June 26, 2007

# NEWFOUNDLAND AND LABRADOR

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

## **REPORT 2007-007**

# **Town of Portugal Cove – St. Philip's**

**Summary:** 

The Applicant applied to the Town of Portugal Cove – St. Philip's (the "Town") under the Access to Information and Protection of Privacy Act (the "ATIPPA") for access to disclosure statements filed by Councillors and staff in accordance with the *Municipalities Act*, 1999. Approximately one week after filing his request, the Applicant's application fee was refunded by the Town. Four days later the Applicant was informed by the Town that his request was being processed as a "routine request." At that time, the Town did not seek written confirmation from the Applicant nor did the Town inform the Applicant that he was being denied access to the record. Approximately three weeks later the Town informed the Applicant that the record was dealt with at a privileged meeting of Council. The Applicant filed a Request for Review with this Office, but the Town claimed he did not have the right to do so as his request was processed as routine. The Commissioner did not agree with the Town in this regard and accepted the Applicant's Request for Review. The Town then provided an appropriate response to the Applicant, denying him access in accordance with sections 30(1) and 19(1)(c) of the ATIPPA. The Commissioner determined that the Town had failed to fulfil its duty to assist and issued recommendations in this regard. With respect to the record, the Commissioner determined that the information is personal information and was appropriately withheld in accordance with section 30(1). Accordingly, the Commissioner did not consider the application of section 19(1)(c).

**Statutes Cited:** 

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as am, ss. 2(o), 3(1), 5(2), 9, 11, 12, 19(1)(c), 30(1) and (2), 43(1), 49(1) and (2), 50, 60; Municipalities Act, 1999, S.N.L. 1999, c. M-24, as am, ss. 210, 213, 215(1).

**Authorities Cited:** Newfoundland and Labrador OIPC Report 2005-005; Alberta Order F2005-020.

## **Other Resources Cited:**

Access to Information and Protection of Privacy Act Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at <a href="http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf">http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf</a>; Concise Oxford English Dictionary, 10<sup>th</sup> Edition, Revised, New York: Oxford University Press (2002).

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#### I BACKGROUND

- [1] On 13 April 2007, the Applicant submitted an access to information request to the Town of Portugal Cove St. Philip's (the "Town") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to the disclosure statements of elected officials and staff. Specifically, the Applicant was seeking access to the 2006 and 2007 disclosure statements filed by the Mayor, Deputy Mayor and Councillors, as well as disclosure statements filed by the Town Clerk, Town Manager and all department heads for the past five years.
- On 20 April 2007 the Town refunded the Applicant's application fee. On 24 April 2007 the Town verbally informed the Applicant that his request would be treated as a routine request and it was not necessary to proceed with an *ATIPPA* request. On 15 May 2007 the Town advised the Applicant that in accordance with the *Municipalities Act, 1999* all disclosure statements are retained by the Clerk and are reviewed by Council at a privileged meeting. On 17 May 2007 the Applicant filed a Request for Review with this Office asking me to review the decision of the Town in relation to his request and to address the alleged failure of the Town to fulfil its duty to assist. In correspondence dated 17 May 2007, this Office forwarded a copy of the Applicant's Request for Review to the Town and asked that they provide the appropriate documentation to this Office, as per section 52 of the *ATIPPA*. In response, an official with the Town sent an email to this Office on 23 May 2007, indicating that the matter had been dealt with "as a routine item" and should be concluded.
- This Office did not accept that this matter had been concluded and in correspondence dated 28 May 2007 we informed the Town that the Applicant's request was legitimate and asked that the Town respond accordingly to our letter of 17 May 2007. In addition, this Office asked that the Town provide the Applicant with an appropriate response in accordance with section 12 of the *ATIPPA*. A copy of the responsive record was received at this Office on 30 May 2007. In correspondence dated 29 May 2007 the Town replied to the Applicant, stating in part:

Please be advised that access to these records has been refused in accordance with the following exceptions to disclosure, as specified in the Access to information and Protection of Privacy Act (the Act):

*In accordance with Section 30(1) of the Act which states:* 

The head of a local public body shall refuse to disclose personal information to an applicant.

Under this mandatory Section of the Act you are denied access to the disclosure statements as they contain personal information about councilors and staff, including financial information, and as such, this information cannot be released.

Also, in accordance with Section 19(1)c. of the Act which states:

19(1) the head of a local public body may refuse to disclose to an applicant information that would reveal (c.) the substance of deliberations of a meeting of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

Under this section you are denied access to the disclosure statements as this information is dealt with in a privileged meeting and as such cannot be released.

[4] In correspondence dated 5 June 2007 the Applicant and the Town were each given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. The Town provided a submission. The Applicant did not provide a submission.

#### II PUBLIC BODY'S SUBMISSION

- [5] The Town provided a brief submission in support of its decision to deny access. Both exceptions relied upon by the Town were claimed with respect to all of the responsive record. With respect to section 30(1), the Town refers to the mandatory nature of the exception and claims that the disclosure statements contain the personal information of Councillors and staff, including financial information, and therefore cannot be released.
- [6] With respect to section 19(1)(c), the Town argues that disclosure statements are "...dealt with in a **privileged** meeting and as such cannot be released" (emphasis in original).

[7] The Town also noted that prior to 2005, disclosure statements were replaced annually and are no longer available. In addition, the Town indicated that no disclosure statements were obtained in 2006. The responsive record, therefore, consisted of the 2007 disclosure statements for Councillors and the 2005 and 2007 disclosure statements for the Town Clerk, Town Manager and department heads. The record also contained one disclosure statement for 2006 that had been filed in 2007.

#### III DISCUSSION

- [8] As indicated in the Background section of this Report, the Applicant is alleging that the Town failed to honour its duty to assist. This duty is mandated by section 9 of the *ATIPPA*:
  - 9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.
- [9] The *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice (the "Manual") provides a useful summary of section 9. At section 3.3 the Manual states in part that

The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.

(Emphasis added)

[10] In considering the duty to assist, I am guided by the clear language of the *ATIPPA* and the corresponding language of the Manual. I am also guided by a number of Orders of the Office of the Information and Privacy Commissioner of Alberta. In his Order F2005-020 the Alberta Commissioner summarized as follows:

- [para 16] Interim Order 97-015 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is "reasonable". In Order 98-002, Commissioner Clark adopted the definition of "reasonable" found in Blacks' Law Dictionary (St. Paul, Minnesota, West Corp., 1999) as "fair, proper, just, moderate, suitable under the circumstances. Fit and Appropriate to the end in view."
- In this regard, it is important to discuss the Town's decision to treat the Applicant's access to information request as a "routine" matter. The Applicant initially filed his request in accordance with the *ATIPPA*, using the appropriate form and submitting the appropriate application fee. Approximately one week later the Town refunded his application fee without any notice to the Applicant. The Applicant was notified of this four days later when he visited the Town to submit another access to information request. He was informed that both his new request and his previous request would be dealt with as routine requests and, as such, it was not necessary to proceed by way of the *ATIPPA*. According to the Town, the Applicant agreed and accepted the refund of his application fee. I note, however, that the Applicant was not informed at that time that access to the record was being denied. In an e-mail dated 15 May 2007 the Town informed the Applicant that disclosure statements are "...retained by the Clerk and are all reviewed by Council at a privileged meeting, of Council" (emphasis in original). While there was no express indication in this e-mail that access was being denied, the implication was that the Applicant was not entitled to information reviewed at a privileged meeting.
- [12] This series of events raises a number of concerns. The Town's decision to treat this particular request as routine was done in the context of denying him access to the record. In this regard, I would again refer to the Manual. At section 1.1.2 the Manual states that

Many requests are for records containing information which may be handled outside the scope of the Act. This is called "routine disclosure" of information. Examples include information that is already publicly available or may be purchased. For records that may be routinely disclosed, there is no need for the applicant to make a formal ATIPP request (see section 1.5 of this Chapter).

Section 1.5 of the Manual refers specifically to section 5(2) of the ATIPPA, and in so doing states in part that

The Act will not replace existing procedures for providing the public with access to records or information. The underlying principles of the legislation encourage routine disclosure wherever possible.

• 5(2)(a) Records normally available to the public

Public bodies have always provided public access to certain information and records in their custody. The Act does not replace existing procedures for gaining access to information or records which are normally available to the public, nor does it affect any fees that may be charged for such access.

Not all requests for information or records need to be made under the Act. See Routine Disclosure earlier in this Chapter in 1.1.2. The Act should not be applied to preclude or reduce access to information which is available by custom or practice. However, public bodies should review their routine channels for releasing information to ensure that personal information, Cabinet confidences and information that may be harmful to the business interests of a third party is protected.

- [13] The language in the Manual and in the *ATIPPA* clearly anticipates that certain access to information requests may be treated as routine requests. However, it is equally clear that such routine requests involve the routine *disclosure* of information. In this case, the Town was fully aware that the information being requested was being withheld in its entirety. In situations where public bodies decide not to release information in response to a formal request, the applicant has a fundamental right to request an independent review of that decision by the Information and Privacy Commissioner. This right is clearly set out in section 3(1) of the *ATIPPA*:
  - 3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
    - (a) giving the public a right of access to records;
    - (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;
    - (c) specifying limited exceptions to the right of access;

- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
- (e) providing for an independent review of decisions made by public bodies under this Act.
- [14] While I acknowledge that the Applicant agreed to his request being processed on a routine basis and he accepted the refund of his application fee, I believe he did so without a clear understanding of the circumstances and the repercussions of his agreement. It is evident from our investigation that at the time, it was not explained to him that access to the record was being denied nor was he informed that such action could essentially void his *ATIPPA* request and remove his right to file a Request for Review with this Office. I also note that the Town did not request or receive any written confirmation from the Applicant agreeing to withdraw his request and accepting that he was not entitled to have access to the record. I believe it is reasonable for the Applicant to have assumed that by treating his request as routine, the Town intended to provide access to the record.
- [15] With respect to written verification, I again refer to the Manual. At section 3.6 the Manual states in part that even in situations where a public body is providing information through routine channels there is an obligation on the public body to immediately notify the applicant and to seek confirmation that the access to information request is being withdrawn:

If the information is available through routine channels, the Coordinator should notify the applicant immediately and advise him or her of the normal process. In most cases, the public body will simply provide the information or direct the applicant to the appropriate office where the information may be obtained. The Coordinator should ensure that the applicant understands what is required or who to contact for further information and should then confirm that the applicant wishes to withdraw the ATIPP application.

[16] At a minimum, I would expect this same level of notification, explanation and confirmation when denying an applicant access to the record. Failure to do so is a clear violation of a public body's statutory duty to assist an applicant in the manner mandated by section 9 of the *ATIPPA*. As such, I conclude that the Town in this circumstance failed to make a reasonable effort to assist the Applicant in an open, accurate and complete manner as required by the legislation. As

a result, the Applicant was prejudiced with respect to his right to seek a review of the Town's decision to withhold the responsive record from him. It is for this reason that I did not accept the Town's claim that the Applicant's request had been concluded when he was denied access to the information. As such, I consider the Applicant's request to be appropriate and his right to file a Request for Review to be properly exercised in accordance with section 43(1) of the *ATIPPA*:

- 43. (1) A person who makes a request under this Act for access to a record or for correction of personal information may ask the commissioner to review a decision, act or failure to act of the head of the public body that relates to the request.
- [17] Notwithstanding my comments thus far, I wish to emphasize that this Office fully supports and encourages the processing of requests for information through routine channels. It is important to note, however, that such action is normally associated with the routine *disclosure* of information. I also acknowledge that in certain situations an applicant may accept that they are not entitled to a requested record and may wish to withdraw their access to information request. In these situations, however, it is important for the public body to request and receive written confirmation of the applicant's decision. In the absence of such confirmation, the public body must respond appropriately, in accordance with section 12 of the *ATIPPA*:
  - 12. (1) In a response under section 11, the head of a public body shall inform the applicant
    - (a) whether access to the record or part of the record is granted or refused;
    - (b) if access to the record or part of the record is granted, where, when and how access will be given; and
    - (c) if access to the record or part of the record is refused,
      - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
      - (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

- (iii)that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.
- (2) Notwithstanding paragraph (1)(c), the head of a public body may in a response refuse to confirm or deny the existence of
  - (a) a record containing information described in section 22;
  - (b) a record containing personal information of a third party if disclosure of the existence of the information would disclose information the disclosure of which is prohibited under section 30; or
  - (c) a record that could threaten the health and safety of an individual.
- [18] I do note that after forwarding a letter to the Town specifying the position of this Office on this issue and raising the concerns outlined in this Report, the Town quickly and appropriately responded to the Applicant in accordance with section 12 and provided a copy of the responsive record to this Office. As such, I now turn to the record and in particular the exceptions claimed by the Town.
- [19] In denying access to the record the Town has cited sections 30(1) and 19(1)(c). I will begin with section 30(1). Section 30(1) of the *ATIPPA* is a mandatory exception that protects personal information. Section 30(2) sets out a number of scenarios where section 30(1) does not apply.
  - 30. (1) The head of a public body shall refuse to disclose personal information to an applicant.
    - (2) Subsection (1) does not apply where
    - (a) the applicant is the individual to whom the information relates;
    - (b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;
    - (c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;
    - (d) an Act or regulation of the province or Canada authorizes the disclosure;

- (e) the disclosure is for a research or statistical purpose and is in accordance with section 41;
- (f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;
- (g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;
- (h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;
- (i) public access to the information is provided under the Financial Administration Act;
- (j) the information is about expenses incurred by a third party while travelling at the expense of a public body;
- (k) the disclosure reveals details of a license, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or
- (1) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including
  - (i) personal information that is supplied in support of the application for the benefit, or
  - (ii) personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.

# [20] Personal information is defined in section 2(o):

#### 2. In this Act

- (o) "personal information" means recorded information about an identifiable individual, including
  - (i) the individual's name, address or telephone number,

- (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
- (iii) the individual's age, sex, sexual orientation, marital status or family status,
- (iv) an identifying number, symbol or other particular assigned to the individual,
- (v) the individual's fingerprints, blood type or inheritable characteristics.
- (vi) information about the individual's health care status or history, including a physical or mental disability,
- (vii) information about the individual's educational, financial, criminal or employment status or history,
- (viii) the opinions of a person about the individual, and
- (ix) the individual's personal views or opinions;
- [21] Given the mandatory nature of this exception there is no discretion on the part of a public body nor is there a harms test to be applied. I spoke to this point at paragraph 77 of my Report 2005-005:
  - [77] It is noted that [section 30(1)] of the ATIPPA does not include a harms test. Unlike some other jurisdictions, there is no test of reasonableness when dealing with the release of personal information. In the absence of any discretion, a public body simply has to determine if information meets the definition set out in section 2(0) and, if so, they must not release it....
- [22] The first step, therefore, is to determine whether the information contained in the responsive record is personal information as defined by the *ATIPPA*. The responsive record consists of a series of disclosure statements filed by Councillors and staff. These statements are required in accordance with section 210 of the *Municipalities Act*, 1999:
  - 210. (1) The councillors, clerk, manager, treasurer and department heads of a municipality, shall complete annually, a disclosure statement in a form which the council may establish setting out the interest of a councillor or an employee that may place him or her in a conflict of interest.

- (2) A disclosure statement completed under subsection (1) shall list
- (a) real property or an interest in real property within the municipality that is owned by the councillor or employee;
- (b) corporations in which the councillor or employee holds 10% or more shares;
- (c) partnerships and sole proprietorships in which the councillor or employee holds a 10% or more interest; and
- (d) businesses located within the municipality that are owned by the councillor or employee.
- (3) A disclosure statement required under subsection (1) shall be filed with the council by
  - (a) a councillor, not more than 60 days after taking office immediately after his or her election or appointment and not later than March 1 in each subsequent year; and
  - (b) the clerk, manager, treasurer and department heads, not more than 60 days after commencing employment with the council and not later than March 1 in each subsequent year.
- (4) Notwithstanding subsection (3), a change in the information contained in a disclosure statement filed under that subsection shall be reported to the council, in writing, by a councillor, clerk, manager, treasurer or department head not more than 60 days after that change occurs.
- (5) A disclosure statement filed under this section shall be retained by the clerk and reviewed at a privileged meeting of the council not more than 30 days after the date required for filing under subsections (3) and (4).
- [23] It is evident from section 210(2) of the *Municipalities Act, 1999* that a disclosure statement is intended to reveal certain financial information of identified individuals. The *Concise Oxford English Dictionary*, 10<sup>th</sup> Edition, defines "finances" as "the monetary resources and affairs of a state, organization, or person." Section 2(o)(vii) of the *ATIPPA* expressly includes an individual's financial history as personal information. Clearly, the responsive record by its very nature constitutes the personal information of identifiable individuals for the purposes of the *ATIPPA*.

- Having determined that the information in the responsive record is personal information, I must now look to the application of section 30(2). This provision establishes a number of situations where personal information cannot be withheld by a public body in accordance with section 30(1). In his original request to the Town, the Applicant made reference to section 210 of the *Municipalities Act*, 1999. While I acknowledge that section 30(2)(d) of the *ATIPPA* allows for the disclosure of personal information where such disclosure is authorized by an Act or regulation of the province or Canada, section 210 of the *Municipalities Act*, 1999 does not provide such authorization. In fact, section 210(5) requires disclosure statements to be reviewed at a privileged meeting of council. A privileged meeting is defined by section 213 of the *Municipalities Act*, 1999 to be a meeting held in the absence of the public:
  - 213. (1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.
  - (2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.
  - (3) A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.

Clearly, there is an expectation of confidentiality associated with the disclosure statements of Councillors and staff. I also note that section 215(1) of the *Municipalities Act*, 1999 lists a number of documents that must be made available for public inspection, but that list does not include disclosure statements as required by section 210.

[25] I also find that none of the other provisions of section 30(2) apply to the responsive record in this case. As such, I conclude that the Town has appropriately applied section 30(1) of the *ATIPPA* and has therefore appropriately denied access to the responsive record. Having so determined, it is not necessary for me to discuss the application of section 19(1)(c).

#### IV CONCLUSION

- When filing an access to information request in accordance with the *ATIPPA*, an applicant is exercising a fundamental right of access to records, subject only to specific and limited exceptions to that right. A crucial component of this right is the ability of an applicant to seek an independent review of decisions made by public bodies under this legislation. While the *ATIPPA* supports the routine processing of a request for information, it does so in the context of access. Where a public body intends to disclose information to an applicant it may do so outside of the formal *ATIPPA* process. In fact, this Office supports and encourages the routine disclosure of information as long as it does not conflict with any of the mandatory exceptions to access. In this case, however, the intent of the public body was to deny access. As such, the routine treatment of this request, *prima facie*, appears to have been an attempt to deny the Applicant an opportunity to seek a review of the Town's decision not to disclose the information to him.
- [27] In reviewing the events leading up to this Review, I noted several factors: the Applicant did not receive prior notice of the Town's decision to refund his application fee and treat his request as "routine;" he did not receive a thorough and complete explanation of the repercussions of this decision; he was not informed that access to the record was denied until some 25 days after his application fee was refunded; and he was not asked to provide written confirmation that he was withdrawing his *ATIPPA* request. Based on the manner in which the Town responded to the Applicant's original request I have concluded that the Town failed to fulfil its duty to assist the Applicant in this case, and I have made recommendations in this regard.
- [28] I do note, however, that once this Office raised our concerns with the Town, the Town was very cooperative and acted immediately to respond appropriately to the Applicant in accordance with section 12 of the *ATIPPA*, and to provide a copy of the responsive record to this Office. In this regard, I reviewed the record and concluded that a disclosure statement is clearly the personal information of an identifiable individual and, as such, the Town appropriately withheld the responsive record in accordance with section 30(1).

[29] Having found that the Town acted appropriately with respect to disclosure of the record, it is not necessary for me to make a recommendation in that regard. Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the Town to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60. The Applicant must file this appeal within 30 days after receiving a decision of the head of the Town as per paragraph 31 of this Report.

#### **V** RECOMMENDATIONS

- [30] I hereby issue the following recommendations under authority of Section 49(1) of the *ATIPPA*:
  - 1. That the Town make every reasonable effort to assist an applicant in making an access to information request and to respond without delay to an applicant, in an open, accurate and complete manner, as required by section 9 of the *ATIPPA*.
  - 2. That the Town not deny access to a record or part of a record outside of the *ATIPPA* process without first obtaining written confirmation from the applicant that he or she is withdrawing their access to information request and agreeing to have the request dealt with on a routine basis. In the absence of such confirmation, the Town must respond to the applicant in accordance with sections 11 and 12 of the *ATIPPA*.
  - 3. When deciding to deny access to a record or part of a record outside of the *ATIPPA* process, as described in recommendation number 2, the Town must provide a complete and accurate explanation to the applicant, including an indication that the response is being given outside the scope of the *ATIPPA* and that the applicant will not have the ability to seek a review of the Town's decision by the Office of the Information and Privacy Commissioner.

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[31] Under authority of section 50 of the ATIPPA, I direct the head of the Town of Portugal Cove

- St. Philip's to write to this Office and to the Applicant within 15 days after receiving this

Report to indicate the Town's final decision with respect to this Report.

[32] Please note that within 30 days of receiving a decision of the Town under section 50, the

Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial

Division in accordance with section 60 of the ATIPPA.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26<sup>th</sup> day of June,

2007.

Philip Wall

Information and Privacy Commissioner

Newfoundland and Labrador