Review of the *Access to Information and Protection of Privacy Act*

January 2011

26 January 2011

To the Honourable Felix Collins
Minister of Justice and Attorney General

I have the honour, as Review Commissioner, to present herewith my review of the *Access to Information and Protection of Privacy Act.*

Respectively submitted,

John R. Cummings, Q.C.
Review Commissioner

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1.0 OVERVIEW OF THE *ATIPPA* COMPREHENSIVE REVIEW PROCESS

The *Access to Information and Protection of Privacy Act (ATIPPA* or the *Act*)[1] came into force in January 2005. Pursuant to section 74, a comprehensive review of the *ATIPPA* provisions and operation must take place not more than five years after the coming into force of the *Act.* On March 17, 2010 the Minister of Justice announced my appointment as Review Commissioner.

The Minister of Justice provided me with a mandate which required me to examine, but did not limit me to, the following issues:

- Public and public body experience in using and administering the *ATIPPA* to access information in the custody or control of public bodies in Newfoundland and Labrador and opportunities for improvement;

- Whether there are any types of information that should be made more readily available by public bodies;

- Whether there are any types of information (personal information or otherwise) that require greater protection than the *ATIPPA* currently provides;

- Public body response times for access requests and whether current *ATIPPA* requirements for response times are appropriate;

- An examination of both the mandatory and discretionary exceptions to access as set out in Part III;

- 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;

- Whether the current *ATIPPA* Fee Schedule is appropriate;

- Whether the *ATIPPA* should contain provisions for dealing with frivolous, vexatious or nuisance requests;

- Whether there are any bodies which would not appear to meet the definition of "public body" but which should be subject to the *ATIPPA*; and

- Whether the provisions of the *ATIPPA* are appropriate for local public bodies – such as municipalities, school boards and regional health boards.

My mandate required me to hold public hearings throughout the Province. These public hearings took place in May and June, 2010, as follows: Happy Valley-Goose Bay on May 12, 2010; Labrador City on May 13, 2010; Corner Brook on May 18, 2010; Stephenville on May 19, 2010; Gander on May 31, 2010; Grand Falls-Windsor on June 01, 2010; Clarenville on June 15, 2010; and St. John's on June 22 and 23. I was disappointed in the lack of response to the public hearing sessions. In total, I heard from approximately 10 members of the general public.

In addition, my mandate required me to conduct consultations with key stakeholders and to receive written submissions from public bodies which are subject to the *ATIPPA*. In this regard, I solicited submissions from the following public bodies: the Office of the Official Opposition; the Leader of Newfoundland and Labrador New Democrats; all government departments; all school boards; and all health boards. I also contacted several key government agencies, boards, commissions and municipalities. Some of the public bodies I contacted did not respond or chose not to meet or participate in the consultation process.

I received a great deal of cooperation from the Information and Privacy Commissioner, Mr. Ed Ring, and his staff. They were generous with their time, meeting with me on several occasions and providing insight into the practical application of the *ATIPPA* and on current issues raised by the legislation. I also received a very detailed written submission which was valuable in preparing this report.

As Review Commissioner, I also undertook a review of the relevant literature, case law and Information and Privacy Commissioner decisions. I also examined the freedom of information legislation adopted by other provinces and the federal government.

2.0 EXECUTIVE SUMMARY

As Review Commissioner, I make the following recommendations, including suggested amendments to the *Access to Information and Protection of Privacy Act:*

Recommendation 1

- Every Department should have a policy on routine disclosure, which should include provisions for the disclosure of documents that are commonly requested but do not contain sensitive information or mandatory exceptions to disclosure.

- Funding should be made available to public bodies so they have the ability to post as much information as possible on their websites.

Recommendation 2

- All public bodies should receive increased training in privacy issues and should develop written privacy policies.

Recommendation 3

- All public bodies should have an IMCAT (Information Management Capacity Assessment Tool) carried out by an information management specialist.

- All public bodies should have retention and disposal schedules for all paper and electronic records in their possession, including e-mail.

- All public bodies should take additional steps to ensure that all records management policies, including policies on e-mails, are clearly understood by all employees.

- There must be greater co-ordination and training to ensure that requests for information and privacy issues are dealt with consistently across the public sector.

- All public bodies should use redaction software in the severance process when responding to requests for information.

- All public bodies should review their organization and especially their reporting structures to ensure that access to information requests are dealt with in a timely and efficient manner.

- Currently, several public bodies designate the *ATIPPA* Co-ordinator role to their Information Management resource. Public bodies not having this practise should evaluate if this pairing of duties is appropriate for them.

- All public bodies serviced by the Office of the Chief Information Officer (OCIO) should consult extensively with that office on all the above recommendations.

Recommendation 4

- Funding for the Official Opposition for Purchased Services should be increased.

Recommendation 5

- The definition of personal information should be amended to include a provision having the same effect as subsection 3(1)(i)(ix) of Nova Scotia's *Freedom of Information and Protection of Privacy Act*.

Recommendation 6

- The definition of public body should be amended to include any board, committee, commission, panel, agency, corporation or other entity created by or on behalf of a public body or a group of public bodies.

Recommendation 7

- Disputes relating to whether records are judicial records or records related to a prosecution pursuant to subsections 5(1)(a) and 5(1)(k) respectively should be taken before the Supreme Court, Trial Division for determination of the issue.

- Disputes relating to a note, communication or draft decision of a person acting in a *judicial* capacity, as referenced in subsection 5(1)(b), should be taken before the Supreme Court, Trial Division for determination of the issue.

- The Information and Privacy Commissioner should have express authority to examine records relating to disputes of a note, communication or draft decision of a person acting in a *quasi-judicial* capacity, as referenced in subsection 5(1)(b), and disputes regarding subsections 5(1)(c) to 5(1)(j), to determine whether those records fall within his jurisdiction.

Recommendation 8

- The fee structure as currently set out in the *ATIPPA* should not be increased.

- It is recommended that public bodies should provide information to applicants in electronic form when requested, provided it is reasonable to do so and security measures have been taken to ensure the integrity of the document will remain.

Recommendation 9

- Subsection 16(1) should be replaced by a new provision which allows an extension of time for up to 30 days, or with the Commissioner's permission for a longer period, if:

  (i) the applicant does not give enough detail to identify requested records;
  (ii) a large number of records are requested or must be searched or the public body is forced to deal with a large number of concurrent requests and responding within 30 days will unreasonably interfere with the operation of the public body;

(iii) consultations with another public body or a third party are needed before responding to the request; or
(iv) other circumstances exist where the Commissioner agrees that an extension is fair and reasonable.

Recommendation 10

- It is recommended that public bodies have authority, with prior approval of the Commissioner, to disregard requests for information if they:

(i) are frivolous or vexatious;
(ii) are made in bad faith or are trivial;
(iii) because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body; or
(iv) amount to an abuse of the right to make requests for information.

Recommendation 11

- It is recommended that the list of information captured by section 18 of the *ATIPPA* be extended to include the listing of cabinet records found in the Province's *Management of Information Act*.

Recommendation 12

- Section 19 should be clarified to ensure that the confidentiality of deliberations of a private meeting is not eliminated in the event that information from the private meeting is incidentally referenced in a later public meeting.

Recommendation 13

- It is recommended that section 20 be amended to include additional protection for: "proposals," "analysis, including analysis of policy options" and "consultations and deliberations" between Ministers, the staff of the Ministers and Officials.

Recommendation 14

- The definition of law enforcement found in subsection 2(i)(ii) should be amended to include only investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment that lead or could lead to a penalty or sanction being imposed under an enactment.

Recommendation 15

- Subsection 24(1) of the *ATIPPA* should be replaced by a provision along the lines of section 18 of Saskatchewan's *Freedom of Information and Protection of Privacy Act.*

- Section 27 of the *ATIPPA* should be replaced by a new provision modeled on section 18 of the *Freedom of Information and Protection of Privacy Act* of Manitoba.

- Subsection 27(2) should be amended to prevent the disclosure of royalty information received by the Province in a royalty return except for aggregated royalty information that does not identify the information of individual parties.

Recommendation 16

- Section 28 of the *ATIPPA* should be amended to ensure that third parties are always notified whenever a request for information is received which affects the information of the third party.

Recommendation 17

- Section 30 of the *ATIPPA* should be replaced with a new provision containing a harm test along the lines of section 17 of the *Freedom of Information and Protection of Privacy Act* of Alberta.

Recommendation 18

- It is recommended that the *ATIPPA* be amended to provide that only the salary range of an employee may be disclosed and not the specific amount of remuneration.

Recommendation 19

- The *ATIPPA* should be amended to provide an exception to disclosure for the following opinions: references for employment; opinions related to a person's admission into an academic program; opinions related to the awarding of an employment contract; opinions in workplace dispute resolution processes; opinions related to the granting of tenure; peer reviews; and opinions solicited for the purpose of granting an honour or award.

Recommendation 20

- Section 38 of the *ATIPPA* should be amended along the lines of subsection 41(1)(d) and 41(2) of Ontario's *Freedom of Information and Protection of Privacy Act* to permit the university to use personal information in its alumni records for the purpose of institutional fundraising.

- Section 39 of the *ATIPPA* should be amended along the lines of subsection 40(1) of Alberta's *Freedom of Information and Protection of Privacy Act*.

Recommendation 21

- Section 42.2 of the *ATIPPA* should be amended to provide for at least a 5 year term for the Commissioner.

Recommendation 22

- The *ATIPPA* should be amended to include provisions modelled on subsections 67(2) and (3) of the Province's *Personal Health Information Act (PHIA)* which specify that the Commissioner must conduct a review only when there are reasonable grounds to do so, and provide that the Commissioner may decline to conduct a review if:

(i) the public body has responded adequately to the request;
(ii) the complaint has been or could appropriately be resolved by an alternate procedure;
(iii) the lapse of time between the date when the complaint arose and the filing of a request for review is so great it will likely cause undue prejudice or a report would serve no useful purpose; or
(iv) the request for review is trivial, frivolous, vexatious or is made in bad faith.

Recommendation 23

- It is recommended that the *ATIPPA* be amended permitting the Lieutenant-Governor in Council to appoint a person to review the decisions of the Commissioner's Office about disclosure of its own information.

Recommendation 24

- Subsection 46(2) of the *ATIPPA* should be amended to eliminate the 30 day time limit for informal review and provide the Commissioner with discretion to determine the length of the informal review periods in all cases.

Recommendation 25

- Section 47 of the *ATIPPA* should be amended to provide expressly that when a decision of a public body not to disclose information is reviewed, the public body is entitled to make representations to the Commissioner's Office during the review.

Recommendation 26

- Section 48 of the *ATIPPA* should be amended to remove the 90 day time limit for the Commissioner's Office to complete a review. The *ATIPPA* should be further amended to require the Commissioner's Office to complete a review within 120 days after a request for a review is made, unless they notify the relevant parties that they are extending the time period and provide an anticipated date for providing a report.

Recommendation 27

- It is recommended that recommendation power of the Commissioner remain unchanged.

Recommendation 28

- The *ATIPPA* should be amended to expressly authorize the Commissioner to investigate a complaint from an individual that his or her personal information has been collected, used or disclosed contrary to *ATIPPA*.

Recommendation 29

- The *ATIPPA* should be amended to make it clear that when a claim of solicitor-client privilege is in dispute, the issue should be referred to the Supreme Court, Trial Division for resolution of the matter.

- The *ATIPPA* should also be amended to provide that when information to which solicitor-client privilege applies is disclosed to the Supreme Court, Trial Division, the privilege is not affected by the disclosure.

Recommendation 30

- Section 65(e) of the *ATIPPA* should be amended to permit the nearest relative of a deceased person to exercise rights or powers under the *Act* in relation to the administration of the deceased person's estate where the deceased has no personal representative.

Recommendation 31

- The *ATIPPA* should be amended to include the proposed amendments outlined in Appendix A of this report.

Recommendation 32

- The *ATIPPA* should be amended along the lines of subsection 17(3) of Saskatchewan's *Freedom of Information and Protection of Privacy Act* if the government determines that section 8.1 of the Province's *Evidence Act* remains relevant and that information covered by that section should be protected from disclosure.

Recommendation 33

- It is recommended that the Provincial Government consider the following issues and, if necessary, put a more detailed review in place which would include appropriate stakeholders and experts: the sharing of information about children in the Province's school system; the interaction of the *ATIPPA* with the *Elections Act;* access to health information by a member of the House of Assembly; and the protection of labour relations records under the *ATIPPA*.

3.0 ACKNOWLEDGEMENTS

First of all, I wish to thank the Honourable Felix Collins, Minister of Justice and Attorney General, for offering me the opportunity to carry out this legislative review.

I also wish to acknowledge and thank all those who made an important contribution to the review by taking the trouble to make submissions at the public hearings held in the Spring of 2010 and all those who provided thought provoking written submissions that I received.

Public Sector organizations, including municipalities, regional health authorities and educational institutions, were also very co-operative in taking the time to participate in extensive meetings on issues of importance to them. The views expressed and the information obtained at these meetings were invaluable in preparing the report. In addition, Commissioner Ed Ring and his staff provided important input.

The staff of the ATIPP Office also made significant contributions to my work by providing everything from administrative support to advice and information on issues. The Province is very fortunate to have such a knowledgeable and dedicated group of people carrying out the many tasks required to make access and privacy legislation work for all of us. They are as follows: Brenda Howell, Legal Secretary; Renee Pendergast, Access Manager; Jean Myrick, Senior Privacy Analyst; and Blaine Edwards, Senior Privacy Analyst.

I also wish to thank Meaghan McConnell, solicitor with the Department of Justice, who contributed to the report by assisting with research, citations, and the organizing and editing of the report.

Last but by no means least, I wish to thank Jennifer M. Berlin, Director/Solicitor of the ATIPP Office, who worked with me tirelessly at all stages of this process, participating in all the public hearings and most meetings with public sector organizations. Jennifer also carried out important research, supervised others performing the many tasks required to complete this report and most important of all, provided invaluable assistance in the organizing, writing and editing of the report.

This report could not have been completed without the assistance of all these individuals.

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John R. Cummings, Q.C

4.0 THE STATUTORY FRAMEWORK

On June 16, 1981 the Government of Newfoundland and Labrador proclaimed the *Freedom of Information Act*, becoming one of the first provinces in Canada to officially adopt legislation establishing a statutory regime for citizens to access information in the records of government departments and scheduled agencies, subject to limited exceptions. The *Freedom of Information Act* granted citizens of the Province increased opportunity for informed participation in the democratic process and the assurance of greater government accountability. The *Freedom of Information Act* also provided the right to appeal decisions to the provincial Ombudsman or to the Province's Supreme Court. In 1991 the position of Ombudsman was abolished, leaving the courts as the only venue for appeals.

On December 12, 2000, the Government of Newfoundland and Labrador established the Freedom of Information Review Committee, with a broad mandate to "review and make recommendations on all aspects of the *Freedom of Information Act*." The Committee undertook an extensive review of relevant literature, as well as freedom of information legislation from other provinces and the federal government. The Committee also conducted consultations across the Province and with representatives from other Canadian jurisdictions.

The Committee recommended that the *Freedom of Information Act* be repealed and replaced with new legislation to provide specific rights of access to information, protect personal privacy, ensure access to one's own personal information, and establish an independent process for reviewing decisions made by departments and agencies.

Pursuant to the Committee's recommendations, the *Access to Information and Protection of Privacy Act* received Royal Assent on March 14, 2002. On January 17, 2005, the *Act* came into force, with the exception of Part IV – Protection of Privacy, which was proclaimed on January 16, 2008. The Province conducted training and a privacy awareness campaign, to ensure that public bodies would be in a position to comply with the access and privacy provisions prior to their proclamations in 2005 and 2008 respectively.

Section 3 of the *ATIPPA* provides that the purpose of the *Act* is to make public bodies more accountable to the public and to protect personal information by:

- Giving individuals a right of access to records;
- Giving individuals a right of access to, and a right to request correction of, personal information about themselves;
- Specifying limited exceptions to the right of access to information;

- Preventing the unauthorized collection, use and disclosure of personal information by public bodies; and

- Providing for an independent review of decisions made by public bodies under the *Act.*

The *ATIPPA* applies to more than 460 public bodies across the Province, from government departments and agencies, to health care and educational bodies and to municipalities. The Department of Justice (the "Department") is responsible for the overall administration and coordination of the *ATIPPA*, which involves the provision of support and leadership in its interpretation and application. In order to facilitate this mandate, the Department has established the Access to Information and Protection of Privacy Office (ATIPP Office). The ATIPP Office assists public bodies to conform with *ATIPPA* requirements, by providing education and training, developing policies and procedures, fostering common standards, and providing advice and guidance regarding the processes necessary to ensure the legislation is properly applied.

Part V of the *ATIPPA* creates an independent review mechanism for decisions made by public bodies under the *Act*. Persons who are denied requests for access to information or for correction of their own personal information may request that the Office of the Information and Privacy Commissioner (the Commissioner's Office) review a decision, act or failure to act by the head of the public body in question. The Information and Privacy Commissioner (the Commissioner) is an independent Officer of the House of Assembly, whose general powers and duties pursuant to section 51 include:

- Making recommendations to ensure compliance with the *Act* and regulations;

- Informing the public about the *Act*;

- Receiving comments from the public about the administration of the *Act*;

- Commenting on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;

- Commenting on the implications for protection of privacy of using or disclosing personal information for record linkage or using information technology in the collection, storage, use or transfer of personal information;

- Bringing to the attention of public bodies failures to fulfil the duty to assist applicants; and

- Making recommendations to the head of public bodies or to the Minister of Justice about the administration of the *Act*.

After investigating a request for review or a complaint, the Commissioner is required to prepare a report containing his findings and, where appropriate, recommendations along

with the reasons for those recommendations. The head of the public body then has 15 days to decide whether to follow the Commissioner's recommendations or make another decision the head deems appropriate.

The *ATIPPA* also provides for appeals to the Supreme Court, Trial Division when a person is not satisfied with the decision of the head of a public body or a report by the Commissioner. The Commissioner may also appeal the decision of the head of a public body, with the consent of the applicant or third party involved.

Overall, it appears that the Government of Newfoundland and Labrador is making progress in the area of access to information and protection of privacy. A result of the Province's efforts can be seen in the most recent *National Freedom of Information Audit* released May 12, 2010 by the Canadian Newspaper Association.[2] This year, Newfoundland and Labrador placed fifth among the provinces and territories, receiving a grade of B -.[3] With respect to response times, Newfoundland and Labrador placed second among the provinces with only 7 percent of responses beyond the statutory deadline.[4] This shows that the Province is doing something right, but nevertheless more needs to be done.

5.0 WHAT WE HEARD

Over the course of our consultations with public bodies, I observed widespread frustration and anxiety regarding the *ATIPPA* access to information requirements and, to a lesser extent, the Part IV privacy provisions.

With respect to access, although public body officials expressed the opinion that the majority of requests for information are dealt with efficiently, there are instances where public bodies reported being swamped with requests or struggling to deal with large requests, which drain public body resources due to the time required to accumulate and review documents. I also observed a widespread belief that "fishing expeditions" and abuse of process are harming the system. Almost universally, public bodies complained that the 30 day time limit stipulated by the *ATIPPA* to respond to requests is too short and should be extended to at least 30 business days.

Public bodies observed that the greatest difficulty encountered in responding to access to information requests is the time consuming and difficult task of reviewing documents to identify information falling within a mandatory or discretionary exception from disclosure. Public bodies noted difficulty in determining what information is exempt from disclosure and what is not. Public bodies described navigating many grey areas when carrying out this function.

Public bodies also observed that once an initial review is complete, it is frequently necessary to obtain the approval of superiors. Where superiors determine that the information in question may be sensitive, the approval process will sometimes turn into a second round of severance.

I observed a lack of consistency in the processes and policies adopted by public bodies to address access to information requests. Different public bodies have developed varying interpretations of the *ATIPPA,* different processes to handle access requests and different approaches to the imposition of fees.

Based on the consultations, I am left with little doubt that the need to review documents for severance purposes is having a "chilling effect" on the number of briefing documents being prepared for Ministers. It has also resulted in a disagreement between the Office of the Information and Privacy Commissioner and Cabinet Secretariat on what constitutes a "cabinet confidence" that qualifies for an exception from disclosure. I will deal with these issues further in section 6.3 of the Report.

I have discovered that the implementation of the *ATIPPA* has not had a consistent effect across all public bodies. In terms of workload, public bodies that operate within a culture of disclosure, in that most information of interest is already freely available, field fewer access to information requests and have fewer issues meeting the requirements of the *Act*. Municipalities and educational bodies fall into this category, whereas most government departments and crown corporations are not as transparent. There are exceptions to this

rule when a municipality or education institution becomes embroiled in a political dispute or is targeted by an irate individual with repeated requests for information. Similarly, small municipalities with few resources and little training may also have difficulty meeting the requirements of the *Act*.

During the consultation meetings, I heard many comments about the Office of the Information and Privacy Commissioner. The vast majority of these comments were positive. Most of the critical comments were related to timelines, namely that the Commissioner's Office is too strict on timelines when demanding documents from public bodies. The Official Opposition also believes that the Commissioner's Office takes too long to deal with reviews and too often violates their own statutory timelines. There are mixed opinions on the Commissioner's current policy of "banking" requests for review. Public bodies also expressed their frustration that the Commissioner's Office misses its own 90 day deadline for completing its reports, yet at the same time criticized public bodies for missing their deadlines. In addition, some public bodies were confused about the way the Commissioner's Office switches from the informal to the formal review process provided for in the *Act*. That said, both public bodies and the Commissioner's Office think the informal process is essential and generally works well.

Over the course of our consultations, it became clear that modern and efficient information management is critical to the proper implementation of the *ATIPPA*. This is important for both paper and electronic records. Old paper records present a problem to public bodies, since in many cases they are not properly stored or indexed. This results in tardy responses to access to information requests. More needs to be done to make these old records accessible. At the same time, it must be recognized that the large volume and condition of these records means that many of them will never be properly accessible. A partial solution would be a records management plan for each public body that includes retention schedules which permit the destruction of old records that have no further use.

Electronic records are growing rapidly in volume and will likely exceed paper records in the near future. Electronic records present new issues for government in terms of access requests. Many officials do not know how to search these records properly. Many emails are included in government records when they are in fact transitory records and should be deleted by employees. More training is necessary in this area so that access requests are answered quickly and completely.

Finally, it became apparent over the course of the consultations that the public bodies which have adjusted easily to the implementation of the *ATIPPA* have several things in common. In particular, these public bodies have a solid records management plan; a habit of routinely making significant amounts of information public on websites and by other means; and a policy of engaging with applicants to clarify and narrow their requests so they are responded to quickly and in a manner that is satisfactory to the applicant. These public bodies deal with requests informally whenever possible and only engage the timelines and other formal aspects of the *ATIPPA* as a last resort. Successful public bodies have also readily accepted the *ATIPPA* issues as a part of their business. The public bodies which are struggling with the implementation of the *ATIPPA* did not share

these attributes and are reluctant to treat access to information as part of their regular responsibilities, with the result that these public bodies do not deal with access to information issues adequately.

6.0 RECOMMENDATIONS

Introduction: the Implementation of the *ATIPPA* by Public Bodies

Before I discuss specific recommendations regarding individual sections of the *ATIPPA,* I would like to make four general recommendations regarding the administration of the *Act* related to routine disclosure, the integration of the *ATIPPA* into public body operations, the importance of record management and funding.

It has become clear to me that different public bodies handle the *ATIPPA* in different ways, leading to varying and sometimes contradictory results when responding to requests for information.

Routine Disclosure

Routine disclosure refers to requests for records which may be handled outside the scope of the *Act*, such as information that is already publicly available or may be purchased.

Based on the consultations, it is apparent that the public bodies which have adjusted most readily to the *ATIPPA* are those that make information public as a matter of routine. This seems to reduce the number of formal requests for information and reduces the burden on resources in responding to requests.

It seems to me that it is only an exercise in common sense to regularly make information public – especially information that a public body anticipates will become subject to an access to information request and which does not fall under an exception to disclosure.

The internet makes routine disclosure easier and more practical, while decreasing the associated cost considerations.

All public bodies should review their records with a view to maximizing disclosure without waiting for access to information requests. Funding should be made available to public bodies so they can post as much of this information as possible on their websites.

Recommendation 1

Every Department should have a policy on routine disclosure, which should include provisions for the disclosure of documents that are commonly requested but do not contain sensitive information or mandatory exceptions to disclosure.

Funding should be made available to public bodies so they have the ability to post as much information as possible on their websites.

Integration of the ATIPPA into Public Body Operations

I would like to take this opportunity to emphasize that while the concerns raised below by public bodies are legitimate, one must not lose sight of the purpose of the *Act* set out in section 3. The *ATIPPA* guarantees the public a right of access to all government information, with only very limited restrictions to protect certain legitimate government interests and personal information.

It is clear to me that government departments are having much greater difficulty dealing with access requests than most municipalities and educational bodies. This may be caused partly by differences in the nature of requests received by different types of organizations. However, it is evident that some departments have adopted a secretive attitude, while others are open with their information as a matter of course.

It is not the purpose of the *Act* to make things easier for civil servants. Government departments must remember that providing information to the public under the *ATIPPA* is just as much a part of their responsibilities as the many other things they are called upon to do. Some civil servants have not accepted this fact and regard access requests as a secondary responsibility. Public bodies must be prepared to accept the administration of access to information and protection of privacy legislation as a part of their normal business.

Access legislation exists throughout Canada, not to mention many other countries in the western world. Such legislation is part of our democracy and will increase in importance over time, if the role of government in our society continues to increase and the quantity of information in government records continues to grow.

Part IV of the *ATIPPA*, dealing with protection of privacy, came into force in 2008 and imposes strict requirements on public bodies surrounding the collection, use and disclosure of personal information. Based on the consultations, it is clear to me that more training is necessary to increase awareness of these new obligations.

From anecdotal information I collected over the course of the consultations, it is clear to me that public bodies need to do more to meet their obligations to maintain privacy. At the same time, it is also apparent that there are cases in which the privacy provisions unduly restrict public bodies from legitimate uses of personal information. I will deal with these privacy issues later in the Report.

The big issue for municipalities and educational bodies is the protection of privacy under Part IV of the *ATIPPA*. This is particularity true within our education system, where the large quantity of personal information gathered about students presents unique issues. This is further complicated when parents, including divorced and separated parents, become involved in debates about a minor child's personal information.

Recommendation 2

All public bodies should receive increased training in privacy issues and should develop written privacy policies.

Records Management

One of the most important issues for a public body when fielding access to information and privacy requests is information management. If a public body does not have a modern and efficient records management system it will have difficulty administering the *ATIPPA*. Public bodies also require adequate resources to properly implement the *ATIPPA*.

It is important for all parties using and administering the *ATIPPA* to understand that in certain parts of the public sector there are large quantities of old paper records that are not properly stored or indexed. In many cases, these paper records can only be accessed if long term employees of the public body know from experience where specific records are to be found. These employees are now retiring from the public sector in large numbers and once they are gone the only reasonable means for finding some records will be also gone. From what I heard during consultations, I am convinced that at this late date it will never be possible to access all of these old records in a reasonable or efficient way.

Electronic records, including e-mail, are increasing in volume. Some public bodies and their staff are not adequately prepared to deal with these records for purposes of the *ATIPPA*.

Recommendation 3

1) All public bodies should have an IMCAT (Information Management Capacity Assessment Tool) carried out by an information management specialist;

2) All public bodies should have retention and disposal schedules for all paper and electronic records in their possession, including e-mail;

3) All public bodies should take additional steps to ensure that all records management policies, including policies on e-mails, are clearly understood by all employees;

4) There must be greater co-ordination and training to ensure that requests for information and privacy issues are dealt with consistently across the public sector;

5) All public bodies should use redaction software in the severance process when responding to requests for information;

6) All public bodies should review their organization and especially their reporting structures to ensure that access to information requests are dealt with in a timely and efficient manner;

7) Currently, several public bodies designate the ATIPP Co-ordinator role to their Information Management resource. Public bodies not having this practise should evaluate if this pairing of duties is appropriate for them;

8) All public bodies serviced by the Office of the Chief Information Officer (OCIO) should consult extensively with that office on all the above recommendations.

Funding

During consultations, the Official Opposition recommended that funding to the Commissioner's Office should increase for the purpose of conducting legal proceedings under the *ATIPPA*. Specifically, the Commissioner's Office should challenge public bodies in court when they refuse to disclose information that the Commissioner believes should be disclosed. The Official Opposition submits that one reason why the Commissioner's Office does not undertake legal proceedings is the cost associated with such proceedings.

The funding the Commissioner's Office has available to cover the cost of legal proceedings has increased from $20,000 in the 2007-2008 fiscal year, to $95,000 in the current fiscal year. The Commissioner has indicated to me they have never had difficulty obtaining additional funds for the purpose of engaging in legal proceedings.

The Official Opposition further submits that their office should be allocated more funding for the purpose of applications for information. They indicate in their written submission that fees are one of the greatest stumbling blocks they encounter in attempting to access information from government departments. The Official Opposition further expressed the opinion that fees are being used by public bodies as a tool to force applicants to abandon requests.

It should be noted that Official Opposition funding for purchased services, which includes funding for access to information applications, has been greatly reduced, from $67,000 in the 2008-2009 fiscal year, to $16,600 in the 2010-2011 fiscal year. I note that the Official Opposition did receive additional funding in other budget areas over this time period, with the effect that its overall funding increased.

Recommendation 4

Funding for the Official Opposition for Purchased Services should be increased.

6.1 Part I – Interpretation

Part I of the *ATIPPA* contains five sections: definitions, purpose, schedule of excluded public bodies, application, and conflict with other Acts. During the consultation process, I received proposals for legislative amendments affecting the definitions of "personal information" and "public body" (section 2) and the application of the *ATIPPA* (section 5).

Section 2 – Definition of "Personal Information" & "Public Body"

Personal Information

"Personal information" is defined under subsection 2(o) of the *ATIPPA* as "recorded information about an identifiable individual", including the types of information listed in subsections (i) to (ix). "Personal information" includes within its purview both the opinion of a person about the individual (subsection 2(o)(viii)) as well the individual's view or opinions (subsection 2(o)(ix)).

Most jurisdictions have adopted definitions of "personal information" that avoid a situation in which both an opinion holder and the subject of the opinion can claim ownership of the same personal information.[5] For example, Nova Scotia's *Freedom of Information and Protection of Privacy Act* [6] defines personal information as:

> 3(1)(i) Personal information means recorded information about an identifiable individual, including […]
>
> (viii) anyone else's opinions about the individual; […]
>
> (ix) the individual's personal views or opinions, except if they are about someone else; […]

Report of the Office of the Information and Privacy Commissioner

In a recent decision, the Commissioner's Office pointed out that the "paradox set up by the definition of personal information found in the *ATIPPA* means that the complainant's opinion about the Applicant is the personal information of both parties".[7]

Submissions & Consultations

Several public bodies, including the Commissioner's Office, Memorial University, the Workplace Health and Safety Compensation Commission and municipalities, submitted that the definition of "personal information" under section 2 that relates to opinions contains an inherent conflict, in that it assigns ownership of an opinion to both the opinion holder and the subject of the opinion.

The Commissioner's Office recommends that subsection 2(o)(ix) be amended to reflect their finding that an opinion expressed by another person about an applicant is the

applicant's own personal information, along the following lines: "the individual's personal views or opinions, except if they are about someone else".

Several public bodies also suggested that the *ATIPPA* be amended to provide protection for opinions expressed in certain workplace and academic contexts. This issue is dealt with later in the report at section 6.3.

Recommendation 5

The definition of personal information should be amended to include a provision having the same effect as subsection 3(1)(i)(ix) of Nova Scotia's *Freedom of Information and Protection of Privacy Act*.

Public Body

Based on the section 2 definition of "public body", the *ATIPPA* currently applies to approximately 460 public bodies, including government departments, crown corporations, agencies, boards, commissions, and local public bodies. Included in the definition of local public bodies are municipalities, health care bodies and educational bodies.

Submissions & Consultations

During the consultation process, I received requests to extend the definition of "public body" to include entities created by local public bodies and organizations of which municipalities are joint members. The rational behind this suggestion is that such entities usually depend on public funds, and therefore should be held to a higher level of accountability.

To this end, the Commissioner's Office suggested in their written submission that the definition of "public body" should be amended to include "a corporation or entity created by or for a public body or group of public bodies." They feel that this will fix the loophole under the current legislation which allows an entity created by a public body to carry out policy objectives without falling within the scope of the *ATIPPA*.

The Commissioner's Office further noted that British Columbia's access to information legislation could serve as a model for legislative amendments to the *ATIPPA*, because it defines a "local government body" as any board, committee, commission, panel, agency or corporation that is created or owned by a municipality, and all the members or officers of which are appointed or chosen by or under the authority of that body.

The Eastern School District suggests that consideration be given to expanding the definition of "public body" to include committees or commissions conducting studies, reviews or reports under the guidance or direction of a public body.

Members of the public suggested that the *ATIPPA* be amended to apply to local service districts that provide services to the public.

Recommendation 6

The definition of public body should be amended to include any board, committee, commission, panel, agency, corporation or other entity created by or on behalf of a public body or a group of public bodies.

Section 5 – Application

Section 5 of the *ATIPPA* states that the *Act* applies to all records in the custody or under the control of public bodies, but does not apply to the classes of information described in subsections 5(1)(a) to (k), namely :

- A record in a court file, a record of a judge of the Trial Division, Court of Appeal, or Provincial Court, a judicial administration record or a record relating to support services provided to the judges of those courts;
- A note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;
- A personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;
- Records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act;*
- A personal or constituency record of a minister;
- A record of a question that is to be used on an examination or test;
- A record containing teaching materials or research information of an employee of a post-secondary educational institution;
- Material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person, agency or organization other than a public body;
- Material placed in the archives of a public body by or for a person, agency or other organization other than the public body; or

- A record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

Access to information legislation in all Canadian jurisdictions includes similar provisions setting out classes of information to which the legislation does not apply.

Judicial Consideration

Recently, the Supreme Court of Newfoundland and Labrador, Trial Division considered whether or not the Commissioner's Office has the power to compel the production of a record from a public body for review by the Commissioner, where the public body alleges that the *ATIPPA* does not apply to the record pursuant to section 5.[8] In his decision, Justice Robert A. Fowler held that the Commissioner had no power to compel the production of the records for the purposes of determining whether section 5 had been applied properly. The records in this case directly related to the prosecution of a RNC officer.

Justice Fowler further notes in his decision that the records enumerated in section 5 do not "all carry the same level of security or restrictiveness to warrant the same exclusion from the public".[9] For example, at the end of the spectrum requiring the highest level of protection, Justice Fowler notes that no one can command the production of judicial notes, as this would be a direct attack on the constitutional guarantee of an independent judiciary. Similarly, prosecutorial information cannot be disclosed because its release could interfere with the administration of justice.

Submissions & Consultations

In its written submission, the Department of Justice requests amendments to the *ATIPPA* to clarify the current state of the law, as described by Justice Fowler: specifically that the Commissioner cannot compel the production of the classes of records described in section 5. The Department submits that it may not be necessary to exclude all the record types described in section 5.

In contrast, the Commissioner's Office requests that the *Act* be amended to clarify that the Commissioner has the authority to compel the production of section 5 records for the purpose of determining whether or not the Commissioner has jurisdiction over those records. They proposed that this could be accomplished by an amendment to section 52, which describes the power of the Commissioner to compel the production of documents.

In support of their recommendations, the Commissioner's Office references Justice Fowler's finding that in order for the *ATIPPA* to achieve its purpose, the Commissioner should be entitled to determine its own jurisdiction:

> How can the Commissioner determine his own jurisdictional boundaries without having the power to examine a section 5(1) record to determine for himself whether or not the record properly falls under section 5(1) ……

> This is indeed a conundrum and raises the question, does the Commissioner simply accept the opinion of the head of a public body that the information being requested does not fall under the authority of the *Act*. If that were the case, the argument could be made that it could be seen to erode the confidence of the public in the *Act* by an appearance or perception that the process is not independent, transparent or accountable. […]
>
> I am satisfied that for the ATIPPA to achieve its full purpose or objects, the Commissioner should be able to determine his own jurisdiction. This would not require complex measures to safeguard those special areas where access is off limits.[10]

Discussion

I am of the view that disputes relating to whether records are judicial records or records related to a prosecution, which are classes of information to which the *ATIPPA* does not apply pursuant to subsections 5(1)(a) and 5(1)(k) respectively, should be taken before the Supreme Court, Trial Division for determination of the issue. In addition, any disputes relating to a note, communication or draft decision of a person acting in a *judicial* capacity, as referenced in subsection 5(1)(b), should be taken before the Supreme Court, Trial Division.

I am of the opinion that the remaining categories of information under section 5, namely subsection 5(1)(b) as it related to notes, communications and draft decisions of persons acting in a *quasi-judicial* capacity, and subsections 5(1)(c) to 5(1)(j), do not require the same level of protection. The Commissioner should be granted express authority to review these records to determine whether they are within his jurisdiction. I recognize that this may not be an entirely satisfying conclusion to a difficult issue but it is pragmatic and workable, and one with which the Commissioner's Office agrees.

Recommendation 7

1. Disputes relating to whether records are judicial records or records related to a prosecution pursuant to subsections 5(1)(a) and 5(1)(k) respectively should be taken before the Supreme Court, Trial Division for determination of the issue.

2. Disputes relating to a note, communication or draft decision of a person acting in a *judicial* capacity, as referenced in subsection 5(1)(b), should be taken before the Supreme Court, Trial Division for determination of the issue.

3. The Information and Privacy Commissioner should be granted express authority to examine records relating to disputes of a note, communication or draft decision of a person acting in a *quasi-judicial* capacity, as referenced in subsection 5(1)(b), and disputes regarding subsections 5(1)(c) to 5(1)(j), to determine whether those records fall within his jurisdiction.

6.2 Part II - Right of Access

Part II describes the right of access under the *Act*; explains how to make an information request; outlines the duty of a public body to assist applicants; describes the form which access to information responses should take; defines the time limit for responding to an access to information request; describes the content of responses; creates exceptions for repetitive or incomprehensible requests and for published material; describes the manner in which access shall be given; and specifies the conditions for the extension of the time limit for responding to or transferring requests. During the consultation process, I received proposals for legislative amendments affecting fees (section 7), timelines (sections 11 and 16), and repetitive and incomprehensible requests (section 13).

Subsection 7(3) - Fees

The *ATIPPA* fee structure shares the cost of access between the person asking for the information and the public body responding to the request. Fees may be broken down into an application fee and a processing fee. An access to information request must be accompanied by a $5.00 application fee.

Upon receiving an application for information, the public body determines whether any processing fees will apply to the request, including search, preparation, copying and delivery service fees. Processing fees may also include the actual cost of producing records from information in electronic form; the actual cost of shipping using the method chosen by the applicant; 25 cents per page for providing a copy or print of a record, where the record is stored or recorded in print form; and the actual cost of reproducing a record where the record is stored or recorded in a manner other than that referred to above or cannot be reproduced or printed on conventional equipment. Any person who requests access to their own personal information is subject only to the $5 application fee.

Under subsection 68(2), where a public body intends to charge processing fees, they are required to provide the applicant with an Estimate of Costs. Upon receipt of this estimate, an applicant has 30 days to decide whether to proceed with the request, abandon it, or to refine it.

According to the *ATIPPA Policy Manual*, where the estimated fees of a request are more than $50, the applicant is requested to pay a 50% deposit before the public body begins responding to the request. Where the estimated fees are less than $50, the fees must be paid in full prior to the public body responding to the request.

The cost of locating, retrieving and manually producing a record is $15.00 for each hour of person time, after the first two hours.

At the request of the applicant, a public body may waive all or part of the fees payable where payment would impose an unreasonable hardship on the applicant, or the request for access relates to the applicant's own personal information.

Application Fees: Similar to the *ATIPPA*, the Federal, Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan access to information Acts require an application fee at the time a request is made. The fee must accompany the request in order to activate a search for the information requested. The Federal, New Brunswick, Nova Scotia, Ontario and Prince Edward Island application fees are the same as our provincial fee, $5.00. The application fee in Alberta is substantially higher, at $25.00 for non-continuing requests.[11]

Processing Fees: Similar to the *ATIPPA*, all jurisdictions charge processing fees, copy fees, or both, reflecting the time spent by the public body in responding to a request or the cost of copying the requested material. Copy fees vary according to the type and volume of reproduction involved. For example, the cost of producing an electronic record may be different than producing a paper copy.

A jurisdictional scan reveals that the processing fee structure under the *ATIPPA* is reasonable compared to those adopted in other Canadian jurisdictions. For example:

- The costs for searching, locating and retrieving a record ranges from $6.75 per ¼ hour to 7.50 per ¼ hour (or $15.00 per half hour).

- The costs for preparing and handling a record for disclosure range from $6.75 per ¼ hour to 7.50 per ¼ hour (or $15.00 per half hour).

- Basic copy fees range from $0.20 - $0.30 cents per page.

Public bodies in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, and Saskatchewan are required to provide fee estimates.

Submissions & Consultations

Early in the consultation process, it became clear to me that there is no consensus among public bodies regarding the purpose of fees, or lack thereof, in the administration of the *ATIPPA.*

Some public bodies expressed the opinion that fees are not useful to the administration of the *ATIPPA*, based on the following rationales: fees are inconsistently applied by public bodies; cost recovery is not possible; fees are too low to deter applicants from making unreasonable requests; and fees do not apply to requests for personal information.

Other public bodies, however, submitted that fees assist in deterring unreasonable requests and that fee estimates lead applicants to narrow and more accurately define the scope of their requests.

Overall with regards to fees, a majority of public bodies would like to see fees increased, but there is little agreement on which fees should be increased and to what amount.

Some public bodies further submitted that processing fees should be charged for requests for an applicant's own personal information, in particular where extensive search time is involved or where there are numerous requests by a single applicant.

Public bodies also suggested that fees should apply to the time accumulated while consulting other parties necessary to respond to a request.

With respect to fee estimates, some public bodies feel they unduly increase the workload of public bodies, because it is necessary to do almost all of the work required to respond to a request in order to produce the estimate. On the other hand, some public bodies that participated in the consultation indicated that they do little work before providing an estimate. Several public bodies disagree with the position of the Commissioner's Office that actual fees charged to an applicant may not exceed the amount of an estimate provided to the applicant. In addition, public bodies described situations in which applicants abandoned their access to information requests because the fee estimates were too high. As a result, all the effort made by the public bodies to deal with these requests has been wasted. As a potential solution to this problem, one public body suggested applicants should pay a non-refundable estimate fee with their application fee.

Discussion

I do not think the fees currently charged under the *Act* should be increased or that additional fees should be charged. It is not reasonable to think that fees should be set to accomplish complete cost recovery or that fees should be used to discourage a wide ranging right to seek information from public bodies. The creation of this right to information is the clear purpose of the *ATIPPA.*

Some public bodies are already successfully using the current fees as a means to discuss with applicants the extent of their requests and then to fine tune or limit their requests in a way that saves them money, still gets them the information they really want and minimizes the overload imposed on the public body. Additionally, I do not think that the *Act* should specify that fees charged may not exceed fee estimates.

Lastly, it is noteworthy that the British Columbia *Special Committee to Review the Freedom of Information and Protection of Privacy Act* recommended that the British Columbia legislation be amended to require public bodies to provide electronic copies of records to applicants rather than print records, where the records can reasonably be reproduced in electronic form.[12]

Recommendation 8
The fee structure as currently set out in the *ATIPPA* should not be increased.

It is recommended that public bodies should provide information to applicants in electronic form when requested, provided it is reasonable to do so and security measures have been taken to ensure the integrity of the document will remain.

Sections 11 & 16 – Time Limits for Responding to a Request & Extension of the Time Limit

Section 11 – Time Limit for Responding to a Request

Section 7 of the *ATIPPA* establishes a right to government information. An important aspect of this right is the effectiveness of public bodies in responding to requests both in terms of timeliness and completeness. Section 11 requires a public body to make every reasonable effort to respond to an access request in writing within thirty days. This time frame is consistent across the provinces.[13] In British Columbia, a "day" does not include a holiday or a Saturday.

Submissions and Consultations

During the consultation process, many public bodies expressed frustration regarding the time limits imposed by sections 11 and 16 of the *ATIPPA*. I believe this has become one of the largest challenges for public bodies in conforming with the requirements imposed by the *Act*. Public bodies outlined several factors which contribute to their frustration, including:

- ATIPP Co-ordinators within public bodies typically have *ATIPPA* duties tacked on to an already busy position;
- Public bodies may receive large numbers of requests;
- Large volumes of records may be requested, searched and reviewed;
- Sometimes there is a need for extensive consultations, including consultation with solicitors, communications staff and various experts;
- Severance seems to be a particular concern because of the number of difficult judgement calls required;
- There is a need to obtain approvals from superiors prior to release, which sometimes amounts to a second round of severance;
- There may be a need to seek clarification from the applicant;

- The transfer of requests between public bodies takes too long;

- Co-ordination with other public bodies is often necessary and takes time;

- Time lines for dealing with third party information can be tight;

- Holidays and heavy vacation periods aggravate all these issues when key staff and decision makers are not available;

- It is impossible for School Districts to search for records located in individual schools during the summer because there are few, if any, staff at the schools;

- Some public bodies feel that certain applicants are abusing the right to seek records and are "clogging the system", thus making it difficult to meet timelines.

The Official Opposition indicates that many public bodies are not advising of time delays, particularly in writing as outlined in the legislation, and do not provide adequate explanation for the delays. They also indicated that an appeal to the Commissioner's Office regarding legislative timelines offers little recourse because they usually takes too long to deal with the matter.

Section 16 – Extension of time limit

Section 16 of the *ATIPPA* allows for an extension of the 30 day time frame where the public body is required to give a third party notice regarding the requested information; where the applicant does not give sufficient detail to enable the institution to identify the requested information; or where a large number of records are requested or must be searched, and to complete the request within 30 days would unreasonably interfere with the operations of the public body.

Many other Canadian jurisdictions allow for extensions to the initial response period for similar reasons, however, there are a few notable differences. For example, Alberta, British Columbia, Nova Scotia and Ontario allow for an extension where consultations are necessary to appropriately respond to the request and such consultations cannot be completed within 30 days. It is also noteworthy that in Alberta and Prince Edward Island, an additional extension is permitted with the approval of the Commissioner when a public body receives multiple concurrent requests from a single individual or organization.

Discussion

Most public bodies are having at least some difficulty meeting time lines under the *ATIPPA.* It seems to me that the timelines are being met most of the time except when some extra ordinary circumstance is encountered. Most public bodies think the best solution is to increase the basic 30 day time limit found in sections 11 and 16 of the *ATIPPA* to 30 business days or more. A few have suggested a mechanism allowing an

extension beyond the stated time limits found in the *ATIPPA* if the Commissioner's office concurs.

I am not inclined to extend the existing 30 day deadlines because I believe they are being met in most cases and an extension to 30 business days will not make much difference in most of the cases where legitimate difficulties are encountered. It should be noted that the British Columbia *Special Committee to Review the Freedom of Information and Protection of Privacy Act*, which released its report in May 2010, did not recommend any changes to the existing time limits.[14] Similarly, the *Alberta Standing Committee on Health*, which released its report in November 2010, recommended that the current 30 day time limit remain as "calendar days".[15]

I do believe that the deadlines should be relaxed in most of the extraordinary circumstances referred to above. Section 16 of the *ATIPPA* already permits an extension of 30 days beyond the original 30 day deadline found in section 11. I think Section 16 should be amended to allow even longer extensions in certain extraordinary circumstances with the prior approval of the Commissioner.

Recommendation 9

Subsection 16(1) should be replaced by a new provision which allows an extension of time for up to 30 days, or with the Commissioner's permission for a longer period, if:

(i) the applicant does not give enough detail to identify requested records;
(ii) a large number of records are requested or must be searched or the public body is forced to deal with a large number of concurrent requests and responding within 30 days will unreasonably interfere with the operation of the public body;
(iii) consultations with another public body or a third party are needed before responding to the request; or
(iv) other circumstances exist where the Commissioner agrees that an extension is fair and reasonable.

Section 13 – Repetitive or Incomprehensible Requests

Section 13 of the *ATIPPA* permits a public body to refuse access to a record if the request is repetitive or incomprehensible, or if the information requested has already been provided to the applicant.

Access to information legislation in Alberta, British Columbia, New Brunswick and Prince Edward Island authorizes a public body, with the permission of the Commissioner, to disregard requests that are frivolous or vexatious or would unreasonably interfere with the operations of an institution because of their repetitive or systematic nature. In Alberta and Prince Edward Island, the legislation allows a public body to disregard a request

where the request amounts to an abuse of the right of access because of the repetitive or systematic nature of the request.

Access to information legislation in Ontario grants greater decision making power to public bodies by permitting them to refuse an access request if they are of the opinion that the request is frivolous or vexatious, without seeking the permission of the Commissioner.

Submissions & Consultations

There is widespread agreement among public bodies that section 13 of the *ATIPPA* is of little value in dealing with applicants who are regarded as abusers of the system. They believe the section does not prevent an applicant from re-wording an earlier request so that another search is required, even though it is unlikely any documents, other than those provided in response to the earlier request, will be found.

Access and Privacy Coordinators who participated in the consultations described fielding repetitive requests that they believed were primarily designed to adversely affect the operations of the public body rather than to obtain information. In other words, the objective of these access to information requests was to harass or burden the public body.

Many public bodies have indicated that they find it challenging to deal with requests which lack specificity especially when requests cover long time periods or necessitate the search and review of large volumes of documents. Public bodies expressed concern that multiple general requests have the ability to interfere unreasonably with their other operations.

There have been several suggestions to adopt provisions from other provinces that deal with the concept of frivolous, vexatious or systematic abuse of the legislation.

The Department of Justice recommends that public bodies should be given the ability to refuse to respond to access requests where the head of a public body is of the opinion that the request is frivolous or vexatious. This ability to refuse would be in addition to the authority already contained in section 13.

Discussion

I am convinced that public bodies are forced to contend with requests that are made in bad faith; have no legitimate value; are confusing, repetitive or constitute an abuse of process. Additional measures are necessary to deal with this problem. However such measures must balance the public right to information and the public interest in ensuring that available government resources are not so burdened with access requests they are unable to properly carry out their other functions.

I think it makes sense for a public body to be required to obtain the approval of the Commissioner before refusing to respond to a request on the basis that it is frivolous and vexatious. At least three jurisdictions have this sort of provision.

Recommendation 10

It is recommended that public bodies have authority, with prior approval of the Commissioner, to disregard requests for information if they:

(i) are frivolous or vexatious;
(ii) are made in bad faith or are trivial;
(iii) because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body; or
(iv) amount to an abuse of the right to make requests for information.

If a request for information is refused on this basis, the person making the request must be notified and advised of the reason for the refusal.

6.3 Part III – Exceptions to Access

Part III of the *ATIPPA* contains fifteen sections, which delineate categories of information that are exempt from disclosure and circumstances in which public bodies are not required to disclose information upon request. During the consultation process, I received proposals for legislative amendments affecting seven of these sections, specifically those relating to cabinet confidences (s. 18), local public body confidences (s. 19), policy advice or recommendations (s. 20), legal advice (s. 21), disclosure harmful to law enforcement (s. 22), disclosure harmful to the financial or economic interests of a public body (s. 24), disclosure harmful to business information of a third party (s. 27), and disclosure of personal information (s. 30).

Section 18 – Cabinet Confidences

Section 18 consists of a mandatory exception to disclosure where the information requested would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to Cabinet.

Most access to information legislation across Canada protects from disclosure cabinet confidences which would reveal the "substance of deliberations" of cabinet. The legislation purports to define this term, in part, by listing some of the items that fall within it.

In the *ATIPPA*, "advice, recommendations, policy considerations and draft legislation or regulations" are listed as falling within the meaning of substance of deliberations. British Columbia, Alberta and Prince Edward Island's legislation includes "substance of deliberation" provisions that are essentially identical to section 18 of the *ATIPPA*. Nova Scotia's provision is also substantially similar except that the application of the "substance of deliberations" exception to disclosure is discretionary, whereas, that under the *ATIPPA* is mandatory.

Manitoba, New Brunswick and Ontario's cabinet confidences provisions include a much more substantial description of what information is included within the scope of the exception, insofar as it offers a definition of information that would reveal the substance of the deliberations of Cabinet. For example, under subsection 12(1) of Ontario's *Freedom of Information and Protection of Privacy Act*, a public body shall refuse to disclose a record that would reveal the "substance of deliberations" of Cabinet. This section goes on to list cabinet confidences as explicitly including the following:

> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
> (b) a record containing policy options or recommendations submitted, or prepared for submission., to Executive Council or its committees;
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems

submitted, or prepared for submission, to Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations.

The Ontario Commissioner has interpreted this section to mean that not only must the "substance of cabinet deliberations" not be disclosed but that, in addition, any records specifically listed in the relevant section must also be protected from disclosure because they are deemed to reveal the "substance of deliberations" of Cabinet.[16] Subsection 10(2) of Ontario's *Freedom of Information and Protection of Privacy Act* provides that these records are subject to severance. Anecdotally, it appears that severance does not occur frequently.

The Manitoba Ombudsman has interpreted similar Cabinet confidence provisions and has specifically rejected the notion that the Manitoba provisions exempt entire classes of "records" from disclosure, but rather, exempt a specific class of "information" that reveals the substance of Cabinet deliberations. For the exceptions to apply, the information in question must itself reveal the substance of the deliberations of Cabinet.[17]

Submissions and Consultations

I received three submissions on section 18 from the Executive Council, the Commissioner's Office and the Official Opposition. The submission of Executive Council presents the position that strong protection from disclosure is needed for cabinet confidences. This position is based on the well known and longstanding principle that the ability of Ministers to discuss issues frankly and without fear of disclosure is a vital part of our democratic tradition. Executive Council expressed this point of view in their submission as follows:

> The confidentiality of what is said in the Cabinet room and of documents and papers prepared for Cabinet discussions is a long-standing principle of the British democratic tradition. Cabinet ministers charged with the responsibility of making government decisions must be free to discuss all aspects of the issues and to express all manner of views in complete confidence. Effective government requires that Cabinet members speak freely in the Cabinet room without fear of stating unpopular positions or making comments that might be considered to be politically incorrect if made public. Similarly, Cabinet documents must be protected to avoid creating the type of ill-informed public or political criticism which could hamper the ability of government to function effectively and efficiently.

They believe that the Commissioner's Office has taken a position on the term "substance of deliberations" found in subsection 18(1) that is too narrow and will reveal too much information contrary to the fundamental principle of cabinet confidentiality.

The Commissioner's Office position is based on *O'Connor v. Nova Scotia,*[18] a decision of the Nova Scotia Court of Appeal about the similar provision in the Nova Scotia access to information legislation. It concluded the only information protected from disclosure is that which would permit accurate inferences to be drawn about the "substance of deliberations" of cabinet. This leaves open the possibility that other information considered by cabinet may have to be disclosed or "severed" in any particular case.

Executive Council prefers what they believe is a broader interpretation, affording greater protection from disclosure, taken by the British Columbia Court of Appeal in *Aquasource Ltd. v. British Columbia.*[19] The British Columbia courts have determined that the "substance of deliberations" test encompasses the body of information that Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. Executive Council is of the view that the information and advice contained in Cabinet documents is a compilation of analysis and synthesis of strategy, policy considerations, legislative and legal considerations, financial considerations, communications, evidence, relevant facts and operating constraints that set the context for the advice being given and the recommendations forward for consideration and direction.

I do not intend to get into a more detailed analysis of various interpretations of Courts and Commissioners across Canada about the disclosure of cabinet information under various legislative regimes that, for the most part, are similar but also vary in some significant respects. Suffice it to say, there are at least two basic interpretations of similar provisions in which the "substance of deliberations" test is found.

Even though Executive Council prefers one of the interpretations as outlined above, in the end, it believes the test for cabinet confidentiality lacks clarity and disapproves of the line by line severing required to determine what information must be disclosed or withheld from disclosure when applying the test. I also believe Executive Council has serious concerns about the restrictions imposed by the "substance of deliberations" test and seem to prefer a more extensive listing of information similar to Ontario, Manitoba and Saskatchewan legislation.

Executive Council has also made it clear in its submission it believes that the list found in the definition of "cabinet records" in the Province's *Management of Information Act*[20] would be useful to add to subsection 18(1) of the *ATIPPA*. This definition reads as follows:

> 2. (a.2) "cabinet record" means a record that
>
> (i) is a memorandum, the purpose of which is to present proposals or recommendations to Cabinet,

(ii) is a discussion paper, policy analysis, proposal, advice or briefing material, including all factual and background material prepared for Cabinet,

(iii) is an agenda, minute or other record of Cabinet recording deliberations or decisions of Cabinet,

(iv) is used for or reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy,

(v) is created for or by a minister for the purpose of briefing that minister on a matter for Cabinet,

(vi) is created during the process of developing or preparing a submission for Cabinet,

(vii) is draft legislation or a draft regulation, or

(viii) contains information about the contents of a record within a class of information referred to in subparagraphs (i) to (vii);

It is also worth pointing out that I have not found any interpretation of provincial legislation that necessarily excludes all cabinet information or entire cabinet documents or records from disclosure and avoids severance. The final noteworthy point is that the courts of this Province have never had occasion to comment on all this.

The Commissioner's Office also suggests that it may be worthwhile making the exception from disclosure found in section 18 discretionary instead of mandatory, since this may encourage the disclosure of cabinet information which would not cause significant harm to the operations of cabinet.

The Commissioner's Office suggests amending subsection 18(2) to provide for disclosure of cabinet records once they have existed for 15 years. At present, the subsection prevents disclosure for 20 years.

The Official Oppositions position is that Executive Council interprets the section 18 too broadly.

Discussion

I agree that Executive Council's position about the need for cabinet confidentiality is important. It ensures that our system of government functions in an effective and timely way.

I am not prepared to say that this means all cabinet records must be protected from disclosure in their entirety for 20 years. This means that severance of cabinet records to determine the substance of cabinet deliberations should continue. I am prepared, however, to recommend extending the list of records captured by the section 18 exception

of the *ATIPPA* to include the listing of cabinet records found in the *Management of Information Act* referred to above.

Recommendation 11

It is recommended that the list of information captured by section 18 of the *ATIPPA* be extended to include the listing of cabinet records found in the Province's *Management of Information Act*.

Section 19 – Local Public Body Confidences

Section 19 provides local public bodies with a discretionary exception to disclosure, where the information requested would reveal (a) a draft of a resolution, by-law or other legal instrument by which the local public body acts; (b) a draft of a private Bill; or (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.

Submissions & Consultations

In its submissions, the Commissioner's Office noted that even though subsection 19(1) of the *ATIPPA* protects the confidentiality of "the substance of deliberations" of meetings properly held in the absence of public, subsection 19(2) goes on to specify that this protection does not apply where the "subject matter" of deliberations has been considered at a public meeting. They query whether subsection 19(2) could be interpreted so that the confidentiality of draft resolutions, by-laws or other legal instruments or private Bills or the subject matter of deliberations is eliminated if a matter is subsequently raised in public, but only in a very incidental manner.

Recommendation 12

Section 19 should be clarified to ensure that the confidentiality of deliberations of a private meeting is not eliminated in the event that information from the private meeting is incidentally referenced in a later public meeting.

Section 20 – Policy Advice or Recommendations

Section 20 is a discretionary exception to disclosure which allows the head of a public body to refuse to disclose advice or recommendations developed by or for a public body or minister, or draft legislation or regulations. The information listed under subsection 20(2) is not subject to the exception.

The British Columbia, New Brunswick, Nova Scotia and Ontario Acts have provisions similar to section 20 of the *ATIPPA*, in that they offer protection to advice or recommendations developed by or for a public body.

The legislation in Alberta, Manitoba, New Brunswick, Prince Edward Island and Saskatchewan extends the scope of information protected from disclosure. Subsection 24(1)(a) of Alberta's *Freedom of Information and Protection of Privacy Act* is illustrative in this respect: it protects "advice, proposals, recommendations, analyses or analyses of policy options developed by or for a public body or member of the Executive Council".

Alberta, Manitoba, Prince Edward Island and Saskatchewan's legislation further protects information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council.

Alberta has a unique provision found in 6(4) of its legislation protecting from disclosure, records created solely for briefing Ministers assuming new portfolios or for briefing a Minster in preparation for a sitting of the legislature.

Report of the Office of the Information and Privacy Commissioner

In a 2009 decision, the Commissioner clearly defined "advice" and "recommendations" as follows:

> The term "advice or recommendations" must be understood in light of the context and purpose of the ATIPPA. Subsection 3(1) provides that one of the purposes of the ATIPPA is to give "the public a right of access to records" with "limited exceptions to the right of access."
>
> The words "advice" and recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.
>
> Neither "advice" nor "recommendations" encompass factual material.[21]

Submissions & Consultations

Discussions with senior officials revealed that there is widespread concern that section 20 of the *ATIPPA* has had a "chilling effect" on the preparation of briefing materials for Ministers and heads of agencies. This concern is corroborated by a number of recent media stories which revealed that Ministers have requested that no briefing material be prepared on important issues. Anecdotal evidence suggests that there is significantly less briefing material in the public sector since the introduction of the *ATIPPA*. A major part of the concern is the widespread uncertainty associated with determining what constitutes

"advice or recommendations developed by or for a public body or a minister". Officials reported encountering difficulty when determining what information should be severed.

There is a legitimate concern that if briefing materials are not prepared, Ministers may not be properly apprised of the issues before them, there may be misunderstandings between Ministers and officials about advice given, and important issues may not be dealt with properly. From my own experience in senior government positions, I know that timely and well prepared briefing materials are essential to ensure that good decisions are made.

Some officials who participated in the consultations were of the opinion that all records containing briefing material should be exempt from disclosure under section 20.

Other officials suggested that the protection offered by section 20 should be expanded to include the "analysis of options" and "deliberations" of officials and Ministers on policy issues.

In its submissions the Official Opposition expressed the opinion that public bodies do not always apply section 20 correctly.

Discussion

I am not prepared to go so far as to recommend that all briefing materials should be exempted from disclosure in their entirety. But I do think this is an instance where the right of the public to disclosure of information needs to be restricted somewhat to ensure the proper functioning of government when addressing issues of public policy. The *ATIPPA* should not be structured in a way that discourages the proper functioning of the government**.** It is essential that proper and detailed briefing materials are available when important decisions have to be made. Otherwise, bad decisions will be made that will affect the Province adversely.

Recommendation 13

It is recommended that section 20 be amended to include additional protection for "proposals", "analysis, including analysis of policy options" and "consultations and deliberations" between Ministers, the staff of the Ministers and Officials.

Section 22 – Disclosure Harmful to Law Enforcement

Section 22 is a discretionary exception to disclosure where the requested information could reasonably be expected to be harmful to law enforcement. The provision describes the types of information to, and the circumstances in which, the exception applies.

Access to information legislation in all jurisdictions contain specific exceptions covering information relating to law enforcement, investigations and penal institutions. In addition to a law enforcement exception, our *ATIPPA* also excludes from its application records relating to a prosecution if all proceedings in respect of the prosecution have not been completed. This is also the case in most jurisdictions in Canada, including: Alberta, British Columbia, Ontario, Prince Edward Island, and Nova Scotia.

Submissions & Consultations

During consultations, the Royal Newfoundland Constabulary (RNC) raised concerns about the different standards of protection afforded by the *ATIPPA* to investigative files. Specifically, active investigations are protected by the discretionary exceptions contained in section 22, however, a higher standard of protection is given to active prosecution files which are excluded from the application of the *Act* under section 5.

The RNC requests that consideration be given to broadening section 5 to include active investigations as well. In addition, the RNC questioned whether the Commissioner was the appropriate authority to review sensitive police files to determine the proper application of section 22. RNC officials explained that section 22 captures all types of information that would be contained in police files, including: identification of victims; intelligence information that could frustrate an investigation or put someone in harms way; and/or informant privileged information.

The RNC also raises the possibility of granting section 60 of the *Royal Newfoundland Constabulary Act* priority over the *ATIPPA.* This section requires all employees of the RNC to maintain confidentiality or secrecy of information.

The RNC is also concerned that federal bodies, such as the RCMP, may be hesitant to share information with the RNC, if the RNC cannot guarantee that the information they receive will remain confidential.

The Commissioner's Office expressed concern that the language used in subsection 22(1)(a) is overly broad, specifically in its use of the words "disclose information about." In their written submission, they referenced Report 2007-003, where the Commissioner stated that the broad language of section 22 is at odds with the overall intent of the legislation.

The Commissioner's Office has recommended that paragraph(a) of subsection 22(1) be amended by deleting "disclose information about" while continuing to allow public bodies to withhold information where the disclosure could be expected to "interfere with or harm a law enforcement matter." They stated that this language is consistent with the more restrictive language used in other provinces and territories.

The Commissioner's Office further recommends in their submission that paragraph 2(i) be amended to clarify that "law enforcement" does not include investigations conducted in relation to such matters as harassment or workplace disputes, unless it is an

investigation, inspection or proceeding conducted under the authority of or for the purpose of enforcing an enactment.

Memorial University requested that the definition of "law enforcement" be amended to include investigations conducted by the university. This would include investigations into harassment, student discipline and academic misconduct.

Discussion

I am not prepared to recommend that police investigative files should be exempted from the application of the *ATIPPA*. As pointed out above, the Commissioner's Office believes these files already receive greater protection under paragraph 22(1)(a) than similar files receive under most other access to information legislation in Canada. I am also not prepared to narrow the protection provided to these files under that paragraph as suggested by the Commissioner's Office. Finally, I am not prepared to extend the definition of "law enforcement" to include additional labour relations/employment situations as suggested by Memorial University and others.

As for section 60 of the *Royal Newfoundland Constabulary Act*, there is a mechanism in the *ATIPPA* which may be used to give section 60 priority over the *ATIPPA* if the Lieutenant –Governor in Council approves. I leave it to the RNC to decide if they wish to utilize that mechanism.

Recommendation 14

The definition of law enforcement found in subsection 2(i)(ii) should be amended to include only investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment that lead or could lead to a penalty or sanction being imposed under an enactment.

Section 24 and Section 27– Disclosure Harmful to the Financial or Economic Interests of a Public Body; Disclosure Harmful to Business Interests of a Third Party

Section 24

Section 24 is a discretionary exception according to which a public body may refuse to disclose information which could reasonably be expected to harm the financial or economic interests of a public body or the government of the Province, or the ability of the government to manage the economy. The provision lists five examples of the types of information contemplated.

Several provinces protect the financial or economic interests of public bodies in a manner similar to the approach taken in section 24 of the *ATIPPA*. Alberta, Manitoba, New

Brunswick and Prince Edward Island supplement the protection provided to government negotiations in subsection 24(1)(e) of the *ATIPPA* by also protecting from disclosure information that would result in "financial loss to" or "prejudice the competitive position of" the jurisdiction in question.[22] Several jurisdictions, such as Saskatchewan, expand the protection provided to government negotiations by including language specifically protecting from disclosure the positions, plans, procedures, criteria or instructions developed for government negotiations.

In order for a record to qualify for an exception to disclosure under section 24, the public body must prove that disclosure of the information could reasonably be expected to harm the "financial or economic interests of a public body or the government of the Province or the ability of the government to manage the economy". Relatively few disclosures will result in such grave consequences. This amounts to a very high standard of proof a government must meet in order to protect information from disclosure.

The Ontario and Saskatchewan legislation do not impose this high standard. They simply list the types of information which are subject to the exception from disclosure, without resorting to a harm test.

Consultations & Submissions

During public consultations, stakeholders expressed uncertainty regarding the scope of protection afforded to public bodies by section 24, including the period of time during which the protection applies.

Some public bodies submitted that the section may not adequately protect details of the negotiating positions, strategies and tactics of public bodies before, during and after negotiations. There was concern on the part of some public bodies, for example, that in the case of offshore oil and gas negotiations, information about the Province's negotiations on one project may be used by oil and gas companies against the Province when negotiating on another project.

Public bodies also expressed dissatisfaction with the Commissioner's interpretations of this section, which, it is claimed, unduly narrow the protection for both government negotiations and third party business information in the hands of government during the negotiations process.

Section 27

Section 27 is a mandatory exception to disclosure where the requested information would reveal trade secrets, commercial, financial, labour relations, scientific or technical information of a third party under certain prescribed circumstances.

Subsection 27(2) provides that a head must refuse to disclose information obtained from a tax return or gathered to determine liability or to collect taxes.

Subsection 27(1) of the *ATIPPA* requires that information meet all parts of a three part test before it is protected from disclosure under the section, as follows:

> 27. (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 organization, 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.

Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island have the same three part test.

The Saskatchewan, Manitoba, and New Brunswick legislation offer more flexible and comprehensive protection to third party business information in that they include both a class test and a harm test. This means that information will be protected from disclosure if either the class test or harm test is met. Additionally in some cases, third party business information will be protected even if it is not implicitly or explicitly supplied in confidence. For example, under section 18 of Manitoba's legislation, to qualify for the exception, the disclosure of the information must reveal:

> (a) a trade secret of a third party;
>
> (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party; or
>
> (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to:
>
> (i) harm the competitive position of a third party;

(ii) interfere with contractual or other negotiations of a third party;

(iii) result in significant financial loss or gain to a third party;

(iv) 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; or

(v) 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.

Accordingly, Manitoba's legislation protects a wider scope of business information from disclosure.

Consultations & Submissions

During the consultation process, public bodies expressed concern that section 27 does not adequately protect business information supplied to public bodies by third parties and that this lack of protection may hamper economic development. Public bodies submitted that businesses may avoid working with the government of this Province until better protection is provided for business information.

In particular, many public bodies expressed concern that the three part harm test under subsection 27(1) creates too high a threshold for the protection of business information. Further, several public bodies indicate that they find section 27 confusing, and remain unsure regarding its correct application.

Some public bodies, especially some municipalities, submit that all business contacts and discussions should not be subject to disclosure.

The Labour Relations Agency indicates that many of their stakeholders don't believe that section 27 adequately protects their interests. The Agency requested that a separate provision be added to the *ATIPPA* dealing with the protection of information the Agency collects in carrying out its mandate.

The Department of Business expresses the strongest views about both sections 24 and 27. They believe it is difficult, if not impossible, to meet the burden of proof as interpreted by the Commissioner's Office, which is to provide convincing evidence that the harm is probable and not merely possible. In business relations, it is difficult to predict whether the disclosure of information will result in harm. The Department of Business submits that third parties must be able to approach government and commence discussions on a proposal openly, with assurance from the government that such approaches will be held in confidence. The department maintains that the confidentiality principle is a clear and fundamental expectation of most companies. Even a confirmation by the government that a department is in negotiations with a third party may alert competitors and harm the competitive positions of both the department and the business in question. Without this protection, companies could be deterred from entering into business discussions with the

Province. This could compromise the ability of the department to carry out its mandate to attract business and to support economic development. The Department of Business requests an amendment to the *ATIPPA* to allow a public body to neither confirm nor deny whether it is in discussions with a company during the prospecting and negotiation stages of business dealings. Once negotiations are successful, the Department supports the disclosure of the deal, including its scope, the amount of funding provided and the conditions attached to its funding.

Executive Council, the Department of Fisheries and Aquaculture, the Department of Natural Resources and many municipalities and other public bodies agree with most, if not all, of these comments.

In its written submissions, the Department of Justice expresses concern about what it perceives to be extremely high standards of proof applied by the Commissioner's Office in its reports when considering the burden public bodies must meet to protect information under section 27. The Department notes that this provision is not operating to provide any material protection to third parties for information provided to government. The Department further maintains that the interpretation in this Province and elsewhere of the term "supplied implicitly or explicitly in confidence", found in subsection 27(1)(b), does not meet the reasonable expectations of third party businesses dealing with the government. In particular, certain third party information which is incorporated into contracts is not properly protected from disclosure because it may not be "supplied" to the public body, as that term has been interpreted by the Commissioner's Office.

The Department of Justice submits that section 20 of the Federal access to information legislation takes a more reasonable approach both to the identification of third party commercial information and to the tests or requirements for establishing when protection is granted.

Executive Council raises the possibility of adapting the "commercially sensitive information" provisions of the *Energy Corporation Act*,[23] an Act which establishes and regulates the statutory company known as Nalcor Energy, for use in the *ATIPPA*. The approach to the protection of commercial information adopted in the *Energy Corporation Act* is unlike anything found in access to information legislation in Canada, but it has been used in the *Research and Development Council Act*.[24]

The "commercially sensitive information" provisions of the *Energy Corporation Act* operate in *addition* to section 27 of the *ATIPPA* (per s. 5.4(1)): in practice, the purpose of the "commercially sensitive information" provisions is to enhance the protection offered by section 27 of the *ATIPPA*, in the Nalcor Energy context. Section 5.4 reads as follows:

> 5.4 (1) Notwithstanding section 6 of the *Access to Information and Protection of Privacy Act* , in addition to the information that shall or may be refused under Part III 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 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.

If an applicant is denied information on the foregoing basis and the Commissioner's Office is asked to review the decision, the Commissioner must uphold the decision on "commercially sensitive information" if it is certified to him by the head of the relevant public body that the information was not disclosed by the public body for one of the reasons set out above.

"Commercially sensitive information" is defined in subsection 2(b.1) as 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 lists in a very detailed manner types of information that are included within this definition.

It should also be pointed out, that the British Columbia *Special Committee to Review the Freedom of Information and Protection of Privacy Act* decided not to increase protection for commercial information. The special committee specifically considered proposals to increase the protection of confidential contract information.[25]

Subsection 27(2)

The Department of Justice recommends extending the protection for information obtained on a tax return or gathered for the purpose of determining a tax liability or collecting a

tax to include royalty information submitted on royalty returns. The Department points out that the distinction between taxes and royalties is not relevant in respect to the confidentiality of information reported by individual royalty holders. Nevertheless, government would still need the ability to disclose aggregated royalty information that does not identify the information of individual parties.

Discussion

I know that when the government is in negotiations on a transaction it is essential that its negotiating strategy and tactics as well as the information government generates in order to carry on the negotiations be confidential. Real harm may be done to the Province if this information falls into the wrong hands. Some of this information must remain confidential through a series of different negotiations; such as offshore oil and gas project negotiations.

The submissions made to me and my own experiences in government have convinced me that greater protection is required to protect government negotiations and third party information. I also know that parties dealing with government often raise potential access to their information as a major issue which can greatly complicate negotiations and other commercial dealings. These concerns can adversely affect these dealings at least to some degree from the point of view of the government.

I am prepared to recommend amendments to the *ATIPPA* to reduce the concerns raised by sections 24 and 27. I am not prepared however, to recommend that all business contacts should be expressly exempted from disclosure. After all, this is a democratic society and I think business has to accept there will be a certain level of disclosure when dealing with the government.

I am also not prepared to recommend adoption of amendments based on the *Energy Corporation Act* legislation. It seems to me this Act is a highly customized and discrete solution for issues faced by Nalcor Energy. If government believes that there are other specific situations requiring a similar solution then legislation applying to the specific situation should be amended accordingly. The Nalcor Energy regime should not have general application.

I also wish to emphasize that the amendments I am proposing to section 27 are not intended to expand the protection from disclosure of any information relating to a licence or permit or other discretionary benefit, including a financial benefit, related to a commercial or professional activity, inspections carried out by or on behalf of a public body or a report of an entity that regulates a third party.

Recommendation 15

1) Subsection 24(1) of the *ATIPPA* should be replaced by a provision along the lines of section 18 of Saskatchewan's *Freedom of Information and Protection of Privacy Act*.

2) Section 27 of the *ATIPPA* should be replaced by a new provision modeled on section 18 of the *Freedom of Information and Protection of Privacy Act* of Manitoba.

3) Subsection 27(2) should be amended to prevent the disclosure of royalty information received by the Province in a royalty return except for aggregated royalty information that does not identify the information of individual parties.

Section 28 – Notifying the Third Party

Section 28 stipulates that where a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 27, they must give the third party written notice. Further, where a public body denies access to a record under section 27, the public body has the option of notifying the third party.

Submissions & Consultations

The Commissioner's Office submits that section 28 should be amended to make it mandatory for public bodies to notify third parties when any request affecting their information is received by a public body. Presently section 28 only requires notification when a head intends to disclose such information.

Recommendation 16

Section 28 of the *ATIPPA* should be amended to ensure that third parties are always notified whenever a request for information is received which affects the information of the third party.

Section 30 – Disclosure of Personal Information

Section 30 of the *ATIPPA* contains a mandatory exception to disclosure for personal information, subject to the enumerated classes of information in subsection 30(2) to which the provision does not apply.

During consultations, I received submissions on three distinct issues pertaining to section 30: 1) the introduction of a harm test for the release of personal information, 2) the

protection of public service employee information under subsection 30(2)(f) and 3) the protection of opinion material. I will deal with each of these issues in turn.

Harm Test for Disclosure of Personal Information

The Commissioner's Office has indicated that the protection of personal information under section 30 is more rigid than those found in the access to information legislation in other provinces, in that no discretion exists to consider the relative harm of disclosure.[26] The majority of jurisdictions in Canada, but not Newfoundland and Labrador, have adopted a flexible approach for the release of personal information in the form of a harm test. The harm test provides an exception to disclosure which depends on the consequences that would result to the public body or another party if the information were disclosed. In these jurisdictions, the test is whether the release of information is likely to cause an unreasonable invasion of a third party's personal privacy. This means that there may be times when information that fits the definition of personal information may be released because to do so would not be an unreasonable invasion of privacy. As noted by the Commissioner's Office:

> Newfoundland and Labrador is unique in Canada in its approach to personal information protection under the *ATIPPA* access provisions. The equivalent exception to the disclosure of personal information in other jurisdictions is arguably more nuanced. The standard approach elsewhere involves a harms test, placing some discretion in the hands of public bodies to release a certain amount of personal information when the harm in doing so is considered to be low.[27]

Submissions & Consultations

During the consultation process, we received several requests from public bodies to amend the *ATIPPA* to include a harm test to assist with decisions related to the release of personal information.

For example, the Commissioner's Office submits that the *ATIPPA* should be amended to allow public bodies to release personal information in circumstances where the disclosure would not harm the individual.

Similarly, the Department of Justice submits that section 30 of the *ATIPPA* can be overly rigid and that public bodies should be allowed to release personal information where there is no harm to the individual to whom the information relates. The department therefore proposes the introduction of a harm test into the personal information exception, which will bring the Province's legislation in line with that of other jurisdictions in Canada.

Memorial University recommends that section 30 of the *ATIPPA* be amended to include a harm test to permit public bodies to effectively balance the right of access with protection of privacy, similar to those in the personal information exception provisions in Alberta, Ontario, or Manitoba.

Discussion

I think that a reasonable case has been made by the Commissioner's Office, the Department of Justice, Memorial University and other public bodies for permitting increased disclosure of personal information when responding to access requests and it is clear the release of the personal information will do no harm and may be desirable.

I think Alberta has created the best regime for this purpose and this Province should adopt their model. Pursuant to subsection 17(1) of Alberta's legislation the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 17 does on to give a good list of what is not an unreasonable invasion; a list of situations where the disclosure of information is presumed to be an unreasonable invasion; and a list of circumstances that must be considered in making the determination.

Recommendation 17

Section 30 of the *ATIPPA* should be replaced with a new provision containing a harm test along the lines of section 17 of the *Freedom of Information and Protection of Privacy Act* of Alberta.

Subsection 30(2)(f) – Public Body Employees

Under subsection 30(2)(f) of the *ATIPPA*, information about a person's "position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff" does not qualify for the personal information exception under subsection 30(1) and must be disclosed upon request.

Remuneration

The Commissioner's Office has interpreted "remuneration" broadly, as including "salary, overtime, vacation pay and work-related expenses", payroll, and salary adjustments.[28] Further, they have found that subsection 30(2)(f) mandates the disclosure of entire employment contracts, with the exception of purely personal details.[29]

However, the Commissioner's Office has drawn the line at the disclosure of certain benefits, "including pension, health insurance, unemployment insurance", as well as provincial and federal income tax,[30] These do not fall within the definition of "remuneration" because their disclosure may reveal personal financial information which falls outside the remuneration paid by the government.

A scan of access to information legislation in other Canadian provinces reveals that British Columbia and Nova Scotia have nearly identical provisions regarding the disclosure of personal information related to public body employees.

The comparable provisions in Alberta, Manitoba, New Brunswick, Ontario and Prince Edward Island are significantly different insofar as only the salary range of a government employee must be released upon request, not a specific amount.

Consultations & Submissions

During the consultation process, several government employees raised concerns about the lack of protection for their personal information, specifically the availability to an applicant on request of their exact salary amounts.

Recommendation 18

It is recommended that the *ATIPPA* be amended to provide that only the salary range of an employee may be disclosed and not the specific amount of remuneration.

Opinions

During consultations, public bodies expressed concern that the following types of information are not protected from disclosure under the *ATIPPA*: references for employment, opinions related to the awarding of an employment contract, opinions related to a person's admission into an academic program, opinions in the workplace dispute resolution processes, opinions related to the granting of tenure, peer reviews and opinions solicited for the purpose of granting an honour or award.

Other Canadian jurisdictions offer more comprehensive protection for opinions than that provided under the *ATIPPA*.

Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Saskatchewan offer specific protection for references for employment.

Similarly, Alberta, British Columbia, Manitoba, New Brunswick, Ontario, Prince Edward Island, and Saskatchewan offer specific protection for evaluative or opinion material compiled solely for the purpose of determining an individual's suitability for the awarding of an employment contract.

Opinions related to a person's admission into an academic program are explicitly protected under subsection 49(c.1) of Ontario's legislation.

In the workplace dispute context, subsection 20(1)(a) of New Brunswick's legislation offers explicit protection to records made by an investigator providing advice or recommendations in relation to a harassment investigation or a personnel investigation.

Subsection 32(b) of New Brunswick's legislation and subsection 49(c.1) of Ontario's legislation explicitly protect opinions solicited for the purpose of granting an honour or award.

Submissions & Consultations

During the consultation process, public bodies submitted that increased protection for evaluative records is necessary to encourage individuals to be forthcoming with their opinions. Public bodies maintain that if individuals are concerned that their opinions could be disclosed pursuant to the *ATIPPA*, they are less likely to be candid.

Memorial University requests an amendment to the *ATIPPA* to give better protection to opinions and evaluative material supplied for the purpose of university peer reviews. Memorial submits that the disclosure of information which has been provided for the purpose of conducting peer reviews could harm individuals' relationships and reputations.

Memorial further requests that a discretionary exception be added to the *ATIPPA* permitting a public body to refuse to disclose information which has been provided in confidence for the purpose of assessing an individual's suitability, eligibility or qualifications for employment, for the awarding of an employment contract, or for admission to an academic program.

In addition, Memorial requests that I recommend the inclusion of a provision to protect opinions and evaluative material received in confidence for the purpose of determining an individual's suitability for an honour or award to recognize outstanding achievement or distinguished service.

The Public Service Commission expressed the opinion that professionals and quasi-professionals should be able to follow professional standards and make their own decisions about when their opinion should be released. The decision to disclose should not be left to others, including superiors, who do not have the same expertise.

The Public Service Commission further suggested such opinions should be exempt from the application of the *ATIPPA* under section 5.

Recommendation 19

The *ATIPPA* should be amended to provide an exception to disclosure for the following opinions: references for employment; opinions related to a person's admission into an academic program; opinions related to the awarding of an employment contract; opinions in workplace dispute resolution processes; opinions related to the granting of tenure; peer reviews; and opinions solicited for the purpose of granting an honour or award.

6.4 Part IV – Protection of Privacy

Part IV of the *ATIPPA*, Protection of Privacy, stipulates the circumstances in which a public body may collect, use and disclose personal information. During the consultation process, I received proposals for legislative amendments affecting two of these sections, use of personal information (section 38) and disclosure of personal information (section 39).

Section 38 and Section 39– Use and Disclosure of Personal Information

Section 38 – Use of Personal Information

Section 38 describes the situations in which a public body may use personal information once it has been collected. Personal information may only be used (a) for the purpose for which it was obtained or compiled, or for a use consistent with that purpose; (b) with consent, or (c) for a purpose for which the personal information may be disclosed to the public body under sections 39 to 42 of the *ATIPPA*.

The limitations that the *ATIPPA* places on a public body's use of personal information are similar to those in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

Submissions & Consultations

In their written submission, Memorial University requests that section 38 of the *ATIPPA* be amended to permit the university to use personal information in its alumni records for the purpose of institutional fundraising. As a precedent, Memorial referenced subsections 41(1)(d) and 41(2) of Ontario's *Freedom of Information and Protection of Privacy Act*, which sets out the procedure an educational institution must follow to use personal information in its alumni records for the purpose of fundraising.

Section 39 – Disclosure of Personal Information

Section 39 stipulates that a public body may not disclose personal information in its control to anyone other than the person to whom that information relates, subject only to limited, specific exceptions.

The following provides an overview of some of the key exceptions to the rule against the disclosure of personal information by public bodies in jurisdictions across Canada:

- Under the *ATIPPA,* institutions are entitled to release personal information where the individual the information is about has identified the information and consents to the disclosure. This is also true in all other Canadian jurisdictions.

- Under the *ATIPPA,* a public body may disclose personal information for the purpose for which it was obtained or compiled, or for a consistent purpose. The

Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan access to information Acts contain similar provisions.

- Under the *ATIPPA*, a public body may disclosure personal information to an officer or employee of another public body, if the information is necessary for the performance of the duties of the office or employee. The Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island access to information Acts contain similar provisions.

- Under the *ATIPPA*, a public body may disclose personal information where there are compelling circumstances affecting a person's health or safety. Similar provisions exist in Alberta, British Columbia, Manitoba, Ontario, Nova Scotia, Prince Edward Island, and Saskatchewan.

- The Alberta, British Columbia, and Prince Edward Island Acts permit disclosure of personal information by one institution to another public body if it is necessary for the delivery of a common or integrated program or service and for the performance of duties of the person to whom the information is disclosed.

- All jurisdictions permit the disclosure of personal information within government in connection with either law enforcement or the conduct of judicial proceedings.

- Under the Federal and Saskatchewan Acts, there is a provision that authorizes the disclosure of information when the head of the public body considers that the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure, or disclosure would clearly benefit the individual to whom the information relates.

Submissions & Consultations

During the consultation process, many public bodies raised concerns regarding the rigidity of section 39 with respect to the sharing of information between public bodies.

Memorial University requests an amendment to section 39 to allow the Department of Education to disclose information regarding student performance to Memorial for the purpose of granting entrance scholarships. Memorial submits that it would be beneficial to be able to share personal information with the public bodies that they partner with to stage shared events, such as the Ambassador Program and career fairs. Memorial proposes the adoption of subsection 33.2(d) of British Columbia's *Freedom of Information and Protection of Privacy Act* into the *ATIPPA*, which permits a public body to disclose personal information to an employee of another public body if the information is necessary for the delivery of a common or integrated program or activity.

The Nova Central School District and the Department of Education submit that the *ATIPPA* prevents them from disclosing student information to Members of the House of Assembly for the purpose of recognizing student achievements.

Newfoundland and Labrador Housing requests the ability to collect information from housing applicants, specifically criminal history with regard to certain crimes, to prevent harm to the health and safety of other tenants.

Memorial University of Newfoundland Pensioners Association submits that under the *ATIPPA*, Memorial University is not permitted to provide them with former employees' names and addresses.

A number of public bodies indicated that the *ATIPPA* prevents legitimate sharing of personal information between public bodies, for the purpose of policy development, planning and implementation.

The Commissioner's Office recommends amending subsection 39(1)(q) to expressly include common law spouses on the list of those to be contacted in case of the injury, illness or death of a person.

The Commissioner's Office also recommends adding a provision to section 39 providing for the disclosure of personal information after death, for the purpose of identifying the deceased and notifying a spouse, common law spouse or next of kin, and for any other purpose where to do so would not constitute an unreasonable invasion of privacy.

Discussion

I think the regime created by the *ATIPPA* is too rigid in terms of the restrictions it places on the legitimate use of personal information, such as those referred to above. It should be relaxed to permit greater scope for such legitimate use.

I think Alberta has created the best regime for incorporating greater flexibility and their model should be adopted in this Province.

Recommendation 20

Section 38 of the *ATIPPA* should be amended along the lines of subsection 41(1)(d) and 41(2) of Ontario's *Freedom of Information and Protection of Privacy Act* to permit the university to use personal information in its alumni records for the purpose of institutional fundraising.

Section 39 of the *ATIPPA* should be amended along the lines of subsection 40(1) of Alberta's *Freedom of Information and Protection of Privacy Act*.

6.5 Part IV.1 – Office of the Information and Privacy Commissioner

Part IV.1 of the *ATIPPA* pertains to the creation of the Office of the Information and Privacy Commissioner.

Section 42.2 – Term of Office

Section 42.2 of the *ATIPPA* provides that the Commissioner holds office for 2 years and may be reappointed.

Submissions & Consultations

The Commissioner's Office submission points out that a two year appointment is by far the shortest term of office in the country for such a position. All other provinces and territories provide for a 5 year appointment, except Manitoba and British Columbia where appointments last for 6 years. Some jurisdictions appoint a Commissioner, while others entrust the provincial Ombudsmen with access to information and privacy issues. The Commissioner's Office expressed concern that this short term of office may create a perception that the Commissioner is beholden to a particular government for his/her continued employment.

The Commissioner's Office submission suggests that the *ATIPPA* should be amended to provide for a 6 year term of Office. A Commissioner appointed by a government for 6 years knows that his/her re-appointment will not be made by the same government but rather by the government elected in the next provincial election. The Commissioner's Office is of the position that this amendment will enhance the perceived independence of the Commissioner.

Discussion

I agree with the reasoning in the Commissioner's Office submission. The *ATIPPA* should be amended to provide for at least a 5 year term for the Commissioner.

Recommendation 21

Section 42.2 should be amended to provide for at least a 5 year term for the Commissioner.

6.6 Part V – Reviews and Complaints

Part V of the *ATIPPA*, reviews and complaints, describes the process to follow in order to ask the Commissioner to review a decision by a public body, appeal a decision to the Trial Division and the powers of the Commissioner. During the consultation process, I received proposals for legislative amendments affecting many of these provisions, including the power of the Commissioner to review public body decisions.

Section 45 – Request for Review

Submissions & Consultations

During my consultations with public bodies and the Commissioner's Office, I have raised the possibility of providing the Commissioner with authority to dismiss applications for review when an application is frivolous, vexatious or not made in good faith. Some public bodies have also suggested that the Commissioner should have such authority.

In section 6.2 of this Report, I have also recommended that public bodies should have the authority to refuse to respond to requests for information that are frivolous, vexatious, trivial, or made in bad faith, provided the Commissioner first approves the decision of the public body. In their submission, the Commissioner's Office has expressed reservations about this concept, however, they recommend that if such a provision is included in the *ATIPPA*, then they should be provided with similar authority to refuse requests for review.

Although not yet proclaimed, subsection 67(3) of the *Personal Health Information Act (PHIA)*[31] permits the Commissioner not to conduct a review on several grounds including cases where the request for review is trivial, frivolous, vexatious or made in bad faith. A majority of other Canadian jurisdictions also contain similar provisions in their legislation to permit the Commissioner to refuse to investigate a request for review "if circumstances warrant".

Recommendation 22

The *ATIPPA* should be amended to include provisions modelled on subsections 67(2) and (3) of the Province's *PHIA* which specify that the Commissioner must conduct a review only when there are reasonable grounds to do so, and provide that the Commissioner may decline to conduct a review if:

(i) the public body has responded adequately to the request;
(ii) the complaint has been or could appropriately be resolved by an alternate procedure;
(iii) the lapse of time between the date when the complaint arose and the filing of a request for review is so great it will likely cause undue prejudice or a report would serve no useful purpose; or
(iv) the request for review is trivial, frivolous, vexatious or is made in bad faith.

Access Requests to the Office of the Information and Privacy Commissioner

The Commissioner's Office submission also notes that there are situations where the office, itself, receives applications for disclosure of information in their own records. The *ATIPPA* does not provide a mechanism for some other independent party to review the decisions the Commissioner's Office makes about disclosure in such cases. It would obviously create a conflict of interest if they reviewed their own decisions on disclosure if an applicant wanted a review.

The Commissioner's Office recommends an amendment to the *ATIPPA* permitting the Lieutenant-Governor in Council to appoint a person to review the decisions of the Commissioner's Office about disclosure of their own information. At least 3 other Canadian jurisdictions already have such a provision.

Recommendation 23

It is recommended that the *ATIPPA* be amended permitting the Lieutenant-Governor in Council to appoint a person to review the decisions of the Commissioner's Office about disclosure of their own information.

Section 46 – Informal Resolution

Submissions & Consultations

The Commissioner's Office requests an amendment to the *ATIPPA* eliminating the 30 day limit for informal review in subsection 46(2). They believe that the 30 day period is too restrictive, primarily because of the time consumed in obtaining documents from public bodies necessary to begin the actual review. If the amendment is made, it will be left to the Commissioner's office to determine the time allowed for informal review in each case. Other jurisdictions in Canada have informal review provisions similar to those of our *ATIPPA* and some provide for mediation before a formal review commences. Some jurisdictions impose a time limit, whereas at least five others do not. *PHIA* is somewhat different from the current *ATIPPA* because it allows 60 days for informal reviews instead of 30 days.

Recommendation 24

Subsection 46(2) of the *ATIPPA* should be amended to eliminate the 30 day time limit for informal review and provide the Commissioner with discretion to determine the length of the informal review periods in all cases.

Section 47 – Representation on Review

Submissions & Consultations

The Commissioner's Office submission points out that subsection 47(1) of the *ATIPPA* identifies the parties entitled to make representations to them when a decision of a public body is being investigated. The section does not include the affected public body as a party entitled to make representations. The Commissioner's Office has always had a policy of permitting public bodies to make representations in these circumstances. They recommend an amendment providing the public body with the right to make representations. The Commissioner's Office states that all other provinces and territories have such provisions.

Recommendation 25

Section 47 of the *ATIPPA* should be amended to provide expressly that when a decision of a public body not to disclose information is reviewed, the public body is entitled to make representation to the Commissioner's Office during the review.

Section 48 – Time Limit for Review

Submissions & Consultations

It is well known that the Commissioner's office is having trouble meeting the 90 day deadline for completing reports that reach the formal review stage. In response, the Commissioner's office has instituted a "banking process" which effectively establishes a priority system for dealing with reviews to ensure that each review is dealt with fairly and in as reasonable a period of time as possible. This situation is frustrating both for members of the public and public bodies involved in these reviews. Applicants for review are not receiving timely resolution of their requests for information in some cases. Public bodies are left in an uncertain position for long periods of time and find it difficult to return to the issues after long gaps.

As a result the Commissioner's office requested an amendment eliminating the 90 day limitation for it to complete a review and make a report found in section 48. It points out that a number of Canadian jurisdictions do not impose an absolute deadline. The legislation in Alberta, Manitoba and Prince Edward Island, for example, requires a report within 90 days after a complaint is made unless the Commissioner notifies the relevant parties that it is extending the period and provides an anticipated date for providing a report.

The recently completed report of the British Columbia *Special Committee to Review the Freedom of Information and Protection of Privacy Act* has recommended such an amendment to the British Columbia legislation. [32]

The report of the *Alberta Standing Committee on Health* issued in November 2010, recommended that the Alberta Commissioner should have 1 (one) year instead of 90 days to complete a review unless it notifies the parties that it is extending the time period and provides an anticipated completion date.[33]

PHIA currently requires the Commissioner's Office to complete reports within 120 days of receiving a request for review of public body decision or disclosure.

Recommendation 26

Section 48 of the *ATIPPA* should be amended to remove the 90 day time limit for the Commissioner's Office to complete a review. The *ATIPPA* should be further amended to require the Commissioner's Office to complete a review within 120 days after a request for a review is made, unless they notify the relevant parties that they are extending the time period and provide an anticipated date for providing a report.

Section 49 – Report

Section 49 provides that upon completing a review of a public body's decision not to provide access to a record or correct personal information, the Commissioner may make recommendations to the public body. The Commissioner cannot make orders that bind a public body. In Manitoba, New Brunswick, Nova Scotia and Saskatchewan, Commissioners are also limited to recommendation power. If the Commissioner issues a report recommending disclosure of a record, the public body must decide whether or not to accept it. If the public body decides not to follow the recommendation, they must inform all persons who were sent a copy of the report of the right to appeal the decision to the Supreme Court, Trial Division pursuant to section 60 of the *ATIPPA*.

Sections 60 to 63 of the *ATIPPA* set out the right of an applicant to appeal the decision of a public body about disclosure to the Trial Division of the Supreme Court. The Court has the authority to make any order it considers appropriate including the power to order a public body to disclose information to an applicant.

On the other hand, in Alberta, British Columbia, Ontario and Prince Edward, the Commissioner may order public bodies to do a number of things, including disclosing all or part of a record; confirming the decision of a public body regarding disclosure, or reconsidering the decision not to disclose.

In Alberta, British Columbia and Prince Edward Island, the Commissioner's order may be filed in superior court, whereupon it becomes enforceable as a judgment of the court.

Submissions & Consultations

During our consultation sessions, the Official Opposition had a great deal to say about the Office of the Information and Privacy Commissioner. Their main point was that they think the Commissioner's Office has been unable to hold the Government accountable for failing to comply with the *ATIPPA*. They believe this demonstrates the need to amend the *ATIPPA* to give the Commissioner order power. The Official Opposition stated that without order power, the Commissioner's Office is a "toothless tiger" which does little to ensure greater openness and accountability.

Additionally, two members of the general public requested that the Commissioner be given order power.

Discussion

I have decided not to recommend amendments to the existing authority of the Commissioner to make recommendations to public bodies. This means the existing ability of an applicant to appeal a recommendation of the Commissioner to the courts also remains. The courts have the ability to order public bodies to disclose information. I think this is adequate. It should also be noted that the Commissioner, himself, did not seek an expansion of his current powers to make recommendations.

Recommendation 27

It is recommended that recommendation power of the Commissioner remain unchanged.

Section 51 – General Powers and Duties of Commissioner

Section 51 of the *ATIPPA* provides the Commissioner with a general power to make recommendations respecting compliance with the legislation. This section does not, however, provide the Commissioner with the general power to conduct investigations to ensure compliance with the *Act*.

Subsection 43(1) of the *ATIPPA* provides the Commissioner with authority and specific powers to review a decision by a public body regarding access to a record or for correction of personal information in a record. The *ATIPPA* does not provide express authority for the Commissioner to investigate complaints that personal information has been improperly used, collected or disclosed.

Some Canadian jurisdictions do provide general authority for a Commissioner to conduct investigations to ensure compliance with any provisions of their legislation. Some jurisdictions also provide specific authority to investigate complaints that personal information has been collected, used or disclosed by a public body contrary to the legislation.

Sections 65 and 66 of *PHIA* provide the Commissioner with authority to conduct reviews related to requests for personal health information. Section 66 also gives the Commissioner authority to investigate a complaint from an individual that a custodian has or is about to contravene a provision of *PHIA* respecting the personal health information of the individual or the personal health information of another person.

In its submission to me, the Commissioner's Office takes the position that they should have a general power to conduct investigations to ensure compliance with the *Act*. They foresee such a power being used to allow them to address any systemic issues which may arise and are not clearly addressed in the present form of the *ATIPPA*. They believe it is not possible to carry out their duty to make recommendations under section 51 without conducting an investigation into the nature of the particular compliance issue.

At present there are no express provisions in the *ATIPPA* authorizing the Commissioner to investigate privacy complaints or "privacy breaches". Neither does the Commissioner have the authority to launch, of its own volition, an investigation of an alleged contravention of Part IV of the *ATIPPA* which deals with privacy. The Commissioner's Office believes they should have the authority to do both.

The Commissioner's Office wants to see amendments permitting a person to complain to their office if the person's personal information has been collected, used or disclosed contrary to the *Act*. The Commissioner would then carry out an investigation or a review much the same as it would in the case of a failure of a public body to provide access to information under Part II and III. This would result in a report making recommendations to a public body.

I am not convinced that the Commissioner requires investigatory powers in order to make recommendations respecting compliance with the *Act* in general, but I am prepared to recommend that the Commissioner be given authority to investigate a complaint from an individual that his or her personal information has been collected, used or disclosed contrary to the *ATIPPA*. I do not think it is necessary to allow investigations of alleged breaches of Part IV where there has been no complaint or a compliant is made by a party other than the individual whose privacy has allegedly been breached.

Recommendation 28

The *ATIPPA* should be amended to expressly authorize the Commissioner to investigate a complaint from an individual that his or her personal information has been collected, used or disclosed contrary to *ATIPPA*.

Section 52 – Production of Documents

Section 52 describes the power of the Commissioner to examine records that are in the custody of public bodies.

Judicial Consideration

In *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, the Supreme Court of Newfoundland and Labrador, Trial Division considered whether there is a statutory duty under section 52 for a public body to release a record to the Commissioner for determination of whether the record falls under section 21, the solicitor-client privilege exception.[34] The Honourable Madam Justice Valerie L. Marshall held that section 52 of the *ATIPPA* does not oblige the Government to provide the Commissioner with records to which it claims solicitor-client privilege.

In her decision, Justice Marshall turns to the Supreme Court of Canada decision *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,*[35] which found that the federal Privacy Commissioner does not have the power, in the course of investigating a complaint under the *Personal Information Protection and Electronic Documents Act*, to compel the production of documents over which solicitor-client privilege is claimed. More specifically, the Supreme Court found that "[o]pen textured language governing production of documents will be read *not* to include solicitor-client documents".[36]

Based on *Blood Tribe,* Justice Marshall found that the words "any record" in subsection 52(2) constitute "open textured language" and that the provision does not "clearly or unequivocally express an intention to abrogate solicitor-client privilege".[37] She goes on to find that the powers granted to the Commissioner under the *ATIPPA* are not analogous to that of the court to independently verify claims of solicitor-client privilege:

> As already stated, there was nothing in the legislation, nor in any evidence, to suggest that the purpose of the *Act* is to grant unfettered powers to the Commissioner; to allow him to assume a role analogous to that of a court as an independent verifier of claims of solicitor-client privilege.[38]

Justice Marshall's decision is currently under appeal.

Submissions & Consultations

The submissions from the Department of Justice and the Commissioner's Office mirror the arguments each party advanced in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner*.

The Commissioner's Office recommends amendments to section 52 to explicitly permit the Commissioner to review records that a public body withholds on the basis of solicitor-client privilege in order to verify that solicitor-client privilege applies.

The Department of Justice recommends that the *ATIPPA* be amended to make it clear that the Commissioner does not have the ability to examine records where a claim of solicitor-client privilege is made. The Department argues that this is in keeping with recent pronouncements of the Supreme Court of Canada that solicitor-client privilege should be as close to absolute as possible.

Discussion

Where a claim of solicitor-client privilege is made, it is important for the credibility of the system that this claim be independently verified. Given that solicitor-client privilege should be as near to absolute as possible, the only way to provide for this review is to entrust it to the courts. I do not feel it is necessary for me to wait for a decision in the matter currently before our Court of Appeal in order to make this recommendation.

Recommendation 29

The *ATIPPA* should be amended to make it clear that where a claim of solicitor-client privilege is made, the issue should be referred to the Supreme Court, Trial Division for resolution of the matter.

The *ATIPPA* should also be amended to provide that when information to which solicitor-client privilege applies is disclosed to the Supreme Court, Trial Division, the privilege is not affected by the disclosure.

6.8 Part VII – General

Section 65 – Exercising Rights of another Person

Section 65 describes the situations in which a person's right under the *ATIPPA* may be exercised by another person, including a situation where a person is deceased.

Submissions & Consultations

Both the Commissioner's Office and the Department of Justice recommend an amendment to subsection 65(e) to permit the nearest relative of a deceased person to exercise rights or powers under the *Act* in relation to the administration of the deceased person's estate where the deceased has no personal representative.

Recommendation 30

Subsection 65(e) of the *ATIPPA* should be amended to permit the nearest relative of a deceased person to exercise rights or powers under the *Act* in relation to the administration of the deceased person's estate where the deceased has no personal representative.

Section 74 – Review

Submissions & Consultations

The Commissioner's Office has requested a number of amendments to the *ATIPPA* which correct obvious errors in the *Act* or which amount to purely housekeeping measures. These amendments are reproduced in Appendix A of this report.

Recommendation 31

The *ATIPPA* should be amended to include the proposed amendments outlined in Appendix A of this report.

6.8 Miscellaneous Issues

During the course of the legislative review five issues have been brought to my attention which fall outside the scope of the *ATIPPA* or which pertain to the interaction of the *ATIPPA* with other legislation, all of which require analysis and expertise beyond that which could be provided by this review. Various parties and institutions not available to me would also need input into any proposed legislative amendments. Therefore, I recommend that the Provincial Government consider these issues and put a more detailed review process in place if necessary.

In particular, these issues relate to section 8.1 of the *Evidence Act*; the sharing of information about children in the Province's school system; the interaction of the *ATIPPA* with the *Elections Act;* access to health information, and labour relations.

Section 8.1 of the *Evidence Act*

Section 8.1 of the *Evidence Act* prohibits the disclosure in a legal proceeding of a report made to or by a committee to which the section applies. The section specifically applies to quality assurance and peer review committees in the health care sector.

Section 6 of the *ATIPPA* provides that where another act prohibits access to a record, that prohibition will prevail over the disclosure requirements of the *ATIPPA*, if the prohibiting provision is designated in regulations made under the *ATIPPA*. Section 8.1 is specifically designated in the regulations as such a provision and, therefore, prevails over the *ATIPPA* disclosure requirements.

The health care sector believed that this regime protected quality assurance and peer review reports from disclosure under the *ATIPPA*. The Commissioner considered that issue in Report 2007-14. In that case, an applicant requested incident or occurrence reports in relation to a death at an Eastern Health facility. Eastern Health refused to provide any documents because it believed they were protected from disclosure by the legislative mechanism referred to above.

The applicant insisted that the legislation prevented disclosure of occurrence or incident reports only in legal proceedings and had no application to his access request under the *ATIPPA* because there were no relevant ongoing legal proceedings at the time. The Commissioner agreed that the documents protected by section 8.1 are not protected from disclosure under the *ATIPPA* when there is no ongoing legal proceeding. The Commissioner decided not to provide the document in question to the applicant for other reasons unrelated to the section 8.1 issue.

The *Report of the Task Force on Adverse Health Events,* which was completed before the Commissioner's Report, dealt with section 8.1 and accurately anticipated what would happen if a peer or quality review document was requested under the *ATIPPA*. This Report recommended an amendment to the *ATIPPA* to prohibit disclosure of such

documents.[39] The report indicated that several Canadian provinces had already made such amendments.

The Commission of Inquiry on Hormone Receptor Testing also dealt with section 8.1 in its Report.[40] The Commission reported that this section was made law before the concept of a patient's right to disclosure was fully developed in Canada.[41] The Report concluded, now that this concept exists, section 8.1 does not represent a balancing of policy issues and reflects one perspective only on the issue of disclosure.[42] Madame Justice Cameron said that there should be a complete review of the need for the section; the question being, should it stand given the competing policy considerations related to disclosure?[43]

Two of the main policy considerations are: the need to encourage the production of information from the health care system and frank expression of opinion about adverse events in order to enhance patient safety; and the need to promote a patient's right to disclosure of information. Madame Justice Cameron also expressed the view that peer review or quality assurance reports respecting an adverse event should be provided to the patient on request.[44]

Recommendations 33 to 35 of the Report all deal with section 8.1 and recommend, in part, that the government consider if the section is still relevant and whether the right of patients to obtain a copy of a report dealing with an adverse event should take priority over section 8.1.[45]

Submissions & Consultations

Eastern Health indicates in its submission that documents of a peer review or quality assurance committee should be exempt from the *ATIPPA* and subsection 5(1) should be amended to exclude these documents from the application of the *Act*. Alternatively, section 19, dealing with local public bodies, could be amended to provide discretion not to disclose such documents. Western Health has told me they agree with all the points raised in Eastern Health's submission, including this one.

Correspondence from Eastern Health to the Commissioner's Office, which is quoted in Report 2007-14 referred to above, cogently explains the argument for not permitting disclosure of quality assurance and peer review reports. It states as follows:

> [Section 8.1] provides protection from disclosure of quality assurance and peer review documents in the health care context. The intention is to encourage those within the system to come forward with opinions and recommendations for improvement without concern of disclosure, It is our fear that if not protected, this open and honest discussion will not occur and any opportunity to identify, share and apply learnings to prevent similar adverse events in the future will be lost.

Alberta has dealt with this issue in subsection 4(1)(c) of their legislation by excluding from their Act "quality assurance records within the meaning of section 9 of the Alberta *Evidence Act*. Eastern Health has suggested a similar approach in our Province. Saskatchewan has not gone quite as far but has a discretionary exception in subsection 17(3) for "documents and records" that are inadmissible in evidence under Saskatchewan's *Evidence Act.* These documents and records include the type of records Eastern Health deals with in its submission.

Discussion

The *ATIPPA* in its current form offers little protection for peer review and quality assurance committee records if a request for access is made.

The Government should complete its review of recommendations 33 to 35 of the *Report of the Commissioner of Inquiry on Hormone Report Testing*, if it has not already done so, and determine if section 8.1 of the Province's *Evidence Act* remains relevant. It should then decide if information protected by section 8.1 of the *Evidence Act* should also be protected from disclosure under the *ATIPPA.* If such a protection is required, I think the exception similar to subsection 17(3) of Saskatchewan's legislation provides the best model.

Recommendation 32

The *ATIPPA* should be amended along the lines of subsection 17(3) of Saskatchewan's *Freedom of Information and Protection of Privacy Act* if the government determines that section 8.1 of the Province's *Evidence Act* remains relevant and that information covered by that section should be protected from disclosure.

The Sharing of Student Personal Information

The issue relates to the sharing of students' personal information in our K-12 school system with parents who are separated or divorced. School boards report that conflicts sometimes arise concerning which parent is entitled to receive information about their child from the school. The situation is often exacerbated where issues of custody, access and support have not been resolved. The situation may be further complicated when older children, including so called "emancipated children", make it clear they do not want one or both parents receiving information about them.

In some cases parents may try to use the *ATIPPA* to circumvent family court and mediation processes to obtain information to which they would not otherwise be entitled.

Some school officials expressed the opinion that the *ATIPPA* should be amended to clarify entitlement to information in these types of situations.

The *Elections Act*

Some officials are concerned the *Elections Act* and the *ATIPPA* create confusion about the degree to which voters lists must be kept private and how they may be used by the political parties especially during election campaigns. Old voters lists are easily available to the public through various libraries. The officials question whether the use of voters lists should be reviewed and whether the *ATIPPA* or the *Elections Act* should be amended to better regulate the use of these lists.

Access to Health Information

Eastern Health recommends that where a member of the House of Assembly requests health information on behalf of a constituent, written consent should be required from the constituent prior to disclosure.

Labour Relations

Many public bodies involved with labour relations issues as a regulator, adjudicator or employer expressed great concern about the *ATIPPA* applying to labour relations processes including quasi-judicial processes. The basic concern is that the *ATIPPA* may be used to obtain information about a party which could not be obtained through any of the legal regimes applying to labour relations thus improperly circumventing the regime to the prejudice of the party. For example, this could happen during negotiations, mediation or conciliation. The basic point made to me is that for all these processes to work properly, the parties involved have to be confident that their important information does not fall into other hands in ways not permitted under the existing labour relations regimes.

These issues are obviously important to employees and therefore the unions and other organizations who represent them should be involved in any attempt to deal with this issue.

Recommendation 33

It is recommended that the Provincial Government consider the following issues and, if necessary, put a more detailed review in place which would include appropriate stakeholders and experts: the sharing of information about children in the Province's school system; the interaction of the *ATIPPA* with the *Elections Act;* access to health information by a member of the House of Assembly; and the protection of labour relations records under the *ATIPPA.*

ENDNOTES

[1] *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1.
[2] Canadian Newspaper Association, *2009-2010 National Freedom of Information Audit* (May 12, 2010).
[3] *Ibid.* at 19.
[4] *Ibid.* at 10.
[5] See *Freedom of Information and Protection of Privacy Act*, 2000, c. F-25 (Alberta), s. 1(n)(ix), *Freedom of Information and Protection of Privacy Act*, C.C.S.M. c. F175 (Manitoba), s. 1, *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6 (New Brunswick), s. 1, *Freedom of Information and Protection of Privacy Act*, 1993, c. 5, s. 1 (Nova Scotia), *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31(Ontario), s. 2(1), *Freedom of Information and Protection of Privacy Act*, c. F-15.01 (Prince Edward Island), s. 1, *Freedom of Information and Protection of Privacy Act*, c. F-22.01 (Saskatchewan), s. 24(1)(f).
[6] *Freedom of Information and Protection of Privacy Act* (N.S.), *supra* note 5.
[7] NL OIPC, *Town of Portugal Cove – St. Phillips*, Report 2007-001 (31 January 2007).
[8] *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 19, 908 A.P.R. 339.
[9] *Ibid.* ¶ 43.
[10] *Ibid.* ¶ 44, 45, 47.
[11] *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, s. 11(2).
[12] *Special Committee to Review the Freedom of Information and Protection of Privacy Act*, British Columbia (May 2010) at 13.
[13] Except Quebec which is 20 days.
[14] *Special Committee to Review the Freedom of Information and Protection of Privacy Act* (B.C.), *supra* note 14 at 15.
[15] Alberta Standing Committee on Health, *Review of the Freedom of Information and Protection of Privacy Act* (November 2010) at 12.
[16] Ontario OIPC Order 22 (21 October 1988).
[17] Manitoba Ombudsman, *A Locked Cabinet*, Decision 2000-200, at 40.
[18] *O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)*, 2001 NSCA 132.
[19] *Aquasource Ltd. v. British Columbia (Freedom of Information and Privacy Commissioner* (1996) 45 Admin L.R. (2d) 214.
[20] *Management Information Act*, SNL 2005, c. M-1.01.
[21] NL OIPC, *Department of Environment and Conservation*, Report A-2009-007 (29 June 2009) ¶ 14.
[22] *Freedom of Information and Protection of Privacy Act* (Alberta), *supra* note 5, s. 25(1)(c); *Freedom of Information and Protection of Privacy Act* (Man.), *supra* note 5, s. 18(1)(c); *Right to Information and Protection of Privacy Act* (N.B.), *supra* note 5, s. 22(1)(c); *Freedom of Information and Protection of Privacy Act* (P.E.I.), *supra* note 5, s. 14(1)(c).
[23] *Energy Corporation Act*, S.N.L. 2007, c. E-11.01 (The "commercially sensitive information" provisions of the *Energy Corporation Act* have not been judicially considered).
[24] *Research and Development Council Act*, SNL 2008, c. R-13.1.
[25] *Special Committee to Review the Freedom of Information and Protection of Privacy Act* (B.C.), *supra* note 14 at 17.
[26] NL OIPC, Report 2007-001, *supra* note 7 ¶ 28.
[27] *Ibid*.
[28] See NL OIPC, *Department of Municipal Affairs*, Report A-2008-012 (21 July 2008).
[29] See NL OIPC, *House of Assembly*, Report A-2008-003 (16 April 2008).

[30] See NL OIPC, Report A-2008-012, *supra* note 30.
[31] *Personal Health Information Act*, SNL 2008, c. p-7.01.
[32] *Special Committee to Review the Freedom of Information and Protection of Privacy Act* (B.C.), *supra* note 14 at 28.
[33] Alberta Standing Committee on Health, *Review of the Freedom of Information and Protection of Privacy Act*, *supra* note 17 at 18.
[34] *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 31.
[35] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44.
[36] *Ibid.* ¶ 11, quoted in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, *supra* note 34 ¶ 63 [emphasis in original].
[37] *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, *supra* note 34 ¶ 64.
[38] *Ibid.* ¶ 76.
[39] *Report of the Task Force on Adverse Health Events* (2 December 2008) at 84.
[40] Commission of Inquiry on Hormone Receptor Testing, *Report of the Commissioner of Inquiry on Hormone Report Testing* (1 March 2009).
[41] *Ibid.* at 357 – 358.
[42] *Ibid.* at 358.
[43] *Ibid.* at 363.
[44] *Ibid.* at 363.
[45] *Ibid.* at 469 – 470.

Appendix A

Current Language	Proposed Language	Reasons for Alterations
Conflict with other Acts 6(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 the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it. (3) Subsections (1) and (2) shall come into force and subsection (4) shall be repealed 2 years after this Act comes into force. (4) The head of a public body shall: (a) refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another Act or regulation; and (b) give access and disclose information to a person, notwithstanding a provision of this Act, where another Act or regulation provides that person with a right to access or disclosure of the information.	**Conflict with other Acts** 6(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 the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.	Since the Act has been in force for more than 2 years, subsection (4) ought to be repealed in accordance with subsection (3). Likewise, subsection (3) would appear to serve no further purpose at this time and should also be repealed.

Current Language	Proposed Language	Reasons for Alterations
Published material 14(1) The head of a public body may refuse to disclose a record or part of a record that (a) is published, and available for purchase by the public; or	**Published material** 14(1) The head of a public body may refuse to disclose a record or part of a record that (a) is published **and/or available to the public**; or	Some published material is free and does not need to be purchased.
How personal information is to be collected? 33(1) A public body shall collect personal information directly from the individual the information is about unless (a) another method of collection is authorized by (i) that individual, or (ii) an Act or regulation; (b) the information may be disclosed to the public body under sections 39 to 42 ; or (c) the information is collected for the purpose of (i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary, (ii) an existing or anticipated proceeding before a court or a judicial or quasi-judicial tribunal,	**How personal information is to be collected**? 33(1) A public body shall collect personal information directly from the individual the information is about unless (a) another method of collection is authorized by (i) that individual, or (ii) an Act or regulation; (b) the information may be disclosed to the public body under sections 39 to 42 ; or (c) the information is collected for the purpose of (i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary, (ii) an existing or anticipated proceeding before a court or a judicial or quasi-judicial tribunal,	This would correct what appears to be a drafting error.

Current Language	Proposed Language	Reasons for Alterations
(iii) collecting a debt or fine or making a payment, (iv) law enforcement, or (v) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual	(iii) collecting a debt or fine or making a payment, **or** (iv) law enforcement. **33 <u>(1)(d) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual.</u>**	
35(6) Within 30 days after receiving a request under this section, the head of a public body shall (a) make the requested correction and notify the applicant of the correction; or (b) notify the application of the head's refusal to correct the record and the reason for the refusal, that the record has been annotated, and that the applicant may ask for a review of the refusal under Part V.	35(6) Within 30 days after receiving a request under this section, the head of a public body shall (a) make the requested correction and notify the applicant of the correction; or (b) notify the **<u>applicant</u>** of the head's refusal to correct the record and the reason for the refusal, that the record has been annotated, and that the applicant may ask for a review of the refusal under Part V.	This would correct what appears to be a drafting error.
49(2) Where the commissioner does not make a recommendation to alter the decision, act or failure to act, the report shall include a notice to the person requesting the review of the right to appeal the decision to the court under section 60 and	49(2) **<u>Whether or not the commissioner makes a recommendation</u>** to alter the decision, act or failure to act, the report shall include a notice to the person requesting the review of the right to **<u>appeal the decision of the public body under</u>**	The "whether or not" language reflects the reality that applicants can file an appeal under section 60 regardless of whether or not the Commissioner issues a recommendation. This change also recognizes the fact that even though the

Current Language	Proposed Language	Reasons for Alterations
of the time limit for an appeal.	**section 50** to the court under section 60 and of the time limit for an appeal.	Commissioner may make a recommendation that the public body alter a decision, act or failure to act, the public body may ignore the recommendation, and therefore the applicant must be able to appeal the decision of the public body under section 60. The additional language "of the public body under section 50" makes it clear to applicants which decision must be the focus of their appeal.
50(2) Where the head of the public body does not follow the recommendation of the commissioner, the head of the public body shall, in writing, inform the persons who were sent a copy of the report of the right to appeal the decision to the Trial Division under section 60 and of the time limit for an appeal.	50(2) **Whether or not the head of the public body follows the recommendations of the commissioner**, the head of the public body shall, in writing, inform the persons who were sent a copy of the report of the right to appeal the decision to the Trial Division under section 60 and of the time limit for an appeal.	As with the above comment, this change reflects the reality that applicants can file an appeal under section 60 regardless of whether or not the public body follows the recommendations of the Commissioner. It sometimes occurs that the Commissioner issues a recommendation which is then followed by the public body, but still may not result in the desired outcome of the applicant. Therefore the applicant must be able to appeal, and the language of the *ATIPPA* must be unambiguous on this point.
60(5) A copy of the notice of appeal shall be served by the appellant on the minister responsible for this Act.	60(5) A copy of the notice of appeal shall be served by the appellant **on the commissioner and the minister** responsible for this Act.	This would create agreement with section 61(2). The Commissioner has the power to intervene as a party to an appeal, which is an important provision, but there is no corresponding requirement in the *ATIPPA* that he be informed of such appeals.

Current Language	Proposed Language	Reasons for Alterations
Designation of head by local public body 66 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.	**Designation of head by local public body** 66 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 of this designation**.	This inclusion would allow for better practical application and operation of the legislation. This information could be maintained by the Department of Justice ATIPP Office, and accessed by the public or the Commissioner as required.