



ABOVE BOARD

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New Guidance Issued

The Office of the Information and Privacy Commissioner (OIPC) has released new guidance titled "[Assessing Privacy-Impactful Initiatives During Public Health Emergencies](#)".

This guidance combines a number of resources developed during the COVID-19 public health emergency, with updates to reflect learnings for any future public health emergencies. With this updated document, OIPC is removing three resources from our website:

- COVID-19 FAQ;
- Public Bodies Collecting Proof of Vaccination from Employees; and
- A Framework for the Government of Newfoundland and Labrador to Assess Privacy-Impactful Initiatives in Response to COVID-19.

If you have feedback on our guidance, or suggestions on topics you would like to see guidance on, please contact us at commissioner@oipc.nl.ca or 709-729-6309.

Spotlight On Section 41(c)

ATIPPA, 2015 contains many sections that public bodies may rarely, if ever, use and are thus not as familiar with. One such example is section 41(c), which addresses the disclosure of House of Assembly service and statutory office records:

41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information.

...

- (c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.

The **House of Assembly Accountability, Integrity and Administration Act** defines statutory office in section 2(r) as follows:

"statutory office" means the office and administrative staff directly serving the

- (i) Chief Electoral Officer,
- (ii) Commissioner for Legislative Standards,
- (iii) Child and Youth Advocate,
- (iv) Information and Privacy Commissioner,
- (v) Citizens' Representative,
- (v.1) Seniors' Advocate, and
- (vi) other offices of the House of Assembly, with the exception of the office of the Auditor General, that may be established under an Act;

Section 41(c) is a mandatory, record-level exception to access regarding records connected with the investigatory function of a statutory office. It does not allow for the exercise of discretion to release such records, nor is there any provision within ATIPPA, 2015 to override its application. It is designed to protect the integrity and confidentiality of a statutory office's investigatory functions, and it is intentionally broad, requiring a public body to withhold records in their entirety. It is notable that the exception is intended to protect not only records relating to an investigation, but rather, records connected with the investigatory *function* of a statutory office.

When it was first recommended by former Chief Justice Derek Green in the Green Report that statutory offices be made public bodies subject to ATIPPA, the rationale was described as ensuring transparency for "... general financial and other information about the operation of the offices themselves and the expenses of the heads of the offices and the staff ...".¹

The investigatory functions of the statutory offices are generally established in legislation, such as the **Elections Act; House of Assembly Act; Child and Youth Advocate Act; Access to Information and Protection of Privacy Act, 2015** and **Personal Health Information Act; Citizen's Representative Act; and Seniors Advocate Act**.

OIPC has examined section 41(c) in several past reports (for example, [A-2022-026](#) and [A-2018-008](#)), the most recent of which was [Report A-2023-028](#); the latter report quotes paragraph 40 from Report A-2018-008:

The Complainant also argued that none of the documents excepted or redacted under section 41 actually pertain to the investigative functions of the statutory office, as it is his opinion that the responsive records pertain only to the initiation, preparation and internal approval of the applications to disregard his access requests. This argument fails to recognize that the records withheld under section 41 were the applications themselves, records submitted to our Office in support of the

¹ <https://www.gov.nl.ca/publicat/greenreport/mainreport/mainreport.pdf> P. 5-20.

applications to disregard, or correspondence to and from our Office about the applications, which were an integral part of our investigation.

The Reports note that Section 41(c) not only applies to records that are created over the course of a formal investigation by a statutory office, but also applies to records relating to that investigatory function. As such, records created prior to the launch of an official investigation, or in the course of determining if an investigation is necessary, still relate to the Office's investigatory function and therefore are required to be withheld.

Personal Emails of Former Staff Under the Custody or Control of a Public Body

In April 2025, the Information and Privacy Commissioner of Ontario issued [Interim Order PO-4639-I](#). This interim order was one of two orders being issued together involving similar appeals, both of which involved the Ministry of Municipal Affairs and Housing's control over personal emails in the possession of a former employee. An access request was made for the personal emails of the former minister's Chief of Staff containing the word "Greenbelt":

This is a request for all emails sent to or from [the former minister's Chief of Staff] personal email address containing the word "Greenbelt" in either the subject or body of the email. [In] her Special Report on Changes to the Greenbelt, Ontario's Auditor General observed that "political staff received emails form [sic] lobbyists and other external parties on their personal email accounts" and that "government emails were forwarded by political staff from their government accounts to their personal email accounts." As the auditor general points out, "Any communication between lobbyists and political staff about government business is still subject to [the [Act](#)] and is not excluded from this act even if the communication occurred on a personal email account." Time period: from July 1, 2022 to November 4, 2022.

The ministry provided some emails, but the applicant believed that additional records ought to exist and appealed; the ministry took the position that any additional records were not within its custody or control.

The order used a two-part test to determine if an institution has control of records that are not in its physical possession; this test was adopted by the Supreme Court of Canada in [Canada \(Information Commissioner\) v. Canada \(Minister of National Defence\)](#), 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

1. Do the contents of the record relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

The Order identifies additional factors that may be relevant in paragraph 19, including the reasons why the individual has physical possession of the record and not the institution; the circumstances around the creation, use and retention of the record and ownership of the record; any arrangement giving an institution an express or implied right to possession or control of the record; customary practices of the individual who created the record and others in similar circumstances; whether the individual who created the record has refused to provide the institution with a copy; and whether a finding that a record is outside the institution's control would undermine the purposes of the Act.

The report concluded that any responsive records sent to or from the affected party's personal email containing the word "Greenbelt" were in the ministry's custody or control. The adjudicator ordered the ministry to assert its control of the records by directing the former employee to identify and provide any responsive records to the ministry.

At paragraph 46 it explains:

To be clear, I draw a distinction between any emails responsive to the appellant's request and records of the affected party's private email communications. Previous orders of the IPC have found emails not to be within an institution's custody or control where they are private communications unrelated to government business or dealing with matters unrelated to institution matters, its mandate, functions or business. In this appeal, any emails responsive to the appellant's request, containing the word "Greenbelt", would have to be related to ministry business. There is no reasonable basis for finding that they would be private communications.

The full order is available online at [PO-4639-I - Information and Privacy Commissioner of Ontario](#).

Ransomware is a Breach

Newfoundland and Labrador's ATIPPA, 2015 discusses breaches in section 64, establishing that a breach occurs when personal information is stolen; lost; disposed of (except as permitted by law); or disclosed to or accessed by an unauthorized person. It is an unauthorized collection, use, or disclosure of personal information. But what happens when a ransomware attack encrypts information, with no evidence of exfiltration?

A recent report out of Ontario has broadened the definition of "use" to include ransomware attacks. In [Privacy Complaint MR21-00090](#), the Sault Ste. Marie Police Services (the police) had their network servers infected with ransomware, which encrypted the records of personal information stored on data drives on the servers. These records included: "human resources, finance services, public complaints, freedom of information requests, the criminal record check database, taxi/limo administration, the warrant shared database, closed-circuit television footage, audio from the police's communication system and the police's intranet".

While the police took steps to contain, investigate, remediate, and inform local residents about the ransomware attack, they did not consider it a privacy breach, as their investigation determined that the information was encrypted in place and was neither obtained nor exfiltrated by the threat actor.

The Ontario IPC Investigator's decision that this was a breach centered around the authority to use personal information; section 66 of our ATIPPA, 2015 reflects similar language. Any use outside these circumstances would be considered unauthorized. The report discusses the definition of "use", considering court cases, dictionaries, and various pieces of legislation before deciding to use a broad definition that includes "view, handle or otherwise deal with the information". The Investigator determined that, "...transforming the accessibility of the information was a kind of "handling" of or "dealing with" that information by the threat actor and, therefore, a use...".

ATIPPA, 2015 Privacy Breach Statistics April 1 - June 30, 2025

During the second quarter of 2025 (April 1 – June 30, 2025), OIPC received 33 privacy breach reports from 17 public bodies under ATIPPA, 2015. This is a decrease from the 55 breaches reported during the previous quarter. The numbers indicate that email breaches continue to make up a very significant portion of the overall privacy breaches reported. It should be noted that Premier John Hogan announced changes to department portfolios on May 9, 2025; breaches reported prior to the announcement reflect Department names of the time, while those reported after May 9, 2025, reflect the new structure.

Summary by Public Body

College of the North Atlantic	2
Department of Children, Seniors and Social Development	2
Department of Digital Government and Service NL	1
Department of Education	6
Department of Education and Early Childhood Development	1
Department of Families and Affordability	2
Department of Government Modernization and Service Delivery	1
Department of Justice and Public Safety	1
Human Rights Commission	1
Legal Aid NL	2
Memorial University	3
Newfoundland and Labrador Housing Corporation	3
NL Hydro	2
Public Service Commission	1
Royal Newfoundland Constabulary	3
Town of Conception Bay South	1
Workplace NL	1

