



CONTACT INFORMATION

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“The Commissioner’s
role is to facilitate
the effort of a
requestor to seek
access to
information [...] and
is effectively an
ombudsman or
liaison between the
citizen and
government in
attempting to resolve
the request by
mediation or
otherwise if
documents or
information known to
be existing are being
withheld in whole or
in part for various
reasons”
*Justice Harrington,
NL CA,
NL (Information and
Privacy
Commissioner) v. NL
(Attorney General)*

ABOVE BOARD

A QUARTERLY NEWSLETTER BY THE OFFICE OF
THE INFORMATION AND PRIVACY COMMISSIONER

VOLUME 09, ISSUE 03

JULY 2017

- ◆ APSIM Conference 2018
- ◆ OIPC Reminders and Updates
- ◆ Policy Advice and Recommendations
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- ◆ Recent OIPC Reports
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APSIM Conference 2018

We are pleased to announce that we will once again be offering a FREE Access, Privacy, Security and Information Management conference in early May 2018.

Last year’s APSIM conference was very well received and we intend to provide the same quality of content you have come to expect with experienced and knowledgeable presenters and a diverse range of topics.

This conference will be of interest to all professionals who work in the information management, security and access and privacy fields. The topics covered will capture the interest of all the communities impacted by the *Access to Information and Protection of Privacy Act, 2015* and the *Personal Health Information Act*.

We hope to see you there!

OIPC REMINDERS AND UPDATES

New Senior Access & Privacy Analyst

Please join us in congratulating Janet O’Reilly in becoming our new Senior Access & Privacy Analyst. Many of you already know Janet through her work on investigative files and as an educational ambassador for this Office. She is excited to continue to work with you in this new role.

Important Email Addresses

Coordinators are reminded to use the following email address to report privacy breaches:

breachreport@oipc.nl.ca

Coordinators are reminded to use the following email address to request time extensions or disregards:

commissioner@oipc.nl.ca

POLICY ADVICE AND RECOMMENDATIONS

The purpose of the exception for policy advice or recommendations is maintaining an effective and neutral public service capable of producing full, free and frank advice. This discretionary exception is subject to the public interest override in section 9.

When considering the application of this exception, Coordinators must consider three things:

1. Does the record fit within the exception?
2. If it does, is the harm that the exception is intended to protect against present? (Even though the record fits within the exception, should the information be released anyway?)
3. Does the public interest override apply? (Is it clearly demonstrated that the public interest in disclosure outweighs the reason for the exception?)

1. Does the Record Fit within the Exception?

“Advice or Recommendations” and “Policy Options”

The Supreme Court of Canada in [*John Doe v. Ontario \(Finance\)*](#) addressed a similar exception in Ontario’s access legislation. The Court emphasized that the words advice or recommendations must have separate meanings. This finding supports this Office’s past interpretation of advice or recommendations in [Report A-2009-007](#) at paragraph 14.

In the *Doe* case, the Court also discussed the meaning of the term “policy options” at paragraphs 26 and 27.

After the decision was rendered in *Doe*, the Ontario IPC in [Order PO-3645](#) held that:

[34] *“Advice” includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.*

The British Columbia Court of Appeal in [College of Physicians](#) held that the word “advice” should be interpreted to include:

[113] *“an opinion that involves exercising judgment and skill to weigh the significance of matters of fact on which a public body must make a decision for future action.”*

Drafts and Communication of Advice

There is no specific reference in the exception to “drafts”. The analysis must be of the content of the record itself and not its status in terms of stage of development or whether it was submitted.

POLICY ADVICE AND RECOMMENDATIONS (CONTINUED)

Using the Exclusions to Define

When defining the scope of the exception, the Supreme Court of Canada indicated that insight could be garnered from the items excluded from the exception.

For a full description of all the specific types of records excluded from the advice or recommendations exception see the [ATIPP Manual](#).

When Disclosure would Allow an “Accurate Inference”

We note that the British Columbia IPC found in [Order F15-25](#) at paragraph 17 that the exception “applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations”. The Ontario IPC has also made a similar finding.

2. Is the Harm that the Exception is Intended to Protect against Present?

One of the primary purposes of the *ATIPPA, 2015* (section 3(1)(a)) is disclosure of information to citizens that is required to participate meaningfully in the democratic process, which is balanced by specifying limited exceptions necessary to preserve the ability of government to function efficiently, (section 3(2)(c)).

The Court in *Doe* made a very clear statement about the purpose of this exception:

[46] Interpreting “advice” in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

The next step, if the purpose of the exception is present (i.e. there is a risk of impeding open communication on policy matters), is for the public body to consider whether it should exercise its discretion to release despite that conclusion. We addressed the topic of discretion in [Report A-2017-001](#).

3. Does the Public Interest Override Apply?

If, after the second step, a decision to withhold the records has been made, the Coordinator must then apply the public interest override test, set out in section 9 of the *Act*.

For more information on how to apply this test, see our [Public Interest Override Guidance Document](#).

Much more detail about section 29 can be found in our full [guidance piece](#) on our website.

DISCLOSURE TO LAW ENFORCEMENT OR PUBLIC BODIES CONDUCTING INVESTIGATIONS

Public bodies may only disclose personal information in accordance with the provisions of the *ATIPPA, 2015*.

One circumstance in which disclosure by a public body may be authorized is when the request for personal information is received from a law enforcement agency or public body conducting an investigation associated with a law enforcement proceeding. This does not mean, however, that public bodies should automatically comply with all requests by law enforcement agencies or public bodies claiming to be pursuing a law enforcement proceeding.

Before discussing required evaluation, a distinction must be made between requests associated with search warrants or other forms of judicial authorization and those without. Pursuant to section 68(1)(e) public bodies need not question requests accompanied by warrants or other similar authorizations, other than to ensure that the information to be disclosed matches and does not exceed the information described in the warrant or authorization.

Public bodies must evaluate requests for personal information not accompanied by a warrant or other form of authorization issued by a competent authority. In those circumstances, the public body receiving the request must satisfy itself, preferably via a written submission by the law enforcement agency (or other public body making the request, that all of the following conditions are met before providing that information:

- the investigation is being conducted under the authority of or for the purpose of enforcing an enactment (statute or regulations), specifically referencing the sections of the enactment pursuant to which the investigation is being conducted;
- the personal information is sought to assist with that investigation; and
- the investigation is one that leads or could lead to a penalty or sanction being imposed under the enactment specifically referencing the sections of the enactment pursuant to which a penalty or sanction could be imposed.

Section 68(1)(n) of *ATIPPA, 2015* requires that the public body be satisfied that the law enforcement agency (or other public body) is conducting an investigation relating to a law enforcement proceeding before the public body is authorized to release any personal information.

If a delay in obtaining the personal information could result in the loss of evidence or a danger of bodily harm or death to a person, the request may be submitted orally. In such cases, detailed notes should be kept by both the public body and law enforcement agency, including notes as to the urgent circumstances that precluded a written request.

DISCLOSURE TO LAW ENFORCEMENT OR PUBLIC BODIES CONDUCTING INVESTIGATIONS

Law enforcement agencies and public bodies relying upon section 68(1)(n) should keep records of all of their requests, including those that are denied. Public bodies who receive such requests should keep records of all requests. These records should include all correspondence and notes relating to these requests.

Public body disclosures pursuant to section 68 must be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed in accordance with section 68(2).

The full [guidance piece](#) can be found on our website.



**Did you know you can follow our Office and
other IPC Offices across the country on
Twitter for discussions on interesting
access and privacy developments?**

Check us out at [@OIPCNL](#)

RECENT OIPC REPORTS

A-2017-009 – Department of Health and Community Services

The Applicant requested copies of correspondence between the Department of Health and Community Services and ambulance operators relating to the payment of wage subsidies. The Department gave notice to the Third Party and other affected third parties that it intended to disclose some of the information. The Third Party was the only ambulance operator to object to disclosure. After consulting with the Third Party, the Department severed some information pursuant to section 40 (disclosure harmful to personal privacy) of the *ATIPPA, 2015* and determined that the remainder should be released. The Third Party complained to this Office, arguing that the information should be withheld pursuant to section 39 (business interests of a third party) and section 40.

Beyond sections 39 and 40, the Third Party also raised other objections to the release of the records. However, as confirmed in previous Reports issued by this Office, a third party may only make a complaint opposing the disclosure of its information pursuant to sections 39 or 40 and generally only if it has received notice from a public body with respect to one or the other exception. It is for the public body to decide whether any information in the responsive records ought to be withheld on the basis of any other exceptions provided by the *ATIPPA, 2015*.

The Third Party requested that this Office consider the initial request to be frivolous, vexatious and made in bad faith under subsection 21(1)(a). The Commissioner found that there was no basis to assert such a claim in this case and, furthermore, section 21 only allows a public body in receipt of a request to apply to this Office to disregard the request.

The Third Party also argued that this Office should disregard the Applicant's request for information as being outside of the spirit and purpose of the *ATIPPA, 2015* as stated in section 3. Section 3 is a statement of principles to inform the application of the *ATIPPA, 2015* and cannot be used as an exception to the right of access.

The Commissioner found that the Third Party was not entitled to rely on sections 3, 21 or 40 and had not met the test for section 39. The Commissioner recommended that the requested information be disclosed.

A-2017-013 – Department of Transportation and Works

The Department of Transportation and Works received an access request seeking disclosure of all correspondence between the Provincial Government, two named individuals and the Third Party. The correspondence was identified by the Applicant as "all correspondence and emails exchanged...requesting an increase to the floor space," at a specific location. The Department was prepared to provide access to the information with only minimal redactions based on section 40 (disclosure harmful to personal privacy), however, the Third Party filed a complaint with this

RECENT OIPC REPORTS (CONTINUED)

Office objecting to some of the information being released based on section 39 (disclosure harmful to business interests of a third party) and section 31 (disclosure harmful to law enforcement). The Commissioner found that the Third Party had not met the test for section 39 and recommended that the information be disclosed.

As in Report A-2017-009, the Commissioner once again found that a third party has a right to file a complaint with our Office only with respect to disclosures which might be harmful under section 39 (in the case of business information) or section 40 (in the case of personal information) and about which they have been notified. Therefore, the Third Party was not entitled to rely on section 31.

A-2017-014 – Memorial University of Newfoundland

The Applicant made a request to Memorial University for information relating to network services. Memorial decided to grant access to the records, but also decided to notify third parties, ultimately resulting in a complaint from one of the third parties. In its complaint, the Third Party objected to the disclosure pursuant to section 39 of the *ATIPPA, 2015* (disclosure harmful to the business interests of a third party). The Third Party also objected to the disclosure of signatures of its employees, on the basis that such a disclosure would be an unreasonable invasion of privacy pursuant to section 40 or contrary to the provisions of the federal *Privacy Act* or *PIPEDA* neither of which applies to information in the custody of public bodies in this province. Therefore, the Commissioner conducted his analysis in relation to the signatures solely in relation to section 40. The Commissioner cited and adopted Alberta Report F2009-009 where it was determined that the names and signatures of those acting in a professional capacity in an employment context is not information “about” those individuals but rather about their work and no harm would likely come from the release of such information. The Commissioner found that neither section 39 nor 40 applied and recommended the release of the information.

The Commissioner also addressed Memorial’s decision to notify third parties despite having concluded that section 39 did not apply. The Commissioner held that once Memorial determined that the information did not meet the three-part harm test, the records ought to have been disclosed immediately to the Applicant. The Commissioner went on to state that as a result of third party notifications and the complaints to this Office timely disclosure was hindered and one of the essential purposes of the Act was undermined. (An appeal was filed by the Third Party)

PRACTICE TIP

Create a calendar with the holidays listed in section s.27(l) of the [Interpretation Act](#)
Highlight and make copies for every ATI file you process.
This way you can easily calculate “business day” timelines.

ATIPPA PRIVACY BREACH STATISTICS April 1–June 30, 2017

During this reporting period (April 1 – June 30, 2017), the OIPC received 41 privacy breach reports from 15 public bodies under the *ATIPPA, 2015*. This is down from the 43 reports from 18 public bodies received in the first quarter of 2017/2018.

If any public body would like the OIPC to deliver training regarding privacy breaches, or any other topic relating to access or privacy, contact our Office to arrange a time.

Summary by Public Body	
Advanced Education, Skills and Labour	5
City of St. John's	1
College of the North Atlantic	4
Department of Children, Seniors and Social Development	7
Department of Fisheries and Aquaculture	1
Human Resource Secretariat	1
Memorial University of Newfoundland	3
Newfoundland and Labrador English School District	3
Newfoundland and Labrador Housing Corporation	1
Office of the Information and Privacy Commissioner	1
Research and Development Corporation	1
Service NL	8
Town of Portugal Cove-St. Philip's	1
Workplace Health, Safety and Compensation Review Division	1
Workplace NL	2

Summary by Type	
Email	14
Fax	2
In Person	5
Mail Out	16
Other	4

The OIPC has issued a tip sheet on
Avoiding Inadvertent Privacy Breaches
visit our website

www.oipc.nl.ca