or disclosed in contravention of the *Act*.

73. (1) Where an individual believes on reasonable grounds that his or her personal information has been collected, used or disclosed by a public body in contravention of this Act, he or she may file a privacy complaint with the commissioner.

(2) Where a person believes on reasonable grounds that personal information has been collected, used or disclosed by a public body in contravention of this Act, he or she may file a privacy complaint with the commissioner on behalf of an individual or group of individuals, where that individual or those individuals have given consent to the filing of the privacy complaint. …

The OIPC does not receive a lot of ATIPPA privacy complaints. The experience of the last four years:

YEAR	PRIVACY COMPLAINTS
2016–17	23
2017–18	46
2018–19	41
2019–20	41

The present process is directed at addressing past breaches of privacy and making recommendations for improvement. But the OIPC suggests that more should be done – that an avenue be provided through which a prospective privacy complaint may be addressed, thus perhaps avoiding the unfortunate consequences of a breach.

The OIPC submission, at pages 25–26:

> Prospective Complaints
>
> Section 73 provides for the right to make a complaint about the collection, use or disclosure of personal information in contravention of ATIPPA, 2015. The right applies to an individual complainant about the collection, use or disclosure of their own information (section 73(1)), an individual complainant on behalf of another person with consent (section 73(2)), or the Commissioner to initiate an own motion investigation. In all instances, the collection, use or disclosure is referred to in the past tense, ie, where the allegation is that there has already been a collection, use or disclosure in contravention of ATIPPA, 2015.
>
> In public sector privacy legislation across Canada, the right to complain is usually retrospective, as it is in ATIPPA, 2015, or vague. There is no explicitly prospective right.

PHIA, meanwhile, provides for a complaint against a prospective contravention of the Act, at section 66:

> *66(3) Where an individual believes on reasonable grounds that a custodian has contravened or is about to contravene a provision of this Act or the regulations in respect of his or her personal health information or the personal health information of another, he or she may file a complaint with the commissioner.*

This prospective right exists in other health privacy legislation, such as Ontario's *Personal Health Information Protection Act*, at section 56:

56(1) A person who has reasonable grounds to believe that another person has contravened or is about to contravene a provision of this Act or its regulations may make a complaint to the Commissioner.

There are many circumstances whereby it would be appropriate to allow a privacy complaint to be of a prospective nature. For example, if an individual becomes aware of a new program involving a collection, use or disclosure of their personal information, and they have a reasonable basis to believe that it is contrary to *ATIPPA, 2015*, they should be able to file a complaint before the collection, use or disclosure is under way. From our perspective overseeing compliance with *ATIPPA, 2015*, one of the most important roles we can play is to *prevent* privacy breaches *before* they can occur. Other provisions, such as the privacy impact assessment provision in section 72(3) and (4) and the requirement to consult with the OIPC on draft bills in section 112 reflect the same intent.

In some cases, we have become aware of programs or activities or public bodies through the media or through calls from people who do not wish to take on the role of complainant, but who have concerns. Often we are able to initiate engagement with the public body on such issues and ensure that privacy concerns are addressed. Initiating that dialogue is typically our first course of action. Sometimes this is before implementation, other times after. Clearly, there are many reasons why it is much better to be able to initiate that dialogue before a program is implemented.

As noted, when we have heard through informal channels about privacy concerns regarding a program or policy before it is implemented, our preferred option is to open a dialogue with the public body to learn more about it, and then to suggest ways to address those concerns. We have had significant success with this approach, however public bodies do not always agree with us. If serious privacy concerns exist with a program or policy that has not yet been initiated, we believe it is important for us to be able to proceed with a formal investigation before personal information has been collected, used or disclosed, potentially in conflict with *ATIPPA, 2015*. This would require an

> amendment to section 73(1), (2) and (3) to make it clear that a privacy complaint can be either prospective or retrospective in nature.

I agree. As emphasized in this report, prevention must be the watchword in any consideration of the privacy right. In an adjudicative context, making a claim based on an anticipated act seems counter-intuitive. This is not the situation under *ATIPPA, 2015*. The role of the OIPC, carefully crafted by the Wells Committee, is that of an ombuds. It is true that aspects of the role call for independent assessments, but in the complaint investigation context, the role is more that of a mediator attempting to guide the parties to an acceptable resolution of their dispute.

As said in the OIPC submission, being notified of the prospect of a privacy breach allows the OIPC to utilize its experience and expertise to pursue what should be a common purpose – the protection of privacy.

While a public body may not always agree with the OIPC conducting a before-the-fact formal investigation, the objective – the common purpose – is worth more than some level of discomfort. I hasten to add that, with good faith on all sides, I suspect that it would be rare for OIPC to resort to a formal investigation.

I recommend that s. 73 be amended to allow a prospective complaint of a privacy breach.

The submission of the OIPC also points to what may be considered a gap in the complaint filing and notification process. On occasion, the OIPC is made aware of concerns over the privacy implications of a program or activity not through the filing of a complaint but through informal contact from the media or other concerned individuals or groups.

In commenting on the commissioner's power to investigate a privacy complaint, the Wells Committee said, at page 241:

> However, this new power is limited. It does not address a situation where one person, or an organization such as an advocacy group, makes a complaint on behalf of another person or a group of persons.

And further, at page 242:

> Another serious shortcoming is that the *Act* only envisages complaints about one's own personal information. It ignores the fact that an important feature of privacy provisions

has been third-party reporting of perceived violations of personal information to privacy watchdogs who then act upon the information.

ATIPPA, 2015 provides for third party filing of a complaint, but only with the consent of the individual concerned. The report of the Wells Committee does not discuss the requirement of consent; indeed the report emphasizes the importance of third party reporting on behalf of another person. The *Personal Health Information Act* contemplates that an individual may file a complaint "in respect of his or her personal health information or the personal health information of another …" (s. 66(3)).

The present informal process for addressing third party 'complaints' through dialogue is a commendable attempt by the OIPC to address concerns that may not otherwise be brought to its attention. But it is not good enough to leave the protection of privacy to informality. The protection of an individual's privacy is a primary objective of the *Act* and the processes intended to realize that objective must be both clear and effective.

There is merit in having in *ATIPPA, 2015* the same ability of third parties as is in the *Personal Health Information Act* to file a complaint in respect of a past or prospective privacy breach. The investigation of privacy breaches is in the public interest. Should there be circumstances which suggest to the OIPC that a third party complaint should not be pursued without the consent of the individual concerned, there is no impediment to the OIPC's seeking such consent. In addition, pursuant to s. 75, the OIPC may in certain circumstances refuse to investigate a complaint.

I recommend that s. 73 be amended to delete the requirement for the consent of an individual to the filing of a privacy complaint.

RECOMMENDATION

That the *Act* be amended to:

- Allow complainants to file prospective complaints about privacy breaches. [Appendix K, s. 73(1) and (2)]
- Remove the requirement for individual consent to the filing of a privacy complaint. [Appendix K, s. 73(1) and (2)]

ANONYMITY OF PRIVACY COMPLAINANTS

The submission of the OIPC points out that, on occasion, a privacy complainant may wish to remain anonymous during the investigation process. But the present provisions of the *Act* – s. 78(1)(b) and s. 79(1)(b) require a public body to notify the complainant following the making of a recommendation by the commissioner, thus requiring the public body to know the identity of the complainant. Further, in some circumstances, the OIPC may not be able to properly and fairly investigate a complaint without disclosing the identity of the complainant to the public body.

The submission of the OIPC explains the issue more fully, at pages 73–74:

> Anonymity of Privacy Complainants
>
> Privacy complaints typically fall into two categories. The first, most common one, is when a complainant has been the subject of a specific privacy breach, often the result of a failure of procedure or failure to implement a correct procedure, or a failure to implement appropriate information security, etc. Such complaints may arise from a privacy breach where the individual has been notified, and has been advised of their right to complain to the Commissioner. Sometimes, but not always, the specific circumstances of how the individual's personal information was handled are integral to such an investigation, and in such cases it is not possible for us to investigate, nor is it possible for a public body to respond to our investigation, without the identity of the complainant being known.
>
> Other complaints relate to larger systems. For example, we received a complaint from an individual regarding the Town of Paradise and its implementation of a new video surveillance system. The individual was of the view that the surveillance involved the collection of more personal information than was warranted. In that case, the identity of the complainant was not relevant to our investigation, which was about the surveillance system, rather than about its impacts on the complainant specifically. The complainant provided valid reasons to us why they did not wish to have their name used. We therefore provided the Town with a summary of the privacy complaint, as allowed by section 73(5), leaving out the name of the complainant.
>
> During the complaint investigation process, the Town demanded that we disclose the identity of the complainant. We refused to do so. We then issued Report P-2018-003 recommending that the Town cease collecting personal information via its video surveillance system, which we sent to the Town's designated Head as well as the complainant, in accordance with section 77(1)(b).

The Town was then required, by section 78(b), to give a copy of its response to "a person who was sent a copy of the report." In order to facilitate this, we provided a copy of the Town's response to our Report to the complainant. The Town then filed an application for a declaration under section 79. Again, the requirement for the Town to notify the complainant in section 79(b) conflicted with the complainant's wish to remain anonymous. We therefore took it upon ourselves to make the complainant aware of the declaration application.

Ultimately, the Town provided further information about its surveillance system, and we agreed that if the Town made some specific modifications that we would consent to a Court Order to re-instate its surveillance system, which is how the matter concluded. However, it is clear that the anonymity of the complainant was a sore point for the Town, and was a challenge for us in terms of ensuring that the intent of the Act was fulfilled, even though the letter could not be.

That experience taught us that we needed to make it clear upon receipt of a complaint by any complainant who wished to remain anonymous that there could be challenges ahead. Going forward, one option would be to not proceed with the complainant's complaint, but instead initiate an own motion complaint under section 73(3). That might work, however we must consider how that impacts the complainant's experience of pursuing their rights under ATIPPA, 2015. It is not an easy matter to carry the weight of a complaint forward, even if you hope to remain anonymous. That being said, a complainant's journey is often founded on personal conviction, and it would be unfair to remove them from the process because of their wish for anonymity where the complainant's identity is not relevant.

However, there is no guarantee, particularly if a matter proceeds to a court process for a declaration application, that anonymity can be retained. While it is incumbent upon us to make complainants aware of such risks, it would also be appropriate to amend ATIPPA, 2015 so that, in certain circumstances where the identity of the complainant is not relevant to the investigation of the complaint, nor relevant to the public body's ability to respond to that complaint, complainants would more clearly be able to proceed anonymously.

We believe this can be done through the addition of language in Part III, Division 2. Specific language may need to be added to section 73(5) to allow the Commissioner to accept a complaint from someone who does not wish their identity to be shared with the public body, where the complainant's identity is not relevant to the investigation of the allegations. Additional amendments would then be required in sections 77(2), 78(1)(b), and 79(1)(b). We believe that in circumstances where the identity of the complainant is not relevant to the complaint, and the complainant wishes to remain anonymous, that the statute can be amended so that the Commissioner can be required to ensure that the complainant receives a copy of the public body's response to our Re-

port in section 77(2)/78(1)(b), and that we can facilitate service of the application for a declaration on the complainant in 79(b).

OIPC Recommendation: Amend ATIPPA, 2015 to accept a privacy complaint from someone who does not wish their identity to be shared with the public body, where the identity of the complainant is not relevant to the investigation.

The circumstances in which this issue will arise will be rare. But the concerns of the OIPC are reasonable; if, for whatever reason, a privacy complainant wishes to remain anonymous throughout the process, the commissioner should be authorized to accept and investigate the complaint where the commissioner reasonably believes that the identity of the complainant is not relevant to the investigation – including the public body's ability to respond meaningfully to the complaint. Filing of the actual complaint with the OIPC should not be anonymous, but the subsequent sharing of the complainant's identity may be avoided where requested by the applicant and where the commissioner considers it is not required for a proper investigation. In such a situation, the notification requirements in sections 78 and 79 should be amended to allow the commissioner to provide the notice and application in question to the applicant.

Should the complaint be the subject of a court proceeding, whether or not the complainant can or should remain anonymous is a matter for the court.

I recommend that the *Act* be amended accordingly.

RECOMMENDATION

- That the *Act* be amended to allow the commissioner to accept a privacy complaint from a person who wishes to remain anonymous, if their identity is not relevant to the investigation. [Appendix K, s. 73(6), (7) and (8)]

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POLITICAL PARTIES AND PERSONAL INFORMATION

The issue of the collection, use and disclosure of personal information by political parties was discussed briefly by the Wells Committee. From its report, at pages 182–183:

> In Newfoundland and Labrador, as in most Canadian jurisdictions, political parties are subject to strict rules governing their use of personal information, including donations and expenses by parties and candidates, during election periods.
>
> But increasingly, privacy experts have grown concerned about the amount of personal information collected by political parties, particularly in North America, under the influence of political practices in the United States, a country where there is no privacy legislation such as that which exists in Canada or Europe.
>
> Professor Colin Bennett of the University of Victoria, a world-renowned privacy expert, recently wrote an analysis of the use of personal information by federal and provincial political parties in Canada and concluded that limits on their use of personal information are overdue and that those limits should be consistent with international standards.
>
> Bennett's research revealed that political parties in Canada (except in BC) are largely free to collect information on voters, including any habits, ideas, or preferences that may be available publicly or that may be purchased from specialized sources. Voters do not have a right to know what information a political party holds on them and cannot check to see if it is correct. They do not know how this information is shared among party officials or elected party members. When a party forms a government, it is not clear if information kept in their voter databases is used, or how it might be used, for government decisions.
>
> Traditionally, political parties did their best to ascertain accurately who their supporters and detractors were. What has changed? The sheer amount of information that can be obtained and held indefinitely, the extent to which it spills over from the documenting of political preferences to lifestyle choices, leisure activities, and religious affiliations, all of which can be cross-referenced in order to categorize individuals as supporters and non-supporters. This information does not vanish after the election. It can be kept and refined as more personal information trickles in about individual voters from media reports, the purchase of new information, and the scouring of social media sites between election dates.

However, the Committee did not make a specific recommendation, at page 183:

> Personal information in the hands of political parties is an area of concern for those who value their privacy. The laws which apply to individuals and corporations (the *Privacy Act*), public bodies (the *ATIPPA*), and commercial organizations (*PIPEDA*) do not cover political parties.
>
> Clearly, a gap exists in the personal information protection available in the province. While it is not, strictly speaking, within the purview of this Committee because the *ATIPPA* does not apply to political parties, it is appropriate that the Committee draw the problem to the attention of government.

As noted by the Wells Committee, the *Act* contains a specific exception for the records of a registered political party:

> 5. *(1) This Act applies to all records in the custody of or under the control of a public body but does not apply to …*
>
> *(d) records of a registered political party or caucus as defined in the House of Assembly Accountability, Integrity and Administration Act;*

In its current submission to this Committee, the OIPC made a specific recommendation directed to the protection of personal information in the hands of political parties, at pages 39–40:

> In Canada, no public sector access and privacy legislation applies to the collection, use or disclosure of personal information by political parties. Currently, only British Columbia's private sector *Protection of Personal Information Act* captures political parties within its scope. BC's Information and Privacy Commissioner published a substantial report on issues relating to privacy and political parties in 2019, entitled Full Disclosure: Political Parties, Campaign Data, and Voter Consent.
>
> In this age of social media and big data, whereby political parties engage in micro-targeting of potential voters based on their demographic characteristics, the groups they belong to, the products they purchase, and many other indicators, it is clear that personal information of Canadians, often in minute, granular detail, is now at the core of modern sophisticated campaigns at the provincial and federal level. When power is at stake, as it is in the political process, such data is prone to misuse.
>
> The right to privacy is a fundamental human right, and the collection of personal information by political parties should be subject to privacy protection. It might be possible to provide for this protection in a separate, stand-alone statute. However, it is our view that it could also be accomplished by amend-

ments to *ATIPPA, 2015*. There are several such amendments that, together, would accomplish this goal.

Canada's Federal, Provincial and Territorial Privacy Commissioners issued a joint resolution in 2018 calling on governments to create laws containing meaningful privacy obligations for political parties:

- Requiring political parties to comply with globally recognized privacy principles;
- Empowering an independent body to verify and enforce privacy c ompliance by political parties through, amongh other means, investigation of individual complaints; and,
- Ensuring that Canadians have a right to access their personal information in the custody or control of political parties.

As noted in Privacy and the Electorate: Big Data and the Personalization of Politics,

Federal privacy legislation applicable to the private and public sectors does not currently cover the activities of political parties. The Personal Information Protection and Electronic Documents Act (PIPEDA), applicable to the private sector, does not appear to cover political activities because they are likely excluded from the definition of "commercial activities" in the legislation. Political parties are excluded from the definition of "government institutions" in the Privacy Act, the public-sector privacy legislation. The Canada Elections Act (CEA) does not significantly oversee the practices of political parties with regard to the collection, use, storage, and analysis of data about voters and donors. Numerous private sector entities are involved by collecting, analyzing, and selling voter data to political parties. It is unclear how the legislative framework applies to them or what privacy rules they apply to their own activities Academics, privacy oversight bodies, and Canada's Chief Electoral Officer have all expressed the need for legislation to address the gap which allows political parties to operate without privacy laws or oversight. Alternatives to address this would appear to involve either substantial amendment to *ATIPPA, 2015* or a standalone statute. Although a standalone statute might be the better option in some respects, the perfect is often the enemy of the good. The value of bringing it forward in this context is that the *ATIPPA, 2015* is a statute that is currently under review, making it the most practical option available. Furthermore, it could be accomplished in an incremental way through inclusion in the *ATIPPA, 2015*. For example, if "registered political party" were to be added to the definition of public body, a provision of section 5 could be drafted to make it clear that the *Act* only applies to *personal* information collected, used, and disclosed by political parties, and the access to information aspect would therefore be limited such that individuals would only be able to access their own personal information. As for the privacy provisions, a number of those would also not be applicable, which could be referenced in section 5.

> The process for an access to information request should apply to political parties as it currently exists, as well as appeal and oversight by the Commissioner. In terms of the privacy provisions, again, some would not be applicable to political parties; however even if section 64 were to apply, along with the privacy complaint and oversight provisions, this would be a significant step forward. By proceeding in this incremental fashion, the efficacy of this approach could be reconsidered and potentially expanded at the next statutory review of *ATIPPA, 2015*.
>
> It's recommendation, at page 40:
>
> **<u>Recommendation 8.1</u>: broaden the scope of *ATIPPA, 2015* to include political parties by adding "registered political party" to the definition of a public body in section 2; and make corresponding amendments to section 5 to limit the access to personal information collected, access and used by political parties; and make further amendments to section 5 to ensure that only the appropriate privacy sections of the Act apply to political parties.** (Emphasis in original)

The Committee forwarded the submission and recommendation of the OIPC to the registered political parties in this province asking for their comments. Only one party replied. The reply of the Progressive Conservative Party of Newfoundland and Labrador:

> Our party respects an individual's expectation of privacy in the context of data collection and otherwise, but we feel that the above-referenced recommendation, insofar as treating a registered political party as a public body for the purpose of privacy legislation, is inherently problematic in encouraging and facilitating government oversight of political activities, and is, frankly, impractical, given the lack of resources available to political parties in attempting to ensure compliance with same.
>
> We suggest that one might reasonably presume that the preamble to the recommendation, "*No jurisdiction presently has such legislation*", is telling in that it begs the question as to why no other jurisdiction has seen fit to introduce such legislation, including jurisdictions with political parties that are significantly more resourced than our local parties. Our understanding is that the reference to the British Columbia legislation should also be distinguished as it pertains to the private sector, whereas the proposal here would be to include any registered political party as a "public body."
>
> If said amendment were to be introduced, it would create an inherent anomaly as the political parties would be the only entities under this contemplated definition that are not directly funded or directed by the Provincial Government. We believe that introducing this unprecedented level of oversight and access to the inner workings of a party, including membership lists, corre-

spondence, and the like, would introduce more mischief to the privacy equation than that which would be sought to be alleviated by such an amendment.

Finally, in the absence of a clarification as to what is meant by "*to ensure that only the appropriate privacy sections*" are applied, we suggest that any such application of the Act to political parties be taken with the utmost caution and due diligence.

We also query the practical implementation of any such change. We posit that in jurisdictions with political organizations at provincial and national levels boasting multi-million dollar budgets for staffing and information management systems, questions as to the volume and security of collected data might be more pertinent. In Newfoundland and Labrador, the Progressive Conservative Party is one of the two largest political parties in the province. We, at present, do not have the resources to acquire the expertise to implement the required measures as would be expected under the proposed legislative amendment. While there may sometimes be a perception of "too much money" in politics, the local reality is starkly modest.

Except for funding elections, our organization, at present, is 100% volunteer-led and administered. With an annual budget of less than Twenty Thousand Dollars ($20,000) for our entire organization, and often with legacy debt and financial obligations with which to contend, it would be impractical and financially unfeasible for us to meet stringent reporting guidelines as would be required under the proposed legislative amendment.

We do not have the expertise at our disposal to implement the expected requirements. For example, while we currently have internal protocols for the collection, storage, access and usage of personal information, the proposed legislative change would require:

- protocols for addressing inquiries and complaints;
- trained personnel and resources;
- strict adherence to timelines and deadlines; and
- legal support.

Given the challenges emanating from the current legislation, there is also a probability that such legislation would be used to perpetuate mischief with an aim toward derailing a political agenda. A large volume of inquiries would necessitate significant human and financial resources, with no provision for any reimbursement to said political parties for expenditures required for compliance with said requests. There is, of course, also, the possibility of targeted requests in times such as elections, or other critical events, to preoccupy party resources so as to circumvent a political party's priorities.

> Quite simply, the level of data in question, and date management tools employed, simply lack the sophistication that would be required to ensure compliance with this proposed legislative amendment.
>
> As well, there are many unresolved questions as to the duties to be imposed on members of political parties. For example, personal data held at the party level (membership lists, for example) are often disseminated to local district associations, candidates, leadership candidates, and related volunteers during the normal course of their duties. While there are internal protocols to prescribe the responsibilities of holders of such data, practically, the level to which these can actually be managed and audited by a group of volunteers is questionable.
>
> Finally, our overarching fear with the implementation of such legislation vis-à-vis political parties would be a significant decrease in the level of engagement in the political process by individuals. As a volunteer organization with limited resources, the imposition of additional legal requirements such as those contemplated, in the absence of any additional resources to meet those requirements, may effectively dissuade an already small group of people from further political engagement. The dedicated volunteers currently maintaining membership lists, for example, may be quick to absolve themselves of said responsibilities for fear of potential liabilities.
>
> It is perhaps trite to note that governing parties generally find themselves in stronger financial standing than their opposition counterparts; as such, a governing party would be better resourced to meet the requirements of the proposed legislative amendment. We cannot stand for legislation that would effectively aggravate the political imbalance that often exists between governing and opposition parties.

To date, the only legislation in Canada which provides for protection of personal information in the possession of political parties is in British Columbia. The privacy legislation of that province encompasses political parties.

One of the Terms of Reference of this Committee requires it to consider whether "there are any entities which would not appear to meet the definition of "public body" but which should be subject to the *ATIPPA, 2015*".

It is true, as emphasized by the submission of the Progressive Conservative Party, that political parties are not public bodies as such and are not publicly funded. However, it is a fair reading of the Wells Committee report that the Committee was sufficiently concerned about the protection of personal information by political parties that it specifically drew "the problem" to the attention of government.

Political parties, while private entities, are not like commercial or other private organizations. They exist at the boundary between public and private bodies with an objective directed solely or primarily at governing or influencing governance. It is reasonable to conclude that the store of personal information acquired by political parties, through various means, will continue to increase and will be subject to whatever analyses present and future technology may enable.

Given the unique role of political parties in our democratic system, broadly defined, it is appropriate now to accept that a degree of regulation and oversight of the collection, use and disclosure of personal information is needed.

It is well beyond the scope, resources and timing of this Committee to embark on the consultative, deliberative and other processes that are necessary if a considered and comprehensive regulatory and oversight regime is to be created.

But, as said elsewhere in this report, the future is now and I recommend that government commit to the development of a regulatory and oversight regime, through *ATIPPA, 2015* or otherwise, covering the collection, use and disclosure of personal information by registered political parties.

RECOMMENDATION

Administrative:

- That government proceed expeditiously with the development of a regulatory and oversight regime covering the collection, use and disclosure of personal information by registered political parties.

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STUDENT SUPPORT SERVICES

The submission of the College of the North Atlantic spoke to the periodic need to share students personal information with counsellors or caregivers in order to ensure that a particular need of a student is properly met.

From the written submission, at pages 2–3:

> 3. Specific access and privacy provisions for records of student support services.
>
> CNA's values diversity and we strive to provide excellence in education to all individuals. This sometimes requires us to collect and use a wide variety of personal information, some of which is highly sensitive such as personal information related to disability accommodations and educational counselling. Decisions have to be made and plans executed to ensure everyone gets a fair opportunity to achieve excellence. To inform these decisions community based individuals like counsellors and caregivers or government agencies such as other educational bodies, health authorities or funding agencies may need to be consulted to provide the best educational experience for an individual. We request a provision be set out in the ATIPPA to enact a circle of care approach to these records. This would allow for the involvement of necessary third parties in these processes.

During the public hearings, Heidi Staeben-Simmons, the Associate Vice-President of Public Affairs of CNA explained the position:

> **MS. STAEBEN-SIMMONS:** … Like personal health information, educational information is comprised of unique records for students. The collection, use and disclosure of these records can be different from the normal transaction of government services. For example, the college is sometimes required to collect and use a wide variety of personal information, some of which is highly sensitive to those individuals such as personal information related to disability accommodations, educational counselling – those types of sensitive records.
>
> **CHAIR ORSBORN:** Are you saying that's not protected now?
>
> **MS. STAEBEN-SIMMONS:** No, we're looking for a little bit greater protection. They are protected.
>
> **CHAIR ORSBORN:** Greater protection in what sense?

MS. STAEBEN-SIMMONS: If you'll indulge me and then I'll answer. Okay.

Decisions must be made and plans executed to ensure that all students get a fair opportunity to succeed and have excellence within their education. Sometimes, we need to consult guidance counsellors, high school guidance counsellors, community-based psychological counsellors, those types of individuals in the community. All this is with a view to carrying out the best possible outcomes for students, so it's a little bit of mixed message there.

CHAIR ORSBORN: Can you seek consent in those situations?

MS. STAEBEN-SIMMONS: Well, we can. Consent is not always timely and not always well understood so that it's given and provided. If we don't have consent we can't, obviously, have those conversations and we can't provide the best possible pathway for students.

CHAIR ORSBORN: So you're looking for some kind of provision that would allow you to disclose personal information without consent in some kind of circumstance.

MS. STAEBEN-SIMMONS: Within what we would call a circle of care, similar to what they have within the *Personal Health Information Act*, so those individuals who are involved in the delivery of particular services to a student. (Transcript – January 19 – page 80)

The disclosure of personal information without the consent of the individual concerned is permitted by *ATIPPA, 2015* in limited circumstances. In particular, where there are compelling circumstances affecting a person's health or safety, information may be disclosed (sections 40, 68, 69).

While I appreciate the concern of CNA, I was not given sufficient information about the circumstances under which non-consensual disclosure would be needed to support the recommendation sought. Outside the circumstances encompassed by the *Personal Health Information Act*, the concern may be more an issue of convenience than an inability to address the needs of a particular student. It seems to me that in most circumstances, an appropriately worded informed consent and the present personal information disclosure and use provisions of the *Act* would provide the necessary degree of disclosure authority.

ALUMNI ENGAGEMENT

The College of the North Atlantic suggested that a post-secondary educational body be permitted to allow the use of personal information in its alumni records for more purposes than fundraising. The present s. 67(1):

> *67. (1) Notwithstanding section 66 , a post-secondary educational body may, in accordance this section, use personal information in its alumni records for the purpose of its own fundraising activities where that personal information is reasonably necessary for the fundraising activities.*

The written submission, at page 3:

> Currently, section 67 of the ATIPPA only allows for the use of information about students for fundraising purposes. We would like to see this expanded to include more general outreach. This ensures that we can reach former students with opportunities to engage with each other and with current students of the college. With the acknowledgement that the individual always has the right to opt out of receiving communications from us, CNA requests that s.67 be broadened to include alumni engagement activities more generally.

And from the public hearings:

> **Ms. Staeben-Simmons:** … Much of our engagement to our alumni goes beyond fundraising. We would enhance our relationship with our alumni in a number of ways, such as co-operative educational opportunities for our students, mentoring, peer-tutoring opportunities and networking events. We would ask that section 67 be amended to explicitly allow for these activities.
>
> **CHAIR ORSBORN:** With the opt-out.
>
> **MS. STAEBEN-SIMMONS:** Right. (Transcript – January 19, 2021 - Page 81)

This is a valid suggestion. I recommend that, subject to the periodic notification requirements in subsection 67(2), a post-secondary educational body be permitted to use personal information in its alumni records not only for the purposes of fundraising but also for outreach and engagement purposes. This expanded provision should remain subject to the ability of an individual to require the educational body to stop using the personal information for such purposes.

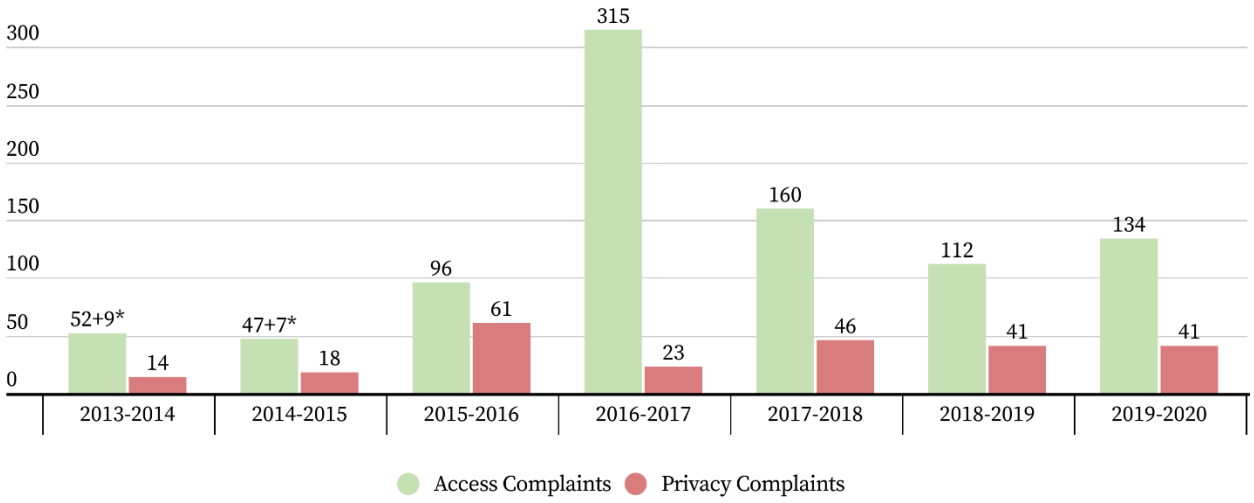
RECOMMENDATION

That the *Act* be amended to:

- Allow post-secondary educational bodies to use personal information in alumni records for outreach and engagement purposes. [Appendix K, s. 67]
- Allow alumni to request that their personal information cease to be used for outreach and engagement activities. [Appendix K, s. 67(2)(c)]

The process initiated by the filing of the complaint under s. 47 generally works well. Nonetheless, the Committee received a number of recommendations addressing specific concerns within that process.

Access and Privacy Complaints, 2013-2020



*These numbers refer respectively to Requests for Review and Access Complaints, which were both part of ATIPPA prior to 2015.

PARTIES TO A COMPLAINT

Section 44 requires the commissioner to notify the "parties" to a complaint and provide an opportunity to make representations to the OIPC. In circumstances where the public body has relied on s. 39 to withhold information – and recognizing that if the recommendations of this report are accepted, then any refusal of access pursuant to s. 39 will in all likelihood be based on an assessment of harm to a third party – the third party in question should be considered a party to the complaint.

I recommend that the *Act* be amended accordingly.

RECOMMENDATION

- That the *Act* be amended to provide that when a complaint is made regarding information witheld due to third party business interests, the third party is considered a party to the complaint. [Appendix K, s. 44(1.1)]

COMPLAINT INVESTIGATION PROCESS

A number of public bodies expressed concern about the timeliness and process of the commissioner's investigation of complaints – from receipt of a complaint to the making of a formal recommendation.

The operative provisions of the *Act*:

> *44.(1) The commissioner shall notify the parties to the complaint and advise them that they have 10 business days from the date of notification to make representations to the commissioner.*
>
> *(2) The parties to the complaint may, not later than 10 business days after notification of the complaint, make a representation to the commissioner in accordance with section 96 .*
>
> *(3) The commissioner may take additional steps that he or she considers appropriate to resolve the complaint informally to the satisfaction of the parties and in a manner consistent with this Act.*
>
> *(4) Where the commissioner is unable to informally resolve the complaint within 30 business days of receipt of the complaint, the commissioner shall conduct a formal investigation of the subject matter of the complaint where he or she is satisfied that there are reasonable grounds to do so.*
>
> *(5) Notwithstanding subsection (4), the commissioner may extend the informal resolution process for a maximum of 20 business days where a written request is received from each party to continue the informal resolution process.*
>
> *(6) The commissioner shall not extend the informal resolution process beyond the date that is 50 business days after receipt of the complaint.*

Section 96 speaks to investigations:

> *96.(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.*
>
> *(3) The commissioner may decide whether representations are to be made orally or in writing.*
>
> *(4) Representations may be made to the commissioner through counsel or an agent.*

Section 45 sets out certain circumstances in which the commissioner may refuse to investigate a complaint. If an investigation is pursued, time limits are imposed:

> *46.(1) The commissioner shall complete a formal investigation and make a report under section 48 within 65 business days of receiving the complaint, whether or not the time for the informal resolution process has been extended.*

A supplementary submission of the ATIPP Office summarized the concerns, at page 11:

> **6. OIPC Complaint process**
> **6.1 Clarification re: process**
> Issue
> A number of public bodies brought forward recommendations regarding the OIPC and their investigatory functions. Since our submission in November, 2020, our Office has become aware of a number of concerns with the complaint process that would be in line with the recommendations brought forward. Of particular concern, is the process when an investigation moves from the informal to formal investigation stage.
> Prior to 2015, public bodies were able to provide formal submissions to the OIPC once a formal investigation was initiated, as the matter was unable to be resolved informally. This afforded the public body, and presumably the complainant, the opportunity to provide a final summary of their positions, which may include additional information that only became relevant during the informal investigation stage.

However, since 2015, in order to meet their legislated timelines, the OIPC has changed their process significantly, including the process for public bodies to provide a response regarding a complaint. Generally speaking, submissions must be provided within the first 10 business days of notification of the complaint, when it is still in the informal resolution stage.

It has been our experience that there is communication through the informal stage of the investigation. The OIPC provide their general findings and provide the public body, and presumably the complainant, the opportunity to respond in an effort to resolve the matter before requiring a formal investigation. However, it appears that once the informal stage of the investigation has completed that the level of communication varies. While in some cases there could be additional communication, there have been cases where there is no communication with the public body until the final report is issued. This is of particular concern in cases where the OIPC appears to agree with the position of the public body toward the end of the informal stage and has indicated they will try to resolve the matter informally. However, without any further communication, the public body receives the final report in which the OIPC has taken a different position on the matter.

The Act is extremely prescriptive when it comes to public body requirements, however, does not appear to hold the OIPC to the same standard in terms of documentation and communication during the complaint process.

Suggestion

Consider amending the provisions regarding the complaint process with the OIPC. For example, if a complaint cannot be resolved informally and it moves to the formal investigation stage, it should be mandatory for the OIPC to notify the public body and complainant and opportunity be provided to both parties to provide additional submissions prior to the final report being issued.

Additionally, the OIPC should be legislatively required to provide the public body and the complainant with their general findings during the informal stage of the complaint, to ensure both parties have sufficient information when completing their final submission (if the suggestion above is made). This is of particular importance in cases where the OIPC has indicated that they agree with a party's position, but then issue a report that takes the opposite or varying position.

6.2 Authority to not investigate a complaint

Issue

Sections 45 and 75 of the Act provide the OIPC with the discretion to not investigate a complaint under specific circumstances. The City of Corner Brook

has recommended that these provisions be amended to be mandatory rather than discretionary.

Our Office is aware of an instance where a complaint was received where the individual was unable to provide specific details or any supporting documentation other than a statement that they thought someone in a public body had inappropriately breached their privacy four or five years ago. This complaint was forwarded to the public bodies they had identified as potentially breaching their privacy, without any further questions or follow-up with the complainant.

With such limited details, it was extremely difficult for the public bodies to determine whether the individual's privacy had been breached, and provide the OIPC with the level of detail they require within 10 business days. One question brought forward by one of the public body's was whether the OIPC had contacted the complainant, or anyone else with supporting information to confirm whether a breach had even occurred. They did not, but rather accepted the complaint and forwarded to the public bodies prior to obtaining sufficient details to allow the public bodies to fully investigate the matter or respond to the complaint in a meaningful way.

If similar complaints continue to occur, with limited details being provided to the public body, the coordinator may be required to consult more staff than necessary in order to determine to what the individual's complaint is in relation. This would impact the number of people to whom the complaint is disclosed. This potential for unnecessary disclosure would be mitigated if public bodies were only notified of the complaint once the OIPC obtained sufficient details for them to respond.

Our Office recognizes that complainants are unlikely to be fully versed in privacy legislation and requirements, and may need the OIPC to assess whether a complaint is warranted. As such, complainants should not be expected to have detailed arguments prepared about how the law was not followed. However, complainants should be able to provide sufficient factual details to assess the complaint. If they do not have these details, the onus should be on the OIPC to either use their discretion not to investigate or to work with the complainant to obtain sufficient details, which may include obtaining their consent to contact others who may be able to assist in the matter. Furthermore, this should be done prior to notifying a public body.

Suggestion

Consider whether to amend the Act to require the OIPC to communicate with the complainant and receive sufficient details to proceed prior to sending the notification to the public body.

6.3 Time limit for responding to a complaint (s.46)

Issue

> The College of the North Atlantic recommended that the timeframe set out in section 46 be extended beyond 65 days, while Tourism, Culture, Arts and Recreation suggested the 10 day timeframe provided to public bodies to respond to complaints be extended.

Suggestion

> As noted above, the current policy of the OIPC is to provide public bodies with 10 business days to respond to a complaint once notified. If the Committee determines that extending the timeframe for an OIPC investigation is appropriate, we would suggest that consideration be given to amending the Act to provide provisions outlining the timeframe allotted to public bodies and complainants to respond to a complaint in both the informal and formal stages of the investigation. Furthermore, if the timeframe is extended, and provisions regarding the above are added, the timeframe for responding should be greater than 10 business days.

Once a complaint is received by the commissioner the *Act* contemplates that the parties and the commissioner will first direct their efforts to an informal resolution of the complaint. This, of course, is the approach to be preferred. The informal resolution process can be as long as 50 days following receipt of the complaint, but should no informal resolution be reached, a formal investigation must follow and a report be made within 65 days of receipt of the complaint unless that time is extended by the court. The *Act* does not provide for a formal transition from the informal process to the investigation/report/recommendation functions.

The overall time allowed to consider, investigate, attempt to resolve and report on a complaint is over three months. The submission from the ATIPP Office refers to the view of the College of the North Atlantic. That body's submission, at pages 5–6:

> CNA supports the time frames set out in the ATIPPA for processing an ATI request and we commend the excellent work the OIPC has done to streamline the processes for requesting a time extension, disregarding a request etc.
>
> We would respectfully request an increase in the 65 day timeframe set out in section 46 of the ATIPPA in which a formal investigation of the OIPC must be completed. The changes made to the ATIPPA in 2015 greatly impacted the investigation process. For example, the only option to dispute the recommendations of a report of the Commissioner's formal investigation is to seek a decla-

> ration of in the Supreme Court. It is therefore critical that a public body be able to take the necessary steps, complete the necessary consultation and develop the necessary legal representations to fulfil the burden of proof. The current timeframe can make doing this overly burdensome.

This submission refers to the time needed by a public body after a report is issued and recommendations received. I recognize that during an investigation a public body may well be considering its options should an unfavourable recommendation be received, but I am not persuaded that the submission supports a recommendation to extend the pre-report process beyond 65 days.

The submission of the Department of Tourism, Culture, Arts and Recreation focused on the initial 10 day response mandated by s. 44(2), at page 3:

> On occasion and in accordance with the ATIPPA, 2015, responses to applicants are challenged and investigated by the OIPC. The majority of this department's interactions with the OIPC have been cordial and professional so the following observations are meant to help with the workload associated with the ATIPP process. Once, a complaint is filed with the OIPC, the department has 10 business days to respond. This, however, does not take into account the ongoing workload of the department. More time for response to the OIPC should be a consideration if the department is to undertake OIPC challenges and investigations while conducting normal departmental ATIPP responsibilities. In addition, in cases where the OIPC may be aware of records that were not provided to an applicant, it is incumbent upon the OIPC to share those records with the public body so that public body can determine why a particular record may no longer be in custody.

The Committee has not received much comment on this issue. But responding to a complaint and making considered representations in accordance with s. 96 is not an endeavor that should be done in haste or be made subject to undue pressure of time.

In order to allow a meaningful informal resolution process, the initial representations by both the complainant and the public body should be comprehensive and balanced. Within the total 65 days allowed for the process, I see no prejudice in allowing an additional five days for the making of representations and allowing the basic informal resolution process to extend to 35 days. The ability of the commissioner, on request, to extend the informal resolution process should be reduced from 20 to 15 days, thus keeping the entire informal resolution process to its present 50 days.

I recommend that subsections 44(2), (4) and (5) be amended accordingly.

With respect to the other complaint process suggestions advanced by the ATIPP Office, I am not prepared to recommend incorporating into legislation processes or acts that should be considered as normal and expected in any resolution or investigative process carried on by an independent body.

I have commented earlier on the necessity for the OIPC doing its best to demonstrate its independence and objectivity while at the same time advocating for access. The demonstration of fairness and objectivity is an essential element of a process intended to reach a resolution without recourse to a formal report and perhaps litigation. Recognizing that I am not aware of the particular circumstance referred to in the ATIPP Office's submission, I would simply observe that, on its face, issuing a formal report that, without notice, varies significantly from a previously expressed position does not instill confidence in the objectivity of the review function.

On occasion, as mentioned in the ATIPP Office submission, the OIPC may receive a complaint with little if any supporting detail. Such a circumstance would I think be unlikely in the case of a grant or refusal of access to information, but could occur with respect to an alleged privacy breach. In such a circumstance, the OIPC is the first and perhaps only current contact with the complainant and should ensure that the complainant provides sufficient detail of the complaint to enable the public body to identify the circumstance in question and respond usefully. Advising a public body of a vague nonspecific complaint is not productive. The public body needs to know 'the case to be met' and in the absence of the complainant providing the necessary particulars to the OIPC, the OIPC should seriously consider exercising its s. 45 authority to refuse to investigate the complaint.

I reiterate that not all issues or concerns can or should be addressed by legislation. But I do consider it appropriate to offer some suggestions that may improve the process. The application of each will of course depend on the circumstances of the particular complaint.

RECOMMENDATION

That the *Act* be amended to:

- Allow an additional five days for parties to a complaint to make representations to the commissioner and for the initial informal resolution process. [Appendix K, s. 44(2) and (4)]
- Reduce the commissioner's optional extension to the informal resolution process by five days. [Appendix K, s. 44(5)]

Suggestions:

- If a complaint contains insufficient particulars to allow a public body to identify the circumstance in question and respond meaningfully, the OIPC should seek further particulars from the complainant. If no such particulars are forthcoming, the OIPC should consider refusing to investigate the complaint.
- The OIPC formally advise the complainant and the public body of the cessation of the informal resolution process.
- The OIPC advise the complainant and the public body no later than five days following the cessation of the informal process of the general conclusions of the OIPC with respect to the complaint and the likely recommendation(s).
- After being so notified, the complainant and the public body be given five days within which to provide the OIPC with a final written submission, should they so choose.

TIME FOR COMPLIANCE WITH RECOMMENDATIONS

Some have suggested that the timelines for a response to the commissioner's recommendations be extended, thus allowing more time for consideration of compliance or

for the filing of an application for a declaration by the Supreme Court pursuant to s. 50(2).

At present, s. 49 stipulates that a public body has 10 business days in which to declare to accept or reject a recommendation and, if necessary, prepare and file a court application:

> *49. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,*
>
> *(a) decide whether or not to comply with the recommendation in whole or in part; and*
>
> *(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.*
>
> *(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.*

It may well be that this is a tight timeframe. But by this stage, the public body should be fully engaged with the request and with any ramifications of the release of the requested information. The matter has gone through the informal resolution and the complaint processes and, if the suggestions outlined in this section of the report are adopted as a matter of practice, the public body should be well informed on the relevant issues. Allowing for more time beyond the present 10 days for still more thought and reflection would allow an unacceptable delay in the final determination of the applicant's right of access.

It was also suggested to the Committee that there should be a legislated time limit for a public body to comply with and put into effect a decision to accept a recommendation. Given the infinite variety of circumstances that a particular recommendation may engage, I do not consider it appropriate to recommend a legislated time limit for compliance. Should compliance with an accepted recommendation – a legal obligation – be unduly delayed, I would expect that an applicant would seek the assistance of the Supreme Court. No amendment is recommended.

An applicant may make a complaint to the OIPC in certain circumstances:

> *42. (1) A person who makes a request under this Act for access to a record or for correction of personal information may file a complaint with the commissioner respecting a decision, act or failure to act of the head of the public body that relates to the request.*

Upon receipt of a complaint, and subject to limited exceptions, the commissioner must investigate the complaint. The parties may make representations during this process; the commissioner can take steps to "resolve the complaint informally", provided that this process lasts no longer than 50 days after receipt by the commissioner of the complaint (s. 44).

If there is no resolution, the commissioner completes the formal investigation and makes a report that may contain recommendations:

> *47. On completing an investigation, the commissioner may recommend that*
>
> *(a) the head of the public body grant or refuse access to the record or part of the record;*
> *(b) the head of the public body reconsider its decision to refuse access to the record or part of the record;*
> *(c) the head of the public body either make or not make the requested correction to personal information; and*
> *(d) other improvements for access to information be made within the public body.*

The *Act* sets out further processes in sections 48–49, including the obligation of the public body to make a timely decision with respect to compliance with the commissioner's recommendations. Sections 50–54 provide avenues to the Supreme Court to obtain either an order requiring compliance or otherwise with the recommendation, or a declaration that compliance is not required.

In these provisions, the language of 'entry' to the court and that of its remedial authority has caused some concern in public bodies.

Section 50 sets out circumstances in which a public body is required to apply to the Supreme Court for a declaration to, essentially, authorize non-compliance with the recommendation of the commissioner. The reasons for seeking a declaration:

50.(2) … because

> *(a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;*
>
> *(b) the head of the public body is required under this Part to refuse access to the record or part of the record; or*
>
> *(c) the decision of the head of the public body not to make the requested correction to personal information is in accordance with this Act or the regulations.*

This section speaks to the issues of access and correction of personal information.

In certain circumstances, the commissioner may prepare and file an order in the Supreme Court. Any order is confined to issues of access or correction:

51.(2) The order shall be limited to a direction to the head of the public body either

> *(a) to grant the applicant access to the record or part of the record; or*
>
> *(b) to make the requested correction to personal information.*

An applicant may seek the intervention of the Supreme Court without first filing a complaint with the OIPC:

52. (1) Where an applicant has made a request to a public body for access to a record or correction of personal information and has not filed a complaint with the commissioner under section 42 , the applicant may appeal the decision, act or failure to act of the head of the public body that relates to the request directly to the Trial Division.

The grounds for an appeal under this section include not only a decision of the head of the public body – presumably regarding access – but also an "act or failure to act" of the head. It may be that the phrase "act or failure to act" is intended to encompass a decision of the head of a public body to make or not to make a correction to personal information.

Under s. 53, a third party may appeal directly to the Supreme Court on decisions relating to a grant of access. That this section is limited to a question of access may also

suggest that an "act or failure to act" involves an issue of correction of personal information, an issue that would not be of relevance to a third party.

If an applicant or third party does initiate the complaint, informal resolution and s. 49 recommendation process, they may, following the head's decision to comply or otherwise with the recommendation of the commissioner, file an appeal with the court:

> *54. An applicant or a third party may, not later than 10 business days after receipt of a decision of the head of the public body under section 49 , commence an appeal in the Trial Division of the head's decision to*
>
> *(a) grant or refuse access to the record or part of the record; or*
>
> *(b) not make the requested correction to personal information.*

Thus, notwithstanding the scope of the authority of the OIPC to make various recommendations in s. 49, any appeal to the court following an investigation by the commissioner can address only a head's decision in response of an OIPC recommendation to grant or deny access or to correct personal information.

Section 59 requires the court to "review the decision, act or failure to act" of the head as a new matter.

The remedial authority of the court:

> *60. (1) On hearing an appeal the Trial Division may*
>
> *(a) where it determines that the head of the public body is authorized to refuse access to a record under this Part and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, dismiss the appeal;*
> *(b) where it determines that the head of the public body is required to refuse access to a record under this Part, dismiss the appeal; or*
> *(c) where it determines that the head is not authorized or required to refuse access to all or part of a record under this Part,*
>
> *(i) order the head of the public body to give the applicant access to all or part of the record, and*
>
> *(ii) make an order that the Court considers appropriate.*

(2) Where the Trial Division finds that a record or part of a record falls within an exception to access under this Act and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, the Court shall not order the head to give the applicant access to that record or part of it, regardless of whether the exception requires or merely authorizes the head to refuse access.

(3) Where the Trial Division finds that to do so would be in accordance with this Act or the regulations, it may order that personal information be corrected and the manner in which it is to be corrected.

The court's determinations are limited to those relating to a grant or refusal of access and the correction of personal information. (Also, in passing, I note that the phrase "dismiss the appeal" may not be appropriate in the case of a third party who appeals a decision to grant access and who is successful in persuading the court that the public body is required to refuse access (s. 60(1)(b)). In this case, the appeal would, I believe, be allowed.)

This process is detailed and comprehensive. But it raises questions about the consequences of OIPC recommendations other than those relating to a grant or refusal of access to information or a correction of personal information. Specifically, what are the consequences of a recommendation to reconsider a decision (paragraph 47(b)) or to make some other access related improvement within the public body (paragraph 47(d))?

The Committee received competing submissions on how such recommendations should be handled.

The OIPC recommends that s. 47 and related sections be amended to make it clear that a public body's "failure to act" – in cases other than those involving a grant or refusal of access or a correction of personal information – may in all cases be the subject of an appeal to the Supreme Court as outlined above. At present s. 54 – appeal after a recommendation of the OIPC – refers only to a grant or refusal of access or correction. However, the direct right of appeal in s. 52 – an appeal without involvement of the complaint process and the OIPC – includes "failure to act" as a ground of appeal. As already mentioned, this language may have been included to ensure that an applicant could appeal a refusal to correct personal information. However, the OIPC suggests that "a failure to act" could include a failure to assist an applicant, a failure to conduct any or an adequate search, or some other failure in fulfilling what an applicant may consider to be a statutory obligation of a public body. The OIPC recommends that it be made clear that there is an avenue of appeal where an applicant feels that a public body has, for exam-

ple, not complied with an OIPC recommendation to reconsider a decision or conduct a new search.

The OIPC's submission, at page 50:

> Section 47(b) sets out an option for the Commissioner to recommend that a public body reconsider its decision to refuse access to a record or part of a record. Such an option is well-suited to a scenario where the public body has applied an exception, and the OIPC has received a complaint and agrees that the exception applies, but it is clear that the public body has not adequately considered the exercise of discretion. While these scenarios are not frequent, they do occur, and we believe a provision like section 47(b) has a place in *ATIPPA, 2015*.
>
> The circumstance here is not one in which there is a public interest to the extent that section 9(1) comes into play. In weighing the purpose for the exception against the reasons for exercise of discretion, there are times when public bodies have failed to fully take into account those impacts in comparison with the reason for the exception, and have withheld information when disclosure would cause little if any harm.
>
> Despite the intent of section 47(b), we have not utilized it in any Commissioner's Reports. The main reason for this is uncertainty regarding the appeal process. In the circumstance described above, we could issue a Report making a finding that the exception applies and a recommendation under 47(a) that the public body refuse access, and this clearly preserves the applicant's right to file an appeal in section 54. While we believe that a recommendation under section 47(b) would result in either a new or a re-confirmed decision, it is not clear where that leaves the applicant's right to appeal. Arguably the new or reconfirmed decision could then come back to the Commissioner for review, however if we have already agreed that the exception applies, it is not clear what the process is from there to an appeal.
>
> **OIPC's Recommendation 13.1: Amend Part II, Division 3 to clarify that the applicant retains a path to appeal in the Trial Division if the Commissioner makes a recommendation under 47(b).**
>
> *Clarity of Breadth of Applicant's Right of Appeal*
>
> It is our view that any time an access to information applicant files a complaint under section 42, there is a clear path through the Commissioner's review process to an appeal at the Trial Division. Section 42 is quite broad in its

language – the threshold is that the complaint must be a matter "respecting a decision, act or failure to act of the head of the public body" and it need only "relate to the request" for access or correction. Under ATIPPA, 2015, a complainant has two options – they may go to the OIPC, or they may go directly to the Trial Division, where the language in section 52(1) closely mirrors that of section 42.

A decision, act, or failure to act takes in a lot of ground. Particularly when it comes to a failure to act, some of those alleged failures can relate to a failure to assist the applicant in making the request. Section 13 of ATIPPA, 2015 requires that public bodies respond without delay in an open, accurate and complete manner. The duty to assist in section 13 is a common feature of access to information statutes everywhere, and numerous Commissioner's Reports have been issued dealing with that subject, including, for example, the duty to conduct an adequate search for records. The standard for an adequate search, in brief, is that public body officials who are knowledgeable about the subject matter of the request must search where such records are reasonably likely to be found. Often adequacy of search issues are resolved during informal resolution, but not always. If, at the end of the process, the requester has the basis to make a complaint that the search was not adequate, they have an opportunity to make that case directly to the Trial Division in section 52, or to first go to the Commissioner under section 42, which will cost less, occur more quickly, and more often than not will be resolved informally.

If a requester decides to first pursue the matter through a complaint to the Commissioner, they should not be penalized by the placement of a roadblock against subsequent appeal to the Trial Division. In our view, that is not what is intended by the language in section 54(a). Section 54 provides for appeals to Court following a public body's response to a Commissioner's Report. Section 54(b) states that an applicant (or third party) may commence an appeal of "the head's decision to grant or refuse access to the record or part of the record." In our view, if a public body decision, act or failure to act results in the applicant not getting the records requested, this amounts to a refusal to grant access, and is encompassed within section 54.

In recent years Memorial University, one of the province's largest and most influential public bodies, has adopted a restrictive view of this process. For example, in issuing our Report A-2019-032 we agreed that Memorial had conducted a reasonable search, and recommended that it maintain its position regarding the request for records by the Applicant. When we address a reasonableness of search issue, Memorial University has unfortunately developed

boilerplate language which it inserts in its section 49 letter of response that states:

> *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 grants 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 of personal information.*

In our view, this is contrary to section 49, which requires the head of the public body to decide whether to follow our recommendations (49(1)(a)) and give written notice of that decision to relevant parties. Section 49(3) specifies the contents of that notice, including the right of appeal. In our view, such an approach to statutory interpretation is not consistent with the purpose of *ATIPPA, 2015* and contrary to the principles of statutory interpretation. Eventually this may have to be addressed by a Court, however this statutory review presents an opportunity to do so that will avoid the cost and delay of a Court process for all parties.

OIPC's Recommendation 13.2: Amend Part 2, Divisions 3 and 4 for greater certainty to clearly establish that an applicant's right of appeal to the Trial Division following a complaint to the Commissioner's Office is equally as broad as the right of appeal granted under section 52 when the applicant goes directly to Court, and that it encompasses any decision, act or failure to act which results in the applicant not receiving the requested records.

As pointed out in the OIPC's submission, Memorial University takes a contrary view. It suggests that the *Act* be clarified to make it clear that what it refers to as a 'soft' recommendation cannot be the subject of an appeal. The University's submission, at pages 27 – 28:

> The *ATIPPA, 2015* contains no provision specifying how a public body responds to a Soft Recommendation. Further, section 49 specifies that no later than 10 business days after receiving the Commissioner's recommendation, the public body must notify the Commissioner and any person who was sent a copy of the report, which notice must:
>
> ….include notice of the right
>
> (a) of an applicant or third party to appeal under section 54 to the Trial Division [General Division] and of the time limit for an appeal; or

(b) of the Commissioner to file an order with the Trial Division [General Division] in one of the circumstances referred to in subsection 51(1). (ss 49(3))

This section does not adequately delineate that the notice regarding the appeal provision ought only be provided with respect to Hard Recommendations. This has placed public bodies in the position of having to notify applicants of a right of appeal under section 54 where no such right exists, or to amend its notice with the clarification that while it is obligated to advise the applicant of section 54, there is no right of appeal in the circumstances. The Information and Privacy Commissioner has frowned upon the latter approach. The former results in the filing of unnecessary appeals that are outside the legislative framework, resulting in increased costs to a public body.

Memorial University's Recommendation #8:

Memorial University recommends

- Section 48 be amended to clarify that the Commissioner should distinguish between Soft and Hard Recommendations in his reports.

- Section 49(3) be amended to clarify that notice of the right of appeal in a public body's decision letter is only required where the Recommendation in question is regarding the granting or refusing of access to the record or part of the record; or, not to make a requested correction to personal information.

The different positions in the submissions point to the desirability of clarification of the avenues for adjudication and enforcement open to an applicant who, apart from issues involving the grant or refusal of access to information or the correction of personal information, believes that a public body has 'failed to act' – in other words, has not met its other obligations under the *Act*. The disposition of complaints other than those involving the right of access and the correction or protection of personal information was not an issue raised before the Wells Committee.

The phrase "act or failure to act" has been in the ATIPP legislation since at least 2002. It has not, until very recently, been the subject of comment. In *ATIPPA, 2015* the phrase appears in: s. 42(1) – complaint to the commissioner; s. 52 – applicant's direct appeal to the Supreme Court; s. 56(4) – no right of commissioner to intervene in an appeal when the commissioner has refused to investigate; s. 59(1) – conduct of appeal; 83(1) – procedure in Supreme Court regarding declaration with respect to personal information. The current s. 60 – the remedial authority of the court – is generally con-

sistent with the previous legislation – see for example, s. 63(1) of *ATIPPA,* SNL 2002 c. A-1.1.

The ability to pursue an appeal with respect to a "failure to act" was addressed in a very recent decision of the Supreme Court of Newfoundland and Labrador. In *Oleynik v. Memorial University of Newfoundland and Labrador*, 2021 NLSC 51, released April 14, 2021, the parties asked the court to rule on a number of questions of law. One of the questions:

> Whether the duty to assist in section 13 of the *Act* is appealable on an appeal commenced under section 54 of the *Act* …

The court rejected the argument of Memorial University and found that a claim of the breach of a public body's duty to assist an applicant could be the subject of an appeal.

> [47] … I agree with Oleynik and the Commissioner that the duty to assist is appealable. Memorial is required under section 13 of the *Act* to "make every reasonable effort to assist" Oleynik in his request to access records. The Court has the duty in section 59(1) to review Memorial's "failure to act" in determining whether a reasonable search was conducted. The question of the adequacy of the search is a determination requiring an assessment of the evidentiary record put before the Court. The burden of proof is on Memorial to establish the reasonableness of the search: section 59(2). …
>
> [55] … By directing the Court to "review the decision, act, or failure to act" of the public body in section 59, the Court has the power to conduct an independent review and determine if the public body has failed to assist the applicant in conducting a reasonable search. …
>
> [57] If I were to accept the interpretation Memorial proposes on the duty to assist, there would be no oversight of the duty to assist on appeals that proceed directly to the Court. That would be contrary to the approach this Court took in *McBreairty v. College of the North Atlantic*, 2010 NLTD 28. Seaborn, J. reviewed the duty to assist in the context of a direct appeal under the previous legislation, and concluded (at para. 42), having reviewed the documents in evidence, that the public body "made every reasonable effort" to respond to the appellant's request. He stated (at para. 43) "the standard is not perfection but all reasonable effort." The Legislature could not have intended that the Court would have an over-

sight role on the duty to assist on a direct appeal, but not under a section 54 appeal of a public body's decision following a review by the Commissioner.

[58] Memorial's position would leave Oleynik with a right of access to records (unless exceptions under the *Act* applied), but no oversight by the Court on Memorial's requirement under section 13 to make reasonable efforts to assist and to respond timely "in an open, accurate and complete manner." …

[60] The duty to assist in section 13 creates a positive statutory obligation on a public body. I am persuaded by counsel for the Commissioner's submissions that if a search is deficient the public body is "failing to act," and an access to information applicant is being denied a statutory right of access. Section 3 sets out the purpose of the *Act* and how it is to be achieved, specifically by providing for "independent review" of decisions by public bodies. Section 8 recognizes the applicant's right of access.

[61] Reading the *Act* as a whole, together with the stated objects, the Court is empowered under a section 54 to consider the reasonableness of the effort Memorial made to assist Oleynik in his access requests. The Court may exercise its power under section 59(3) to order production of documents for examination to assess whether there any missing records as alleged. The Court can then proceed to dispose of the appeal pursuant to section 60.

[62] The duty to assess in section 13 of the *Act* is appealable under section 54 in 202001G2986, 202001G3967, 202001G4524, 202001G4526 and 202001G4809. The Appeals in each will require an assessment of the particular evidentiary record for the Court's determinations on the reasonableness of Memorial's effort to respond to the access requests.

Given the submissions that have been made to this Committee, it may be useful to consider the overall compliance process set out in the *Act*.

Section 3 of the *Act* establishes the OIPC as an independent "oversight agency" responsible for monitoring the operation and administration of the *Act* in all its aspects. The commissioner is empowered to make recommendations that, while they may be considered 'administrative' in nature, go beyond the core issues of access and the protection of personal information. I repeat parts of s. 47:

47. On completing an investigation, the commissioner may recommend that …

(b) the head of the public body reconsider its decision to refuse access to the record or part of the record;…

(d) other improvements for access to information be made within the public body.

The *Act* also contains provisions suggesting a legislative intention that the OIPC oversee, more generally, compliance by public bodies with the legal obligations imposed by the *Act*:

95.(1) In addition to the commissioner's powers and duties under Parts II and III, the commissioner may

(a) conduct investigations to ensure compliance with this Act and the regulations;

(b) monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities and duties under this Act;

The references to compliance and duties under the *Act* confirm the OIPC's ability to investigate possible non-compliance with the *Act*; it would be logical to infer a legislative intention that, following any such investigation, the commissioner be able to make a recommendation addressing the breach. A further paragraph in s. 95 addresses this, referring specifically to the duty to assist:

95.(2) In addition to the commissioner's powers and duties under Parts II and III, the commissioner shall exercise and perform the following powers and duties: …

(h) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants;

The section goes on to address any question about the extent of the commissioner's authority:

95.(3) The commissioner's investigation powers and duties provided in this Part are not limited to an investigation under paragraph (1)(a) but apply also to an investigation in respect of a complaint, privacy complaint, audit, decision or other action that the commissioner is authorized to take under this Act.

The formal complaint and appeal provisions specifically address the enforcement of the fundamental rights of access to information and privacy protection granted by the *Act*. These rights are absolute and are distinct from whatever other obligations may be

found in the *Act* and from other issues involving the conduct of a public body. What is not clear, as evidenced by the need to seek assistance from the court in the decision referred to earlier, is the process for asserting a breach of an obligation under the *Act* other than one relating to an access or correction request. How to bring such an issue before the court has not been considered, at least until the recent court decision. Further, since in that case the matter was brought before the court for a preliminary determination of a question of law, the extent of the remedial authority of the court was not a focus of the discussion. Finally, the question put to the court related only to the s. 13 duty to assist. There was no reason for the court to consider what other legal obligations may be imposed by the *Act*.

The Committee agrees with the OIPC that a person who believes that a public body has not met an obligation under the *Act* should have an avenue of access to the court. The question then is whether, as urged by Memorial University, that access should be outside the confines of the *ATIPPA, 2015* process or should rather be incorporated into that process.

The *Act* is a complete code for access to information and the protection of privacy in the public sector. One of the roles of the ombuds oversight body is to facilitate "a timely and user friendly application of the *Act*". In recommending this model, I do not think it was the intention of the Wells Committee to constrain the role of the OIPC in its investigation, resolution-seeking and recommendation-making roles.

The nature of the rights granted by the *Act* and the comprehensive provisions for the protection and administration of those rights support a policy of ready access to the court when an adjudication involving those rights is required. The provisions of the *Act* referred to earlier support the view that questions relating to an assertion of a legal wrong involving the *Act*, and the nature of any remedy for such a wrong, be dealt with by the processes set out in the *Act*.

The avenues for ensuring compliance should be clear. Time and money spent in adjudicating questions of process is not productive and detracts from fulfilling the purposes of the *Act*.

Giving the commissioner the specific authority to make recommendations directed to improvements of the access to information system reflects the central oversight role of the OIPC and implicitly recognizes the expertise and experience of that office that can be utilized for the benefit of the residents of the province. Even if lacking legal consequences, any such recommendation would carry the weight and persuasive influence of

the OIPC and a public body's response to it could be the subject of comment in the commissioner's annual report.

I am not prepared to recommend removal of the commissioner's power to recommend that a public body make other improvements for access to information. Although, in my respectful view, such recommendation does not address or create a legally enforceable obligation imposed by the *Act*, the commissioner's ability should be retained.

I do not hold the same view of the authority of the commissioner to recommend that a public body reconsider its decision to refuse access. My understanding is that a recommendation to reconsider would only be made in circumstances where the commissioner believes that the refusal is in fact in accordance with the *Act* but, for some reason not directly related to the provisions of the *Act*, access should nonetheless be granted. From the OIPC's submission:

> Section 47(b) sets out an option for the Commissioner to recommend that a public body reconsider its decision to refuse access to a record or part of a record. Such an option is well-suited to a scenario where the public body has applied an exception, and the OIPC has received a complaint and agrees that the exception applies, but it is clear that the public body has not adequately considered the exercise of discretion. While these scenarios are not frequent, they do occur, and we believe a provision like section 47(b) has a place in *ATIPPA, 2015*.
>
> The circumstance here is not one in which there is a public interest to the extent that section 9(1) comes into play. In weighing the purpose for the exception against the reasons for exercise of discretion, there are times when public bodies have failed to fully take into account those impacts in comparison with the reason for the exception, and have withheld information when disclosure would cause little if any harm.

Retaining a specific authority to recommend reconsideration leads to difficulties in determining the status of the original decision for appeal purposes, the consequences, if any, of a refusal to reconsider, and whether or not a reconsidered decision is one that could restart the whole complaint process. I recommend that this provision be removed from the *Act*. Should, in any particular circumstance, the commissioner believe that, for whatever reason, access otherwise properly refused should nonetheless be granted, the matter should be addressed in the informal resolution process.

As confirmed by the recent decision of the Supreme Court, the *Act* contains other provisions that may be interpreted as imposing a legal obligation in addition to a grant or refusal of access or correction of personal information.

An applicant should be able to initiate a complaint asserting a failure by a public body to comply with such an obligation. Further, in the context of an investigation into a complaint, should the commissioner conclude that there has been a failure to comply with an obligation under the *Act*, it should be clear that the commissioner has the authority to recommend compliance and that there is an avenue of appeal.

I recommend that the s. 47 recommendation powers of the commissioner be expanded to allow a recommendation directed to compliance with what the commissionert considers to be a failure by a public body to comply with a legal obligation under the *Act*; this would be in addition to the commissioner's present authority to recommend the grant or refusal of access or the correction of personal information. A recommendation to take steps to comply with a legal obligation should be subject to the declaration and order provisions in sections 50 and 51 and a refusal by the head of a public body to comply with such a recommendation should be amenable to appeal under s. 54.

The remedial authority of the court (s. 60) should be amended to allow the court to make an order it considers appropriate should it determine that a public body has not met an obligation imposed by the *Act*.

The *Act* should not provide for a direct right of appeal where an applicant feels that a legal obligation has not been fulfilled. In this area – not involving a clear question of an entitlement to access or correction – the involvement of the commissioner is necessary. The role of the commissioner in attempting to resolve disputes and in assessing whether or not a complaint engages the breach of an obligation imposed by the *Act* is crucial when dealing with these 'softer' complaints. Accordingly, whether or not a particular circumstance gives rise to an obligation under the *Act* will be an issue in the first place for the commissioner to consider and, as appropriate, for the court to decide.

The statutory authority to make recommendations – apart from the authority to recommend improvements – should be limited to those which carry legal consequences, the path to adjudication of which is clear in the *Act*. To be absolutely clear, and at the risk of repeating myself, any recommendation that is not directed to a grant or refusal of access, a correction of personal information, or to what is considered to be a legally enforceable obligation under the *Act* should not carry a right of appeal.

With respect to concerns about a public body's administration of the *Act* that may not be considered to involve a legal obligation, the *Act* provides other avenues of redress. Should, in the view of the OIPC, a public body be routinely acting otherwise than in accordance with the principles of the *Act*, and perhaps contrary to the spirit of any recom-

mendations directed to improvement, the investigatory and public reporting powers and duties of the OIPC may be utilized to address the issue.

RECOMMENDATION

That the *Act* be amended to:

- Allow a person to file a complaint for failure to comply with a obligation under the *Act*. [Appendix K, s. 42]
- Allow the commissioner to make recommendations that a public body take steps to comply with a legal obligation under the *Act* and delete the reference to "failure to act". [Appendix K, s. 42(1) and (2)(a), s. 47(e), s. 52(1), (2)(a), and (3), s. 56(4)(b), s. 59(1), s. 83(1)]
- Allow the head of a public body to apply to court for a declaration that the public body is not required to comply with that recommendation. [Appendix K, s. 50(1)(c)]
- Allow the commissioner to file an order with the court directing the head of the public body to take steps to comply with an obligation under the *Act*. [Appendix K, s. 51(2)(c)]
- Allow an applicant or third party to commence an appeal in court of a public body's decision not to take steps to comply with an obligation under the *Act*. [Appendix K, s. 54(1) and (2)]
- Allow the court to make an order it considers appropriate should it determine that a public body has not complied with an obligation under the *Act*. [Appendix K, s. 54(1)(c), s. 60(1)(d)]
- Remove the option for the commissioner to recommend that a public body reconsider a decision. [Appendix K, s. 47(b)]

The City of Mt. Pearl pointed to a potential for confusion regarding the filing of an appeal where there is a deemed acceptance of a commissioner's recommendation pursuant to s. 49(2):

> *49. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,*
>
> *(a) decide whether or not to comply with the recommendation in whole or in part; and*
>
> *(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.*
>
> *(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.*
>
> *54. An applicant or a third party may, not later than 10 business days after receipt of a decision of the head of the public body under section 49 , commence an appeal in the Trial Division of the head's decision to*
>
> *(a) grant or refuse access to the record or part of the record; or*
>
> *(b) not make the requested correction to personal information.*

The City's submission, at page 9:

> Sections 49. (1) and 49. (2) are contradictory to each other in how they are written and could have negative impact on S.54. Section 49(1) indicates that a Public Body must give written response within a certain timeline, but 49(2) indicates that no response within said timeline is considered acceptance. Therefore, a non-response by a Public Body is considered acceptance of the Commissioner's recommendation, the Public Body would not need to notify the Commissioner or an Applicant/Third Party of its decision to accept the Commissioner's recommendations. This could lead to confusion when S. 54 Appeal of public body decision after receipt of commissioner's recommendation is relevant.

While the situation may arise only infrequently, it is appropriate, as with other recommendations made by the Committee, to try and avoid future uncertainty wherever possible. I recommend that s. 49(4) and s. 54(2) be amended accordingly.

RECOMMENDATION

That the *Act* be amended to:

- Provide that when the head of a public body has not responded to a recommendation of the commissioner and is thus considered to have complied with it, the commissioner will give written notice of this to the complainant, the public body, and any notified third parties. [Appendix K, s. 49(3) and (4), s. 54(2)]

THE COURT PROCESS

Memorial University submitted that *ATIPPA, 2015* should be amended to provide some control on the processes available to *ATIPPA, 2015* appeal litigants under the *Rules of the Supreme Court, 1986*.

The submission:

> Memorial University is currently party to 17 court actions arising under the *ATIPPA, 2015* (all with the same self-represented applicant). In the course of these actions, Memorial University has been served with notices of inspection, interrogatories, interlocutory applications, requests for lists of documents, and there has been reference to examination for discoveries and other similar procedures. This has increased the cost of complying with the legislation dramatically and, we believe, has also unnecessarily complicated proceedings that are meant to be expeditious. Clarification regarding the expedited nature of the *de novo* hearings under the *ATIPPA, 2015* is warranted. It will help to avoid an increased cost of compliance while ensuring timely access to information.
>
> Section 57 of the *ATIPPA, 2015* provides that "the practice and procedure under the *Rules of the Supreme Court, 1986* providing for an expedited trial, or such adaption of those rules as the court or judge considers appropriate in the circumstances, shall apply to the appeal." At the same time, section 59 governs the conduct of the appeal. Section 59(1) states that the Court shall review the matter as a new matter "and may receive evidence by affidavit," while subsection (3) contemplates that the Court may accept evidence in private.

…

> Memorial University respectfully requests clarification of the process for a *de novo* hearing and the application of the *Rules of the Supreme Court, 1986*. In this respect, it asks that the legislation be amended to clarify that a *de novo* appeal shall proceed as an expedited trial on the basis of affidavit evidence, and that no further recourse to the *Rules of the Supreme Court, 1986* is permitted absent an application to the Supreme Court pursuant to Rule 17A.09. It would further recommend that a first appearance date proceed by way of a case management meeting at which time the parties could discuss filing deadlines and applications that are contemplated under Rule 17A.09. Lastly, the ability to file a copy of the records in dispute with the Court under seal should not, in the context of access to information legislation, be contested or require an application. As a result, Memorial University recommends that the legislation require a public body to file an audit copy of the records under seal (an audit copy being a copy that delineates where redactions are applied but does not contain the redactions).

The OIPC supports the position put forth by the University to the extent of considering the need for a more specific reference in the *Act* to the summary procedures of the Supreme Court.

The *Act* provides that an appeal will proceed as a "new matter", and that affidavit evidence may be received. Further:

> *57. The practice and procedure under the Rules of the Supreme Court, 1986 providing for an expedited trial, or such adaption of those rules as the court or judge considers appropriate in the circumstances, shall apply to the appeal.*

The 2002 *Act* contained a similar provision, (sub. 60(8)), but absent the specific reference to an expedited trial.

The concerns expressed by the University are no doubt the product of its experience and its desire to avoid numerous pre-hearing procedures, particularly procedures involving discovery of documents and witnesses.

I am reluctant to interfere too much with the processes of the court. However, given the variety of procedural and other issues that may be raised on an appeal as a "new matter" and recognizing that the extent of any factual disputes and the need for evidence will vary significantly from case to case, I consider it appropriate that the *Act* be amended to provide that all appeals, unless ordered otherwise, be subject, at least initially, to

case management under Rule 18A of the *Rules of the Supreme Court, 1986*. Rule 18A.06(3) describes the wide scope of a case management meeting:

> *(3) At a case management meeting, the judge and the parties may discuss any or all of the following matters:*
>
> *(a) the nature and extent of the pre-trial procedures that may be required to advance the proceedings;*
>
> *(b) the timing and methodology associated with the making of any application;*
>
> *(c) the dispensing with procedural steps associated with any application;*
>
> *(d) the possibility of resolving procedural steps by agreement;*
>
> *(e) the appropriateness of restructuring any or all of the proceedings for trial;*
>
> *(f) the setting or re-adjustment of timetables for steps to be taken in the proceedings;*
>
> *(g) the determination of readiness for trial of some or all of the proceedings, if more than one;*
>
> *(h) those other matters as would be discussed and dealt with at a pre-trial conference;*
>
> *(i) the appropriateness of holding a settlement conference or mediation session;*
>
> *(j) the manner of conduct of the trial;*
>
> *(k) the preparation and filing of a certificate of readiness when the matter is ready for trial; and*
>
> *(l) any other matters pertinent to or affecting the proper conduct of the proceeding.*

This controlled process, always subject to an order of a judge, should assist the parties in moving efficiently and fairly to the actual adjudication of the appeal.

RECOMMENDATION

- That the Act be amended to provide that unless otherwise ordered, an appeal shall be subject to case management under Rule 18A.06 and the first step in the proceeding following the filing of the notice of appeal shall be a case management meeting. [Appendix K, s. 57]

APPLICATION TO SUPREME COURT FOR A DECLARATION

The concern of the OIPC:

> When a public body applies under section 50 (or 79) to the Trial Division for a declaration that the public body is not required to comply with a recommendation of the Commissioner, section 50(3) requires the head to serve a copy of the application on the Minister responsible for the *Act*, the Commissioner, and a person who was sent a copy of the report. Section 50(4) gives those parties an opportunity to become intervenors in that application.
>
> There is no indication in *ATIPPA, 2015* that the Commissioner is intended to be the respondent for this declaration application. The fact that the Commissioner is given equal standing to intervene, along with the Minister and a person who was sent a copy of the report, indicates that status. The public body's declaration application is clearly an *ex parte* application, and the Commissioner has the option not to be a party to the application. Unfortunately, it has commonly been assumed that the Commissioner is the respondent, and public bodies have constructed their applications based on this assumption. Some language in section 50 (and 79) to indicate that the application for a declaration is an *ex parte* application would be helpful.
>
> OIPC's Recommendation 13.4: Amend *ATIPPA, 2015* to clarify that an application by a public body for a declaration under sections 50 and 79 is an *ex parte* application.

This point is valid. Interested parties, including the OIPC, may apply to intervene if they consider it necessary. I recommend that sections 50 and 79 be amended to read "apply *ex parte* …".

RECOMMENDATION

- That the *Act* be amended to make clear that when a public body seeks a declaration by the court that it is not required to comply with a recommendation of the commissioner, it is by way of an *ex parte* application. [Appendix K, s. 50(2), s. 79(1)(a)]

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OTHER ISSUES

WHISTLEBLOWER PROTECTION

ATIPPA, 2015 does not contain its own whistleblower protection. Such protection is recommended by the OIPC.

Current protection of whistleblowers in public bodies in Newfoundland and Labrador is found in the relatively recent *Public Interest Disclosure and Whistleblower Protection Act*, SNL 2014, c. P-37.2 ("*PIDA*"). The intention of that *Act* is expressed in s. 3:

> *3. The purpose of this Act is to facilitate the disclosure and investigation of significant and serious matters in or relating to the public service that an employee believes may be unlawful, dangerous to the public or injurious to the public interest, and to protect persons who make those disclosures.*

PIDA offers protection against reprisals for public employees who make a disclosure of specified wrongdoings:

> *4.(1) This Act applies to the following wrongdoings in or relating to the public service:*
>
> *(a) an act or omission constituting an offence under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act;*
>
> *(b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee;*
>
> *(c) gross mismanagement, including of public funds or a public asset; and*
>
> *(d) knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b) or (c).*

PIDA contemplates a formal disclosure process – a complaint in writing to the Office of the Citizen's Representative. An investigation, a report and recommendations may follow. Formal investigations are uncommon, with many complaints being resolved by way of advice or being directed to the wider arena covered by the *Citizen's Representative Act*, SNL 2001 c. C-14.1. *PIDA* does not extend to all public bodies. It extends to the "public service" as defined, but does not include, for example, Memorial University, the cities, municipalities or the Royal Newfoundland Constabulary. A body may be desig-

nated by regulation as a public body – part of the public service – for the purposes of *PIDA*.

Wrongdoings for the purposes of *PIDA* include offences under *ATIPPA, 2015*. These offences are set out in s. 115(2) of *ATIPPA, 2015*:

> *115.(2) A person who wilfully*
>
> *(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.*

The types of ATIPPA disclosures or actions by an employee that would not likely be considered to be a report of a wrongdoing could include, for example, a disclosure of an accidental release or loss of personal information, a disclosure that access is being given, refused or delayed contrary to the intent of the *Act*, or a refusal by an employee to do something that the employee reasonably believes to be in contravention of the *Act*.

In Canada, only British Columbia presently has statutory whistleblower protection in its freedom of information legislation.

Two issues arise for consideration. The first is whether the concept of wrongdoing as defined in *PIDA* should be expanded to incorporate ATIPPA-related transgressions that do not constitute offences and thus do not come within *PIDA*'s present scope.

My assessment is it should not. The *PIDA* scheme is carefully crafted to provide reprisal protection across the public service for the reporting of significant and serious matters. The legislature has chosen to define significant and serious, in part, by reference to acts constituting an offence. To introduce into that scheme, for one statute only, wrongdoings that do not rise to the level of an offence would be a confusing and unnecessary fragmentation of the present structure. I have not been provided with any evidence suggesting that such a change is needed to promote compliance with *ATIPPA, 2015* and, lacking such evidence, I would much prefer to try and advance the objective of excellence in *ATIPPA, 2015* and encourage public servants to "do the right thing" by other means. The threshold of significant and serious matters should remain applicable to *ATIPPA, 2015*.

I add that the *PIDA* structure involves disclosure to the Citizen's Representative. In my view, it is preferable that 'non-offence' issues within the ATIPPA regime be addressed, if and as required, by the OIPC in its oversight role. That oversight role includes broad powers given to the commissioner under s. 95 and recognizes the confidentiality of information supplied to the commissioner in the course of an investigation.

The second issue is whether or not *PIDA* should be extended to *ATIPPA, 2015* public bodies not presently covered. In principle, it should be. However, the issue goes well beyond ATIPPA since wrongdoings for the purposes of *PIDA* include offences under any act or regulation of the province or Canada. Further, a public body may already have a comprehensive internal whistleblower protection which should not be disrupted without good reason.

A public body can be made subject to *PIDA* by regulation. I recommend that government consider whether or not any public body now subject to *ATIPPA, 2015* but not subject to *PIDA* should, by regulation, be considered a public body for *PIDA* purposes. Such bodies would include cities, municipalities and the Royal Newfoundland Constabulary.

RECOMMENDATION

Suggestion:

- That government consider whether or not any public body now subject to *ATIPPA, 2015*, subject to *PIDA*, should by regulation be considered a public body for *PIDA* purposes.

OTHER AMENDMENTS TO THE ACT

In addition to the recommendations made in the body of the report, I recommend a number of minor amendments to the *Act*, primarily for clarification or appropriate updating. They include general amendments; amendments to the definition of "personal information" to encompass biometric information, gender, internet protocol address, and to exclude business contact information; a revised definition of "business day" to reflect the different circumstances involved in complying with time limits; and an amendment to replace any references to the Royal Newfoundland Constabulary with the broader description of "law enforcement".

GENERAL AMENDMENTS

- Make pronouns gender neutral;
- Update "Trial Division" references to "Supreme Court"; and
- Any necessary punctuation and grammar amendments

OTHER AMENDMENTS

s. 2(a.3): "biometric information" means information derived from an individual's unique physical, physiological, or behavioral characteristics;

s. 2(b): "business day" means any day from Monday to Friday, but does not include holidays or

(i) other days on which a public body is not open for business;

(ii) for the purposes of section 42 and section 44, other days on which the Office of the Information and Privacy Commissioner is not open for business; and

(iii) for the purposes of section 52, section 53, section 54 and section 54.1, other days on which the Trial Division is not open for business.

2(u) "personal information" means recorded information about an identifiable individual including:

(i): the individual's name, address or telephone number, but not the individual's business name, address or telephone number,

(iii): the individual's age, sex, gender, sexual orientation, marital status orfamily status,

(v): the individual's biometric information, blood type, or inheritable characteristics.

x): the individual's Internet Protocol (IP) address, if it can be used to identify the individual.

(x)(viii): the Court of Appeal of Newfoundland and Labrador, the Supreme Court of Newfoundland and Labrador, or the Provincial Court of Newfoundland and Labrador, or

s. 5(1)(a): a record in a court file, a record of a judge of the Court of Appeal of Newfoundland and Labrador, Supreme Court of Newfoundland and Labrador, or Provincial Court of Newfoundland and Labrador, a judicial administration record or a record relating to support services provided to the judges of those courts

s. 5(1)(k): a record relating to a law enforcement investigation if all matters in respect of the investigation have not been completed;

s. 5(1)(l): a record relating to a law enforcement investigation that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter; or

s. 5(1)(m): a record relating to a law enforcement investigation in which no charge was ever laid, or relating to prosecutorial consideration of that investigation;

s. 19(7) The head of the public body shall not give access to the record or part of the record until

(a) the time period for filing a complaint or an appeal under section 42, 53 or 54, as applicable, has expired and no copy of the complaint or notice of appeal has been provided to the head of the public body pursuant to paragraph 6(c);

(b) the third party has advised the head of the public body in writing that no further recourse under the Act will be pursued; or

(c) a court order has been issued confirming the decision of the public body, or otherwise concluding the appeal.

s. 26(1): Where an applicant is to be charged a cost under subsection 25(1), the head of the public body shall give the applicant an estimate of the total cost before providing the services or reproducing or shipping the record.

s. 26(5): Where an applicant applies to the commissioner to revise an estimate of costs or to review a decision of the head of the public body not to waive all or part of the costs, the time period of 20 business days referred to in subsection (2) and section 16 is suspended until the application has been considered by the commissioner.

s. 40(2)(m): the disclosure is not contrary to the public interest as described in subsection (5) and reveals only the following personal information about a third party: […]

s. 42(8)(e): a request that is considered to be abandoned under subsection 11.1(5).

s. 49(2): [Repeal and substitute:] The written notice shall include notice of the right

(a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or

(b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in subsection 51(1).

s. 55(d): requests that are deemed abandoned; or

s. 55(e): a decision under paragraph 49(d) to not make a recommended improvement to access.

s. 56(6): Where an appeal is brought by a third party, the head of the public body shall give to the applicant written notice of the appeal and instructions on how to intervene as a party to the appeal.

s. 66(1)(c): for a purpose for which that information may be disclosed to or by that public body under sections 68 to 71.

s. 68(1)(p): where the head of the public body determines that compelling circumstances exist that affect a person's health or safety and where notice of disclosure, if appropriate, is given to the individual the information is about;

s. 68(1)(v): to the surviving spouse or relative of a deceased individual where the head of the public body considers it appropriate under the circumstances.

s. 68(1)(x): if the personal information is information of a type routinely disclosed in a business or professional context and the disclosure

> (i) is limited to an individual's name and business contact information, including business title, address, telephone number, facsimile number and e-mail address, and
>
> (ii) does not reveal other personal information about the individual or personal information about another individual.

s. 72(1): A minister shall, during the development of a program or service by a department or branch of the executive government of the province as defined under subparagraph 2(x)(i), submit to the minister responsible for this Act […]

s. 73(4)(a): one year after the subject matter of the privacy complaint first came to the attention of or should reasonably have come to the attention of the complainant or complainants; or

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SCHEDULE A – INTRODUCTORY COMMENTS

The Committee's Terms of Reference and s. 117 of *ATIPPA, 2015* require it to consider the list of provisions in Schedule A to *ATIPPA, 2015* to determine the necessity for their continued inclusion in that schedule. Schedule A should be read in conjunction with s. 7 of *ATIPPA, 2015*:

> ***7.****(1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.*
>
> *(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in Schedule A, that provision shall prevail over this Act or a regulation made under it.*
>
> *(3) When the House of Assembly is not in session, the Lieutenant-Governor in Council may by order amend Schedule A, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.*

SCHEDULE A

(a) sections 64 to 68 of the Adoption Act, 2013 ;

(b) section 29 of the Adult Protection Act ;

(c) section 115 of the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act ;

(d) sections 90 to 96 of the Children, Youth and Families Act ;

(e) section 5.4 of the Energy Corporation Act ;

(f) section 8.1 of the Evidence Act ;

(g) subsection 24(1) of the Fatalities Investigations Act ;

(h) subsection 5(1) of the Fish Inspection Act ;

(i) section 4 of the Fisheries Act ;

(j) sections 173, 174 and 174.1 of the Highway Traffic Act ;

(j.1) section 21 of the Innovation and Business Investment Corporation Act;

(k) section 15 of the Mineral Act ;

(l) section 16 of the Mineral Holdings Impost Act ;

(l.1) section 23 of the Oil and Gas Corporation Act ;

(m) subsection 13(3) of the Order of Newfoundland and Labrador Act ;

(m.1) sections 10 and 15 of the Patient Safety Act ;

(n) sections 153, 154 and 155 of the Petroleum Drilling Regulations ;

(o) sections 53 and 56 of the Petroleum Regulations ;

(p) [Rep. by 2018 cI-7.1 s24]

(q) section 12 and subsection 62(2) of the Schools Act, 1997 ;

(r) sections 19 and 20 of the Securities Act ;

(s) section 13 of the Statistics Agency Act ; and

(t) section 18 of the Workplace Health, Safety and Compensation Act.

Inclusion in Schedule A thus removes the listed provision from the application of *ATIPPA, 2015*, giving the provision in question priority over that *Act*.

The Schedule A list of provisions, as those provisions were in 2014, was the subject of careful consideration by the Wells Committee. It offered recommendations, with supporting reasons, for either the removal or the continued inclusion of the various enactments listed in the Schedule.

In a general commentary on Schedule A exceptions, the Wells Committee observed, at page 141:

> The Committee agrees that it would be good practice to review the list in conjunction with each five-year review. We do not agree that it is desirable to expressly state that an onus is on each public body concerned to make a convincing case for continued inclusion of provisions for which that public body had responsibility. That would be tantamount to automatic exclusion unless somebody from each public body concerned appeared and made a convincing

> case every five years, whether or not it was obvious that the provision should remain. A better approach would be for a committee doing a five-year review to indicate which provisions, if any, it believed should be considered for removal from the list. In that way the public body concerned would be forewarned and take steps to make a convincing case for continued inclusion at the next five-year review. …
>
> Access to information is important, but it is not the only important aspect of the process of government, or necessarily the most important. Priorities in government cannot be determined by viewing issues only through the lens of access to information. …

It suggested two criteria against which to evaluate the desirability of Schedule A protection, at page 142:

> Here again are those two criteria: (i) it is essential for the purpose of the particular piece of legislation that certain information described therein not be disclosed, and (ii) whether the nature of the activity that is regulated by the statute controlling access to the records in issue is such, that the public interest is best served by control of access to related records being regulated under provisions of the statute that provides comprehensively forall other aspects of that activity, or by the *ATIPPA*.

Where the Schedule A statute itself incorporates a specific reference to *ATIPPA, 2015*, the Wells Committee concluded that it would be inappropriate for an *ATIPPA* Review Committee to recommend changes to that other *Act*. In the context of its discussion on the *Adoption Act*, the Committee said this, at page 143:

> In any event, the legislature has enacted, apart from the *ATIPPA*, a provision that specifies that the records concerned are to be governed by the *Adoption Act, 2013,* notwithstanding the *ATIPPA*. This Committee has jurisdiction to recommend changes that would improve the legislation respecting matters covered by the *ATIPPA*. It would be inappropriate for the Committee to question the legislature's judgement, taken in the course of enacting another statute, that its provisions should apply to records dealing with the subject matter of that statute, notwithstanding the *ATIPPA*. Doing so would run counter to the legislature's specific decision as to the relationship between that Act and the *ATIPPA*.
>
> In those circumstances, the Committee concludes that sections 64 to 68 of the *Adoption Act, 2013* are to remain on the list, unless and until the legislature alters those provisions of the *Adoption Act, 2013*.

As I have indicated on a number of issues, I consider the report of the Wells Committee to be the foundation of the current *Act*. Unless persuaded by five years of experience, the need for clarification, by changing circumstances, or other compelling reason, I do not propose to make recommendations to disturb this solid foundation.

This is the approach I have taken to the review of the Schedule A exceptions. As will be evident, any recommendations for removal of an *Act* from Schedule A find their genesis either in the recommendation of Justice Richard LeBlanc from the Muskrat Falls Inquiry or in the modifications I have recommended to s. 39 of *ATIPPA, 2015*.

THE PRESENT SCHEDULE A STATUTES

The first three statutes may be considered together. They fall under the responsibility of the Department of Children, Seniors and Social Development.

ADOPTION ACT, 2013, SNL 2013, C. A-3.1

64. Notwithstanding the Access to Information and Protection of Privacy Act, 2015 and the Privacy Act (Canada), the use of, disclosure of and access to information in records pertaining to adoptions, regardless of where the information or records are located, shall be governed by this Act.

65. (1) The provincial director may disclose identifying or non-identifying information to a person where the disclosure is necessary for

(a) the health or safety of an adopted child or adopted person; or

(b) the purpose of allowing an adopted child or adopted person to receive a benefit.

(2) Where identifying information is disclosed under subsection (1), the provincial director shall, where possible, notify the person being identified.

66. In circumstances affecting a person's health or safety, the provincial director may contact the following persons to provide to or obtain from them necessary identifying or non-identifying information:

(a) a birth parent;

(b) where a birth parent cannot be contacted, a relative of a birth parent;

(c) an adopted person; and

(d) an adoptive parent.

67. (1) The provincial director has the right to information that is in the possession of or under the control of a public body as defined in the Access to Information and Protection of Privacy Act , 2015 that is necessary to enable the provincial director to perform the duties or to exercise the powers and functions given under this Act or the regulations.

(2) A public body referred to in subsection (1) that has possession or control of information to which the provincial director is entitled under subsection (1) shall, upon request, disclose that information to the provincial director.

(3) This section applies notwithstanding another Act.

68. (1) The provincial director may disclose information to an adoption agency, including information obtained by him or her under section 67, where the disclosure is necessary to enable the agency to perform the duties or to exercise the powers and functions given to the agency under this Act or the regulations.

(2) The provincial director may disclose information to an authority responsible for adoptions or adoption records in another province, including information obtained by him or her under section 67, where the disclosure is necessary to enable the authority to perform the duties or to exercise the powers and functions given to the authority under an Act or regulations of that province.

(3) An adoption agency or authority shall not use or disclose information provided under subsection (1) or (2) except for the purpose for which it was provided.

29.(1) A person employed in the administration of this Act shall maintain confidentiality with respect to all matters that come to his or her knowledge in the course of that person's employment and shall not communicate the matters to another person, including a person employed by the government, except

(a) with the consent of the person to whom the information relates;

(b) where the disclosure is required by another Act of the province;

(c) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information;

(d) where, in the opinion of a director, the disclosure is in the best interests of the person to whom the information relates;

(e) where the disclosure is necessary to the performance of duties or the exercise of powers under this Act;

(f) where the disclosure is to the next of kin of the adult in need of protective intervention, where that disclosure is, in the opinion of a director, in the best interests of the person to whom the information relates;

(g) where the disclosure is for research approved by a research ethics body; or

(h) for another purpose authorized by the regulations

and the information released under this section shall only be used for the purpose for which it was released.

(2) The department or an authority is not liable for damages caused to a person as a result of the release of information under subsection (1).

(3) A person shall be denied access to information where

(a) there are reasonable grounds to believe that the disclosure might result in physical, emotional or financial harm to that person or another person;
(b) where the disclosure would identify a person who made a report under section 12; or

(c) the disclosure could reasonably be expected to jeopardize an investigation under this Act or a criminal investigation.

(4) Where information excepted from disclosure under this section can reasonably be severed, a person who is otherwise permitted to receive information under this section shall be given the remainder of the information.

(5) A person has a right of access to information or records created or maintained respecting that person in the course of the administration of this Act except where

(a) that information would identify a person making a referral under section 12; or

(b) there are reasonable grounds to believe that the disclosure might result in physical, emotional or financial harm to that person or another person.

90. Notwithstanding the Access to Information and Protection of Privacy Act, 2015 , the collection of, use of, disclosure of and access to information in records pertaining to the care and protection of children and youth obtained under this Act, regardless of where the information or records are located, shall be governed by this Act.

91. In this Part, "information" means personal information obtained under this Act or a predecessor Act which is held in government records by, or is in the custody of or under the control of, the department, and includes information that is written, photographed, recorded or stored in any manner.

92. (1) A person over 12 years of age has the right to and shall, on request, be given information relating to himself or herself.

(2) A person over 12 years of age who is, or has been, in the care or custody of a manager has the right to and shall, on request, be given information relating to himself or herself including

(a) information relating to his or her birth family that the minister determines is appropriate to release;

(b) the reasons why he or she was removed from his or her parent and information relating to the continuation of a court order relating to him or her; and

(c) the identity of a former foster parent, family-based caregiver or the name of a former residential placement.

(3) A person who has custody of a child has the right to and shall, on request, be given information about himself or herself and the child.

(4) A person who had custody of a child has the right to and shall, on request, be given information about himself or herself and the child, but only for the period of time that the person had custody.

(5) Where information excepted from disclosure under section 93 can reasonably be severed, a person who is otherwise permitted to receive information under this section shall be given the remainder of the information.

93. Notwithstanding section 92,

(a) a provincial director or a manager shall not disclose information where

(i) the disclosure is prohibited under the Adoption Act, 2013 , the Young Persons Offences Act or the Youth Criminal Justice Act (Canada),

(i) there are reasonable grounds to believe that the disclosure might result in physical or emotional harm to that person or to another person,

(ii) the disclosure would identify a person who made a report under section 11, or

(iii) the disclosure could reasonably be expected to jeopardize an investigation under this Act or a criminal investigation; and

(b) a provincial director or a manager may refuse to disclose information that is a transitory record as defined in the Management of Information Act .

94. A provincial director or a manager may, without the consent of another person, authorize the disclosure of information obtained under this Act or the regulations where the disclosure is

(a) in the best interests of a child or youth;

(b) provided to persons with whom a child or youth has been placed for care;

(c) for case planning or integrated service delivery purposes, including disclosure for these purposes to Indigenous representatives;

(d) for research or evaluation purposes and the person to whom that information is disclosed has signed an agreement to comply with conditions set by the minister;

(e) for a criminal proceeding or an investigation by the Chief Medical Examiner or the Child Death Review Committee under the Fatalities Investigation Act and the person to whom that information is disclosed has signed an agreement to comply with conditions set by the minister;

(f) for a review or investigation of a matter relating to a child or youth by the Child and Youth Advocate under the Child and Youth Advocate Act and the person to whom that information is disclosed has signed an agreement to comply with conditions set by the minister; or

(g) necessary for the administration of this Act.

95. The minister may enter into an agreement with an Indigenous government or organization with respect to the access to or disclosure of information under this Act.

96. (1) A manager or social worker has the right to information where that information

(a) relates to

(i) a child,

(ii) a youth, or

(iii) a parent;

(b) is necessary to enable the manager or social worker to exercise his or her powers or perform his or her duties or functions under this Act or the regulations, including powers, duties or functions relating to investigations, assessments or determining whether a child is or remains in need of protective intervention; and

(c) is in the custody or under the control of

(i) a person, or

(ii) a public body.

(2) A public body or a person referred to in subsection (1) that has custody or control of information to which a manager or social worker is entitled under subsection (1) shall disclose that information to the manager or social worker.

(3) Notwithstanding subsections (1) and (2), information that is subject to solicitor-client privilege is not required to be disclosed unless the information is required to be disclosed under section 11.

(4) Notwithstanding subsections (1) and (2), a peace officer may refuse to disclose information where

(a) the disclosure would be an offence under an Act of Parliament; or

(b) the disclosure would be harmful to law enforcement or could easily be expected to interfere with public safety, unless the information is required to be disclosed under section 11.

The submission of the Department, at page 2:

> This department currently has three pieces of legislation listed under Schedule A of ATIPPA which prevail over the Act. The provision for the Adoption Act (AA), Adult Protection Act (APA) and Children, Youth and Families Act (CYFA) should continue to remain as this legislation governs extremely personal information that must be protected and the right to privacy far outweighs the public's right to know.
>
> These Acts primarily involve personal information of the individuals, rather than information respecting governmental operations:
>
> - the CYFA protects the information that must be collected for the safety and well being of the children who are in need of protective intervention;
> - the APA protects the information that must be collected for the safety and wellbeing of adults who need intervention; and
> - the AA protects the information that must be collected for the adoption of a child and in their best interests.
>
> The processes in place for the management of access to and disclosure of information under the ATIPPA are not at all suitable for the management of this sort of information.

Of the *Adoption Act*, the Wells Committee said, at page 143:

> On even superficial examination it would seem that protection for such records is more appropriately provided for in the *Adoption Act, 2013*, the statute that provides for all aspects of adoption, than by provisions of the *ATIPPA*, a statute providing generally for the exercise of public rights to access information and the protection of privacy. In any event, the legislature has enacted, apart from the *ATIPPA*, a provision that specifies that the records concerned are to be governed by the *Adoption Act, 2013,* notwithstanding the *ATIPPA*. This Committee has jurisdiction to recommend changes that would improve the legislation respecting matters covered by the *ATIPPA*. It would be inappropriate for the Committee to question the legislature's judgement, taken in the course of enacting another statute, that its provisions should apply to records dealing with the subject matter of that statute, notwithstanding the *ATIPPA*. Doing so would run counter to the legislature's specific decision as to the relationship between that Act and the *ATIPPA*.
>
> In those circumstances, the Committee concludes that sections 64 to 68 of the *Adoption Act, 2013* are to remain on the list, unless and until the legislature alters those provisions of the *Adoption Act, 2013*.

And of the then *Children and Youth Care and Protection Act*, the Committee said, at page 149:

> As is the case with the *Adoption Act, 2013*, the legislature has specified that notwithstanding the *ATIPPA,* those provisions shall prevail. The Committee's statutory jurisdiction is to recommend changes to the *ATIPPA* structure. Where the legislature has enacted in another statute that it is to prevail notwithstanding the *ATIPPA,* it is not appropriate for the Committee to question the legislature's judgment in enacting that other statute. In the case of the provisions of the *Children and Youth Care and Protection Act* that prevail over the *ATIPPA*, the Committee's views are, therefore, not pertinent. It may, however, be helpful for the participants to know that the Committee believes there appears to be a sound basis for the current approach.
>
> Like the *Adoption Act, 2013*, this is a specialty statute. It provides for all actions necessary to achieve its purpose, expressed in section 8: "to promote the safety and well-being of children and youth who are in need of protective intervention."
>
> Part VIII of the statute, which contains sections 69 to 74, protects the information that must be collected for the safety and well-being of the children who need intervention by the state. Those sections provide for special circumstances, which primarily involve personal information of the children concerned, rather than information respecting governmental operations. The processes in place for the management of access to and disclosure of information under the *ATIPPA* are not at all suitable for the management of this sort of information. Clearly the public interest is best served by access to this kind of information being regulated by a specialty statute.

I take the same approach as did the Wells Committee. Both the *Adoption Act* and the *Children, Youth and Families Act* contain specific references to *ATIPPA, 2015* and confirm the primacy of the disclosure provisions in the subject matter *Acts*. There is a sound basis for access to this information being regulated by a specific statute.

Although the *Adult Protection Act* does not refer to *ATIPPA, 2015*, it is nonetheless a specialized statute dealing with personal information and individual safety. The Wells Committee said, at p. 144:

> This is a statute that deals, comprehensively, with a special subject matter. Because of the nature of the *Adult Protection Act,* and the matters for which it makes provision, it is clear that the level of access to or protection of records in connection with the matters with which the Act deals, is best provided for in that Act, rather than being governed by the provisions of the *ATIPPA* dealing with access in general. The public interest would be best served by section 29 of the *Adult Protection Act* remaining on the list of provisions that prevail over *ATIPPA*.

I agree. These statutory provisions should remain in Schedule A.

115. (1) In this section

(a) "delineation well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that there is a reasonable expectation that another portion of that accumulation will be penetrated by the first mentioned well and that the drilling is necessary in order to determine the commercial value of the accumulation;

(b) "development well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that it is considered to be a well or part of a well drilled for the purpose of production or observation or for the injection or disposal of fluid into or from the accumulation;

(c) "engineering research or feasibility study" includes work undertaken to facilitate the design or to analyze the viability of engineering technology, systems or schemes to be used in the exploration for or the development, production or transportation of petroleum in the offshore area;

(d) "environmental study" means work pertaining to the measurement or statistical evaluation of the physical, chemical and biological elements of the lands, oceans or coastal zones, including winds, waves, tides, currents, precipitation, ice cover and movement, icebergs, pollution effects, plants and animals both onshore and offshore, human activity and habitation and related matters;

(e) "experimental project" means work or activity involving the utilization of methods or equipment that are untried or unproven;

(f) "exploratory well" means a well drilled on a geological feature on which a significant discovery has not been made;

(g) "geological work" means work, in the field or laboratory, involving the collection, examination, processing or other analysis of lithological, paleontological or geochemical materials recovered from the seabed or subsoil of a portion of the offshore area and includes the analysis and interpretation of mechanical well logs;

(h) "geophysical work" means work involving the indirect measurement of the physical properties of rocks in order to determine the depth, thickness, structural configuration or history of deposition of rocks and in-

cludes the processing, analysis and interpretation of material or data obtained from that work;

(i) *"geotechnical work" means work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the seabed or subsoil of a portion of the offshore area;*

(j) *"well site seabed survey" means a survey pertaining to the nature of the seabed or subsoil of a portion of the offshore area in the area of the proposed drilling site in respect of a well and to the conditions of those portions of the offshore area that may affect the safety or efficiency of drilling operations; and*

(k) *"well termination date" means the date on which a well has been abandoned, completed or suspended in accordance with applicable regulations respecting the drilling for petroleum made under Part III.*

(2) *Subject to section 18, information or documentation provided for the purposes of this Part or Part III or a regulation made under either Part, whether or not that information or documentation is required to be provided under either Part or a regulation made under either Part, is privileged and shall not knowingly be disclosed without the written consent of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to the administration or enforcement.*

(3) *A person shall not be required to produce or give evidence relating to information or documentation that is privileged under subsection (2) in connection with legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.*

(4) *For greater certainty, this section does not apply to a document that has been registered under Division VII.*

(5) *Subsection (2) does not apply to the following classes of information or documentation obtained as a result of carrying on any work or activity that is authorized under Part III, namely, information or documentation in respect of*

(a) *an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if 2 years have passed since the well termination date of that well;*

(b) *a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of*

(i) 2 years since the well termination date of the relevant exploratory well, and

(ii) 90 days since the well termination date of the delineation well,

have passed;

(c) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) 2 years since the well termination date of the relevant exploratory well, and

(ii) 60 days since the well termination date of the development well,

have passed;

(d) geological work or geophysical work performed on or in relation to a portion of the offshore area,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or subparagraph (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in another case, after the expiration of 5 years following the date of completion of the work;

(e) an engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to a portion of the offshore area,

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or subparagraph (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in another case, after the expiration of 5 years following the date of completion of the research, study or project or after the reversion of that portion of the offshore area to Crown reserve areas, whichever occurs first;

(f) *a contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III;*

(g) *diving work, weather observations or the status of operational activities or of the development of or production from a pool or field;*

(g.1) *accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act in respect of the accident, incident or spill;*

(h) *a study funded from an account established under subsection 76(1) of the Canada Petroleum Resources Act, where the study has been completed; and*

(i) *an environmental study, other than a study referred to in paragraph (h),*

(i) *where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or subparagraph (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or*

(ii) *in another case, where 5 years have passed since the completion of the study.*

(6) *The board may disclose any information or documentation that it obtains under this Part or Part III, to officials of the Government of Canada, the government of the province or any other province, or a foreign government, or to the representatives of any of their agencies, for the purposes of a federal, provincial or foreign law, that deals primarily with a petroleum-related work or activity, including the exploration for and the management, administration and exploitation of petroleum resources, if*

(a) *the government or agency undertakes to keep the information or documentation confidential and not to disclose it without the board's written consent;*

(b) *the information and documentation is disclosed in accordance with any conditions agreed to by the board and the government or agency; and*

(c) *in the case of disclosure to a foreign government or agency, the federal minister and the provincial minister consent in writing.*

(7) *The board may disclose to the federal minister and the provincial minister the information or documentation that it has disclosed or intends to disclose under subsection (6), but the federal minister and the provincial minister are not to further disclose the information or documentation unless the board consents in writing to that disclosure or the federal minister or the provincial minister is required by an Act of Parliament of Canada or an Act of the Legislature to disclose that information or documentation.*

(8) *For the purposes of paragraph (6)(a) and subsection (7), the board may consent to the further disclosure of information or documentation only if the board itself is authorized under this section to disclose it.*

(9) *Subsection (2) does not apply in respect of information regarding the applicant for an operating licence or authorization under subsection 134(1) or the scope, purpose, location, timing and nature of the proposed work or activity for which the licence or authorization is sought.*

(10) *Subsection (2) does not apply in respect of information or documentation provided for the purposes of a public hearing conducted under section 44.1.*

(11) *Subject to section 115.1, the board may disclose all or part of any information or documentation related to safety or environmental protection that is provided in relation to an application for an operating licence or authorization under subsection 134(1), or to an operating licence or authorization that is issued under that subsection or provided in accordance with any regulations made under this Part or Part III, however the board is not permitted to disclose information or documentation if the board is satisfied that*

(a) *disclosure of it could reasonably be expected to result in a material loss or gain to a person, or to prejudice his, her or its competitive position, and the potential harm resulting from the disclosure outweighs the public interest in making the disclosure;*

(b) *it is financial, commercial, scientific or technical information or documentation that is confidential and has been consistently treated as such by a person who would be directly affected by its disclosure, and for which the person's interest in confidentiality outweighs the public interest in its disclosure; or*

(c) *there is a real and substantial risk that disclosure of it will impair the security of pipelines, as defined in section 131, installations, vessels, aircraft or systems, including computer or communication systems, used for any work or activity in respect of which this Act applies, or methods employed to protect them, and the need to prevent its disclosure outweighs the public interest in its disclosure.*

(12) Subsections (9) to (11) do not apply in respect of information or documentation described in paragraphs (5)(a) to (e) and (i).

115.1 (1) If the board intends to disclose any information or documentation under subsection 115(11), the board shall make every reasonable effort to give the person who provided it written notice of the board's intention to disclose it.

(2) A person to whom a notice is required to be given under subsection (1) may waive the requirement, and if he, she or it has consented to the disclosure, he, she or it is considered to have waived the requirement.

(3) A notice given under subsection (1) shall include

(a) a statement that the board intends to disclose information or documentation under subsection 115(11);
(b) a description of the information or documentation that was provided by the person to whom the notice is given; and
(c) a statement that the person may, within 20 days after the day on which the notice is given, make written representations to the board as to why the information or documentation, or a portion of it, should not be disclosed.

(4) If a notice is given to a person under subsection (1), the board shall

(a) give the person the opportunity to make, within 20 days after the day on which the notice is given, written representations to the board as to why the information or documentation, or a portion of it, should not be disclosed; and
(b) after the person has had the opportunity to make representations, but no later than 30 days after the day on which the notice is given, make a decision as to whether or not to disclose the information or documentation and give written notice of the decision to the person.

(5) A notice given under paragraph (4)(b) of a decision to disclose information or documentation shall include

(a) a statement that the person to whom the notice is given may request a review of the decision under subsection (7) within 20 days after the day on which the notice is given; and

(b) a statement that if a review is not requested under subsection (7) within 20 days after the day on which the notice is given, the board shall disclose the information or documentation.

(6) *If, under paragraph (4)(b), the board decides to disclose the information or documentation, the board shall disclose it on the expiry of 20 days after the day on which a notice is given under that paragraph, unless a review of the decision is requested under subsection (7).*

(7) *A person to whom the board is required under paragraph (4)(b) to give a notice of a decision to disclose information or documentation may, within 20 days after the day on which the notice is given, apply to the Trial Division for a review of the decision.*

(8) *An application made under subsection (7) shall be heard and determined in a summary way in accordance with the applicable rules of practice and procedure of that court.*

(9) *In a proceeding arising from an application under subsection (7), the Trial Division shall take every reasonable precaution, including, when appropriate, conducting hearings in private, to avoid the disclosure by the court or any person of any information or documentation that, under this Act, is privileged or is not to be disclosed.*

After considerable discussion of competing views, the Wells Committee concluded that the public interest would be best served by s. 115 of the *Accord Implementation Act* remaining in Schedule A to *ATIPPA, 2015*. The Committee noted the comprehensive provisions governing both protection and disclosure (s. 115(5)); I note also s. 115(11) which provides for disclosure of information related to safety or environmental protection and for a harm/public interest balancing exercise when considering such disclosure.

The Wells Committee's conclusion, at page 148:

> Taking all of the foregoing factors into consideration, the Committee is satisfied that the public interest would be best served if these provisions continue to regulate access to the records concerned. For that reason the Committee recommends that section 115 of the *Atlantic Accord Implementation Act* remain on the list.

I agree with the conclusion of the Wells Committee. Other than a general recommendation from the Centre for Law and Democracy, I heard no submissions suggesting the removal of this provision from Schedule A. It should remain.

Section 5.4 of the *Energy Corporation Act*, ("*ECA*") is the type of information protection provision that generates strong opinions for and against its retention in Schedule "A" of *ATIPPA, 2015*.

5.4(1) Notwithstanding section 7 of the Access to Information and Protection of Privacy Act, 2015 , in addition to the information that shall or may be refused under Part II, Division 2 of that Act, the chief executive officer of the corporation or a subsidiary, or the head of another public body,

(a) may refuse to disclose to an applicant under that Act commercially sensitive information of the corporation or the subsidiary; and

(b) shall refuse to disclose to an applicant under that Act commercially sensitive information of a third party

where the chief executive officer of the corporation or the subsidiary to which the requested information relates, taking into account sound and fair business practices, reasonably believes

(c) that the disclosure of the information may

(i) harm the competitive position of,

(ii) interfere with the negotiating position of, or

(iii) result in financial loss or harm to

the corporation, the subsidiary or the third party; or

(d) that information similar to the information requested to be disclosed

(i) is treated consistently in a confidential manner by the third party, or

(ii) is customarily not provided to competitors by the corporation, the subsidiary or the third party.

(2) Where an applicant is denied access to information under subsection (1) and a request to review that decision is made to the commissioner under section 42 of the Access to Information and Protection of Privacy Act, 2015 , the commissioner shall, where he or she determines that the information is commercially sensitive information,

(a) on receipt of the chief executive officer's certification that he or she has refused to disclose the information for the reasons set out in subsection (1); and

(b) confirmation of the chief executive officer's decision by the board of directors of the corporation or subsidiary,

uphold the decision of the chief executive officer or head of another public body not to disclose the information.

(3) Where a person appeals,

(a) under subsections 52 (1) and (2), subsections 53 (1) and (2) or section 54 of the Access to Information and Protection of Privacy Act, 2015 , from a decision under subsection (1); or
(b) under subsections 52 (1) and (2), subsections 53 (1) and (2) or section 54 of the Access to Information and Protection of Privacy Act, 2015, from a refusal by a chief executive officer under subsection (1) to disclose information,

paragraph 59 (3)(a) and section 60 of that Act apply to that appeal as if Part II, Division 2 included the grounds for the refusal to disclose the information set out in subsection (1) of this Act.

(4) Paragraph 102 (3)(a) of the Access to Information and Protection of Privacy Act, 2015 applies to information referred to in subsection (1) of this section as if the information was information that a head of a public body is authorized or required to refuse to disclose under Part II, Division 2.

(5) Notwithstanding section 21 of the Auditor General Act, a person to whom that section applies shall not disclose, directly or indirectly, commercially sensitive information that comes to his or her knowledge in the course of his or her employment or duties under that Act and shall not communicate those matters to another person, including in a report required under that Act or another Act, without the prior written consent of the chief executive officer of the corporation or subsidiary from which the information was obtained.

(6) Where the auditor general prepares a report which contains information respecting the corporation or a subsidiary, or respecting a third party that was provided to the corporation or subsidiary by the third party, a draft of the report shall be provided to the chief executive officer of the corporation or subsidiary, and he or she shall have reasonable time to inform the auditor general whether or not in his or her opinion the draft contains commercially sensitive information.

(7) In the case of a disagreement between the auditor general and a chief executive officer respecting whether information in a draft report is commercially sensitive

information, the auditor general shall remove the information from the report and include that information in a separate report which shall be provided to the Lieutenant-Governor in Council in confidence as if it were a report to which section 5.5 applied.

(8) Notwithstanding the Citizens' Representative Act , the corporation, a subsidiary, another public body, or an officer, member or employee of one of them is not required to provide commercially sensitive information, in any form, to the citizens' representative in the context of an investigation of a complaint under that Act.

2. In this Act …

(b.1) "commercially sensitive information" means information relating to the business affairs or activities of the corporation or a subsidiary, or of a third party provided to the corporation or the subsidiary by the third party, and includes

(i) scientific or technical information, including trade secrets, industrial secrets, technological processes, technical solutions, manufacturing processes, operating processes and logistics methods,

(ii) strategic business planning information,

(iii) financial or commercial information, including financial statements, details respecting revenues, costs and commercial agreements and arrangements respecting individual business activities, investments, operations or projects and from which such information may reasonably be derived,

(iv) information respecting positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the corporation, a subsidiary or a third party, or considerations that relate to those negotiations, whether the negotiations are continuing or have been concluded or terminated,

(v) financial, commercial, scientific or technical information of a third party provided to the corporation or a subsidiary in confidence,

(vi) information respecting legal arrangements or agreements, including copies of the agreement or arrangements, which relate to the nature or structure of partnerships, joint ventures, or other joint business investments or activities,

(vii) economic and financial models used for strategic decision making, including the information used as inputs into those models, and

(viii) commercial information of a kind similar to that referred to in subparagraphs (i) to (vii),

but does not include information relating to an independent contractor's

(ix) name,

(x) position or function with the corporation,

(xi) remuneration, and

(xii) payments received from the corporation;

In the words of the OIPC, from Report 2019-005 at paragraph 40:

> [40] The ECA establishes and maintains Nalcor's unparalleled position among public bodies subject to the ATIPPA, 2015. The only recent change to that status was the minor amendment addressing disclosure of information relating to Nalcor's independent contractors. Under the ECA, Nalcor alone has significant leeway to determine, unilaterally, the extent of its own accountability and transparency.

From the OIPC's submissions to the Committee, at pages 83–84:

> In any other context, contracts entered into by a public body would be public. In any other context, the threshold to withhold third party business information would be section 39, and section 35 would serve to protect public body commercial or financial information. In our view, it has never been adequately explained why the *ATIPPA, 2015* regime would not work for Nalcor. Sections 35 and 39 also protect commercially sensitive information, but they do so to the extent necessary. In our view, the definition and the construction of section 5.4 in the *Energy Corporation Act* cast an unnecessarily broad net over the information held by Nalcor.
>
> In our submission to the 2014 Statutory Review of ATIPPA we pointed out that Manitoba Hydro is a crown corporation that is subject to the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) in that province. It undertakes much the same kind of work in developing major hydroelectric projects as Nalcor has done, yet it operates within *FIPPA* in the same manner as any other public body.
>
> Beyond the breadth of the definition, the main issue is with section 5.4. It already says that the Commissioner can determine whether the information is commercially sensitive, but the process is unlike that found in *ATIPPA, 2015*, and lacks clarity. It is arguable that 5.4(2)(a) and (b) constitute the threshold

necessary for such a determination by the Commissioner, otherwise it is difficult to see why the certification and confirmation process is present. Normally, under *ATIPPA, 2015*, when the head of a public body refuses access based on an exception, there are no certificates involved. A decision has been made, and we review that decision if a complaint is received. If we are intended to review and make a determination based on argument and evidence presented by Nalcor whether or not the exception applies, then the certification and confirmation process is unnecessary.

The OIPC's recommendation, at page 84:

> **Recommendation 17.1: Amend section 5.4 of the *Energy Corporation Act* to remove the certification and confirmation process to make it clear that the Commissioner's review of a decision to deny access places the burden of proof on Nalcor, and it must discharge that burden through the presentation of evidence and argument about commercial sensitivity and the expected harm from disclosure, as would be the process for any other public body under *ATIPPA, 2015* and remove section 5.4 of the *Energy Corporation Act* from Schedule A of *ATIPPA, 2015***. (Emphasis in original)

This echoes the recommendation of Paul Lane.

On the other hand, Nalcor's position – from its submission:

SECTION 5.4 OF THE ENERGY CORPORATION ACT

> The ATIPPA applies to Nalcor and its subsidiaries. The exceptions to disclosure found in the ATTIPA are supplemented by section 5.4 of the ECA, which deals with the disclosure of commercially sensitive information by Nalcor and its subsidiaries, not including NLH and CF(L)Co. The continued availability of section 5.4 of the ECA for Nalcor is critical to the Corporation's operations and to ensure that the Province obtains maximum benefits from Newfoundland and Labrador's natural resources. This criticality is compounded by the extremely limited application of section 39 of the ATIPPA, as outlined below.
>
> Without Nalcor having the ability to avail of section 5.4 of the ECA for sensitive commercial information, and with the current confusion surrounding section 39 of the ATIPPA, Nalcor may find itself in a position where commercially-sensitive information should be withheld from the public, but there is no available, and suitable exception to apply. While all public bodies face difficulties in navigating through section 39, in Nalcor's case, the inability to utilize section 5.4 of the ECA can have the very real impact of resulting in financial harm to the Province of Newfoundland and Labrador, especially if there are no relevant exceptions available under section 35 of the ATIPPA – "disclosure harmful to the financial or economic interests of a public body." Nalcor's busi-

ness often involves, and will continue to involve, complex commercial relationships such as those it presently has with Emera and various oil and gas companies. Its projects, both present and future, involve partners and contractors who by necessity provide Nalcor with information that to them is very commercially sensitive. Nalcor must be able to deal with these entities in carrying out its business and they in turn need to be comfortable that Nalcor can control the confidentiality of their information. Without the benefit of section 5.4, businesses will begin to fear that by submitting sensitive information to Nalcor, they are taking a risk that it may become available to the general public, even if their expectation is that it will not. If companies become worried that by conducting business with Nalcor, they may be putting sensitive and potentially harmful corporate information at risk, they will avoid sharing that information and doing business with the Corporation completely. This could very well result in uncompetitive bids being received for projects, the best vendors avoiding doing business with Nalcor, and a loss of possible business opportunities in relation to new ventures. Given the magnitude of the cost of projects undertaken by Nalcor and the complexity of its developments, it will handicap Nalcor's ability to meet its mandate and ensure that the Province obtains maximum benefits from Newfoundland and Labrador's natural resources. For these reasons, it is critically important that Nalcor's current ability to apply section 5.4 of the ECA remains unchanged.

When Nalcor Oil and Gas was created, it was mandated to take an equity interest in new developments. The then existing participants in the offshore oil and gas industry resisted the involvement of a Crown agent at their management table for various reasons. One reason they resisted Government involvement is that information in the possession of the Crown is subject to disclosure obligations, such as the ATIPPA, even with regard to third party information. As a way to assuage this anxiety, the Crown put in place section 5.4 of the ECA in order to provide comfort to the offshore participants that they could treat Nalcor Oil and Gas in the same fashion that they treat their other business partners, without fearing for the sanctity of their commercially-sensitive information. When the Project Agreements were drafted, every one of them expressly dealt directly with the ATIPPA and section 5.4 of the ECA provisions and Nalcor Oil and Gas's obligations thereunder. Without the additional protections afforded by section 5.4 of the ECA, Nalcor Oil and Gas's partners in co-ventures may quite legitimately plead that the protections that have been afforded to their information have now been pulled from under them, with the result being that at best there will no longer be full disclosure to Nalcor Oil and Gas with respect to the Corporation's assets, and at worst that the Corporation will have to return the information hitherto provided to Nalcor Oil and Gas.

The application of section 5.4 of the ECA is of critical importance with respect to the communication and agreements with oil companies. Disclosing an oil company's commercially sensitive information may financially harm that organization and will assuredly damage the negotiating power that organization

may have in future joint ventures. Changing the legislation under section 5.4 of the ECA is in and of itself a breach of the assurances given to Nalcor Oil and Gas's co-venture partners at the time that they entered into the Project Agreements. Breaches, perceived or real, to this commitment to confidentiality will threaten Nalcor's ability to have meaningful input and involvement in the management of its assets and potentially threaten involvement in future business dealings. The potential impact to the various companies that Nalcor engages with is unfathomable, and could have negative consequences for some of those companies on a global scale.

While Nalcor Oil and Gas's interests in offshore developments are now managed by the Oil and Gas Corporation of Newfoundland and Labrador, the existing equity interests remain in Nalcor Oil and Gas. From an access to information standpoint, this translates into an equal need for both organizations to have the capacity to adequately protect commercially sensitive information from public disclosure. Altering this ability for either or both of these organizations will negatively impact both organizations with respect to their ability to maintain successful business relationships that drive economic growth and prosperity.

It has been pointed out by some that section 5.4 of the ECA is unique to Newfoundland and Labrador. It was put in place by the Government to address the commercial nature of Nalcor's business. For instance, Newfoundland and Labrador and Alberta are similar in that the oil and gas industry is of critical importance to both economies. Also similar, is the protection afforded to the business information of third parties through the Provinces' respective access to information acts. The similarities end there, however. Nalcor Oil and Gas requires the protection afforded it in section 5.4 of the ECA with respect to commercially sensitive information as it is a state owned oil and gas company. The ECA provides the expected level of commercial confidentiality that was, and continues to be, an absolute requirement to protect the Province's revenue generating ability and to ensure the optimization of Nalcor Oil and Gas's valuable business relationships. On the other hand, Alberta does not have a state owned oil and gas company, which is the critical difference between the two regimes.

A change to the current application of section 5.4 of the ECA would ultimately be a policy decision that would speak to the value that the Provincial Government places on Nalcor Oil and Gas as well as the equity involvement for these three projects and any more that may come the Province's way. Altering the current protection afforded by the ECA would fundamentally change the way oil and gas relationships in Newfoundland and Labrador progress and may cause irreparable harm to the future of the industry in the Province. Oil and gas companies would close the veil of confidentiality with Nalcor and there would be perpetual concern that future legislative changes may have an impact on past, current and future levels of confidentiality. Needless to say, Nalcor's ability to meet its mandate would be dramatically impacted.

Nalcor also emphasized its limited use of s. 5.4 at page 6:

> Nalcor does not apply section 5.4 of the ECA unless the Corporation feels that it is absolutely necessary to do so. The Access and Privacy Officer will always look to the ATIPPA first, but there are circumstances when section 5.4 of the ECA is absolutely required. Since 2016, Nalcor has applied this exception with respect to approximately 10% of its overall requests. In the limited number of cases where complaints were received with respect to the use of section 5.4, Nalcor's Board of Directors agreed that the information was indeed commercially-sensitive and its release would be harmful to both Nalcor and various third parties. In these cases, it was critical to have the ability to apply section 5.4 of the ECA and protect the information from public release.

As I appreciate the structure of s. 5.4, it is this:

1. It applies to commercially sensitive information of Nalcor, subsidiaries of Nalcor or a third party. Commercially sensitive information is defined extremely broadly in s. 2(b.1).
2. If the CEO of Nalcor reasonably believes that any one or more of the five delineated harm or confidentiality factors have been established, then an access request may/must be refused.
3. If an applicant complains to the OIPC and the OIPC decides to review the refusal, the commissioner will determine only whether the information is commercially sensitive.
4. If the commissioner determines that the information is in fact commercially sensitive – as defined – the commissioner must uphold the refusal if:

    (i) the CEO certifies that the refusal is based on one or more of the five possible reasons for refusal, and
    (ii) the Board of directors of Nalcor or the subsidiary confirms the CEO's decision.

5. In the event of an appeal by an applicant or a third party to the Supreme Court, the grounds for refusal to be considered by the Court include the five factors listed in ss. 5.4(1).

The scope of external review presently contemplated by s. 5.4 was the subject of discussion between the Chair and Grant Hiscock, ATIPP coordinator for Nalcor.

CHAIR ORSBORN: Just help me understand the process as it's laid out now in 5.4. You take the position that certain information is commercially sensitive and then that the CEO forms a belief that the release of that information may harm the corporation or a third party, then release is stopped. Correct?

MR. HISCOCK: Yes, correct.

CHAIR ORSBORN: So, the applicant then goes to the Commissioner and the Commissioner has the ability to do what? Simply look at the information to see if it's commercially sensitive or to look at the opinions of the CEO that harm would result?

MR. HISCOCK: In this case, the big thing, it's a sign-off from the CEO and also the certification from our board of directors.

CHAIR ORSBORN: Yeah, okay.

MR. HISCOCK: Yeah, so –

CHAIR ORSBORN: That's on the harm aspect of it, but looking at the act, it says "the commissioner shall, where he or she determines that the information is commercially sensitive …" accept the certification.

So is the only role of the OIPC to determine whether something is commercially sensitive?

MR. HISCOCK: Right now, the OIPC can weigh in on whether something is commercially sensitive.

CHAIR ORSBORN: But that's the extent of it, isn't it?

MR. HISCOCK: That's the extent of it. That is correct. They can weigh in on it; they can give us our feedback.

CHAIR ORSBORN: Right. Okay. The OIPC then, I'm not quite sure what they have to do. If they determine it's commercially sensitive, if they uphold the decision, then, of the CEO, what happens? How does the appeal proceed?

MR. HISCOCK: At that point, it would be on the applicant to appeal to the Supreme Court.

CHAIR ORSBORN: Okay. What limits are placed on the court? Is it, again, the court simply determining whether the information is commercially sensitive?

MR. HISCOCK: Exactly. They would be determining that.

> **CHAIR ORSBORN:** That would be the only area of dispute all the way through this process, whether the information comes within the definition of commercially sensitive?
>
> **MR. HISCOCK:** That's my understanding. Correct.
>
> **CHAIR ORSBORN:** No assessment of the opinion of the CEO that a competitive position would be harmed, a negotiating position interfered with. Once it's certified, that's done?
>
> **MR. HISCOCK:** Once it's certified, as of today, that's largely done. The OIPC will weigh in. They'll make some comments here and there, but yes.
>
> **CHAIR ORSBORN:** Not a lot left out of that definition, is there, commercially sensitive?
>
> **MR. HISCOCK:** It's a fairly broad definition.
>
> **MR. HICKMAN:** We have not been – I was going to say we've never been to court. There's been one maybe years ago with this where someone appealed to court.
>
> I agree the act is pretty constrained. I believe the court can go dig a little bit deeper than that. I mean, certainly, if we would take the position that it's third party information, that this is customarily dealt with on a confidential basis, they can question it. But I agree; there's only so far they can go with it, if there's a certification of the CEO, but it is limited. I think a court would go a little bit farther than that. (Transcript – January 19, 2021, page 106)

The scope of appellate review under s. 5.4(3) is not an issue for this review.

Section 5.4 was enacted in SNL 2008 c. 31. It was carefully considered in 2014 by the Wells Committee. The Wells Committee acknowledged the concerns of Nalcor and discussed the appropriateness of addressing access to information in Nalcor's hands in the specific context in which Nalcor operates – as the Committee put it, in the "reality in particular circumstances" (p. 147).

The Committee summarized its views at page 151:

> The comments of Mr. Keating, [Vice-President of Nalcor Energy] excerpted above, explain in detail the underlying reasons for the presence of this section in the *Energy Corporation Act*. The compelling factor is that Nalcor Energy is operating, on behalf of the people of the province, in the competitive commercial world. That requires it to keep certain aspects of its operations information confidential from competitors. If it did not, it could run the risk of

> failure, with the potential for massive adverse financial consequences for the people of the province. As well, it partners with one or more private sector commercial entities in a significant part of its commercially competitive activity. Those commercial partners would not be prepared to disclose significant information to Nalcor Energy if Nalcor Energy were subject to the risk of disclosure of that information through the *ATIPPA*.

Its conclusion – at page 150:

> As is the case with the *Adoption Act, 2013* and the *Children and Youth Care and Protection Act,* the legislature has specified that notwithstanding the *ATIPPA,* those provisions shall prevail. The same comments the Committee made with respect to the impropriety of the Committee questioning the legislature's judgment in the matter apply here with even more force. The legislature specified that this statute is to apply notwithstanding section 6 of the *ATIPPA.* Section 6(1) is the provision that gives the *ATIPPA* priority over all other statutes. The legislature has clearly specified that this statute is to have priority, even in the face of the priority specified in section 6 of the *ATIPPA.*

It went on to explain its view that there were sound reasons for this position.

As I have indicated elsewhere in this report, where a previous review has reached a considered conclusion on a substantive issue, I do not consider it productive or appropriate to take a contrary position absent a compelling reason to do so.

I agree with the Wells Committee's conclusion that it is not wise for an ATIPPA review committee to recommend changes to other legislation that specifically addresses access to information and the relationship of the *ATIPPA, 2015* to those specific provisions, or to recommend, without compelling reason, that any such legislation be removed from Schedule A. Any change to the substantive 'blanket of protection' afforded to Nalcor is a matter for the application of judgment by the legislature.

But having said that, and although it is s. 5.4 of the *ECA* and not *ATIPPA, 2015* that limits the OIPC oversight function, my view is that it is not inappropriate, during the course of this statutory review of *ATIPPA, 2015*, to consider whether or not the level of oversight is consistent with current circumstances and with the objectives of *ATIPPA, 2015*. The oversight process, to put it simply, is not of the same policy-based character as the substantive provisions which set out the nature and degree of the specific disclosure-related harms or factors which must be considered.

There is a second factor which requires this Committee to consider the oversight process contemplated by s. 5.4. The Terms of Reference specifically require a considera-

tion of Recommendation 3 of the Commission of Inquiry Respecting the Muskrat Falls Project. That recommendation:

> 3. The Government of Newfoundland and Labrador should amend s. 5.4 of the Energy Corporation Act to authorize the Information and Privacy Commissioner to determine if Nalcor is required to disclose information it wishes to withhold on the grounds of "commercial sensitivity."

This recommendation flows, I believe, from Justice LeBlanc's view that, in the context of the Muskrat Falls Project, Nalcor unjustifiably refused to provide what it considered to be commercially sensitive information to either the Government Oversight Committee or the Public Utilities Board.

The Wells Committee acknowledged the criticism of the substantive protection granted by s. 5.4, but, although it did not discuss in detail the oversight protection, was of the view that the existing oversight provisions did provide some comfort to those who were concerned about the substantive level of protection. At page 151:

> From the comments of many participants, the Committee concludes that most people appreciate the importance of specific circumstances in the context of access to information held by a public body. The primary concern expressed is to avoid a situation where the head of a public body, Nalcor Energy, can simply declare the record being sought to be "commercially sensitive" and, with the approval of the board of directors, refuse disclosure. The perception of that circumstance, as much as the reality, gives rise to the concern.
>
> … While it is not what the Commissioner recommends, the government could go a long way towards addressing many of the expressed concerns by adding even a moderately limiting objective standard by which to establish the reasonable belief of the chief executive officer. That could be achieved by inserting before the words "reasonably believes" in subsection 5.4(1) the phrase "taking into account sound and fair business practices."
>
> Those concerns should also be allayed by the existence of the process for review by the Commissioner. Section 5.4(2) clearly contemplates review by the Commissioner under section 43 of the *ATIPPA*, and subsection (3) contemplates appeal to the courts. In addition, during the hearings, Mr. Keating clearly stated he would have no objection to the Commissioner examining the document to ensure that it was of the character claimed. As a result, the normal review procedures of the Commissioner should apply. In those circumstances the Committee is satisfied that, although the basis for making the de-

> cision is different from that which protects third party commercially sensitive information under section 27 of the *ATIPPA*, it is not unreasonable in the circumstances and, because the Commissioner can examine the records, would not prevent disclosure of records that should otherwise be disclosed.

The recommendations from Justice LeBlanc suggests that this confidence in the oversight provision was perhaps, in hindsight, misplaced.

Nalcor noted that Justice LeBlanc did not recommend removing s. 5.4 from the *ECA*, and commented on his recommendation:

> The Corporation respectfully submits that the acceptance of this recommendation will not be in the best interests of the Province. Section 5.4 presently permits an Applicant to appeal to the Supreme Court if he/she does not agree with Nalcor's use of the exception. Nalcor believes that this is the appropriate venue for a review of Nalcor's position, as it will ensure that the review is fulsome and provides the parties with the opportunity to present their arguments and evidence in a judicial forum.

But the submission went on to acknowledge "that there is a need for an improved process with respect to complaints received regarding section 5.4 of the *ECA*."

Nalcor's suggestion:

> Therefore, to improve transparency and accountability, and for complaints where the Applicant would prefer to avoid making an appeal directly to the Supreme Court, Nalcor suggests the following approach for consideration:
>
> 1. If a complaint is received by Nalcor in relation to the use of section 5.4, Nalcor will develop an information package that clearly explains the justification for utilizing that section of the ECA.
>
> 2. The information package will then be shared directly with the Office of the Information and Privacy Commissioner (OIPC) before any information is shared with Nalcor's Board of Directors.
>
> 3. The OIPC will then have time to review Nalcor's submission and provide a response to the Nalcor Board with any comments, feedback and recommendations with respect to the commercial sensitivity of the applicable records.
>
> 4. Nalcor's Board of Directors will then review Nalcor's information package and the OIPC's response and factor them into the Board's discussion and ultimate decision regarding whether the applicable information

should be released or withheld from disclosure under the section 5.4 exception.

5. The final decision from Nalcor's Board of Directors will be shared with the OIPC detailing Nalcor's consideration of the OIPC's feedback.

It is submitted that this proposed process will improve transparency and accountability and will effectively insert the OIPC into Nalcor's decision-making process regarding the use of section 5.4 of the ECA. Of critical importance to Nalcor (and its business partners) is that while this process provides for a more fulsome dialogue with respect to the application of section 5.4, it ensures that the Nalcor Board retains the final decision with respect to whether the information is disclosed.

The way the suggestion is worded, it contemplates the OIPC being able to communicate directly with the Nalcor Board regarding the commercial sensitivity of the requested records. The OIPC's views on commercial sensitivity would then be reviewed by the Board in the course of its consideration of the request. However, based on discussions with the representatives of Nalcor during the public hearings, it seems that the intent is somewhat broader and would allow the OIPC to comment on the applicability of whatever harm-based provisions were at issue.

MR. HISCOCK: I just want to touch on the recommendation that we have come up with for a moment. It was in our submission, but I think it's an important one to go over. Again, it is simply a five-step process. So just to go through that.

"If a complaint is received by Nalcor in relation to the use section 5.4, Nalcor will develop an information package that clearly explains the justification for utilizing that section of the ECA." We would then take that information package –

CHAIR ORSBORN: Okay, let me just stop you there.

Justification in terms of classifying something as commercially sensitive? Or justification in terms of harm or confidentiality?

MR. HISCOCK: In terms of classifying something as commercially sensitive. Both, actually, because we would need to speak to the harm within that section of the act.

CHAIR ORSBORN: Okay. So that would go one step beyond the legislation in that you would be informally explaining to the Commissioner why the CEO reached the opinion and why the board certified that something was harmful or confidential.

MR. HISCOCK: Yeah, and the board certification will actually come later in this new process. …

MR. HISCOCK: … In number two, that information package will then be shared directly with the OIPC. They will then be given an opportunity to comment on whatever they want to comment on, whether it's commercial sensitivity or whether they have any recommendations. We're going to keep that process fairly open.

CHAIR ORSBORN: Well, that was my question, because in number three there you talk about: OIPC can review, provide a response to the board with any comments, et cetera, with respect to the commercial sensitivity.

MR. HISCOCK: Yes.

CHAIR ORSBORN: But are you saying it goes beyond that?

MR. HISCOCK: With respect to the commercial sensitivity, yeah, and they could even speak about harm if they have an opinion as to what the harm will be. …

CHAIR ORSBORN: So you're suggesting that the OIPC would have a chance to comment on the two-level decisions that have to be made. One: Is it commercially sensitive? Number two: Should it be protected?

MR. HISCOCK: Yes, they will be able to comment on that and we will feed that into our board.

The board of directors will then review the original information package, as well as the OIPC's response, and factor all of that into their decision. The other benefit that we're going to get here is that that formal decision will need to be made available back to the OIPC and back to the applicant as well.

The final decision from Nalcor's board of directors will be shared with the OIPC detailing, not only our position, but our position as it stands to the comments brought forward by the OIPC. We're inserting them, to a degree, into our own information-making process.

CHAIR ORSBORN: The board looks at all aspects of the decision, not just the commercial sensitivity, but also the harm issue.

MR. HISCOCK: Yes.

CHAIR ORSBORN: Okay. Are you suggesting that this be incorporated into legislation somehow, or made a more sort of formal practice?

MR. HISCOCK: Yeah, I'm suggesting that while this may be slightly different than the recommendation 3 that stemmed out of the –

…

MR. HISCOCK: – Inquiry Respecting the Muskrat Falls Project, our preference would be to not implement that recommendation and, in lieu of that, implement this process which we feel improves openness and transparency without having the negative impact of worsening our business relationships that we rely on with our business partners.

CHAIR ORSBORN: I don't know if you're able to expand on that recommendation. The way it reads is it should amend 5.4 to authorize the OIPC to determine if you're required to disclose information it wishes to withhold on the grounds of commercial sensitivity. But the Commissioner already has that power, doesn't he, to rule on whether or not it's commercially sensitive?

MR. HISCOCK: They can make a ruling on whether or not they think it's commercially sensitive but if we had the sign-off from our CEO and by our board, for lack of a better term, it doesn't carry a whole lot of meaning then, because that effectively shuts that information down from going out the door.

This new process would have much more of a back and forth between the Nalcor board and the –

CHAIR ORSBORN: I am trying to understand that the extent of the recommendation, it seems to focus on commercial sensitivity. As the statute stands now, the OIPC can assess it for commercial sensitivity whether it comes within the definition.

MR. HISCOCK: Yes.

CHAIR ORSBORN: So I am trying to understand how the – can you help me? Does the recommendation go beyond that? It's focused on commercial sensitivity.

MR. HICKMAN: If I may, I had the benefit of sitting in this room when some of this discussion was going on and there was some attention given to 5.4 and one of the key aspects was that it felt that the people who were critical of it, who felt that the Commissioner was somewhat powerless. We have, as Grant has explained, he can say well, this is what I think but if the CEO, with the board's agreement, signs off on it, then whatever the Commissioner finds is really of no effect.

We interpret that – we being Nalcor – recommendation to mean, in essence, this exception should be treated like the other exceptions in the ATIPP Act, in

that the Commissioner, if there's a complaint – we would have the opportunity to put forward our position and he would review it and then he would issue a response which may be recommending disclosure of some or all of the information, and then we would have to follow the rest of the act. That's how we've interpreted it.

CHAIR ORSBORN: So 5.4 would be essentially a part of ATIPPA subject to the Commissioner, okay.

MR. HICKMAN: Exactly. Yeah, that's the way we would interpret it.

CHAIR ORSBORN: That is what I assumed, okay.

MR. HICKMAN: If I may go back as to why Mr. Keating and Mr. Templeton explained why it is important to the oil and gas business. We believe it's important to the rest of our organization too that this sort of final say, subject to appeal to the court, rests with the board.

The process we're suggesting is – we understand the concern that people have. There's this balance of the public's interest of disclosure and understanding what's going on, balanced with the commercial interests that we, as a corporation, have and our partners have. Ultimately, if they're in the best interests of Nalcor, they're in the best interests of the province.

The process we're putting forward is to shine a bit of a brighter light on it, transparency to the process. We have to fully explain why we took the position, explain that to the Commissioner; he then can turn and then fully explain his position. Then our board can take – this is sort of like a fresh set of eyes – a look at it. They may defer it from the CEO, in some respects. Whether or not they do, their final decision in that regard would be outlined as well for the applicant to see.

It's about putting more transparency on the process. Right now, I think that this is part of the process; it's just like whatever Nalcor says is (inaudible).

CHAIR ORSBORN: Yeah. Trying to work through the recommendations of Justice LeBlanc. Just assume, for the sake of argument only, that you had the harm and confidentiality provisions in 5.4 and then you had the commercially sensitive argument. What would be the prejudice to Nalcor if the commercial sensitivity and the reason for non-disclosure were subject to review by the Commissioner with the possibility of a recommendation for release, which could then be taken to court? What would the prejudice to Nalcor be?

…

MR. HISCOCK: The difficulty for Nalcor there, when it comes to our business partners and oil and gas companies as well, is knowing that there may be a third party deciding whether or not their information gets released. To a slightly lesser degree, they're going to look at that the same as if they never had access to that provision, because it is going outside of the relationship between the business partner and Nalcor and they are losing some control there.

While it's not completely the same as if it went away, some of our business partners would take a great deal of concern over the fact that we're introducing someone else into it.

…

CHAIR ORSBORN: Are you suggesting that your partners would get upset if the Commissioner had the power to recommend but not order?

MR. HISCOCK: I think – and correct me if I'm wrong – if the Commissioner has the power to recommend and then they put that on us, in most cases outside of 5.4 we would then need to take that to court.

…

MR. HISCOCK: If that's the way it was going to work around section 5.4, then absolutely and, Jim, correct me if I'm wrong – Mr. Keating. Our business partners would have concerns around that because it's now the relationship between us and our business partners, and we're now introducing another body that has the authority, potentially, to make their life a lot more difficult when it comes to trying to keep that commercially sensitive information close to their chest.

MR. HICKMAN: Yeah and I think it would be whitling away at these protections that our partners feel they have with respect to disclosure of information. This is a world they're not used to. We talk about oil and gas because they were sort of the genesis of this, but we do have others such as Emera and the Innu –

CHAIR ORSBORN: That's the world they're in, isn't it.

MR. HICKMAN: Pardon?

CHAIR ORSBORN: I say that's the world they're in.

MR. HICKMAN: Yeah, it's the world they're in. Yeah, exactly.

There are the Emeras of the world – who are a key partner of ours – and the Innu, as Grant pointed out and as you know, highlight in their submission.

Each layer that goes makes them a lot less comfortable and, we believe, a lot less able to share with us or likely to share with us key information. Or even in some instances, if they're not in relationship with us now, to not get into a relationship with us, which we believe would be harmful to the business that we're in and thus the province.

Yes, there's no doubt that ultimately if an applicant under the present situation can still go to Supreme Court and appeal it, it's a little bit constrained, as we discussed earlier, about how far even a court can go in its review. As I say, the more this is whittled away, the more uncomfortable they get and that puts us in a difficult position.

I think Grant mentioned earlier in some instances we would have to pursue, go to court over this. In just about all instances we're going to want to, because it's in our best interests and the interest of our partners to go to court to contest such a recommendation. While maybe that's fine and Nalcor has to do that all the time, that's time, expense and resources.

If the position now is the applicant, if they feel strongly about it they'll go to court, that's great; we'll be there and we'll be there to contest their application. But I can say that we would – it would be almost automatic that we would be in court over any recommendation that would be for us to disclose information that we felt should be retained under 5.4.

I'm not meaning that as a threat or anything like that, I'm just saying that's the way it is. That's the world we live in. We're playing in a commercial world and there are expectations on us from our partners.

MR. HISCOCK: While our recommendation – and I'm happy to go into more detail on that – may not specifically address Recommendation 3 coming out of the Inquiry Respecting the Muskrat Falls Project, if implemented it will still have the benefit of improving transparency without putting business relationships and, ultimately, the economy of the province, at stake.

We submit that the onus should be on the applicant to choose whether or not to proceed with a complaint to the Supreme Court, rather than implementing a system that would quite possibly see Nalcor in court with respect to all OIPC decisions that recommend the release of commercially sensitive information. Overall, this will provide for dramatically more information being provided to the applicant with a greater level of transparency, while protecting Nalcor's ability to sometimes operate like a true commercial entity, when it is required to do so, to maximize the return to the province.

Not only will this provide for greater involvement by the OIPC, but it will better inform the applicant and the general public. Additionally, this new process may be financially beneficial to the applicant who may have previously con-

> sidered a complaint directly to the Supreme Court. They will now be receiving significantly more information in advance of any deliberations regarding possible court proceedings that should prove helpful in their decision-making.
>
> This is ultimately about balance. Nalcor does understand the concerns of the public and of this committee in weighing the needs of the applicants with the needs of the public bodies. From a public-facing point of view, this new approach puts more onus on both Nalcor and on the Information Commissioner to better inform the applicant while, again – and not sound too repetitive – still affording Nalcor the protections that it needs to operate successfully and maximize the return to the province.
>
> **CHAIR ORSBORN:** It doesn't mention it specifically but your proposal would contemplate the sharing of the information package that you provide the OIPC – the sharing of that with the applicant.
>
> **MR. HISCOCK:** Yes. (Transcript – January 19, 2021 – pages 107 – 111)

And subsequently, at page 114:

> **MR. HISCOCK**: We are leading the way here for the entire country. Sometimes restrictions are also needed to balance the needs of the public to obtain the information of public bodies, with the requirement of some of those public bodies to compete with and do business with private companies who require a greater degree of information protection. We don't feel that this process is broken, but our recommendation noted in our submission will provide many additional benefits as described here today.
>
> **CHAIR ORSBORN:** If I can just go back to that and to Judge LeBlanc's recommendation. Is it fair for me to take from that recommendation – and I didn't sit through the days of hearings that Mr. Hickman did – that he's not suggesting that 5.4 should be taken away, but suggesting that it should remain but with the insertion of the Privacy Commissioner in the full sense. You would disagree with the full sense part of it and want it back up to a more informal process. Is that …?
>
> **MR. HISCOCK:** Exactly.
>
> **CHAIR ORSBORN:** Okay. It's not within this recommendation, as you see it, from Justice LeBlanc; a recommendation that 5.4 should be done away with in terms of ATIPP.

As s. 5.4 is presently structured and in light of the very broad definition of commercially sensitive information, the statutory provision for OIPC oversight is essentially meaningless.

I appreciate Nalcor's efforts to fashion an approach to oversight that will allow the OIPC to play a more meaningful role by providing its informed participation and views on all aspects of Nalcor's decision-making process relating to access to information. But I am not persuaded by Nalcor's position – reproduced above – that if the full range of OIPC review and related remedial authority were applicable, Nalcor would somehow be prejudiced because its business partners "would take a great deal of concern over the fact of introducing someone else into it". Simply expanding the ability of the OIPC to make a formal recommendation relating to the applicability of one or more of the s. 5.4 harm or confidentiality factors, in addition to its present ability to review commercial sensitivity, does not change either the substantive protection of s. 5.4 or the decision-making authority of Nalcor as a public body. As I have repeated throughout this report, procedure must be distinguished from substance. I appreciate that the oversight process may be considered by some as occupying the outer limits of what may be considered procedural. But the oversight and appeal process, providing for an independent review of decisions, must respect the substantive parameters surrounding those decisions. An expanded scope of review simply allows additional decisions and aspects of those decisions to be subject to scrutiny. The review may generate comment and potentially a recommendation by the OIPC, but it does not and cannot change either the decision-making authority or the substantive issues considered in the course of that exercise of authority.

At present, if the OIPC were to recommend, pursuant to s. 47 of *ATIPPA, 2015*, that access should be granted on the grounds that the requested information is not commercially sensitive – an unlikely scenario – the resulting Nalcor decision could be appealed by either an applicant or a third party pursuant to s. 54 of *ATIPPA, 2015*, with the Court required to apply the definition of commercially sensitive and the s. 5.4(1) refusal grounds. Allowing the OIPC to recommend access or otherwise based on its assessment of the s. 5.4 grounds for a refusal of access cannot reasonably be said to prejudice Nalcor's position regarding the protection of the information it holds. An applicant retains the present 'full-scope' right of direct appeal; it is only when an applicant or third party chooses to file a complaint that the OIPC becomes involved. Any dispute between the applicant or third party with respect to a decision of Nalcor in response to an OIPC recommendation still ends up in court if contested.

More broadly, oversight of the access to information decisions of public bodies is critical to public confidence in the principled treatment of access requests. It is difficult for a public body to say, on the one hand, that it is committed to transparency and accountability but, on the other hand, that it needs to retain a measure of essentially unsupervised control over what is released.

As observed by the OIPC, Nalcor – and its affiliates – have an "unparalleled position" among public bodies with respect to public accountability and transparency. That unparalleled position is, in substance, the result of the all-encompassing definition of commercially sensitive information and five very gently worded exceptions, the establishment of a reasonable belief in any one of which would support a denial of access.

Being subject to the same level of oversight and scrutiny as other public bodies recognizes that, although Nalcor and its affiliates are operating in the competitive and complex commercial world, they are, for better or worse, nonetheless public bodies, owned by the Crown and operated on behalf of the citizens of Newfoundland and Labrador. As subsection 3(1) of the *ECA* says, Nalcor is "an energy corporation for the province".

I recommend that Nalcor and its subsidiaries be subject to the full range of oversight contemplated by *ATIPPA, 2015*. This recommendation is, I believe consistent with the recommendation of Justice LeBlanc.

Whether Nalcor should continue to enjoy the substantive exception provisions of s. 5.4(1) is a matter for the legislature. Having said that, in the course of the Committee's hearings it was suggested by government that, to be consistent with the fact that Newfoundland and Labrador Hydro is fully subject to *ATIPPA, 2015*, it would be appropriate that any hydro electric business activities carried on by Nalcor or one of its subsidiaries should also be subject to the *ATIPPA, 2015* regime.

The thrust of Nalcor's presentation was the need to maintain the protection given by s. 5.4 of the *ECA* for its activities related to oil and gas exploration, development and production. I repeat some extracts from the hearing transcripts reproduced earlier:

> The application of section 5.4 of the ECA is of critical importance with respect to the communication and agreements with oil companies. Disclosing an oil company's commercially sensitive information may financially harm that organization and will assuredly damage the negotiating power that organization may have in future joint ventures. Changing the legislation under section 5.4 of the ECA is in and of itself a breach of the assurances given to Nalcor Oil and Gas's co-venture partners at the time that they entered into the Project Agreements. Breaches, perceived or real, to this commitment to confidentiality will threaten Nalcor's ability to have meaningful input and involvement in the management of its assets and potentially threaten involvement in future business dealings. The potential impact to the various companies that Nalcor engages with is unfathomable, and could have negative consequences for some of those companies on a global scale.

> While Nalcor Oil and Gas's interests in offshore developments are now managed by the Oil and Gas Corporation of Newfoundland and Labrador, the existing equity interests remain in Nalcor Oil and Gas. From an access to information standpoint, this translates into an equal need for both organizations to have the capacity to adequately protect commercially sensitive information from public disclosure. Altering this ability for either or both of these organizations will negatively impact both organizations with respect to their ability to maintain successful business relationships that drive economic growth and prosperity.
>
> It has been pointed out by some that section 5.4 of the ECA is unique to Newfoundland and Labrador. It was put in place by the Government to address the commercial nature of Nalcor's business. For instance, Newfoundland and Labrador and Alberta are similar in that the oil and gas industry is of critical importance to both economies. Also similar, is the protection afforded to the business information of third parties through the Provinces' respective access to information acts. The similarities end there, however. Nalcor Oil and Gas requires the protection afforded it in section 5.4 of the ECA with respect to commercially sensitive information as it is a state owned oil and gas company. The ECA provides the expected level of commercial confidentiality that was, and continues to be, an absolute requirement to protect the Province's revenue generating ability and to ensure the optimization of Nalcor Oil and Gas's valuable business relationships. On the other hand, Alberta does not have a state owned oil and gas company, which is the critical difference between the two regimes.

The "oil and gas line of business" of Nalcor is reflected in the section of the *ECA* setting out the objects of the corporation:

> *5.(1) The corporation is responsible for investing in, engaging in and carrying out the following activities in all areas of the energy sector in the province and elsewhere, in accordance with the priorities of the government of the province: …*
>
> *(b) the exploration for, development, production, refining, marketing and transportation of hydrocarbons and products from hydrocarbons; …*

Government has, apparently, made a policy decision to remove Nalcor's hydro business from s. 5.4; I suggest that, in implementing this policy, government consider doing so by limiting the application of s. 5.4 to oil and gas (hydrocarbon) related information, thus allowing the ATIPP regime to apply to all other information in Nalcor's custody or control. Such an approach would, I believe, retain the protection said by Nalcor to be imperative while respecting to the extent possible the principles of transparency and accountability of public bodies. Accordingly, my suggestion is to limit the definition of commercially sensitive information – the information protected by the substantive provi-

sions of s. 5.4 – to information relating to the business affairs or activities in respect of the business and activities encompassed by paragraph 5(1)(b) above.

Related to the matter of the oversight of the application of s. 5.4 and to the general thrust of Recommendations 3 and 4 of the Muskrat Falls Inquiry is the consideration of whether the public interest override should be applicable to the s. 5.4 exception.

In the application of a s. 5.4 exception, should the public interest be considered? To the extent that the exception is discretionary, consideration of the public interest is already required. In line with the discretionary exceptions in *ATIPPA, 2015* itself, the exception should be specifically subject to the public interest override.

If the interest is "of a third party", the s. 5.4 exception is mandatory. Nalcor is a Crown corporation operating in the interests of the residents of the public. As a Crown corporation it is owned, indirectly, by those residents. There is an obvious public interest in the transparency of and accountability for the economic activities of government, including those conducted through a wholly owned corporation. Should the situation arise where the benefit to the public of disclosure of information held by the corporation is "clearly demonstrated" to outweigh the need for s. 5.4 protection, disclosure should follow. I am satisfied that, as is the case with some of the mandatory exceptions in *ATIPPA, 2015*, the public interest override should be available. While this recommendation relates more to the substantive level of protection than to oversight, given the express direction to this review to consider Recommendations 3 and 4 of the Muskrat Falls Inquiry in relation to Nalcor, I am comfortable with making this a recommendation rather than simply a suggestion.

I recommend that the s. 9 override provision be extended to s. 5.4 of the *ECA* in both its discretionary and mandatory aspects.

Repeating the discussion earlier in this report, I suggest that government consider an amendment to the *ECA* to give the responsible minister the authority to order Nalcor to disclose to the minister information in its custody or control without the need for an ATIPP request or complaint. This latter approach is more a matter of corporate governance than of ATIPPA, but it would I think, deal with the concerns of Justice LeBlanc as reflected in Recommendation 4 of the Muskrat Falls Inquiry, a recommendation which I have been asked to consider. Whether the minister would publicly disclose the requested information would be a decision for the minister to be made, if in the context of a request for information, in accordance with *ATIPPA, 2015*.

I would make one further point. The submission of the Innu Nation expressed a concern over access to existing agreements which were reached in an understanding of confidentiality:

> Innu Nation sees no good policy reason for the Information and Privacy Commissioner to be engaged in assessing whether Nalcor has a right to withhold information on grounds of commercial sensitivity where Nalcor has already agreed with a third party that an agreement needs to be treated confidentially. The confidentiality terms of agreements that we have entered into with Nalcor Energy in which we have already agreed to maintain confidentiality should not be allowed to be overridden by the Commissioner becoming involved.

This is a valid point. While the interests of the Innu Nation may be protected to some extent under s. 35 there is perhaps an element of unfairness in subjecting existing confidential information to a more extensive access oversight process than that in place when the information came into Nalcor's possession. As discussed earlier, it is true that the substantive non-disclosure provisions of s. 5.4 – left undisturbed by this Committee's recommendations – may well apply so as to preclude any recommendation by the OIPC to grant access. But in any event, I would recommend – without recommending a legislative amendment – that the OIPC, when considering a request for access to information which was in Nalcor's custody or control before passage of the above recommendation – assuming it is accepted – ensure that its consideration fairly reflects the circumstances and oversight regime under which Nalcor obtained the information.

RECOMMENDATION

- That section 5.4 of the *Energy Corporation Act* be amended to allow the standard *ATIPPA* request, review, recommendation and declaration/appeal processes. [Appendix K]
- That *ATIPPA, 2015* be amended to extend the section 9 public interest override provision to section 5.4 of the *ECA*. [Appendix K, s. 9(2.1)]
- That the *Energy Corporation Act* be amended to limit the application of section 5.4 only to hydrocarbon-related information in Nalcor's custody. (Appendix K]

Suggestion: That government considering amending the *Energy Corporation Act* to provide that the corporation is required to provide to the responsible minister such information as may be requested by the minister.

These two inclusions in Schedule A should be considered together.

Evidence Act

8.1 (1) In this section

(a) "legal proceeding" means any civil proceeding, inquiry, arbitration, judicial inquiry or proceeding in which evidence is or may be given before a

(i) court, tribunal, board or commission,

(ii) person or committee, including a disciplinary committee, mandated to review the clinical competency of a health care provider of a regional health authority established under the Regional Health Authorities Act , or

(iii) committee, including a disciplinary committee, of a governing body of a regulated health profession,

and includes an action or proceeding for the imposition of punishment by way of fine, damages or penalty for the violation of an enactment but does not include an inquiry ordered under the Fatalities Investigation Act , the Provincial Offences Act or the Public Inquiries Act, 2006 ;

(b) "witness" includes a person who, in a legal proceeding

(i) is examined orally for discovery,

(ii) is cross examined on an affidavit made by that person,

(iii) answers interrogatories,

(iv) makes an affidavit as to documents, or

(v) is called on to answer a question or produce a document, whether under oath or not.

(2) This section applies to the following committees:

(a) a quality assurance committee as defined under the Patient Safety Act ;

(b) a quality assurance activity committee as defined under the Patient Safety Act ; and

(c) the Child Death Review Committee under the Fatalities Investigations Act .

(3) The following shall not be disclosed in or in connection with a legal proceeding:

(a) a report, statement, evaluation, recommendation, memorandum, document or information, of, or made by, for or to, a committee to which this section applies; and

(b) a report or notice made under section 4 or 7 of the Patient Safety Act .

(4) Where a person appears as a witness in a legal proceeding, that person shall not be asked and shall not

(a) answer a question in connection with proceedings of a committee to which this section applies;

(b) produce a report, evaluation, statement, memorandum, recommendation, document or information of, or made by, for or to, a committee to which this section applies; or

(c) produce a report or notice made under section 4 or 7 of the Patient Safety Act .

(5) Subsections (3) and (4) do not apply to original medical or hospital records pertaining to a person.

(6) Where a person is a witness in a legal proceeding notwithstanding that he or she

(a) is or has been a member of;
(b) has participated in the activities of;
(c) has made a report, evaluation, statement, memorandum or recommendation to; or

(d) has provided information or a document to

a committee set out in subsection (2) that person is not, subject to subsection (4), excused from answering a question or producing a document that he or she is otherwise bound to answer or produce.

Patient Safety Act

10.(1) The Access to Information and Protection of Privacy Act, 2015 does not apply to the use, collection, disclosure, release, storage or disposition of, or any other dealing with, quality assurance information.

(2) Notwithstanding the Personal Health Information Act or another Act or law, a person may release any information to a quality assurance activity committee.

(3) Notwithstanding subsection (2) or another Act or law, a person shall not disclose, release or access quality assurance information, even where it contains his or her personal health information, except as permitted under this Act.

(4) For the purpose of carrying out its duties and responsibilities under this Act, a quality assurance activity committee may require a health care provider or a person under the authority of a regional health authority who has information, or the custody or control of a document or record, relating to a close call or an occurrence being reviewed or investigated to provide the information, document or record in accordance with the regulations.

(5) If a close call or an occurrence involves more than one regional health authority, the quality assurance activity committees established to review or investigate it may share information, documents and records with each other to the extent necessary to properly carry out their duties and responsibilities.

(6) For the purpose of subsection (5), a document or record may contain personal information or personal health information.

15. Quality assurance information collected by or for a quality assurance committee or a quality assurance activity committee continues to be quality assurance information after

(a) the committee is no longer in existence or no longer being maintained or operated; or

(b) the entity that established the committee no longer has the authority to establish or maintain the committee.

Quality assurance information is defined in s. 2(s) of the *Patient Safety Act*:

2.(s) "quality assurance information" means information in any form that is

(i) provided to or generated for a quality assurance committee or a quality assurance activity committee,

(ii) provided to or generated for the purpose of carrying out a quality assurance activity,

(iii) generated for the purpose of producing patient safety indicators,

(iv) generated in the course of carrying out a quality assurance activity, or

(v) contained in a report or notice made under section 4 or 7,

but does not include

(vi) information contained in a record, such as a hospital chart or a medical record, that is maintained for the purpose of documenting health services provided to a patient,

(vii) the fact that a quality assurance activity committee met or that a quality assurance activity was conducted, and

(viii) the terms of reference of a quality assurance activity committee;

The submission of the Department of Justice and Public Safety regarding s. 8.1 of the *Evidence Act,* at pages 14–15:

> The Department of Justice and Public Safety is recommending that Schedule A of the ATIPPA, 2015 subsection (f) remain as is, to protect the integrity of the above noted committees.
>
> The conduct of quality assurance activities within the health care system is critical to patient safety and to ensuring the safe delivery of health services to patients. Quality assurance is a means of identifying system improvements and to be effective, health professionals, particularly physicians, must participate in reviews and investigations in a frank and open manner.
>
> Quality assurance activities are critically important to patient safety processes within the regional health authorities, which require the participation of physicians and other health care providers. However, there has been a general concern among physicians, as communicated by the Canadian Medical Protective Association, that their views of a colleague's work could be disclosed in a trial or made public. Sections 10 and 15 of the *Patient Safety Act*, as well as section 8.1 of the *Evidence Act* therefore protect quality assurance information in order to encourage frank and open participation within the process.
>
> The Child Death Review Committee (CDRC), as organized under s. 13.1 of the *Fatalities Investigations Act,* evaluates the facts and circumstances of child deaths, deaths related to pregnancy, and still births/neonatal deaths in the

province. The CDRC receives confidential information, including medical information and often information pertaining to the life circumstances of children, from the Office of the Chief Medical Officer as it relates to the above noted deaths. As such, this information is highly confidential and should continue to be protected from access requests under the ATIPPA, 2015.

Recommendation

Schedule A of the Act should continue to contain the *Evidence Act* s. 8.1 as means of protecting vulnerable and private information from access requests under the ATIPPA, 2015.

The submission from the Department of Health and Community Services relating to the *Patient Safety Act,* at pages 2–3:

> Quality assurance information collected by or for a quality assurance committee or a quality assurance activity committee continues to be quality assurance information after:
>
> (a) the committee is no longer in existence or no longer being maintained or operated;or
> (b) the entity that established the committee no longer has the authority to establishor Maintain the committee.
>
> The conduct of quality assurance activities within the health care system is critical to the safe delivery of health services to patients. Quality assurance is a means of identifying system improvements. To be effective, health professionals, particularly physicians, must participate in reviews and investigations in a frank and open manner.
>
> For many years, physicians, in particular, were reluctant to participate in quality assurance activities for fear that their comments regarding a colleague's work, which are essential to the learnings process, would be made public or used in subsequent legal or disciplinary proceedings. Consequently, documents related to quality assurance activities have traditionally been treated as highly confidential.
>
> One of the primary objectives of the **Patient Safety Act** when it came into force in 2017 (and the corresponding consequential amendments to subsection 8.1 of the **Evidence Act)** was to clarify the intention that quality assurance information, as defined in the **Patient Safety Act**, was protected and could only be disclosed in circumstances as prescribed in the **Patient Safety Act**.
>
> The Canadian Medical Protective Association (CMPA) is a not-for-profit organization dedicated to promoting safe medical care in Canada through medical

advice, patient compensation and professional development. On numerous occasions, the CMPA has stated to the Department of Health and Community Services that the failure to adequately protect quality assurance information would have a highly negative impact on the efforts to improve patient safety in the province. Without adequate protection against disclosure, the CMPA indicated that physicians might be reluctant to participate in quality assurance activities.

To fully appreciate the information protected under the **Patient Safety Act**, it is important to highlight the distinction between the systems-oriented quality assurance activities and the health care provider performance-oriented accountability responses to a particular incident or occurrence within the health care system. When conducting a quality assurance activity related to an incident or occurrence, if it appears that the actions of a particular health care provider did not meet the requisite standard of care, then a review into the skill, knowledge or clinical competency of that provider would be undertaken as an individual accountability review. This review would not form part of the quality assurance activity related to the occurrence. Rather, it would be conducted within an accountability context that may lead to discipline imposed on a health care provider by a regional health authority or a complaint made to the relevant professional regulatory body. The **Patient Safety Act** does not extend protection to the information generated for or produced in the context of that type of individual accountability review.

Moreover, the **Patient Safety Act** requires disclosure of adverse health events to patients impacted and their families. It also mandates the information that must be disclosed, including the recommendations from any quality assurance activity. Therefore, the Act override does not affect patients from accessing information regarding a review or investigation into the health care that they received.

Quality assurance activities are critically important to patient safety processes within the regional health authorities, which require the participation of physicians and other health care providers. However, there has been a general concern among physicians, as communicated by the CMPA, that their views of a colleague's work could be disclosed in a trial or made public. Sections 10 and 15 of the **Patient Safety Act**, as well as section 8.1 of the **Evidence Act** protects quality assurance information in order to encourage frank and open participation within the process. Therefore, the department recommends the continued inclusion of subsections 10 and 15 of the **Patient Safety Act** in Schedule A of the Act.

At the time of the Wells Committee report, s. 8.1 of the *Evidence Act* applied to the following Committees: the Provincial Perinatal Committee, the Child Death Review Committee under the *Fatalities Investigation Act*, a quality assurance committee of a health authority and a peer review committee of a health authority.

The views of the Wells Committee, at page 152:

> Clearly, these are specialized committees designed to promote critical peer review, over and above any assessment otherwise provided for that is produced in connection with the matters that are the subject of such peer reviews. Subsections (5) and (6) establish that the exemption is confined to documents and proceedings connected with those special purpose committees and does not affect the obligation to answer a question or otherwise produce a document. The section also provides for limitation on the use of such information in legal proceedings. The Committee cannot, on the limited information it has, conclude either that the *ATIPPA* contains provisions that are better suited to managing the special and limited protection required for those particular circumstances, or that the public interest would be best served by the provisions in question continuing to prevail over the *ATIPPA*.
>
> The Committee also notes that the recommendation made by Justice Cameron in her report on the Commission of Inquiry on Hormone Receptor Testing, respecting the application of and possible changes to section 8.1 of the *Evidence Act* to materials considered in peer review committees, is still under consideration by the government. It is reasonable to assume that in the course of that consideration, the government would consider also the effect of section 8.1 of the *Evidence Act* on the *ATIPPA*.
>
> For those reasons, that section of the *Evidence Act* should, for now at least, remain on the list of statutory provisions that prevail over the *ATIPPA*. That recommendation is, however, made in the expectation that in the course of the next *ATIPPA* statutory review, information sufficient to enable a fuller assessment will be available.

As part of the passage in 2017 of the *Patient Safety Act*, s. 8.1 of the *Evidence Act* was amended to apply to the three committees now listed in subsec. (2) and to expand the definition of legal proceeding.

It is evident that s. 8.1 was amended to ensure that its provisions reflected the comprehensive regime of patient safety reporting, incident investigation, information accessibility and peer review processes set out in the new *Patient Safety Act*. However, and perhaps contrary to the expectation of the Wells Committee, s. 8.1 remained in Schedule A of *ATIPPA, 2015*.

As I appreciate the effect of s. 8.1, it is intended to ensure that information or reports connected with one of the listed committees not be disclosed in connection with a legal proceeding as defined. Outside the confines of a legal proceeding, and as far as I can ascertain, s. 8.1 has no application.

Access to quality assurance information, defined as including any information provided to a quality insurance committee, is governed by the provisions of sections 10 and 15 of the *Patient Safety Act*. Access to information related to the Child Death Review Committee under the *Fatalities Investigation Act* is covered by s. 24(1) of that *Act*. These provisions are included in Schedule A of *ATIPPA, 2015*, thus confirming that access to the information described is governed by the specific access provisions of those statutes.

I see no effect on the operation of the access to information provisions of those statutes if s. 8.1 of the *Evidence Act* were to be removed from Schedule A.

After further consideration following the provision of the written departmental submissions set out above, government advised during its final oral submission that it has modified its view and now supports the removal of s. 8.1 from Schedule A.

With respect to sections 10 and 15 of the *Patient Safety Act*, they are part of a recently-enacted statute dealing comprehensively with matters of quality assurance in the health service activities of the regional health authorities. The *Act* specifically excludes *ATIPPA, 2015* and that sound policy choice should be respected.

Section 8.1 of the *Evidence Act* should be removed from Schedule A. Sections 10 and 15 of the *Patient Safety Act* should remain in Schedule A.

RECOMMENDATION

- That the *Act* be amended to section 8(1) of the *Evidence Act* from Schedule A. [Appendix K, Schedule A (f)]

24. (1) All reports, certificates and other records made by a person under this Act are the property of the government of the province and shall not be released without the permission of the Chief Medical Examiner.

The submission of the Department of Justice and Public Safety, at pages 15–16:

> When a death occurs in the Province in certain circumstances (including deaths as a result of violence, accident or suicide; unexpected deaths; institutional deaths; and employment related deaths) the Chief Medical Examiner (CME) is responsible for investigating the cause, manner, date, time, and place of the death as well as identifying the deceased person. The Office of the Chief Medical Examiner (OCME) creates records relating to such deaths which can include certificates of death, autopsy reports, and other documents related to post-mortem investigations. The OCME therefore creates singular records about complex situations most often relating to the death of an individual.
>
> The inclusion of s. 24(1) of the FIA in Schedule A of the ATIPPA, 2015 was addressed in the Report of the 2014 Statutory Review. At page 153 of the Report, it was found that:
>
> > …Obviously details of such deaths and certificates resulting from post-mortem examinations cannot be made available for public access on demand, nor should they even be subject to the possibility of a commissioner recommending that they be released publicly. Access to such documents is better regulated by provisions in the special statute governing all aspects of the matters to which they relate than by provisions designed for management of general access to public records.
>
> <u>Recommendation</u>
>
> JPS agrees with the statement above and contends that s. 24(1) of the Fatalities Investigations Act should continue to be included in Schedule A. Because of the sensitive nature of the information within the custody of the OCME, which often concerns deaths other than by natural causes and highly sensitive personal health information which could have implications for the deceased's family, such information should not be available for public review unless the Chief Medical Examiner agrees that it should be released. The CME is in a better position to make this determination than an ATIPP coordinator or the Commissioner, as the CME, a trained pathologist, has a more complete understanding of the nature of the information and the impact its release could have.

This recommendation was supported by the Royal Newfoundland Constabulary.

I agree with the conclusion of the Wells Committee as reproduced in the submission and have been given no reason to warrant its reconsideration. This provision should remain in Schedule A.

FISH INSPECTION ACT, RSNL 1990, C. F-12

5. (1) The minister may refuse to issue a licence required under this Act or the regulations without assigning a reason for the refusal.

This *Act* – primarily the regulations under the *Act* – regulates many aspects of the province's fishing industry, including the issuance of licenses for fish buyers and fish processors. Section 5 of the *Fish Inspection Administration Regulations*, NL Regulations 74/07 refers to the license application process:

5. (1) An application for a fish buyer's licence or a fish processing licence shall be made to the minister in the approved form and containing the information that the minister shall require.

(2) A fish buyer's licence or a fish processing licence may be issued by the minister upon the terms and conditions that the minister considers necessary and advisable, including terms and conditions not related to quality, and the minister may prescribe and attach different conditions to fish buyer's licences or fish processing licences in respect of different areas of the province.

(3) The minister may attach supplemental conditions to, or vary or amend, the terms and conditions of a fish buyer's licence or a fish processing licence issued under subsection (2) as the minister sees fit while the fish buyer's licence or fish processing licence is in effect.

(4) A fish buyer's licence shall be issued only to a specific person and may contain authorizations with respect to one or more species of fish.

(5) A fish processing licence shall be issued only to a specific person and may contain authorizations with respect to one or more specified establishments or to one or more species of fish.

(6) A fish buyer's licence or a fish processing licence issued by the minister shall, unless cancelled by the minister under section 12 or 14, expire on March 31 of the calendar year immediately following the calendar year in which the licence was issued or such other period as the minister may stipulate.

(7) A fish processing licence may not be transferred or assigned without the approval of the minister.

(8) A fish buyer's licence may not be assigned without the approval of the minister.

Schedule A of *ATIPPA, 2015* refers to s. 5(1) of the *Act*. The effect of its inclusion is not clear to me. The Department of Fisheries, Forestry and Agriculture commented, at page 3:

> Section 5(1) of the **Fish Inspection Act** allows the Minister of FFA to refuse a processing licence without a reason. The Minister cannot arbitrarily refuse a processing licence, but there are circumstnaces (e.g. monies owed to government) whereby the release of the reason of refusal may result in undue harm to the company. Should the Minister provide no reason for the refusal, it is because the information has been carefully reviewed and determined to be sensitive to an individual, company or industry. FFA does not believe that reliance on Section 39 will necessarily ensure that this information is not released. Again, for reasons stated above with the three-part test, FFA does not believe reliance solely on Section 39 is sufficient.

It is not my mandate to provide an interpretation of the effect of s. 5(1) on an ATIPP request; the Department appears to take the position that since no reason has to be given to support the minister's refusal of a license, no information in respect of that refusal may be released.

The views of the Wells Committee on this provision, at page 153:

> The provisions of the statute do not readily indicate, and the Committee has not been made aware of, the reason why a minister should be empowered to make a discretionary decision refusing the granting of a license without assigning a reason for doing so. It appears to permit an arbitrary decision, and having it prevail over the provisions of the *ATIPPA* offends the principle of transparency and accountability in government. On that basis alone, it would be reasonable to conclude that the public interest would not be best served by continuing to include subsection 5(1) in the list of provisions that prevail over the *ATIPPA*.
>
> To the extent that records that might affect confidential scientific, technical, financial, or commercial information of a third party, such information is adequately protected by the *ATIPPA*. There is nothing in the *Fish Inspection Act* to indicate there is anything special about the inspection of fish plants that would necessitate records relating to the matter being regulated by the special provisions of the statute regulating the inspection. On the information before it, the Committee is unable to identify a credible basis for its continued inclusion on the list of provisions that prevail over the *ATIPPA*.
>
> However, bearing in mind the importance of the fishery and regulation of fish processing facilities to this province, the Committee is reluctant to recommend

> removal of section 5(1) from the list at this time. Instead, unless the government takes steps to cause its removal the issue should be more fully examined during the course of the next statutory review. For the time being it should continue to be included in the list of provisions that prevail over the *ATIPPA*.

I agree with this view. The submission of the responsible department does not advance the case for the continued inclusion of s. 5.1 in Schedule A, whatever meaning may be attributed to it.

It should be removed from Schedule A. I appreciate that *ATIPPA, 2015* will now govern any requests for information collected under this *Act* but I would point out that if the recommendations in this report are adopted, such requests would be assessed in accordance with the proposed amendments to s. 39. Those amendments, which focus on harm and eliminate the pre-condition of confidentiality should relieve much of the concern about the inappropriate release of third party commercial information.

RECOMMENDATION

- That the *Act* be amended to remove section 5(1) of the *Fish Inspection Act* from Schedule A. [Appendix K, Schedule A (h)]

4. (1) The minister shall keep every return secret and, except for the purpose of a prosecution under this Act, shall not permit a person other than an employee of the department to have access to a return.

(2) An employee of the department shall not disclose or permit to be disclosed to a person other than the minister or another employee of the department a return or part of a return coming to his or her knowledge which can be identified with or related to an individual return or individual person.

(3) Notwithstanding subsections (1) and (2), the minister may, with the written consent of the person from whom a return is obtained, disclose information in that return.

(4) In this section and section 5, "return" means information, oral or written, obtained as a result of a request under section 3.

The *Fisheries Act* is a very short statute dating back to 1995. Essentially it allows government to compel production to it of information about a fishing business. Section 3 sets out the information that may be required to be produced:

3. (1) A person who manages, directs or has control of a fish business or enterprise or has the control, custody or possession of the accounts, documents or records relating to a fish business or enterprise shall, at the written request of the minister and within a reasonable time that the minister may specify in the request,

(a) provide copies of the accounts, documents or records of that business or enterprise;

(b) provide information that is sought in respect of that business or enterprise or in respect of the accounts, documents or records of that business or enterprise; and

(c) grant access to the accounts, documents or records of that business or enterprise for the purpose of examination by an employee of the department.

(2) In this section "fish business or enterprise" means a business or enterprise that includes in its operations

(a) the catching, producing, processing, buying, selling, exporting or marketing of fish or fish products; or

> *(b) the manufacture, importation, distribution, purchase or sale of gear, engines, equipment or other supplies used in fishing or in equipping a boat or vessel for fishing activity; or*
>
> *(c) the construction, manufacturing, importation, distribution, purchase or sale of fishing vessels or hulls to be outfitted as fishing vessels and materials to be used in the construction, repair or modification of those vessels,*
>
> *but does not include a business or enterprise described in paragraph (a) that operates wholly as a retail outlet.*

The Department of Fisheries, Forestry and Agriculture strongly supports the retention of s. 4 in Schedule A. From its submission, at pages 2–3:

> Section 4 of the **Fisheries Act** states the Minister shall keep every return secret, with the exception for the purpose of a prosecution under the **Fisheries Act** and shall not permit a person other than an employee of the department to have access to a return. A return under the **Fisheries Act** is defined as oral or written information obtained from a fish business or enterprise that operates in the catching, processing, buying, selling, exporting and marketing of fish products, as well as companies involved in the manufacturing and distribution of gear, equipment and vessels. The **Fisheries Act** allows for secrecy when the information supplied or gathered is determined to be sensitive for a variety of reasons including evaluation, negotiations, commercially sensitive, competitors gain, loss of damage to reputation and more. Information collected, used and maintained includes production records, company share structure, proof of ownership, business plans and financial records and more.
>
> FFA deems section 4 of the **Fisheries Act** critical in ensuring growth to a billion dollar industry and the livelihood of many Newfoundlanders and Labradorians. In 2019, the Newfoundland and Labrador seafood industry was valued at $1.4 billion with 90 active processing plants. These 90 plants are owned by 52 non-affiliated companies, and many of these plants are located in rural areas of the province. Being able to protect this information is vital. Please allow me to offer a few illustrative examples of why:
>
> - In 2020, 37 species are being processed in Newfoundland and Labrador. In some instances, there are very few plants processing a particular species type, which increases the likelihood that the company could be identified if information was publicly released. This release of information has the potential for third party harm.
> - Marketing of raw material from Newfoundland and Labrador occurs inside and outside of the province. Should any sensitive information be released, it would cause undue harm to the individual company and poten-

> tially the industry. For instance, if sensitive information relating to one company is released and shows poor quality product, this could cause outside buyers to view the entire industry as producing poor quality.
>
> These companies are competing for raw material starting with the harvesters at the wharves. Release of sensitive information through any means has the potential to create a competitive advantage for others competing for the purchase. FFA must maintain Section 4 of the **Fisheries Act** as protection. FFA does not believe that reliance on Section 39 – Disclosure harmful to business interests of a third party of *ATIPPA, 2015* will necessarily eliminate all circumstances where requests are made to ensure commercially sensitive information is not released. This provision involves a three-part test to be confirmed in all parts, which in most cases is not possible. To prove that information was supplied, implicitly or explicitly, in confidence has been challenging when most third party information is required by FFA to evaluate prior to licensing.

I note the comment that if information is required to be produced, it is difficult to establish that it has been "supplied in confidence".

The views of the Wells Committee, at page 154:

> Clearly, the information is the proprietary and commercially sensitive information that fishing enterprises are required to provide to the government so that it can monitor certain aspects of the operation of fish businesses and enterprises. In the circumstances there is a clear responsibility to maintain the confidentiality with which the owners of the information treat it.
>
> The provisions of the *ATIPPA* that protect trade and technical secrets and other commercially sensitive information of businesses can probably protect fish businesses as well. However, it may be more appropriate to offer that protection in the statute that regulates the industry, rather than in the more uncertain general protection principles of the *ATIPPA*. On the limited information available to the Committee, it cannot be concluded with confidence which would best serve the public interest.
>
> That section of the *Fisheries Act* should remain on the list of statutory provisions that prevail over the *ATIPPA* until the matter can be more thoroughly considered in the next statutory review, unless the government sees fit to ask the legislature to remove it before that time.

This is a less than ringing endorsement of leaving s. 4 in Schedule A of *ATIPPA, 2015*. In my view, the *Fisheries Act* is not one that regulates activity such that the public interest is best served by controlling access to related information as part of the overall scheme of regulating that activity. The submission of the Department refers to the potential for undue harm, and the potential to create a competitive advantage. These in-

volve 'straightforward' assessment of harm issues and do not speak to access to information as an aspect of a comprehensive regulatory regime.

If this Committee's recommendations on s. 39 are accepted, the provisions of that amended section will, in my view, provide an appropriate level of protection for third party information collected by government pursuant to the *Fisheries Act*. Section 4 should be removed from Schedule A.

RECOMMENDATION

- That the *Act* be amended to remove section 4 of the *Fisheries Act* from Schedule A. [Appendix K, Schedule A (i)]

173.1 (1) The registrar may release the information referred to in subsection (2) to

(a) a person involved in an accident which was not required to be reported under this Act;

(b) a person or insurance company that has paid or may be liable to pay damages resulting from an accident; or

(c) a solicitor, agent or other representative of the person or company

where the registrar has received written confirmation of the accident by either of the parties involved in the manner acceptable to the minister.

(2) The registrar may, under the authority of subsection (1), release the following information:

(a) the identification of vehicles involved in the accident;

(b) the name and address of the registered owner; and

(c) the name and address of an insurance company that has issued a policy insuring a party to or a person involved in an accident, together with the policy number applicable to that policy.

174.(1) A person involved in an accident and a person or an insurance company that has paid or may be liable to pay for damages resulting from an accident in which a motor vehicle is involved and a solicitor, agent or other representative of the person or company is entitled to the information that may appear in a report made under section 169, 170, 171 or 172 in respect of

(a) the date, time and place of the accident;

(b) the identification of vehicles involved in the accident;

(c) the name and address of the parties to or involved in the accident;

(d) the names and addresses of witnesses to the accident;

(e) the names and addresses of persons or bodies to whom the report was made;

(f) the name and address of a peace officer who investigated the accident;

(g) the weather and highway conditions at the time of the accident;

(h) [Rep. by 1993 c37 s1] and

(i) the name and address of an insurance company that has issued a policy insuring a party to or involved in an accident, together with the policy number applicable to that policy.

The submissions of Digital Government and Service NL and the Royal Newfoundland Constabulary urge retention of these provisions in Schedule A.

The Wells Committee commented, at page 155–156:

> It is necessary to also examine sections 169, 170, 171 and 172 because those sections describe the nature and content of the information that is intended to be protected from the access requirements of the *ATIPPA*. It is not necessary to reproduce those sections here. Section 169 is lengthy; it identifies the responsibilities of a person involved in a motor vehicle accident. Some of the subsections provide for mandatory reporting of the circumstances of the accident and certain personal information of the driver. Section 170 requires the driver, in circumstances where injury or death is involved, or there is property damage in excess of $2,000, to report to the nearest police officer (or failing the driver, a passenger or the owner of the vehicle if the driver is not the owner). Section 171 requires a police officer who has witnessed or investigated to report, and section 172 requires a garage to report damage. The information is not about government or its operations. It is private or personal information, usually relating to unfortunate incidents between individuals that could require judicial resolution. It is not information that any citizen not personally involved is entitled to access at will. Also, the provisions that protect the information are best contained in the statute that otherwise makes full provision for all other aspects of the circumstances that gave rise to compelling the private citizens to make the reports that sections 169–172 require citizens to make. For those reasons the Committee is of the view that the public interest is best served by the specified sections of the *Highway Traffic Act* remaining on the list of statutory provisions that prevail over the *ATIPPA*.

This conclusion remains valid. I have been given no reason to suggest removing the provisions from Schedule A. They should remain.

21. (1) In this section, "designated director" means the director designated by the board under the by-laws to exercise the powers and discharge the duties under this section.

(2) Notwithstanding section 7 of the Access to Information and Protection of Privacy Act, 2015 , in addition to the information that shall or may be refused under Part II, Division 2 of that Act, the designated director

(a) may refuse to disclose to an applicant under that Act commercially sensitive information of the corporation; and

(b) shall refuse to disclose to an applicant under that Act commercially sensitive information of a third party

where the designated director, taking into account sound and fair business practices, reasonably believes

(c) that the disclosure of the information may

(i) harm the competitive position of,
(ii) interfere with the negotiating position of, or
(iii) result in financial loss or harm to

the corporation or the third party; or

(d) that information similar to the information requested to be disclosed

(ix) is treated consistently in a confidential manner by the third party, or

(ii) is customarily not provided to competitors by the corporation or the third party.

(3) Where an applicant is denied access to information under subsection (2) and a complaint is made to the commissioner under section 42 of the Access to Information and Protection of Privacy Act, 2015 , the commissioner shall, where he or she determines that the information is commercially sensitive information,

(a) on receipt of the designated director's certification that he or she has refused to disclose the information for the reasons set out in subsection (2); and

(b) on confirmation of the designated director's decision by the board,

uphold the decision of the designated director not to disclose the information.

(4) Where a person appealsunder subsection 52(1), subsection 53(1) or section 54 of the Access to Information and Protection of Privacy Act, 2015 , from a decision under subsection (2); or

(a) under subsection 52(1), subsection 53(1) or section 54 of the Access to Information and Protection of Privacy Act, 2015 , from a refusal by the designated director under subsection (2) to disclose information,

(b) paragraph 59(3)(a) and section 60 of that Act apply to that appeal as if Part II, Division 2 of that Act included the grounds for the refusal to disclose the information set out in subsection (2) of this section.

(5) Paragraph 102(3)(a) of the Access to Information and Protection of Privacy Act, 2015 applies to information referred to in subsection (2) of this section as if the information was information that a head of a public body is authorized or required to refuse to disclose under Part II, Division 2 of that Act.

(6) Notwithstanding section 21 of the Auditor General Act, a person to whom that section applies shall not disclose, directly or indirectly, commercially sensitive information that comes to his or her knowledge in the course of his or her employment or duties under that Act and shall not communicate those matters to another person, including in a report required under that Act or another Act, without the prior written consent of the designated director.

(7) Where the auditor general prepares a report which contains information respecting the corporation, or respecting a third party that was provided to the corporation by the third party, a draft of the report shall be provided to the designated director, and he or she shall have reasonable time to inform the auditor general whether or not in his or her opinion the draft contains commercially sensitive information.

(8) In the case of a disagreement between the auditor general and the designated director respecting whether information in a draft report is commercially sensitive information, the auditor general shall remove the information from the report and include that information in a separate report which shall be provided to the Lieutenant-Governor in Council in confidence.

(9) Notwithstanding the Citizens' Representative Act , the corporation, another public body, or an officer, member or employee of one of them is not required to provide commercially sensitive information, in any form, to the Citizens' Representative in the context of an investigation of a complaint under that Act.

The Innovation and Business Investment Corporation, the successor to the Business and Investment Corporation, is an agent of the Crown. It reports to the Minister of Industry, Energy and Technology. Its objects are set out in s. 5 of the *Act*:

> 5. *The corporation is responsible for making strategic funding investments in innovation and business growth in the province to advance economic development in accordance with the priorities of the government of the province.*

The corporation's 2019–20 Activity Plan says:

> The Innovation and Business Investment Corporation (the Corporation) operates as a Crown Agency reporting to the Minister of Tourism, Culture, Industry and Innovation (TCII) [now the Department of Industry, Energy and Technology]. It was established on the authority of the Innovation and Business Investment Corporation Act, May 31, 2018. …
>
> The Corporation's mandate is to direct the management of the investment portfolio of the Department and to administer new investments made by virtue of its funding programs: the Business Investment Program, the Business Growth Program, the Research and Innovation Fund Program and the Fisheries Loan Guarantee Program (in partnership with the Department of Finance). …
>
> The primary clients of the Innovation and Business Investment Corporation are local businesses, including growth-oriented firms, entrepreneurs, and research and development institutions/academia. The Corporation's primary responsibility is to its clients, analyzing and rendering decisions on applications in a timely and efficient manner and, when appropriate, providing funding to those clients. It provides grants, loans or other means of financial support to commercial or social enterprises, academic institutions, not-for-profit organizations or individuals undertaking research and innovation activities consistent with the objects of the corporation. The Corporation also has a responsibility to clients through the ongoing management of client accounts, which continues for the life of the investment. …
>
> The Board's primary function is the administration of new investments and the management of its investment portfolio. Members of the Board use their experience and skills in the areas of: business development/growth; investment and lending; management and leadership; international business; risk management; regional economic development; R&D and innovation; provincial business climate; and, assessing business proposals. This supports the Provincial Government's strategic direction of Promote and Accelerate Economic Growth, particularly in the area of business investment, and is aligned with the Provincial Government's The Way Forward. These functions are ac-

> complished with consideration given to the mandate and financial resources of the Innovation and Business Investment Corporation.

It is obvious that much third party financial and other information will come into the possession of the corporation.

The Activity Plan makes it evident – and this is reflected in the governing legislation – that the corporation functions as an arm of the department. But the governing statute, passed in 2018, and in particular s. 21, provides as a matter of government policy the same 'super-priority' degree of protection as is afforded to Nalcor and its subsidiaries under s. 5.4 of the *ECA*.

But as noted earlier, there is a difference between the degree of protection and the nature of the oversight. Accordingly, for the same reasons given in support of the recommended 'oversight' amendments to the *Energy Corporation Act*. I recommend that s. 21 of the *Innovation and Business Investment Corporation Act* be amended to similar effect. I am not prepared to go so far as to recommend, for other than Nalcor, that the substantive public interest override provision be made applicable to the disclosure exceptions available to the Innovation and Business Investment Corporation. However, given the public nature of the ownership and governance structure of the corporation, I suggest that government consider an amendment to *ATIPPA, 2015* to make the public interest override applicable to all disclosure exceptions available to the corporation.

RECOMMENDATION

- That section 21 of the *Innovation and Business Investment Corporation Act* be amended to allow the standard *ATIPPA* request, review, recommendation and declaration/appeal processes. [Appendix K]

Suggestion: That government consider an amendment to *ATIPPA, 2015* to extend s. 9 public interest override provision to s. 21 of the *Innovation and Business Investment Corporation Act*. [Appendix K]

15. (1) Subject to an Act of the province relating to the compilation of data, completion of statistics or an agreement between this province and another province or the Government of Canada relating to the exchange of confidential information under that Act, information that is required to be given under this Act shall be made available only

(a) to persons permitted by this Act to receive that information or authorized by the minister to receive that information;

(b) to persons that the person giving the information may consent to receiving the information; or

(c) for the purpose of assessment or imposition of a tax imposed after receipt of the information upon the person giving the information.

(2) Except with respect to information compiled under section 5, subsection (1) stops applying to information after the expiry of 3 years from the day that the information was given under this Act.

(3) Notwithstanding subsections (1) and (2), where information has been given under this Act in respect of a mineral that is subject to a licence or lease from the Crown, that information may be made available by the minister after the termination, surrender or expiration of the licence or lease regardless of the time when the information was given.

(4) Subsection (1) does not apply to information of the following kinds:

(a) the numbers of people employed;
(b) the amount and nature of work done;
(c) expenditures of money;
(d) the qualifications or skills of persons who are employed;
(e) the residences or places of origin of persons who are employed; or

(f) information that in the opinion of the minister is similar to the information described in paragraphs (a) to (e).

(5) Notwithstanding a provision contained in another Act or in an agreement, whether or not it was passed or entered into before July 12, 1977, respecting the confidentiality of information provided to the department under that Act or agreement, this section applies to that information as if it had been provided under this Act.

Under sections 5 and 18 of the *Mineral Act*, persons who carry out searches or surveys for minerals are required to submit considerable commercial information to government. Although the *Act* makes no specific references to *ATIPPA, 2015*, it is nonetheless a specialized enactment which addresses, in detail, the information required to be provided, the circumstances under which that information may be disclosed, and duration of the confidentiality provision.

I agree with the conclusion of the Wells Committee, at page 158:

> The statute requires that commercially sensitive information be provided. The information includes details of the results of mineral prospecting and exploration on which prospectors and mining exploration companies would likely have spent considerable sums. Enticing prospectors to explore for minerals is important to the government as the owner of most of the undiscovered minerals in the province. Without the kind of protection that section 15 provides, few prospectors would be prepared to spend the money necessary, and the interest of the government and the people of the province would be adversely affected.
>
> The *Mineral Act* is better suited than the *ATIPPA* to offer that kind of protection because it is a special statute governing exploration of minerals, the details of which need to be protected. As well, section 15 contains a sunset clause limiting the protection for the information provided under subsection 18(1) to three years. In those circumstances the Committee has concluded that section 15 of the *Mineral Act* should remain on the list of statutory provisions that prevail over the *ATIPPA*.

There is no reason to remove this provision from Schedule A. It should remain.

16. (1) Information contained in, or given to the assessor in relation to, a return required by this Act shall only be made available to persons authorized by the minister to receive that information; and the authorization shall be given only for the purposes of this Act or an Act of the province that provides for the administration of mines or minerals or that imposes a tax in respect of mines or minerals.

(2) Subsection (1) does not affect the operation of

(a) other Acts that provide for the collection of information for statistical purposes; or

(b) an agreement of this province with the Government of Canada or with another province or with a statistical or other agency of the Government of Canada or another province.

The Wells Committee commented on this provision, at page 159:

> The statute is little different from an income tax statute requiring potential taxpayers to report the circumstances that form the basis for the imposition of the tax. The information should not be subject to disclosure to anyone who may seek it under the *ATIPPA*. As this is a special purpose statute providing only for the provision of information for the sole purpose of taxing ownership of minerals, management of the confidentiality provided in the reports is best provided for in the special statute. The Committee is of the view that the public interest is best served by having access to such records regulated by the provisions of the special statute that regulates all other aspects of the subject matter with which it deals. Section 16 should remain on the list of statutory provisions that prevail over the *ATIPPA*.

This conclusion remains sound. I have been given no reason or argument to support the removal of this provision from Schedule A. It should remain.

23. (1) Notwithstanding section 7 of the Access to Information and Protection of Privacy Act, 2015, in addition to the information that shall or may be refused under Part II, Division 2 of that Act, the chief executive officer of the corporation or a subsidiary, or the head of another public body,

(a) may refuse to disclose to an applicant under that Act commercially sensitive information of the corporation or the subsidiary; and

(b) shall refuse to disclose to an applicant under that Act commercially sensitive information of a third party

where the chief executive officer of the corporation or the subsidiary to which the requested information relates, taking into account sound and fair business practices, reasonably believes

(c) that the disclosure of the information may

(i) harm the competitive position of,

(ii) interfere with the negotiating position of, or

(iii) result in financial loss or harm to

the corporation, the subsidiary or the third party; or

(d) that information similar to the information requested to be disclosed

(i) is treated consistently in a confidential manner by the third party, or

(ii) is customarily not provided to competitors by the corporation, the subsidiary or the third party.

(2) Where an applicant is denied access to information under subsection (1) and a request to review that decision is made to the commissioner under section 42 of the Access to Information and Protection of Privacy Act, 2015 , the commissioner shall, where he or she determines that the information is commercially sensitive information,

(a) on receipt of the chief executive officer's certification that he or she has refused to disclose the information for the reasons set out in subsection (1); and

(b) confirmation of the chief executive officer's decision by the board of directors of the corporation or subsidiary,

uphold the decision of the chief executive officer or head of another public body not to disclose the information.

(3) Where a person appeals,

(a) under subsections 52 (1) and (2), subsections 53 (1) and (2) or section 54 of the Access to Information and Protection of Privacy Act, 2015 , from a decision under subsection (1); or
(b) under subsections 52 (1) and (2), subsections 53 (1) and (2) or section 54 of the Access to Information and Protection of Privacy Act, 2015, from a refusal by a chief executive officer under subsection (1) to disclose information,

paragraph 59 (3)(a) and section 60 of that Act apply to that appeal as if Part II, Division 2 included the grounds for the refusal to disclose the information set out in subsection (1) of this Act.

(4) Paragraph 102 (3)(a) of the Access to Information and Protection of Privacy Act, 2015 applies to information referred to in subsection (1) of this section as if the information was information that a head of a public body is authorized or required to refuse to disclose under Part II, Division 2.

(5) Notwithstanding section 21 of the Auditor General Act , a person to whom that section applies shall not disclose, directly or indirectly, commercially sensitive information that comes to his or her knowledge in the course of his or her employment or duties under that Act and shall not communicate those matters to another person, including in a report required under that Act or another Act, without the prior written consent of the chief executive officer of the corporation or subsidiary from which the information was obtained.

(6) Where the auditor general prepares a report which contains information respecting the corporation or a subsidiary, or respecting a third party that was provided to the corporation or subsidiary by the third party, a draft of the report shall be provided to the chief executive officer of the corporation or subsidiary, and he or she shall have reasonable time to inform the auditor general whether or not in his or her opinion the draft contains commercially sensitive information.

(7) In the case of a disagreement between the auditor general and a chief executive officer respecting whether information in a draft report is commercially sensitive information, the auditor general shall remove the information from the report and include that information in a separate report which shall be provided to the Lieutenant-Governor in Council in confidence as if it were a report to which section 24 applied.

(8) *Notwithstanding the Citizens' Representative Act, the corporation, a subsidiary, another public body, or an officer, member or employee of one of them is not required to provide commercially sensitive information, in any form, to the citizens' representative in the context of an investigation of a complaint under that Act.*

The introduction to the corporation's submission, at pages 1–2:

> Background
>
> The Oil & Gas Co. is a Crown corporation established in 2019 by enactment of the *Oil and Gas Corporation Act*. Reporting directly to the Minister of Industry, Energy and Technology, the Oil & Gas Co. focuses on maximizing opportunities for growth in the province's offshore oil and gas industry and positioning the province as a globally preferred location for oil and gas development. The Oil & Gas Co.'s activities aim at maximizing exploration investments in Newfoundland and Labrador, to acquire and manage the Province's equity interests in oil and gas projects, and enhancing local supply chain development in support of *Advance 2030 – the Way Forward on Oil and Gas*.
>
> The objects of the Oil & Gas Co., as expressed in subsection 7(1) of the *Oil and Gas Corporation Act*, are to invest in, engage in and carry out prescribed activities in the province and elsewhere, in accordance with the priorities of the government of the province. The prescribed activities are:
>
> - the exploration for, development, production, refining, marketing and transportation of hydrocarbons and products from hydrocarbons; and
> - research and development.
>
> In addition, the Oil & Gas Co. has discretion to invest in and engage in other activities that the Lieutenant-Governor in Council approves.
>
> The Oil & Gas Co. partners with private sector oil and gas companies and other service providers to pursue its mandated activities. The entity will hold the Province's future equity interests and currently manages all of the Province's interests in existing oil and gas assets; Hebron, White Rose, and Hibernia South Extension and is responsible for the Bull Arm Fabrication Site. While the Oil & Gas Co. is overseen by government, as a directly held Crown corporation, the corporation has operational autonomy for the specific purpose of keeping the day-to-day activities at arm's length from government.
>
> The resource potential in Newfoundland and Labrador's offshore is significant, with over 650 leads and prospects identified to date. Only ten per cent of the province's offshore potential has been explored, and that has already yielded a combined resource potential of 63.3 billion barrels of oil and 224.1 trillion cubic feet of gas. The Oil & Gas Co.'s engagement in offshore seismic work

> and other geoscience research is intent on unlocking that resource potential. The Oil & Gas Co. therefore has custody and control of data, information, plans, and perspectives of all its offshore licence holders and service providers. In this regard, the corporation strives to maintain a level and competitive playing field in its efforts to attract and manage the foreign direct investment so critical to the provincial economy.

The newly-formed corporation has yet to receive an ATIPP request.

The legislation incorporating and governing the corporation was introduced only in 2019. The corporation's submission reproduces excerpts from Hansard setting out some of the discussion surrounding the introduction of the Bill.

At page 6:

> … When the Bill proposing enactment of the *Oil and Gas Corporation Act* was debated in the House of Assembly, the Minister of Natural Resources commented on the necessity for section 23 in light of the underlying policy rationale and the competitive commercial context in which the Oil & Gas Co. operates, as follows:
>
> > *"Section 23 speaks to the provisions for records of commercially sensitive information. Additional rights to protect commercial information are required given the commercial nature of the contracts the corporation requires to conduct its business. Oil and gas companies would not enter into agreements with a Crown corporation if there is a possibility that their commercial information was going to be disclosed.*
> >
> > *If you recall, Mr. Speaker – and I'm sure you do – Chief Justice Wells even made that comment when he brought into effect the ATIPPA legislation. This section outlines the procedures to be followed as it relates to the Access to Information and Protection of Privacy Act, the Auditor General Act, and the Citizens' Representative Act."* (Emphasis in submission.)

In response to concerns raised by opposition and independent members of the House of Assembly respecting section 23, the minister further commented:

> *"The Oil and Gas company, as a subsidiary of Nalcor, this was under the Energy Corporation Act as well and it was really put in there because of that commercially sensitive information from the Oil and Gas company. That was one of the reasons why it was in the Energy Corporation Act. I do know that Chief Justice Wells who is reviewing ATIPPA legislation did say and did recognize that commercially sensitive information is required or you wouldn't be able to have the information required to make informed decisions that are essential, especially under oil and gas.*

I will say that ATIPPA does apply to the Oil and Gas Corporation; however, there is a section on commercially sensitive information that does prevail. So I will say that it is very similar to what is in the Energy Corporation Act, recognizing what Chief Justice Wells who wrote the ATIPPA legislation and who did give his considered opinion that – and I can quote here: It requires to keep certain aspects of its operation's information confidential from competitors. If it did not, it could run the risk of failure with the potential for massive, adverse financial consequences to the people of the province. As well, it partners with one or more private sector commercial entities and the significant part of its commercially competitive activity. Those commercial partners would not be prepared to disclose sufficient information – unquote.

That was from Chief Justice Wells in the day. So he recognized that there is a requirement and I will say that I believe that there has been limited cause for concern – I don't know of any – but limited cause for concern about the oil and gas company." (Emphasis in submission.)

In further response, the Minister commented:

"I will say this, Justice Wells, in his deliberations around ATIPPA and around the Energy Corporation Act, did recognize commercial sensitivity, as the Member opposite has said. He talked a lot about the commercial risks and the risks around public disclosure and the fact that if there is a risk of disclosure that perhaps we won't get the information that we require from our commercial partners. The commercial partners would be reluctant to give information in case it ever became public and disclosed.

The Privacy Commissioner, under the ATIPPA legislation, is required to be as open and transparent as they possibly can. That is a good thing for the province.

I will say to the Member opposite that, of course, the Privacy Commissioner will pass comment and pass judgment. I will give him an incident. In the last 10 years, I understand – I'll say that – there's been once that the oil and gas corporation within Nalcor had to go to the CEO and make a determination. They couldn't release information once in that 10-year period, and the Privacy Commissioner agreed. The Privacy Commissioner can weigh in on the fact and could actually go to court if they thought it should be released.

So, I'll say it's an element of risk, Mr. Chair, an element of ensuring that the information is able to flow between the Crown corporation and its private sector partners. Most of them, I think almost all of them, are publicly traded. There are a lot of rules around publicly traded information, Mr. Chair. I would think that there is a requirement and an understanding of commercial sensitivity risk. I'm sure if there is anything that is required to be released, that the Privacy Commissioner can weigh into that and can go to court, if required. (Emphasis in submission.)

The submission raised the question, mentioned above, of an *ATIPPA, 2015* review Committee's jurisdiction to recommend changes other than to *ATIPPA, 2015*. The submission continued, emphasizing the linkage between the corporation and Nalcor, at pages 9–10:

> The *Oil and Gas Corporation Act* is a specialty statute. It provides for all actions necessary to achieve the corporation's objects expressed in subsection 7(1). Section 23 protects commercially sensitive information that must be kept confidential from competitors. The processes in place for the management of access to and disclosure of information under the *ATIPPA, 2015* are not at all suitable for the management of the sort of commercially sensitive information to which section 23 applies. Clearly, the public interest is best served by access to this kind of information being regulated by a specialty statute.
>
> As in the case of section 5.4 of the *Energy Corporation Act*, the compelling factor supporting the protection of commercially sensitive information is that the Oil & Gas Co. is operating, on behalf of the people of the province, in the competitive commercial world. That requires it to keep certain aspects of its operations information confidential from competitors. If it did not, it could run the risk of failure, with the potential for massive adverse financial consequences for the people of the province. As well, the Oil & Gas Co. partners with one or more private sector commercial entities in a significant part of its commercially sensitive activity. Those commercial partners would not be prepared to disclose significant information to the Oil & Gas Co. if the corporation were subject to the risk of disclosure of that information through the *ATIPPA, 2015*.
>
> While the Oil & Gas Co. manages Nalcor Energy's oil and gas interests in offshore developments, the existing equity interests remain, for the time being, in Nalcor Energy Oil and Gas. From an access to information standpoint, this translates into an equal need for both organizations to have the capacity to adequately protect commercially sensitive information from public disclosure. Altering this ability for one organization would have the consequential impact of opening the floodgates for both organizations with respect to the ability to maintain successful business relationships that drive economic growth and prosperity.

As stated above, I agree with the view of the Wells Committee that when provisions in another statute are directed to access to information and to *ATIPPA, 2015* and establish their own scheme of protection for information referred to in that statute, changing the substantive degree of protection is a matter for the legislature. That view applies with greater force when the statute in question is of recent origin.

But as discussed above, and because of the close relationship between the Oil and Gas Corporation and Nalcor, I do consider it appropriate that the level of OIPC oversight of Oil and Gas Corporation access to information decisions be equivalent to that applied to other public bodies and, in concert with my recommendations, to Nalcor.

The parameters of the exceptions to access remain unchanged, as does the corporation's decision-making authority. Substantively, s. 23 remains unchanged.

For the same reasons given in support of the recommended 'oversight' amendments to the *Energy Corporation Act*, I recommend that s. 23 of the *Oil and Gas Corporation Act* be amended to similar effect. Similarly, I suggest that government consider an amendment to *ATIPPA, 2015* to make the public interest override applicable to all disclosure exceptions available to the corporation.

RECOMMENDATION

- That section 23 of the *Oil and Gas Corporation Act* be amended to allow the standard *ATIPPA* request, review, recommendation and declaration/appeal processes. [Appendix K]

Suggestion: That government consider an amendment to *ATIPPA, 2015* to extend the s. 9 public interest override provision to s. 23 of the *Oil and Gas Corporation Act*.

13. (3) The deliberations of the council shall be kept confidential.

The submission of the Executive Council is short and to the point – "the rationale for including the section in Schedule A has not changed".

It is useful to put the confidentiality provision in context:

> *13. (1) The council shall meet at least once in each year*
>
> *(a) for the purpose set out in section 10; and*
>
> *(b) for other reasons related to the Order that the council considers nec essary.*
>
> *(2) The council may determine the procedures for the conduct of its business.*
>
> *(3) The deliberations of the council shall be kept confidential.*
>
> *10. The council shall consider nominations received under section 9, and shall submit to the Chancellor the names of not more than 8 individuals in each year who in the opinion of the council are worthy of receiving the Order.*

The view of the Wells Committee:

> The council's minutes would indicate why members of the council decided for or against each nomination. Making such discussions subject to potential disclosure under the ATIPPA would almost certainly deter members of the council from participating, or from expressing themselves frankly. Clearly, the public interest would be best served by that provision of the *Order of Newfoundland and Labrador Act* remaining on the list of statutory provisions that prevail over the *ATIPPA*.

I agree. I received no submissions suggesting that the rationale for including subsection 13(3) in Schedule A has lessened or disappeared. It should remain.

153.(1) *Subject to section 154 and to any law of the province, the director shall securely store and keep confidential all information, reports, cores, cuttings and fluid samples submitted by the operator in accordance with these regulations.*

(2) *Notwithstanding subsection (1), any information, report, analysis or sample submitted by an operator in accordance with these regulations may be used for the management of oil or gas resources.*

154.(1) *Subject to subsections (2), (3), (4) and (5), information relating to a drilling program that is given in accordance with these regulations shall not be made public.*

(2) *General information on a well including the name, classification, location, identity of the drilling rig used by the operator, depth and operational status of the drilling program may be released by the director to the public.*

(3) *Information that is furnished by an operator in support of an application for drilling program approval referred to in section 8 or included in an application for an authority to drill a well referred to in section 29 in respect of*

(a) *the proposed design, method of operation of a drilling program and objectives of the proposed well shall not be released without the written consent of the operator;*

(b) *research work that relates to the safety of the drilling operations at a well, shall not be released before the final well report in subsection 151(1) for that well is released without the written consent of the operator; and*

(c) *research work or feasibility studies relating to exploration or production techniques and systems shall not be released until 5 years has elapsed from the date the work or studies were furnished.*

(4) *Information referred to in subsection (3) in respect of environmental studies or contingency plans may be released by the minister.*

(5) *Notwithstanding another provision of these regulations, the director may 2 years after the rig release date in the case of an exploration well or 60 days after the rig release date in the case of a development well, release information contained within a final well report.*

155. *Notwithstanding section 154,*

(a) where information submitted by an operator during the drilling of a well in an area has a direct bearing on the safety of the drilling operation being carried out by another operator in the same area, the director may communicate that information to the other operator; and

(b) information contained in the report referred to in subsection 139(2) may be released by the director.

PETROLEUM REGULATIONS, 1151/96

53.(1) For the purposes of this section

(a) "operation generating the data" is completed on the last date of acquisition of data from the operation;

(b) "confidential" means that the director, during the confidentiality period, shall not disclose the data without the consent of the owner of the data.

(2) Data acquired during

(a) an exclusive exploration survey submitted to the director under subsection 52(1) shall remain confidential for 5 years following the date that the particular operation generating the data was completed; and

(b) a non-exclusive exploration survey, submitted to the director under subsection 52(1), shall remain confidential for 15 years following the date that the particular operation generating the data was completed,

after which time the director may disclose that data to a person but is under no duty to disclose the data.

(3) Data submitted to the director under

(a) paragraph 52(2)(a) shall remain confidential for 5 years following the date on which the operation generating the data was completed;

(b) paragraph 52(2)(b) shall remain confidential for 5 years following the date of submission of the summary report;

(c) subsection 52(3) shall remain confidential for

(i) 2 years following the rig release date of the well, in respect to a exploratory well, and

> *(ii) 60 days following the rig release date of the well in respect to a development or stepout well,*
>
> *after which time the director may disclose that data to a person, but is under no duty to disclose the data.*
>
> *(4) Notwithstanding another provision of the regulations, a well history report for a development or stepout well shall not be disclosed before the expiration of the confidentiality period of the exploratory well that first penetrated the petroleum pool and led to the drilling of the development or stepout well.*
>
> …
>
> *56. Notwithstanding section 53, the director may disclose information submitted under section 52 to another interest holder in order to prevent, control or terminate a blowout of a well or similar emergency incident.*

These regulations are best considered together. Passed pursuant to the *Petroleum and Natural Gas Act*, they regulate access to information regarding oil exploration and drilling programs. They are part of a comprehensive scheme governing regulation of the oil and gas industry in this province. No public body or other submission commented on their inclusion in Schedule A.

The views of the Wells Committee on the Drilling Regulations, at page 161:

> The reason why the drilling companies involved would want this level of confidentiality for the information they are required to submit to government is immediately obvious from the content of these sections of the regulation. …
>
> … it is clearly in the interest of the government and people of this province to protect the specified information. This will help the province attract the huge private sector investment that is necessary for the resource to be explored, and ultimately result in economic development for the benefit of the province.
>
> *The Petroleum and Natural Gas Act* provides for highly specific circumstances; the most appropriate place to regulate the protection of this kind of information is, therefore, in regulations under that Act. The Committee concludes that the public interest is best served by these provisions remaining on the list of those that prevail over the *ATIPPA*.

And commenting on the Petroleum Regulations, at page 161:

> Confidential information of the kind identified in these sections is extremely valuable to the exploration companies that have spent huge sums to acquire

> it. That value would be lost if competitors could access it under the *ATIPPA*. Similar issues have already been discussed in connection with the *Petroleum Drilling Regulations* and the comparable mining exploration statutes. The designated provisions of the regulations should remain on the list of provisions that prevail over the *ATIPPA*.

This view remains applicable. I have been presented with no argument in favour of removing these provisions from Schedule A. They should remain.

Schedule A includes two sections of the *Act*. Their inclusion generated considerable debate.

The first – s. 12:

12.(1) A student record shall be maintained for each student in the manner required by a policy directive of the minister.

(2) Except as provided in this section a student record may only be reviewed by

(a) the parent of the student; or

(b) the student, if the student is 19 years of age or older,

to whom that student record pertains.

(3) A parent or student, if the student is 19 years of age or older, shall review the student record at a time and with a person designated by the board and receive an explanation and interpretation of information in the student record from that person.

(4) A parent or student, if the student is 19 years of age or older, who is of the opinion that the student record contains inaccurate or incomplete information may request the principal to review the matter.

(5) A student record may be used by the principal and teachers of a school and by board employees to assist in the instruction of the student to whom that student record pertains.

(6) Without the written permission of the parent of a student, or the student if the student is 19 years of age or older,

(a) a student record shall not be admissible in evidence in a trial, inquiry, examination, hearing or other proceeding except to prove the establishment, maintenance, retention or transfer of that student record; and

(b) a person shall not be required to give evidence respecting the content of the student record in a trial, inquiry, examination, hearing or other proceeding.

(7) Notwithstanding subsections (1) to (6), a principal may use a student record to prepare information or a report

(a) required under this Act; and

(b) when requested in writing by a parent, or where a student is 19 years of age or older, the student or former student, for

(i) an educational institution, or

(ii) an application for employment.

(8) This section shall not prevent the use of a report based upon a student record by the principal of a school attended by that student, or the board, for the purpose of a disciplinary proceeding commenced by the principal respecting the conduct of that student or a prosecution of an offence under this Act.

(9) An action shall not lie against a person who contributes test results, evaluations or other information to a student record where he or she acted in good faith within the scope of his or her duties.

The submission of the OIPC, at pages 56–58:

> The OIPC has issued two reports regarding the interaction between section 12 of the *Schools Act, 1997* and *ATIPPA, 2015*. In both reports, the Commissioner disagreed with the interpretation of the NLESD. From Report A-2018-010:
>
> [10] *The Schools Act, 1997 restricts access to "student records" to the parent or the student when the student is 19 years of age or older. Section 12(2) of that Act is permissive in the sense that the School District is not required to disclose the entire record upon request to the parent or the student – it simply restricts the parties who "may" review the record. Review of student records occur under the supervision of a person designated by the School District. Interestingly, section 12 is silent on whether, as part of that review, a parent or student may make notes on or take a copy of any portion of the student record.*
>
> *[11] As section 12 of the Schools Act, 1997 is listed in Schedule "A" to the ATIPPA, 2015, it notionally prevails to the extent there is any conflict between it and the ATIPPA, 2015. Much turns on the overlap, if any, between the terms "review" and "access". The word "review" is not defined in the Schools Act, 1997. The word "review" is often limited to a viewing or a visual inspection. Interpreting it in that manner excludes any conflict with the ATIPPA, 2015 as it addresses the ability to access copies of records. While I am inclined to the view that the ATIPPA, 2015 applies unreservedly to "student records", I need not decide the matter conclusively as even if correct, in these circumstances the result would be the same. It warrants noting that the Schools Act, 1997 is rather dated on this topic given that we*

are now in an age of electronic records while paper records were the standard when it was drafted.

The same issue was revisited in Report A-2019-008:

> [34] For the same reasons noted in Report A-2018-010, I see no basis upon which to conclude that a conflict exists between the ATIPPA, 2015 and the Schools Act, 1997 in these circumstances. Section 12 of the Schools Act, 1997 establishes a process, at the discretion of the District, for a parent or student to review the student record in person with NLESD staff, and the NLESD has concluded that the Complainant has already been furnished with the maximum amount of information appropriate to provide him with under that statute. The ATIPPA, 2015 establishes a right of access which includes a right to obtain a copy of a record. That right is abrogated only if an exception applies, and in this case section 40 is a mandatory exception to the right of access which I have concluded applies to the information withheld from the Complainant. As a result, even if I were to determine that a conflict exists, the outcome would be the same for the Complainant.

In addition to the issue of interpreting whether there is a conflict between the legislative provisions, another feature of Report A-2018-010 is the confusion that was evident during the request process. This legislative review is an opportunity to bring greater clarity for all parties, given that the *Schools Act, 1997* pre-dates the original *ATIPPA* by several years and the language in the two statutes does not align.

The Ontario Information and Privacy Commissioner has come to similar conclusions regarding the interaction of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) and Ontario's *Education Act*, and has issued a guidance document on the subject of access to information pertaining to student records:

> If a student, or their parent or guardian, wants to access the student's personal information, they might choose to ask for the information informally, by asking the child's teacher for a particular record, for example. If an informal request does not work, or the records are numerous and lengthy, they may choose to make a formal access request. The request can be made under the Education Act or MFIPPA, or both.

Section 266(3) of Ontario's *Education Act* establishes a right for a student, or his or her parent or guardian where the person is a minor, to "examine" a student record, which appears to be similar to the right to "review" the record provided for in section 12(3) of the *Schools Act, 1997*. Ontario's *MFIPPA* takes precedence over the *Education Act*, therefore, the guidance offered by Ontario's Commissioner is clear and valid, as the *Education Act* offers a right to "ex-

amine" a student record while the *MFIPPA* establishes a right to obtain a copy – two separate but related rights which do not conflict.

The *Schools Act, 1997* establishes a right to review a student record only "at a time and with a person designated by the board." It is silent on the right to obtain a copy of a record, however, and that is a right to which the *ATIPPA, 2015* speaks directly. Since the *Schools Act, 1997* came into force, the right of access to records has become well entrenched beginning with the original *ATIPPA* in 2005. Furthermore, the development of electronic forms of communication means that the limitation of reviewing a record in the presence of a board employee appears rather paternal and outdated.

As with Ontario, while section 60 of Prince Edward Island's *Education Act* allows for inspection of student records, the *Education Act* is not listed in the regulations of PEI's *Freedom of Information and Protection of Privacy Act* (*FOIPP*) as taking precedence. Therefore the *FOIPP* access to information process would apply and sit side-by-side with the *Education Act*, one providing for access to a copy of records, including student records, and the other establishing a more informal right to "inspect" a student record.

British Columbia's *School Act* at section 170 makes it clear that the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) is the appropriate forum for access to student records:

> 170(1) A public body as defined in the Freedom of Information and Protection of Privacy Act must not disclose any personal information contained in a student record except for one of the following purposes:
>
> (a) a purpose authorized under the Freedom of Information and Protection of Privacy Act;
>
> (b) to ensure efficient and effective use of grants paid under sections 114 and 115 of this Act and under sections 12 and 13 of the Independent School Act;
>
> (c) to evaluate the effectiveness of boards, francophone education authorities and authorities governed by the Independent School Act and the programs, courses and curricula delivered by them.

Section 9 of British Columbia's *School Act* also provides a right for students and parents to "examine" student records – once again, this right exists in parallel to the right of access under BC's *FIPPA*.

Based on the foregoing analysis, it is therefore recommended to remove the reference to section 12 of the *Schools Act, 1997* from Schedule A of *ATIPPA, 2015* in order to provide greater clarity for those requesting information per-

> taining to student records. As noted above, it is the view of the OIPC that there is no conflict between section 12 of the *Schools Act, 1997* and *ATIPPA, 2015*, however the presence of the *Schools Act, 1997* provision in Schedule A of the *ATIPPA, 2015* has created unnecessary confusion. This can be remedied through a simple legislative fix.
>
> > [OIPC] Recommendation 14.2: Remove the reference to section 12 of the *School's Act, 1997* from Schedule A of *ATIPPA, 2015*.

This recommendation was opposed by both the Newfoundland and Labrador English School District and the Department of Education.

The response of the School District, at pages 5–7:

> First and foremost, the District does not agree with the Commissioner's assessment of s.12 of the *School's Act, 1997* and the manner in which it is interpreted in relation to *ATIPPA, 2015*. The Commissioner focuses on firstly, the analysis of whether there is a conflict between the two pieces of legislation. This is, in fact, not required. Section 7(1) of *ATIPPA, 2015* deals with the issue of conflict between *ATIPPA, 2015* and other pieces of legislation. Section 7(2) however, sets out specific legislative provisions, listed in Schedule A, that prevail over *ATIPPA, 2015* where those legislative provisions provide, prohibit, or restrict access to a record. There is no requirement that those provisions conflict with *ATIPPA, 2015*. In fact, in both cases referenced by the Commissioner where reports were released by the Commissioner in response to complaints from parents seeking information from the District, the Commissioner's report acknowledges that the District made the correct decision, and in fact, would have been the same outcome had the request been assessed solely under *ATIPPA, 2015*. This statement was explicitly made in the Commissioner's Report A- 2018-010 where it was stated:
>
> > As referenced earlier, the issue of which legislation governs does not need to be conclusively determined here. If the *ATIPPA, 2015* prevails, section 40 of *ATIPPA, 2015*, which lists mandatory exemptions for personal information, must be applied. The personal information of the other students in the file of the Complainant's child and the personal information in the files of the other students, falls within section 40, and is all exempt, as its disclosure would constitute an unreasonable invasion of their personal privacy. Having considered section 40 as a whole, including all considerations that may militate in favour of disclosure (including circumstances affecting a person's health or safety; or whether the personal information is relevant to a fair determination of the Complainant's rights), the case for disclosure is insufficient to require the unreasonable invasion of personal privacy that such disclosure would represent.

The other report referenced by the Commissioner, Report A-2019-008, involved a parent seeking disclosure of personal information about his own daughter. This was a good example of a situation that arises not infrequently in the District, having to address issues that arise out of the family law context. Which parent has a right to access information about a student? Does the custodial parent have to be notified? Do they have to consent? What if the parent seeking the information is estranged from the child? Will release of this information be harmful to the child or the other parent? With over 63,000 students in the school system, these are issues that the District has to deal with on a regular basis. In doing so, the District relies on the provisions of all relevant legislation including the *Schools Act, 1997*, the Children's Law Act, any custody/access orders or agreements in place, as well as the provisions under *ATIPPA, 2015* where required to justify a withholding of information. Again, in this more recent case, the Commissioner agreed with the decision of the District to withhold the information requested. There is no evidence from either of these cases that exemption of s.12 of the *Schools Act, 1997* from *ATIPPA, 2015* caused any issues with respect to assessing these requests for information.

It is important to note that what was being challenged in each of these cases was the District's refusal to release confidential information on a minor student. The *Schools Act, 1997* provides optimal protection to this information. It provides access only to the student's parents, and even then, with a view to protecting the personal privacy of a student even from his/her parent. There is a clear, simple process for a parent to obtain the student record, or any information therein, from their school. The District cannot speak to what policies/practices are in place in other jurisdictions with respect to what they include as part of a student record, who has access to them, or what issues may have been identified that resulted in the legislative provisions and privacy decisions as referenced by the Commissioner. What we can say is that there is no evidence that parents under the District have experienced issues with respect to getting the appropriate access to their child's school records, including copies of documents, despite the fact this is not specifically set out in the *Schools Act, 1997*.

While we recognize that the *Schools Act, 1997* is dated, it is important to note that this legislation is also currently under review. The District has made submissions on several issues as part of that review, including the definition of a 'parent' to better align with the legal rights of an individual to access educational information under the applicable family law legislation and jurisprudence. The District has also put forth recommendations on the collection of personal information as a result of that gap in the legislation being flagged by the OIPC in the past. Further, the Department of Education has advised it is working on a new policy/process for Student Records, in keeping with the changes in the way information is collected and maintained (for example electronic information is becoming more common).

It is important to recognize the uniqueness of information that forms a student record. All of the information in such a record is personal information, and often highly sensitive personal, including medical information, that the *Schools Act, 1997* and the District strives to provide the utmost protection for. The *Schools Act, 1997* even contains provisions restricting the use of this information in court proceedings. This is a further recognition of the sensitive nature of this information and the importance of safeguarding it from disclosure, and safeguarding its use for the purposes for which it was intended, to provide educational programming to students in a safe and caring environment. This type of information is deserving of its own legislative protections and analysis rather than being a part of the general provisions of *ATIPPA, 2015*. Further, there is very little protection provided for minors under *ATIPPA, 2015*, in particular where a parent is the one requesting the information. *ATIPPA, 2015* contains only a general provision which reads as follows:

Exercising rights of another person

108. A right or power of an individual given in this Act may be exercised

...

(d) by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy; or ...

While the District recognizes that the *Schools Act, 1997* needs improvements in many areas including the collection, use and disclosure of student information, it would be premature at best to simply remove the exemption of s.12 from *ATIPPA, 2015* while the *Schools Act, 1997* is under review. Any concerns with respect to the treatment of such information would be best addressed under that review process. The District undertakes to review the submissions made to the Department of Education on the *Schools Act, 1997* and determine whether further submissions should be made respecting the concerns raised by the Commissioner in his submissions to your office. We have been advised by the Department of Education that further consultations are to be expected in any event before the new Act is finalized. We understand the OIPC will be involved in such consultations.

The view of the Department of Education, at page 2:

As noted by NLESD, the Schools Act, 1997 is quite dated and the Department is currently undertaking a comprehensive review with the aim of modernizing the legislation by drafting a new Act and ensuring it is in line with the current practices. As such, the Department feels that the current section 12 of the

> Schools Act, 1997 should not be removed from Schedule A of ATIPPA, 2015 at this time. As the legislative review is ongoing, we do not yet know what the recommended changes will be for section 12. It would be premature to make a decision to remove section 12 from Schedule A at this time.
>
> Further, it has always been the intention of the Department to discuss this issue, as welI as other sections of the legislation relating to access and privacy, with OIPC as part of the legislative review process.

The report of the Wells Committee, at page 164:

> It is obvious that information in a student register should not be disclosed to any person other than the persons provided for in the statutory provision. Further discussion respecting section 12 is unnecessary.

As is evident from all the submissions, consideration of the issue of access to student records – the degree and manner of access and by whom and when it may be exercised – is a matter requiring sensitivity to the various personal interests involved. The Wells Committee accurately and succinctly described these concerns as "obvious".

I acknowledge the valid concerns of the OIPC about the need for clarity. In the context of information as sensitive as that which may be contained in a student record, a debate over semantics – for example, "review" versus "access" versus "examine" – does not seem to me to be productive. I also acknowledge the view that s. 40 of *ATIPPA, 2015* provides strong protection against improper release of personal information.

But I consider that in view of the "comprehensive review" of the 1997 statute currently underway, it is appropriate to defer any consideration of the Schedule A provisions to that process. That process will provide opportunity for identification of all the important personal and public interests involved in the various aspects of the legislation and will, hopefully, produce a cohesive legislative framework which reflects all of today's realities and circumstances.

The Newfoundland and Labrador English School District acknowledged both the need for amendment and the appropriateness of the OIPC being consulted with respect to amendments that relate to access to information and the protection of privacy. The Department of Education voiced a similar view. I recommend that s. 12 remain in Schedule A pending completion of the legislative review.

The second Schedule A provision – s. 62(2):

62.(2) Notwithstanding subsection (1), the minutes of a closed meeting shall not be available to the public.

This section should be read with the accompanying sections:

61. A meeting of a board is open to the public unless it is declared by vote of the trustees to be a closed meeting from which members of the public shall be excluded.

62. (1) A board and the executive committee of that board shall keep minutes of its proceedings and the minutes shall at all reasonable times be available for inspection by an official of the department designated by the minister, and on request, to members of the public.

(2) Notwithstanding subsection (1), the minutes of a closed meeting shall not be available to the public.

The OIPC argues that this provision is redundant since s. 28(1)(c) of *ATIPPA, 2015* provides a discretionary exemption for privileged deliberations. The OIPC comments generally on problems with the application of s. 28(1)(c), and then refers to s. 62(2) of the *Schools Act, 1997* at page 59 of its submission:

> Section 28(1)(c) is the discretionary exception which allows public bodies to withhold the substance of deliberations of its private or privileged meetings, provided that an Act authorizes such meetings:
>
> 28(1)(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.
>
> There is at present a lack of consistency in terms of the information that is or should be protected from disclosure by this provision, primarily due to the fact that most of the Acts in question are silent in terms of the subject matter that is appropriate for a privileged meeting. Research from other jurisdictions demonstrates that comparable statutes in some cases do actually limit the subject matter of such meetings, and as a result there is greater transparency about the operation of such local public bodies. Amendments to the specific Acts governing these public bodies are the most appropriate means of addressing this issue, however there are some aspects that can be considered in this context.

In particular, section 62(2) of the *Schools Act, 1997* is listed in Schedule A of *ATIPPA, 2015*, which means that it takes precedence over the *ATIPPA, 2015* as a result of section 7(2). Section 28(1)(c) is already available to a school board that wishes to withhold information from minutes or other records of a privileged meeting. Having section 62(2) in Schedule A simply means that there are no limitations on the absolute nature of the prohibition, however it is submitted that section 28(2) *ATIPPA, 2015* would not significantly impair the intended purpose of 62(2).

[OIPC] Recommendation 14.1: Remove section 62(2) from Schedule A as it is redundant to section 28(1)(c).

The School District, at pages 2–3:

The Commissioner raises concerns firstly with the fact that this provision of the *Schools Act, 1997*, is silent on the subject matter that is appropriate for a privileged meeting. The Board submits that given the vast nature of the decisions that have to be made by the Board in relation to all aspects of the public education system, it would not be possible to provide a complete list of issues that would be appropriate to address in a closed meeting. Nor would it be prudent to have these things enshrined in legislation. The students we serve, and hence the education system itself, is constantly evolving and changing. The issues that have to be addressed by the Board in any given year are diverse and often include deliberations involving highly sensitive personal information in relation to students and employees.

While the *Schools Act, 1997* may not set out the types of issues that may be addressed in closed meetings, the Board By-laws include the following:

1.04 Closed Meetings

Closed Meetings of the Board are held to:

a) Hold hearings regarding student appeals.

b) Conduct training, orientation and working sessions of the Board, to assist Trustees in the fulfillment of their responsibilities.

c) Allow for the consideration and/or disposition of matters of a sensitive nature. The Board may, by a resolution passed in an open meeting, move to a private (closed) meeting of the Board. The following matters shall be considered by the Board in closed meetings:

(i)The liability of the Board, which in the opinion of the Chair of the Board and the Director may involve legal action

(ii)Personal matters such as employee performance, medical reports or other sensitive staff matters.

(iii)Reports by the Director or district office staff, which in the opinion of the Chair of the Board and the Direction, might be prejudicial to the operation of the schools.

(iv) Lease or purchase of property.

(v) Negotiations of salary and wage schedules of employees.

(vi) Suspension, expulsion, exclusion of pupils and re-admission of same.

(vii) Materials and information concerning criminal or civil actions which are not part of a public court record;

(viii) Strategy sessions pertaining to collective bargaining, pending or potential litigation when an open meeting would affect the bargaining or litigation position of the Board;

(ix) Discussions which would disclose the identity of a bona fide and lawful donor to the district, when the donor has requested anonymity;

(x) Discussions of the content of documents protected by legislation.

(xi) Discussion of potential or actual emergencies or matters of security related to the preservation of the public peace, health, and safety;

(xii) Preliminary discussions of tentative information relating to school attendance zones, personnel needs, or fiscal requirement;

(xiii) Other matters of a sensitive nature as determined by the Board.

As you can see, many of the issues above that would be dealt with at a closed meeting would necessitate discussion of highly sensitive personal information. The most common use of closed Board meetings is to address human resource issues and student issues.

While this list is within the control of the Board to change, the Board is a public entity that is accountable to the public and upholds the principles of transparency and accountability in all its operations. In order to amend its own By-laws, there is a strict process set out in the By-laws, which requires firstly a Notice of Motion to amend to be made at a public Board meeting. Any changes being proposed can then only be made after having been considered at two regular meetings of the Board. These would be open public meetings. There is a process for the public to be able to make representations at a Board meeting. Further, the *Schools Act, 1997* currently requires the Minister of Education to approve the Board's By-laws or any amendments thereto. This certainly provides the necessary safeguards and transparency to the public and would have the effect of limiting what the Board may consider at a closed meeting.

> Further, the type of information that may be included in the minutes of closed Board meetings, particularly the highly sensitive personal information of students and/or staff, would require greater protection than is provided for in s. 28 of *ATIPPA, 2015*. Firstly, s. 28(2) of *ATIPPA, 2015* is discretionary, whereas s. 62(2) of the *Schools Act, 1997* is mandatory. Secondly, and most importantly, s. 28(2) of *ATIPPA, 2015* states that s. 28(1) does not apply where the information is at least 15 years old. There would be no justification for limiting the protection currently provided for information from closed Board meetings under s. 62(2) of the *Schools Act, 1997*, by having it subject to s. 28(2) of *ATIPPA, 2015*, giving it protection for only 15 years. …

The submission of the Department of Education, at page 1:

> The Department strongly agrees with NLESD that section 62(2) of the Schools Act 1997 not be removed from Schedule A of ATIPPA, 2015. While section 28(2) of ATIPPA, 2015 is discretionary, section 62(2) of the Schools Act, 1997 is mandatory. This provides the necessary protection to the types of highly sensitive information, often including personal information regarding students and staff, that are discussed in closed meetings of the Board of Trustees (the Board) of NLESD. The vast majority of Board meetings are open to the public and closed meetings only occur for discussing issues of a sensitive nature that are set out in the Board's by laws. These by-laws have strict protocols regarding potential changes or amendments taking place, including the requirement of Ministerial approval of such a change.
>
> Another important point outlined by NLESD is the fact that section 28(1) of ATIPPA, 2015 does not apply once the information is at least 15 years old. This highly sensitive information, that is currently protected under section 62(2) of the Schools Act, 1997, should not have a legislated end date for its protection from disclosure.

The views of the Wells Committee with respect to s. 62, at 164–165:

> With respect to section 62, the statute generally requires board meetings to be open to the public. The statute does, however, permit the board to vote at a public meeting to convene a closed meeting. It is not difficult to understand that certain matters, such as disciplinary matters, need to be discussed in a closed meeting. A closed meeting would be pointless if the minutes were subject to disclosure under the *ATIPPA*. It makes sense that protection for such minutes should be in the special statute that provides for the meeting, rather than in the *ATIPPA*. The Committee concludes that the public interest will be best served if those provisions of the *Schools Act, 1997* remain on the list of provisions that prevail over the *ATIPPA*.

I see no benefit in inserting into the current legislative review of the *Schools Act, 1997* any element of confusion or uncertainty that could flow from the removal of s. 62(2) from Schedule A.

I recommend that both s. 12 and s. 62(2) of the *Schools Act, 1997* remain in Schedule A. This recommendation is supported by the good faith assertion of both the Department of Education and the School District that the ongoing comprehensive review will continue, hopefully, without undue delay and will, as appropriate, provide opportunity for consultation with the Office of the Information and Privacy Commissioner.

19. (1) Except in accordance with section 20, no person or company shall disclose, except to his, her or its counsel,

(a) the nature or content of an order under section 12 or 13; or

(b) the name of a person examined or sought to be examined under section 14, testimony given under section 14, information obtained under section 14 or section 14.1, the nature or content of questions asked under section 14, the nature or content of demands for the production of a document or other thing under section 14 or section 14.1, or the fact that a document or other thing was produced under section 14 or section 14.1.

(2) A report provided under section 18 and testimony given or documents or other things obtained under section 14 or 14.1shall be for the exclusive use of the superintendent and shall not be disclosed or produced to another person or company or in a proceeding except in accordance with section 20.

20. (1) Where the superintendent considers that it would be in the public interest, he or she may make an order authorizing the disclosure to a person or company of,

(a) the nature or content of an order under section 12 or 13;

(b) the name of a person examined or sought to be examined under section 14, testimony given under section 14, information obtained under section 14 or section 14.1, the nature or content of questions asked under section 14, the nature or content of demands for the production of a document or other thing under section 14 or section 14.1, or the fact that a document or other thing was produced under section 14 or section 14.1; or

(c) all or part of a report provided under section 18.

(2) No order shall be made under subsection (1) unless the superintendent has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the superintendent; and

(b) in the case of disclosure of testimony given or information obtained under section 14, the person or company that gave the testimony or from which the information was obtained.

(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) authorizing the disclosure of testimony given under subsection 14 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of another country or jurisdiction.

(4) An order under subsection (1) may be subject to terms and conditions imposed by the superintendent.

(5) A court having jurisdiction over a prosecution under the Provincial Offences Act initiated by the superintendent may compel production to the court of testimony given or a document or other thing obtained under section 14 or 14.1, and after inspecting the testimony, document or thing and providing interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant where the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution.

(6) A person appointed to make an investigation or examination under this Act may, for the purpose of conducting an examination or in connection with a proceeding commenced or proposed to be commenced by the superintendent under this Act, disclose or produce a thing mentioned in subsection (1).

(7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 14(1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of another country or jurisdiction.

Digital Government and Service NL points out that these provisions govern the release of information collected as a result of an investigation or examination into matters relating to securities trading or securities law administration. The department urges retention of the provisions in Schedule A.

The views of the Wells Committee, at page 166:

> These two sections are in Part VI of the Act, which empowers the superintendent to appoint investigators to conduct certain investigations:
>
> - for the administration of the securities law of the province
>
> - to assist in the administration of the securities laws of another jurisdiction
>
> - with respect to matters relating to trading in securities in the province
>
> - with respect to matters in the province relating to trading in securities in another jurisdiction
>
> - for the due administration of the securities law of the province or the regulation of the capital markets in the province
>
> - to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.
>
> Other sections provide for the issuing, after a hearing in private, of court orders to empower the investigator to make inquiries, take statements under oath, require production of and seize documents, and take a variety of other steps necessary in connection with the investigation. It is in the nature of police work focused on the financial and securities industry. As with a police investigation, the information gathered should not be disclosed except in the ordinary course of administration of justice. Regulating access to such records is best provided for in the statute that comprehensively provides for all aspects of the subject matter of the legislation. The public interest will be best served by having those sections of the *Securities Act* remain on the list of statutory provisions which prevail over the *ATIPPA*.

I agree. There is no need to remove these provisions from Schedule A. They should remain.

13.(1) Except for the purposes of communicating information in accordance with the conditions of an agreement made under section 14 or 15 and except for the purposes of a prosecution under this Act,

(a) a person other than the director or a person employed by the agency and sworn or affirmed under section 9 shall not be permitted to examine an identifiable individual return made for the purpose of this Act;

(b) a person who has been sworn or affirmed under section 9 shall not disclose to a person other than a person employed by the agency and sworn or affirmed under section 9, information obtained under this Act that can be identified with or related to an individual, person, company, business or association.

(2) The director may authorize the following information to be disclosed:

(a) information collected by persons, organizations or departments for their own purpose and communicated to the agency, but that information when communicated to the agency shall be subject to the same secrecy requirements to which it was subject when collected and may only be disclosed by the agency in the manner and to the extent agreed upon by the collector of the information and the director;
(b) information relating to a person or organization in respect of which disclosure is consented to in writing by the person or organization concerned;
(c) information relating to a business in respect of which disclosure is consented to in writing by the owner of the business;

(d) information available to the public under another law;

(e) information in the form of an index or list of

(i) the names and locations of individual establishments, firms or businesses,

(ii) the products produced, manufactured, processed, transported, stored, purchased or sold, or the services provided by individual establishments, firms or businesses in the course of their business, and

(iv) the names and addresses of individual establishments, firms or businesses that are within specific ranges of numbers of employees or persons constituting the work force.

The submission of the Department of Finance supporting the continued inclusion of this section in Schedule A, at page 3:

> It is noted that while some of the information would be protected under section 39.2 (tax information), the use of section 40 to protect personal info and 39.1 to protect business information requires a harms test to be met. While they are mandatory exemptions, the possibility exists that the information may not be fully protected from disclosure. In addition, section 35 may be applied to some business information, but it is a discretionary exemption and may not fully protect the information collected under section 13 of the Statistics Agency Act.

The Department provided a supporting letter from the Director of the Newfoundland and Labrador Statistics Agency, at pages 4–6:

> The Newfoundland and Labrador Statistics Agency (NLSA) operates under the authority of the Act but also uses ATIPPA on a daily basis. ATIPPA applies to most of the daily business and functions of the Agency; the Act, however, applies to a range of very specific functions of NLSA undertaken on behalf of Government.
>
> Specifically, the Act provides the authority to collect confidential, individual record level data directly and indirectly from persons, businesses or other groups for statistical purposes; such data cannot be used for any form of administrative purpose. The Act ensures information collected is without influence, unobstructed and provided truthfully and requires that this information be protected from disclosure as to ensure the integrity of the statistical system. This is critical for policy research, monitoring and development and the evaluation of legislations, programs and services provided to the public and businesses.
>
> The Act is also designed, and is an absolute requirement to enable the transfer of confidential data between NLSA and Statistics Canada (STC). STC is responsible for the National Statistics System which comprises Statistics Canada, the Provinces and Territories. STC is also responsible on behalf of Canada for compliance to international statistical reporting requirements and standards. Newfoundland and Labrador is a member of the National Statistics System and has a very similar mandate and legislation as Statistics Canada. The Federal Statistics Act has the same exceptions under the Federal Access to information Act and Privacy Act. Under the Access to Information Act, there is a mandatory exemption to the disclosure of information collected under the Statistics Act. In regards to the Privacy Act, the disclosure of personal information is subject to Acts of Parliament that may prohibit the disclosure. This legal framework is the cornerstone of Canadian trust in the statistical system.

NLSA consulted with STC about potential impacts should the Act not be exempt from the ATIPPA legislation. STC has also offered to speak directly with the Committee Chair to discuss the role of the National Statistics System and Access to Information legislations. The comments below highlight some key implications of removing the exemption:

- In order to meet its mandate, the NLSA must have access to a vast array of information on persons, business and organizations, and in many instances, requests for information made under the Act are made on a mandatory basis.

- The powers given to the NLSA to access confidential information must be accompanied by an equally strong confidential provision to protect individually identifiable information (that is, information that could be linked back to a person, business or organization, whether or not direct identifiers remain attached to the record).

- The information obtained under the Act is meant to be used solely to meet the Agency's mandate, which is exclusively of a statistical nature; as such, access to confidential information obtained under the Act cannot be used for administrative or other purposes.

- Currently, survey respondents should have no fear of providing accurate information, as no one other than persons who have taken the oath under the Act can view their information.

- Should the NLSA also conduct surveys on a voluntary basis, having a strong confidentiality provision would reassure respondents and increase participation rates.

- Should the confidentiality protections of the Act be diminished in any way, it will be more difficult for the NLSA to obtain confidential information, and thus meet its mandate. For example, Statistics Canada currently shares confidential information on the basis that the Act offers the same level of confidentiality protection as the federal *Statistics Act*. Should it no longer be the case, the agreement enabling that sharing would have to be terminated, as it would no longer meet the requirement of the federal *Statistics Act* (sections II and 12).

While there are many implications not mentioned, the essence of the situation is that should the full protection of data held under the Act be removed, NLSA would no longer be able to function fully as a member of the National Statistics System. It would not be able to access many types of data from STC and as a result many essential activities of Government would be jeopardized or eliminated (one example would be the loss of data essential for the prepara-

> tion of Government economic forecasts and impact analysis). It would also eliminate our Government's ability to work with other jurisdictions where the Act is routinely required to allow for the collection of and access to key data routinely required as inputs to Government decision-making.
>
> As well, emphasis is growing internationally on the importance of the unique role statistics agencies play in government and their independence to ensure accurate and unbiased information for evidence based, transparent and accountable decision making. The OECD Council on Good Statistical Practice states "statistics are an indispensable tool for good analysis, transparency, accountability and ultimately for informed decision-making and the functioning of democracies." Nationally, there is alignment of these as the federal government committed in the amendments to the Statistics Act in 2017, to legislate the independence of the Chief Statistician. Ensuring that information provided to the Agency cannot be further disclosed, even under the ATIPPA, it provides for an Agency that produces statistics that are neutral, objective, accurate and reliable will ensuring that the public continue to have confidence in the integrity of their national and provincial statistical offices and in the data they produce.
>
> It is therefore recommended that the exemption afforded in the *Access to Information and Protection of Privacv Act* to prohibit the disclosure of information collected under the authority of the *Statistics Agency Act* (v.13) remain to preserve the integrity of the statistical system.

The view of the Wells Committee, at page 167:

> Clearly this is not wholly government information. Much of it may be the private information of the parties from which it is taken by force of law. It may be that such records can be adequately protected by the provisions of the *ATIPPA.* However, as totally private information it would seem appropriate for such records to be protected directly through provisions of the statute authorizing their collection and management. The Committee does not have sufficient information to reach a conclusion as to which course would best serve the public interest. That section of the *Statistics Agency Act* should remain on the list of statutory provisions prevailing over the *ATIPPA*, at least until the next statutory *ATIPPA* review, unless the legislature decides otherwise in the meantime.

Even assuming the passage of the recommended amendments to s. 39, I am satisfied, based on the comprehensive submission of the Director – which provided significant information that was not before the Wells Committee – that the public interest is best served by leaving s. 13 of the *Statistics Agency Act* in the confines of Schedule A of *ATIPPA, 2015*.

> *18. (1) An employee of the commission or a person authorized to make an inquiry under this Act shall not divulge, except in the performance of his or her duties or under the authority of the board of directors, information obtained by him or her or which has come to his or her knowledge in making or in connection with an inspection or inquiry under this Act.*
>
> *(2) Notwithstanding subsection (1), the board of directors may permit the divulging to legal counsel or another authorized representative either of a person seeking compensation or of another interested party of information referred to in subsection (1) or other information contained in the records or files of the commission.*

The Wells Committee's comment, at page 167:

> The purpose of the statute is to create a no-fault system of compensation for workers who are injured as a result of activity associated with their work. Section 19 lists aspects of employee and workplace circumstances that may be relevant to determining entitlement to compensation. Section 17 authorizes the appointment of a person "to make the examination or inquiry into a matter that the commission considers necessary for the purpose of this Act." The information gathered is largely personal information, and in any event not conventional government information. Therefore, access to it is best regulated by the special statute that regulates all other aspects of the subject matter of the statute. There is nothing to indicate that the public interest will be best served by having such information subject to access consideration under the *ATIPPA*. Section 18 should, therefore, remain on the list of statutory provisions that prevail over the *ATIPPA*.

However, with the benefit of experience, the minister responsible for Workplace NL has advised that the exceptions in *ATIPPA, 2015* are sufficient for purposes of this legislation. The submission of the Honourable Gerry Byrne:

> With respect to my role as Minister Responsible for Workplace NL, the only issue identified pertains to Schedule A of the legislation. Workplace NL has determined that there are sufficient protections in ATIPPA, 2015 and section 18 of the *Workplace Health, Safety and Compensation Act* no longer needs to prevail per section 7.(2) of ATIPPA, 2015. As such, section t of Schedule A can be removed.

Accordingly, I recommend that s. 18 of the *Workplace Health, Safety and Compensation Act* be removed from Schedule A of *ATIPPA, 2015*.

RECOMMENDATION

- That the *Act* be amended to remove section 18 of the *Workplace Health, Safety and Compensation Act* from Schedule A. [Appendix K, Schedule A (t)]

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OTHER SCHEDULE A SUBMISSIONS

A number of submissions were made to the Committee recommending that various legislative provisions be added to Schedule A.

ELECTIONS ACT, 1991, SNL 1992, C. E-3.1

3. In this Part: …

(b) "election documents", and "election papers" refer to those documents or papers that are directed by this Part to be transmitted to the C hief Electoral Officer by the returning officer after an election;

55.(4) The list of electors shall not be used for any purpose other than that for which it was prepared or other electoral use prescribed by law.

184.(1) Election documents and election papers sealed in ballot boxes, or that have been removed in accordance with section 185, shall not be inspected or produced except as a result of an order of a judge.

(2) Notwithstanding subsections (1) and 185(1), after the date upon which an application may be made under section 235 has passed, the Chief Electoral Officer may, for the purpose of revising and correcting the Permanent List of Electors under section 56, open a sealed ballot box in the presence of the Clerk of the House of Assembly and, with respect to that opened box,

(a) may remove the contents relevant to the revising and correction of the Permanent List of Electors; and

(b) shall ensure that the contents of an opened ballot box are used or kept in a secure place; and

(c) shall reseal the opened ballot box with a numbered seal making a record of the number on the seal used and furnishing the Clerk of the House of Assembly with a copy of the record.

185.(1) The Chief Electoral Officer shall retain the ballot boxes, sealed, for a period of 1 year after the date of the election in which they were last used and then, unless otherwise directed by an order of a judge, shall destroy all those documents, ballots, and papers contained in the ballot boxes except the poll books, the supplementary list of electors and all oaths.

(2) Notwithstanding subsection (1), where a ballot box or its contents are required in respect of an election during the 1 year period referred to in subsection (1), the Chief Electoral Officer may, in the presence of the Clerk of the House of Assembly open the required number of ballot boxes and, with respect to a ballot box,

(a) if only the contents or some of the contents are required, remove those contents and reseal the ballot box with a numbered seal, making a record of the number on the seal used, and furnishing the Clerk of the House of Assembly with a copy of the record; or

(b) if the ballot box is required or the ballot box and its contents are required, use that ballot box or ballot box and the contents for the purpose of the election.

(3) As soon as possible after a ballot box is opened under paragraph (2)(b), the Chief Electoral Officer shall place the contents of it, other than those of the contents that are required, in a secure place.

(4) A ballot box referred to in paragraph (2)(a) shall remain sealed and the contents of a ballot box placed in a secure place until the expiration of 1 year after the date of the election referred to in subsection (1).

(5) The election materials retained under subsection (1) may be removed from the container in which they are kept and used by the Chief Electoral Officer or made available for the purpose approved by the Chief Electoral Officer.

As mentioned earlier in this report, the *Elections Act* is currently under review by government. I do not recommend its inclusion in Schedule A. The relevant issues will be thoroughly canvassed in the context of the review of the entire *Act*.

The Newfoundland and Labrador Aquaculture Industry Association submitted that subsection 9(4) of the *Aquaculture Act* be included in Schedule A:

> *9.(4) Notwithstanding subsection (3), information prescribed as confidential shall not be available to the public.*

This provision must be read in conjunction with s. 5 of the *Aquaculture Regulations CNLR 1139/96:*

> *5. (1) The Registrar of Aquaculture shall regard as confidential and refuse access to members of the public to information which*
>
> *(a) describes unique trade practices or technology used by a licensee, unless those trade practices or technology are protected by patent, copyright or industrial design; or*
>
> *(b) describes information concerning the financial backing, obligations or performance of an aquaculture facility or an aquaculture enterprise.*
>
> *(2) The Registrar of Aquaculture shall only regard information as confidential and refuse access to members of the public to that information if a request for a designation of confidentiality is made in writing by the licensee with the submission of the information.*
>
> *(3) The Registrar of Aquaculture shall only regard information concerning unique trade practices or technology as confidential for 3 consecutive calendar years.*
>
> *(4) The Registrar of Aquaculture shall release information referred to in subsection (1) to a person who is authorized to receive the information by the written consent of the licensee.*

Also relevant are s. 4(6) and 6(4) of the *Act*:

> *4.(6) The minister may*
>
> *(a) incorporate into an aquaculture licence a plan relating to*
>
> *(i) health, safety and environmental matters, and*
>
> *(ii) resource utilization and sustainable development;*

(b) impose standards relating to the use, stocking, investment in or production of an aquaculture facility;

(c) make provision for access by contiguous landowners through a site;

(d) require records to be kept and information and documents to be provided that the minister considers advisable;

(e) specify the source and strain, and require approval in advance of the source and strain, of all seed and stock to be cultivated;

(f) impose limits on the intensity with which aquaculture is conducted and organisms are concentrated at a site;

(g) specify measures to be taken to prevent the escape of aquatic animals, to mitigate the development of pathogenic agents and prevent the spread of pathogenic agents, and to minimize the risk of damage to the environment or other aquaculture facilities;

(h) specify measures to be taken to minimize risk to other aquaculture facilities; and

(i) incorporate whatever other terms may be necessary to carry out the purpose of this Act.

6.(4) A person responsible for aquaculture gear, an aquaculture facility or other place referred to in subsection (2) shall provide the information, documents and samples and carry out the tests and examinations that an aquaculture inspector may reasonably require.

From the submission of the Association, at pages 2–4:

> In NL, the aquaculture industry contributes significantly to the province's gross domestic product and offers diverse employment opportunities. The industry has particularly increased employment in rural communities throughout the province, and has the potential to grow. Aquaculture production in NL is mostly comprised of growers of high quality salmon and organic mussels. In 2016, the production value of the industry was more than a quarter billion dollars and growing. Significant expansion is expected in the salmon sector, with potential growth of over 50,000 MT anticipated. The mussel sector has grown substantially since 2003, from 1,300 MT to 3,200 MT in 2016, and is poised for future expansion.
>
> In its *Way Forward – Aquaculture Sector Work Plan2*, the Government of NL identified a growth target of increasing commercial salmon production to

50,000 MT (from 25,411 MT, valued at $263 million in 2016) and commercial mussel production to 10,750 MT (from 3,211 MT, valued at $13.6 million in 2016) by, among other things, increasing the water area available for development in 2018. Such an increase would generate 1100 person years of employment. The target coincides with a further goal of increasing NL's food self-sufficiency to at least 20 percent by 2022 (from approximately 10 percent in 2018).

The Aquaculture Industry, Public Reporting and the ATIPPA, 2015

Participants in the aquaculture industry in NL routinely share information with public bodies as a matter of licensing and statutory compliance. Participants are also subject to regulatory auditing and inspection. It is generally accepted by NAIA's members that such reporting and collection of information is a hallmark of responsible regulatory oversight.

The Aquaculture Act3 directs aquaculture licensees' sharing information with government, for example, as follows:

- Subsection 4(6)(d) of the *Act*, which relates to aquaculture licensing, provides that the Minister of Fisheries, Forestry and Agriculture (the **"Minister"**) may require records to be kept and information and documents to be provided that the Minister considers advisable; and
    - Subsection 6(4) of the *Act*, which relates to inspection, provides that a person responsible for aquaculture gear, an aquaculture facility or other prescribed place shall provide the information, documents and samples, and carry out the tests and examinations, that an aquaculture inspector may reasonably require.

The Government of NL's *Aquaculture Policy and Procedures Manual*, issued under the *Aquaculture Act*, likewise includes policies which involve the reporting and collection of business information of aquaculture licensees, for example, as follows:

- *Policy AP 2 – Application Requirements,* which provides for production of financial information, fish health management plans, biosecurity plans, integrated pest management plans, fish disposal plans, production plans and other such business information to government;
- *Policy AP 7 – Annual Reporting,* which provides for annual reporting to government respecting each licensed aquaculture site;
- *Policy AP 11 – Aquaculture Inspection Program*, which provides for inspections to be carried out by government officials to ensure marine and freshwater aquaculture facilities are operating in accordance with the *Aquaculture Act* and its regulations;
- *Policy AP 17 – Public Reporting,* which provides for reporting to be made to government in circumstances of escape, quarantine, de-

population and incident events that occur on licensed aquaculture sites; and

- *Policy AP 32 – Aquatic Animal Health Reporting*, which provides for reporting to be made to government in circumstances of reportable disease events or outbreaks.

As a result of these requirements, the Government of NL has in its custody and control an evergrowing collection of business and commercially sensitive information relating to aquaculture licensees and their activities. The *ATIPPA, 2015* applies to all records in the custody of or under the control of public bodies, save those records expressly listed in subsection 5(1) of the *Act*. The records collected by the Government of NL pursuant to aquaculture license conditions, the requirements of the *Aquaculture Act* and aquaculture policies are records to which the *ATIPPA, 2015* applies.

ATIPPA, 2015 presumes a public right of access to information, subject only to specific exceptions set out in the *Act*.

The submission suggests that s. 39, as applied, does not provide the necessary level of protection of sensitive industry information, at page 5:

Subsection 39(1) is challenging to substantiate as a result of the applicable three-part test. In practice, the three-part test is seldom met. The difficulty lies in the second part of the test, which requires that the information be supplied, implicitly or explicitly, in confidence. While some third party business information may be supplied in confidence, others, such as contracts, are deemed to be "negotiated" and not "supplied", and therefore fail to meet the requirements of the test. Such records may contain commercially sensitive information, however the current section 39 disallows the application of section 39 to the records. Equally problematic in application is the third part of the test, which is routinely accorded an unduly high threshold to substantiate. NAIA submits that the sufficiency of section 39 in its current language should be reviewed by the Committee to determine whether amending it would coincide with the provision's underlying policy justification.

The suggestion of the Association, at page 7:

NAIA submits that consideration should be given to the inclusion of subsection 9(4) of the *Aquaculture Act* in Schedule A of the *ATIPPA, 2015*. Alternatively, the protection offered by section 39 of the *ATIPPA, 2015* should reflect the confidentiality that is intended to apply to participants in the aquaculture industry signaled by subsection 9(4) of the *Aquaculture Act*. There should be no question that the legislature has signaled that commercially sensitive information in the custody and control of government arising in the aquaculture context should be given confidential status.

In his oral presentation, Mark Lane, Executive Director of the Association, first addressed the application of s. 39:

> **MR. LANE:** I guess our number-one recommendation, Mr. Chair, would be that we recommend a review of section 39 of the ATIPP Act, 2015 in its current language and to determine whether amending it would coincide with the provision's underlying policy justification. That would be our number-one recommendation. (Transcript – January 20, 2021 – p. 155)

Mr. Lane then addressed what the Association perceived as unfairness in the different levels of access protection available to different commercial sectors in the province, mentioning specifically the oil and gas sector. He also spoke of what the Association considers to be unfair use of information considered proprietary and confidential by the Association's members. When asked to explain the concern further, he said:

> **MR. LANE:** ... For example, there are well-known groups that are anti-aquaculture activists who want us to not grow seafood for a growing population. Those individuals request basically, on a consistent basis, all information related to our standing operating procedures, which could be competitive in nature, for example, between companies' internal communications. There have been requests for financial information related to specific companies. So, at the end of the day, that proprietary information ends up in the mainstream media, which has been disclosed by the person who had requested the information and it's typically the same one or two individuals or organizations.
>
> We find ourselves unfairly being targeted through this. Proprietary information, confidential information that has no relevance to the public good: knowing the finances of a company. Things related to the environment, related to our practices where people would have an interest – sure, that's fine. But having our business plans subject to ATIPP requests, not so much. It's an unfair – and I don't think, to my knowledge, Mr. Chair, that it's a practice anywhere else in any other jurisdiction in Canada, that I can tell, from where we actually farm. So places like Norway, Scotland or Iceland.
>
> **CHAIR ORSBORN:** Let me put myself in the shoes of the Commissioner for a moment. I appreciate what you're saying about an industry, or one or more of your members being unfairly targeted by interest groups and information ended up in the media.
>
> What has that meant for your members on the ground in their operation from day to day?
>
> **MR. LANE:** Well, it sways the opinion of key decision-makers. We're in the middle of an election now and the people of the province will select the next government, and because information is taken out of context or proprietary

information is twisted, turned and then reported upon due to interest groups or activists, it influences key decision-makers. I've seen it.

I've been in this role for five or six years and we've seen ebbs and flows of support and openness from key decision-makers, depending on sometimes the flavour of the day of *Open Line*. That's unfair. My members invest hundreds of millions – not millions, hundreds of millions – of dollars in this province and I think that we can get more investment in this province. The issue is that companies who come into this province to operate are subject to, without any protection of their business plan or their proprietary or confidential information.

I think it's safe to say we are already the most transparent form of protein farming – or any sort of farming, certainly – in Newfoundland and probably globally. We are also, I would think, probably one of the most transparent sectors in the province of any industry. But I think to go above and beyond and not have any protection about any information that we are required by law, as a matter of licensing procedure, is unfair and it's unfounded.

To go back to your original question, Mr. Chair: How does it affect our farmers? We employ upwards of a thousand people directly on farms, and each one of those jobs creates three to four spinoffs, year-round jobs in towns like Harbour Breton, St. Alban's, Hermitage and Triton. When we see the level of activism against the industry by a very small portion of the population – as I mentioned, only 10 per cent of the population does not support our industry – we find ourselves in a defensive, trying to explain proprietary information that we shouldn't have because other industries are afforded privileges that we are not. That's unfair to my members. (Pages 157-158)

The Chair then asked about the use of information by those opposed to aquaculture:

CHAIR ORSBORN: Forgive me for being devil's advocate for a moment, but you talk about the information being made available and then activists, as you refer to them, using that information to sway the opinion of key decision-makers. Would that activity come within participation in democratic governance, which is one of the objectives of the act?

MR. LANE: In some ways, yes. The issue is that information that should remain private, of a competitive nature in a very small industry but very large output, with only three major players, as I said, in salmon and four in shellfish, to have our proprietary information not presented as found – so a request would go in; then it would be relayed to the public as something different than what was requested so it seems malicious in intent – from our perspective is unfair.

> We should be afforded the same privileges as oil and gas or mining, or some other sector that is listed under Schedule A. We should be there also. Those who come to the province to invest in our province and invest in our people should have some level of protection about their investment. Those things, as outlined, that are for the public good – sure, that's part of doing business, but the nitty-gritty aspects of our business plans and our finances to be subject to public scrutiny when they are competitive in nature, it's unfair, it's a deterrent to future investment and we see room for change. (Page 158)

In his presentation during the s. 39 roundtable, Mr. Lane again emphasized the Association's concern with s. 39:

> **MR. LANE:** But what we find is that we find it challenging, specifically related to this section of the act, section 39, that the three-part test, the second part and certainly the third, we typically find ourselves not qualifying for that; therefore, our proprietary information is, in fact, released to the general public, because it's subject to and under the control of the provincial government.
>
> As I said, in practice, the three-part test is seldom met. The difficulty lies, I guess, probably specifically in the second part of that test which requires that the information be supplied implicitly, explicitly or in confidence. While some third party business information may be supplied in confidence, others such as contracts are deemed to be negotiated or supplied; therefore, fail to meet the requirements of that part of the test, the second part of the test. Such records, as I had indicated, may contain and most often do contain commercially sensitive information. However, the current section 39, as it's written and phrased, disallows the application of section 39 to our records and therefore our proprietary information is released to the general public.
>
> I know in my oral presentation previously, Mr. Chair, you had asked for a specific example. For the benefit of the viewers today and in your presence, a specific example would be our production numbers, fish stocking densities, number of cages on site, et cetera. That information is proprietary to each individual company because not every company farms the same way. Therefore, with the release of that information, in some instances proprietary and confidential information can be compromised in a general or in a public forum. Equally problematic, to the second component of the test, is the application of the third which is routinely accorded an unduly high threshold to substantiate. (Transcript – January 28, 2021 – p. 213)

Mr. Lane was asked about harm to the Association members:

> **CHAIR ORSBORN:** You mentioned issues of confidentiality and trying to satisfy that part of the test. Just leaving that aside for a moment and looking at the harm side of it, either on the competitive side or financial loss or whatever, in situations where your members have been required – or the public body

has been required – to release information related to your members, are you able to give me any specific examples, without naming names, of harm that has come to your members, or loss to one of your members or decisions by a company not to operate in the province?

MR. LANE: Well, generally speaking, as I had mentioned before, Mr. Chair, there are a number of individuals and organizations who are in opposition to our industry, like any industry. These individuals continuously request information from the Department of Fisheries and Aquaculture and other departments in the provincial government.

So then, I read about proprietary information in mainstream media; as I said, for example, the stocking densities, number of cages on sites and configuration of sites. We have absolutely no issue reporting items of interest to the general public; for example, disease detection, mortality events, et cetera. That's no problem. The issue we find ourselves in, as you had alluded to, is that there is confidential, proprietary information released. When that's reported in mainstream media such as, for example, a trade magazine like *Intrafish* or *FishFarmingExpert*, for example, or *SeafoodSource*, people reach out to me globally and ask: If I come to invest in the Province of Newfoundland and Labrador, will my business plan, will my intentions, will my proprietary information be released as I have seen other's released in the past? …

CHAIR ORSBORN: Okay.

When you use the term "proprietary information," are you equating that to what would be considered a trade secret?

MR. LANE: I would. I'm using "trade secret" because I think that's the exact language in the *Aquaculture Act*, I think, or the ATIPP Act. (p. 214)

Section 9(4) of the *Aquaculture Act* was included in Schedule A of the predecessor to the current *ATIPPA, 2015*. The Wells Committee recommended its removal, at page 145:

It is clear from those provisions that section 9 of the Act chiefly concerns the making public of records that the registrar is required to keep. The exception is subsection (4), which may well be appropriate protection for the kind of confidential information involved. If it is, such information can be readily protected by section 27 [now s. 39] of the *ATIPPA*. One cannot imagine that there is anything special about aquaculture licenses, leases, and land grants for aquaculture, or environmental preview reports and impact statements, that would require such records to be protected under provisions of a statute providing comprehensively for aquaculture. Assuming that to be so, the only other records to which subsection (4) could apply are those relating to trade practices, technology, or financial matters, prescribed under section 5 of the

> regulations, and which the licensee has requested in writing be designated as "confidential".
>
> The existing provisions of the *ATIPPA* can provide any protection that may be justified. The public interest is best served if access to such records is regulated by the *ATIPPA*.
>
> The statute does not otherwise indicate any apparent basis for creating a special access protection for the aquaculture business interests in excess of that provided by the *ATIPPA* for all other business interests. The Committee cannot identify any rational basis for continued inclusion of these two provisions on a list of legislative provisions that prevail over the ATIPPA. Subsection 9(4) of the *Aquaculture Act* and subsections 5(1) and (4) of the *Aquaculture Regulations* should be removed from the list.

Experience with the current legislation suggests that the confidence of the Wells Committee in the ability of the present s. 39 to "readily protect" the confidential information government requires the aquaculture industry to provide may have been optimistic.

The concerns about the application of s. 39, and in particular the confidentiality requirement, have been discussed elsewhere in this report.

I repeat that I am not prepared to recommend a reversal of a substantive access-related conclusion of a previous review without good reason. The concerns expressed by the Association about the operation of s. 39 have been expressed by others. If accepted, the recommendation of this Committee to amend s. 39 to place the focus on the analysis of harm and to remove the class requirement of confidentiality as a stand-alone prerequisite for refusal of access should in large measure address those concerns.

Let me add that I do not consider possible misuse or misinterpretation of information by interest groups a factor appropriate for consideration when determining the level of information protection. To do so would in my view run directly counter to the objectives of the *Act*. I acknowledge the concerns of the industry, but should publicly available information be referred to in a manner the industry considers uninformed or inappropriate, it is for the industry to respond as it sees fit.

The matter of fairness to the industry is one of legislative policy choices. With the removal of fishery-related statutory provisions from Schedule A, those involved in the seafood industry should be, at least with relation to *ATIPPA, 2015*, on a level playing field. The government has, for its own policy reasons, chosen to provide the oil and gas industry with significantly enhanced information protection. The argument that this is

unfair to other significant commercial sectors is a matter for consideration by the legislature – not this review.

I do not recommend reinstating s. 9(4) of the *Aquaculture Act* and s. 5(6) of the accompanying Regulations in Schedule A of *ATIPPA, 2015*.

This legislation is managed by Digital Government and Service NL.

In general terms, it governs the registration of pension plans, the maintenance of pension funds, the administration of pension plans, and reporting requirements. Administration of the legislation is under the "control and supervision" of the superintendent of pensions, an appointee of the Lieutenant-Governor-in-Council. Section 25 provides a detailed listing of information that a plan administrator is required to provide to a plan member. A plan administrator is defined in s. 2(b):

> *2. (b) "administrator" means*
>
> > *(i) the employer, or*
> >
> > *(ii) a board of trustees, a pension committee or other body constituted in accordance with the terms of a pension plan or a collective agreement to manage the affairs of the plan;*

Sections 16 and 18 impose filing requirements on a plan administrators:

> *16.(1) An administrator of a pension plan shall file with the superintendent an information return for the plan in the form and containing the information required by the superintendent and as prescribed by the regulations.*
>
> *(2) An administrator of a pension plan shall file other information required by the superintendent and as prescribed by the regulations.*
>
> *(3) The contents and the method of preparation of the reports and qualifications of the persons or classes of persons by whom the report must be prepared shall be as required by the superintendent and as prescribed by the regulations.*
>
> *18. (1) An administrator of a pension plan applying for registration of the plan, or an amendment to the plan, shall do so as required by the superintendent and shall provide the information required by the superintendent.*
>
> *(2) The superintendent shall issue a certificate of registration for each pension plan registered under this Act and a notice of registration for each amendment registered under this Act.*
>
> *(3) An administrator of a pension plan shall not administer the plan unless it is filed for registration under this Act.*

> *(4) Where registration of a pension plan has been refused or revoked by the superintendent, a person shall not administer the plan except for the purpose of a wind-up of the plan.*

There is no specific provision in the legislation directed to the confidentiality of information provided to the superintendent. The regulations passed pursuant to the *Act* do not prescribe what information must be provided in an annual report to the superintendent.

Digital Government and Service NL suggests that additional measures are needed to ensure the confidentiality of information provided by plan administrators to the superintendent.

> Section 16 and 18 of the Pension Benefits Act requires the administrator of a pension plan to file specific documents with the superintendent of pensions. In subsection 25(7) it requires the administrator to provide access to persons eligible, the right to examine those documents and the right to request a copy of those documents directly from the administrator of the pension plan.
>
> The intent of the legislation is that information filed with superintendent should be kept confidential by the superintendent and should not be disclosed except to persons referred to in section 25 and in accordance with section 25(7). As the superintendent does not have access to individual pension plan data, the legislation directs individuals to the record keeper (the plan administrator) who can validate an individual's eligibility before releasing information about the pension plan. The Pensions Benefits Act should be amended to protect the confidentially of this information and require information be released as set out in Section 25(7). Nova Scotia, under Section 15(3), amended their Pensions Benefits Act in 2019 to require the Superintendent to keep this information confidential and require plan administrators to release the information as set out In the Act.
>
> Altematively, Schedule A of the Access to Information and Privacy Protection Act, 2015 could be amended to include an exemption respecting this information.

The impetus for the recommendation appears to be a concern that aggregate private pension fund information in the hands of the superintendent may be subject to disclosure pursuant to *ATIPPA, 2015*. As noted in the submission, the public body, through the superintendent, does not possess personal plan data for individuals, but nonetheless receives significant information about various pension plans. The submission refers to s. 15(3) of the *Nova Scotia Pension Benefits Act*:

> *15(3) Information that is filed, collected by or submitted to the Superintendent in relation to a pension or a pension plan must be kept confidential by the Superintendent and must not be disclosed to any other person, except to a person referred to in any of clauses 41(1)(a) to (k) and in accordance with Sections 42 and 43.*

Sections 42 and 43 of that statute refer, generally, to disclosure to a plan member.

It may well be desirable for the government to consider the need for imposing on the superintendent a non-disclosure requirement in the *Pension Benefits Act*, now over 25 years old. Such consideration would reasonably be expected to include consideration of that *Act* in the context of *ATIPPA, 2015*. Any such amendment is a matter for the legislature.

With respect to including s. 16 and s. 18 of the *Act* in Schedule A, the Committee has been given no information of the experience of the public body when dealing with access requests for pension plan information. Neither was there any submission made on the type of harm that could flow from a disclosure of the aggregate information in possession of government.

In the absence of a sound foundation upon which to base any recommendation, I am not prepared to recommend inclusion of any sections of the *Pension Benefits Act* in Schedule A.