Access to Information

Policy and Procedures Manual

October 2024

The Policy and Procedures Manual is designed to assist public bodies in the province of Newfoundland and Labrador in managing requests made pursuant to the *Access to Information and Protection of Privacy Act, 2015 ("the Act").*

This is the 3rd edition of the Access to Information: Policy and Procedures Manual, originally developed in 2005. It has been updated and revised to reflect the new *Access to Information and Protection of Privacy Act, 2015* that received Royal Assent on June 1, 2015.

Readers will sometimes see references to ATIPP, ATIPP application, ATIPP file, etc. This acronym represents the *Access to Information and Protection of Privacy Act*. The following conventions have been used throughout the Manual:

- Access to Information requests will be referred to as ATIPP requests
- The Office of the Information and Privacy Commissioner will be referred to as the OIPC
- When referring to the legislation, the following terms are used:

  1, 2, 3, ... - section
  (1), (2), (3), ... - subsection
  (a), (b), (c), ... - paragraph
  (i), (ii), (iii), ... - clause

We wish to acknowledge the governments of Manitoba, Alberta, Ontario and British Columbia and the offices that coordinate administration of their respective access and privacy legislation. Their procedure manuals were an invaluable guide in developing this Policy and Procedures Manual for Newfoundland and Labrador public bodies.

This manual will be updated periodically. Please check the website regularly for updated versions.

ATIPP Office
Executive Council
Updated October, 2024

PREFACE

In the past year, the Government of Newfoundland and Labrador has reaffirmed its commitment to accountability and transparency through administration of the Act, and introduced new legislation that will result in Newfoundland and Labrador becoming a leader in access and privacy in Canada and internationally.

To prepare for these changes, the Provincial Government, in collaboration with the Office of the Information and Privacy Commissioner, delivered province-wide training for public body ATIPP coordinators, municipalities and government employees; and also updated training materials, including the access and privacy policy manuals.

As the Minister responsible for the oversight of this Act, I wanted to make sure that we uphold our mandate to assist all public bodies across the province by creating a manual that provides comprehensive guidance to ATIPP Coordinators and others interested in learning more about *Access to Information and Protection of Privacy Act, 2015*.

I would like to extend thanks to our ATIPP Coordinators and all other public body officials throughout Newfoundland and Labrador for their continued support, dedication, and hard work on all matters related to the administration of the Act.

Hon. Steve Kent
Minister Responsible for the Office of Public Engagement
June 2015

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CHAPTER 1: INTRODUCTION

1.1 Background

1.1.1 Principles of Access and Privacy Legislation

Access and privacy legislation is based on two fundamental rights of people in contemporary democratic society:

- the right to access information held by governments and other public bodies, including information about oneself, subject only to certain specified exceptions; and

- the right to privacy for personal information collected, used and disclosed by public bodies.

The right to access information is based on the principles of accountability of governments and other public institutions to citizens, as well as the desirability of having better informed members of society. The exceptions to access derive from recognition that certain types of decision-making and transactions must be conducted in confidence. The practice of severing (i.e. removing) information that falls within an exception to disclosure from a copy of a document to be released provides a means of disclosing as much information as possible while maintaining necessary confidentiality.

The right to privacy for personal information is based on privacy protection measures which are also referred to as fair information practices. The *Act's* privacy provisions control the manner in which a public body may collect, use and disclose personal information of individuals. They also control the manner in which personal information is retained, disposed of, kept accurate and kept secure. An individual has a right of access to his/her own personal information, subject to limited and specific exceptions set out in the *Act*. Additionally, an individual has a right to request corrections to personal information about themselves that is held by a public body.

1.1.2 Newfoundland and Labrador's Access to Information and Protection of Privacy Act

Newfoundland and Labrador enacted freedom of information legislation in 1981, the third jurisdiction of Canada to do so. The *Freedom of Information Act* provided for access to records held by the Government of Newfoundland and Labrador and specified Crown agencies, with the Office of the Parliamentary Commissioner (Ombudsman) and the Supreme Court, Trial Division serving as the review and final decision-making mechanisms. However, the Office of the Parliamentary Commissioner was discontinued in 1991 which resulted in the Trial Division being the only avenue of recourse for complaints. The *Freedom of Information Act* did not contain protection of privacy provisions and the right to access

information did not extend to local public bodies and many Crown agencies and corporations in the province.

In line with the Government of Newfoundland and Labrador's commitment towards more open, transparent and accountable public policy, in December 2000, the Minister of Justice announced the creation of the Freedom of Information Review Committee. This committee was tasked with reviewing the existing *Freedom of Information Act* and making recommendations to modernize the legislation and to create consistency with other Canadian jurisdictions. In July 2001, after an extensive review and consultation process, the Committee submitted its report, *Striking the Balance* (copies of which may be obtained from The Queen's Printer or through the ATIPP website at http://www.atipp.gov.nl.ca/), recommending that the current act be repealed and a new legislative regime enacted.

In response, Bill 49, implementing the Committee's report, was presented to the House of Assembly during the fall of 2001 and the *Access to Information and Protection of Privacy Act* received Royal Assent on March 14, 2002. The *Act* (excluding Part IV, Protection of Privacy) was proclaimed in January 2005. The privacy provisions were proclaimed in January 2008. In March 2010, a Review Commissioner was appointed to conduct the first comprehensive review of the *Act*, pursuant to section 74, and in January 2011, the Review Commissioner's report was provided to the Minister of Justice. Following the review, Bill 29 was presented to the House of Assembly during the spring of 2012 and the amended *Act* was proclaimed on June 27, 2012.

On March 18, 2014, a Review Committee was appointed to conduct the second statutory review of the *Access to Information and Protection of Privacy Act*. This Review Committee was chaired by Mr. Clyde Wells, Q.C. (former Chief Justice of Newfoundland and Labrador and former Premier), and included Ms. Jennifer Stoddart (former Privacy Commissioner of Canada) and Mr. Doug Letto (communications professional, writer, and journalist with over 30 years of experience). This Review Committee was tasked with completing an independent, comprehensive review of the legislation, including amendments made as a result of Bill 29, and providing recommendations arising from this review to the Minister Responsible for the Office of Public Engagement. The Review Committee presented its two volume report to the Minister on March 2, 2015 (copies of which may be obtained from The Queen's Printer or through the ATIPP website at http://www.atipp.gov.nl.ca/). This report contained 90 recommendations, as well as a draft bill. The Provincial Government committed to implementing all of the Review Committee's recommendations, and the *Access to Information and Protection of Privacy Act, 2015* was introduced into the House of Assembly as Bill 1 on April 21, 2015. The new legislation repealed the previous Act, and came into force on June 1, 2015, with the exception of subparagraph 2(x)(vi) (definition of "public body") which came into force on August 1, 2015.

1.2 Purposes

The purpose of the *Act* is set out in section 3. The legislation is intended to facilitate democracy through:

- ensuring that citizens have the information required to participate meaningfully in the democratic process;
- increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and
- protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

This purpose is achieved by:

- giving the public a right of access to public body records;
- giving individuals a right to access their own personal information, as well as the right to request the correction of their personal information;
- specifying limited exceptions to the rights of access and correction that are necessary to
    - preserve the ability of government to function efficiently as a cabinet government in a parliamentary democracy;
    - accommodate established and accepted rights and privileges of others; and
    - protect from harm the confidential proprietary and other rights of third parties;
- providing that some discretionary exceptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception;
- preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
- providing for an oversight agency that
    - is an advocate for access to information and protection of privacy;
    - facilitates timely and user friendly application of the *Act*;

- provides independent review of decisions made by public bodies under the Act;
- provides independent investigation of privacy complaints;
- makes recommendations to government and to public bodies as to actions they might take to better achieve the objectives of the *Act*; and
- educates the public and public bodies on all aspects of the *Act*.

1.2.1 Answers to particular questions

It is important to remember that the *Act* is not meant to replace other procedures for accessing information or to limit access to information that is not personal information and is available to the public (subsection 3(3)).

Public bodies handle a large number of inquiries from individuals seeking an answer to a specific question rather than asking for access to records. Sometimes, a person will combine a question with a request for records. Whenever possible, public bodies should deal with these questions without a formal ATIPP request through the appropriate public body.

If it becomes clear that the request involves records that cannot be routinely disclosed, such as personal information about a third party, the person making the request should be referred to the ATIPP Coordinator within the appropriate public body who can advise the applicant to make an ATIPP request under the Act.

In circumstances where an individual has made a formal ATIPP request where they are asking a question rather than asking for records, the ATIPP Coordinator, as part of their duty to assist, should contact the applicant and advise them that their question can be handled informally without the need for an ATIPP request, or assist them in reformulating their request to capture responsive records.

1.3 Public Bodies

The *ATIPP Act* applies to ***public bodies*** within the Province of Newfoundland and Labrador. ***Public body*** is defined in paragraph 2(x) of the *Act* as:

- a department created under the *Executive Council Act*, or a branch of the executive government of the province;
- a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown;

- a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister;

- a local public body, which means (1) an educational body; (2) a health care body; and (3) a local government body (i.e. municipalities). For a more detailed definition please refer to section 2 of the Act;

- the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*;

- a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility; and

- a body designated for this purpose in the regulations made under section 116.

1.3.1 Bodies that do not Fall under the Act

The following offices or public bodies do not fall under the scope of this *Act*:

- the constituency office of a member of the House of Assembly wherever located;

- the Trial Division, the Court of Appeal or the Provincial Court; or

- a body listed in Schedule B of the Act.

1.4 Records

Subsection 5(1) generally provides that the *Act* applies to "all records in the custody of or under the control of a public body", with the exception of certain listed records.

Under paragraph 2(y) of the *Act* a ***record*** is defined as "a record of information in any form, and includes a dataset, information that is machine-readable, written, photographed, recorded or stored in any manner." A record does not include a computer program or mechanism that produced records on any storage medium.

"Dataset" is defined in paragraph 2(g) as information which comprises a collection of information held in electronic form where all or most of the information:

- has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or carrying out another function of the public body;

- is factual information which is not the product of analysis or interpretation (other than calculation) and to which s. 13 of the *Statistics Agency Act* does not apply; and

- remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded.

For the purposes of the *Act* a record includes any information that is in the custody and/or control of a public body. Examples of the type of information defined as a record are:

- a copy of a record, a draft and any other working materials, information recorded or stored by electronic means and information in any other form;

- all correspondence, reports and other documents and recorded information received by a public body from an outside organization or individual;

- records generated by any staff of a public body in the course of their duties, including handwritten notes;

- collections of data that are in tabular (data stored as columns or rows) or spatial (mapping and boundary files) format; and

- records created or obtained before or after the *Act* came into effect in 2005.

1.4.1 Custody or Control of a Record

For a record to fall under the *Act*, a public body must have either custody or control of the record. In order to determine if a public body has custody or control of a record, it is necessary to consider all aspects of the creation, maintenance and use of the record.

In most circumstances, the term ***custody*** means that a public body has physical possession of a record.

The term ***control*** means that a public body has the power or authority to make decisions concerning the use and disclosure of a record. This would include records that a public body has stored in an off-site records centre owned by another party – while the public body does not have custody of the records, they do have control. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control.

In determining whether a public body has control of a record, they should consider:

- *Does the record relate to a matter within the mandate of the public body?*
  If the answer is no, then the public body does not have control of the record (you should then consider whether you have 'custody' of the record).

- *Can the public body reasonably expect to obtain a copy of the record upon request?*
  Consider all relevant factors*:*
  - the substantive content of the record,
  - the circumstances in which it was created, and
  - the legal relationship between the holder of the record and the public body,

  If a senior official of the public body, based on all relevant factors, reasonably should be able to obtain a copy of the record, the record falls within the scope of the *Act*.[1]

Some other factors to consider in determining whether or not a record is in the custody or control of a public body include:

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
- Is the activity in question a "core", "central" or "basic" function of the institution?
- Does the content of the record relate to the institution's mandate and functions?
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the institution does have possession of the record, is it more than "bare possession"?
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
- Does the institution have a right to possession of the record?
- Does the institution have the authority to regulate the record's content, use and disposal?
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record?
- How closely is the record integrated with other records held by the institution?
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[2]

[1] Canada (Information Commissioner) v. Canada (Minister of National Defence), [2011] 2 S.C.R. 306.

It is important to note that not every factor listed above will be relevant in all circumstances, and that no one factor will be determinative.

1.4.2 Records Excluded from the Act

The *Act* does not apply to a limited number of records that fall under the custody and/or control of a public body. These records are listed in subsection 5(1) of the *Act*:

- **Court Records** (paragraph 5(1)(a))– records in court files; records of a judge of the Trial Division, Court of Appeal or Provincial Court; judicial administration records (records relating to a judge, master or justice of the peace); or records relating to support services provided to a judge;

- **Judicial or Quasi-judicial Records** (paragraph 5(1)(b))– a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;

  A person is acting in a quasi-judicial capacity if they are carrying out a function that is partially administrative and partially judicial, and is required to investigate facts or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions as a basis for official actions, and to exercise discretion of a judicial nature.

- **Personal or Constituency Records of a Member of the House of Assembly** (paragraph 5(1)(c));

- **Registered Political Party or Caucus Records** (paragraph 5(1)(d))– as defined in the *House of Assembly Accountability, Integrity and Administration Act*;

- **Personal or Constituency Records of a minister** (paragraph 5(1)(e));

- **Examination or Test Questions** (paragraph 5(1)(f)) – a record of a question that is to be used on an examination or test;

- **Teaching Material or Research Information of an Employee of a Post-Secondary Educational Institution** (paragraph 5(1)(g));

- **Records in the Custody of the Provincial Archives** (paragraph 5(1)(h)) – material placed in the custody of the Provincial Archives by or for a person, agency or organization other than a public body;

[2] *Sioux Lookout (Municipality) (Re), 2012* CanLII 44415 (ON IPC)

- **Public Body Archives Records** (paragraph 5(1)(i)) – material placed in the archives of a public body by or for a person, agency or other organization other than the public body;

- **Prosecution Records** (paragraph 5(1)(j)) – a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed. A prosecution is completed once the trial is finished, a decision has been made and all appeal periods have expired;

- **Investigation Records of the Royal Newfoundland Constabulary (RNC)** (paragraph 5(1)(k)) – records relating to an investigation by the RNC if all matters in respect of the investigation have not been completed;

- **Confidential Source of Information relating to RNC Investigation** (paragraph 5(1)(l)) – a record relating to an investigation by the RNC that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter; or

- **Investigation Records of the RNC where Suspicion of Guilt is Expressed/Prosecutorial Discretion** (paragraph 5(1)(m)) – a record relating to an investigation by the RNC in which a suspicion of guilt of an identified person is expressed by no charge was ever laid, or relating to prosecutorial consideration of that investigation.

While the *Act* generally does not apply to the records listed above, the Information and Privacy Commissioner **does** have the authority (under subsection 97(1)) to compel the production of and examine the following records to determine whether they fall within the commissioner's jurisdiction or are properly exempted from the application of the *Act*:

- Personal or constituency records of an MHA (paragraph 5(1)(c));
- Records of a registered political party or caucus (paragraph 5(1)(d));
- Personal or constituency records of a minister (paragraph 5(1)(e));
- Records of a question to be used on an examination or test (paragraph 5(1)(f));
- Records containing teaching materials or research information of an employee of a post-secondary institution (paragraph 5(1)(g));
- Material placed in the custody of the Provincial Archives by or for a person other than a public body (paragraph 5(1)(h)); and
- Material placed in the archives of a public body by or for a person other than the public body (paragraph 5(1)(i)).

The commissioner **does not** have the authority to compel the production of or examine the following records in subsection 5(1):

- Records in a court file, records of a judge of the Court of Appeal, Trial Division or Provincial Court, judicial administration records or records relating to support services provided to judges of those courts (paragraph 5(1)(a));

- Notes, communications or draft decisions of a person acting in a judicial or quasi-judicial capacity (paragraph 5(1)(b));
- Records relating to a prosecution if all proceedings in respect of the prosecution have not been completed (paragraph 5(1)(j));
- Records relating to an investigation by the RNC if all matters in respect of the investigation have not been completed (paragraph 5(1)(k));
- Records relating to an investigation by the RNC that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter (paragraph 5(1)(l)); and
- Records relating to an investigation by the RNC in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation (paragraph 5(1)(m)).

1.4.3 Procedures Not Affected by the Act

The *Act* does not replace existing procedures that public bodies have concerning access to records, and the administration of records. These procedures are listed in subsection 5(2):

- **Records Normally Available to the Public** – The *Act* is in addition to existing procedures for access to records or information normally available to the public including a requirement to pay fees. The *Act* should not be applied to preclude or reduce access to information which is available by custom or practice;

- **Transfer, Storage or Destruction of Records** – The *Act* does not prohibit the transfer, storage or destruction of records as long as it is done in accordance with an Act of the province or Canada, or a by-law or resolution of a local public body. It is an offence under paragraph 115(2)(d) of the *Act* to wilfully destroy a record or erase information in a record that is subject to the *Act* with the intent to evade an ATIPP request.

  For provincial government departments, agencies and commissions, any transfer, storage or destruction of records is governed by the *Management of Information Act*;

- **Information Otherwise Available to a Party in a Legal Proceeding** – The *Act* does not limit the information otherwise available by law to a party in a legal proceeding. Specifically, where a public body is required by the rules of court or the rules of quasi-judicial tribunal to produce records, the exceptions to access in the *Act* and the provisions restricting disclosure of personal information do not apply; and

- **Powers of a Court or Tribunal** – The *Act* does not affect the power of a court or tribunal to compel a witness to testify or to compel the production of documents. If a public body is required to produce records by a subpoena, search warrant or other order of production, the exceptions to access in the *Act* and the provisions restricting the disclosure of personal information do not apply.

1.4.4 Relationship to Personal Health Information Act

Section 6 of the *ATIPP Act* states that notwithstanding section 5, but except as provided in sections 92 to 94, this *Act* and the regulations shall not apply and the *Personal Health Information Act* and regulations under that Act apply where (1) a public body is a custodian, and (2) the information or record that is in the custody or control of the public body that is a custodian is personal health information.

Sections 92 to 94 of the *Act* deal with the Information and Privacy Commissioner and his/her staff, their functions and their oaths with respect to the protection of information received under both this *Act* and the *Personal Health Information Act*.

1.4.5 Conflict with Other Acts

Under subsection 7(1) of the *Act*, a general rule of priority is established – where there is a conflict between this *Act* and another Act or regulation, this *Act* or a regulation made under it will prevail. Notwithstanding this general rule, however, where access to a record is prohibited or restricted by, or the right to access to a record is provided in a provision designated in Schedule A of the *Act*, that provision shall prevail over the *Act* (s. 7(2)).

Provisions which are to prevail over the *Act* can no longer be set out through regulations made by the Lieutenant-Governor in Council, as was the case in the previous legislation. In order to prevail over the *Act*, other provisions must be identified in Schedule A, which can only be changed through an amendment to the *Act*, as passed by the House of Assembly. While the Lieutenant-Governor in Council may, by order, amend Schedule A while the House of Assembly is not in session, such an order does not continue in force beyond the end of the next sitting of the House (s. 7(3)).

1.5 Publication Schemes (section 111)

A **publication scheme** is an outline of the classes of information each public body will publish or intends to publish so it may be read easily by the public.[3]

Section 111 applies only to those public bodies that are listed in the regulations (subsection 111(6)).

Section 111(1) of the *Act* requires the commissioner to create a standard template for the publication of information by public bodies to assist the public in identifying and locating

[3] Report of the 2014 Statutory Review Committee at p. 323.

records in the custody or under the control of public bodies.

Where a public body is listed in the regulations as being required to comply with section 111, the head of the public body will be responsible for publishing its own information by adapting the standard template developed by the commissioner (subsection 111(2)).

The published information must include:

- a description of the mandate and functions of the public body and its components (paragraph 111(3)(a));

- a description and list of the records in the custody or under the control of the public body, including personal information banks (paragraph 111(3)(b));

- the name, title, business address and business telephone number of the head and ATIPP coordinator of the public body (paragraph 111(3)(c)); and

- a description of the manuals used by employees of the public body in administering or carrying out the programs and activities of the public body (paragraph 111(3)(d)).

Section 111(4) requires that additional information be published with respect to "personal information banks". A personal information bank is a collection of personal information that is organized or retrievable by the name of an individual or by an identifying number, symbol or other particular assigned to an individual. This means personal information contained in either paper or electronic file banks that relates to an individual and is organized and retrieved using a personal identifier (i.e. individual's name, employee number, social insurance number, etc.)

Not all collections of personal information will be considered to be personal information banks. The key to determining whether a group of files, which contain personal information, is a personal information bank is the way it is arranged or retrieved.

For example, collections of personal information that relate to an individual and are organized and retrievable by the person's last name or personal identifier are considered personal information banks. Collections of information that are organized and retrieved by an identifier that relates to a corporate body (e.g. a company name) or other search field are not listed as personal information banks, even if the collections contain personal information.

A personal information bank has three key components:

1. It contains personal information
   This includes personal information as defined in paragraph 2(u) which means recorded information about an identifiable individual.

2. **It takes the form of a collection**
   Collection means acquiring, receiving, obtaining, gathering or compiling personal information. The collection can include various forms such as paper, electronic, pictures, video or audio. This may include applications or registrations for benefits or services, client or customer files and databases, membership lists, mailing lists and contact databases, licensing applications and certificates, program participation information and investigations, inspections, or audits.

3. **It is organized or retrievable by the name or an identifying number, symbol or other particular assigned to an individual.**
   This means the information is organized or retrievable by name, MCP number, driver's license number, student identification number or some other unique identifier.

For each personal information bank maintained by a public body, subsection 111(4) requires that the following information be published:

- its name and location;
- a description of the kind of personal information and the categories of individuals whose personal information is included;
- the authority and purposes for collecting the personal information;
- the purposes for which the personal information is used or disclosed; and
- the categories of persons who use the personal information or to whom it is disclosed.

Where personal information is used or disclosed by a public body for a purpose that is not included in the information published under subsection 111(2), the head of the public body shall:

- keep a record of the purpose and either attach or link the record to the personal information; and
- update the published information to include that purpose.

Subsection 116(l) of the *Act* gives the Lieutenant-Governor in Council the authority to prescribe, by regulation, which public bodies are required to comply with all or part of section 111.

CHAPTER 2: ADMINISTRATION OF THE *ATIPP ACT*

The *ATIPP Act* establishes a uniform set of administrative requirements which must be undertaken by all public bodies in Newfoundland and Labrador.

2.1 Head of a Public Body

The *ATIPP Act* gives the head of the public body the responsibility for all decisions and actions of the public body under the *Act*.

Paragraph 2(j) defines the head of a public body as the following:

- **For a Department** – the minister who presides over it;
- **For a Corporation** – its chief executive officer;
- **For an Unincorporated Body** – the minister appointed under the *Executive Council Act* to administer the Act under which the body is established, or the minister who is otherwise responsible for the body;
- **House of Assembly** – the speaker;
- **Statutory Offices** – for the statutory offices as defined in the *House of Assembly Accountability, Integrity and Administration Act*, the applicable officer of each statutory office; or
- **Other Cases** – the person or group of people designated under section 109 or in the regulations as the head of the public body.

Local public bodies (i.e. educational, health care bodies, municipalities) must designate a person or a group of persons as the head of the local public body for the purpose of the Act through by-law, resolution or other instrument (subsection 109(1)). Once a head is designated, the local public body must advise the minister responsible for the Act of the designation.

Where an unincorporated entity is owned by or created for a local government body (i.e. municipality) or group of local government bodies, that local government body or group must designate a person or group of persons as the head of the entity through by-law, resolution or other instrument, and shall notify the minister responsible for the Act (subsection 109(2)).

2.2 Delegation of Authority by the Head of a Public Body

Subsection 110(2) of the *Act* gives the head of a public body the ability to officially delegate their responsibilities concerning the *Act* to another individual within the public body (for example, a Minister delegating their authority to a deputy minister). Where the head of a public body delegates their responsibilities under the *Act*, the delegation should be made in writing, and should clearly outline those responsibilities and functions which the delegate is to exercise, as well as any limitations on those responsibilities and functions.

It is not necessary for a minister to officially delegate their responsibilities to thier deputy minister because the deputy generally has the authority to act on behalf of the minister in accordance with the *Executive Council Act* and the *Interpretation Act*.

2.3 ATIPP Coordinator

Under section 110(1) of the *Act*, the head of each public body is required to designate an employee who is responsible for the day-to-day administration of the *Act.* This person is known as the ATIPP Coordinator, and is responsible for the management of requests made under the *Act*. They are the focal point of access to information and protection of privacy within the public body.

As stated by the 2014 Statutory Review Committee, "ATIPP Coordinators assure the efficiency and the credibility of the entire process on a day-to-day basis." The ATIPP Coordinator should be professionally trained and hold a senior position in the organization in order to command respect for their functions under the *Act.*

While the responsibilities of ATIPP Coordinators will vary somewhat depending on the degree of centralization of the access to information and protection of privacy functions within each organization, subsection 110(1) sets out the following list of duties:

- Receive and process requests made under the *Act*;
- Co-ordinate responses to requests for approval by the head of the public body;
- Communicate, on behalf of the public body, with applicants and third parties to requests throughout the process including the final response;
- Educate staff of the public body about the applicable provisions of the *Act*;
- Track requests made under the *Act* and the outcome of the requests;
- Prepare statistical reports on requests for the head of the public body; and

- Carry out other duties as may be assigned.

Other, more specific tasks may include:

- **Assisting Applicants and Potential Applicants** – this includes explaining the *Act,* helping them narrow the scope of their requests, directing them to other sources of information, etc.;

- **Collecting all Responsive Records** – This will involve contacting the appropriate people or units within the public body, informing them of the request, asking them to search for the records and send them to you, as well as answering any questions they may have concerning ATIPP requests;

- **Notifying the Applicant** – At several points throughout the ATIPP request it will be necessary to correspond with the applicant (e.g. acknowledging receipt of request, extending the time limit for a request, etc.);

- **Meeting Time Limits** – You must provide an advisory response to the applicant's request within 10 business days, and must respond to the request within 20 business days, for a longer period with OIPC approval;

- **Contacting Third Parties (if required);**

- **Collecting fees**;

- **Severing Records;**

- **Consulting with the appropriate individuals when necessary;**

- **Developing final response** – Once this is done provide a copy of the response and responsive records to the head of the public body (or his or her delegate) to review;

- **Corresponding with the Office of the Information and Privacy Commissioner (OIPC)** – When a complaint is made by an applicant or when a public body requests an extension of time limits, or request permission to disregard a request;

- **Training Administration** – This may include identifying the training needs of the staff of the public body; and

- **Preparing Statistical Reports** – For both the public body and the ATIPP Office.

The ATIPP Coordinator should have sole responsibility handling requests made under the *Act* within the public body. Coordinators may consult others within their public body, but only to receive advice on the interpretation or application of the *Act*, or to receive assistance in locating or obtaining the information needed to respond to a request.

ATIPP Coordinators should be the only person to communicate with an applicant on behalf of the public body, including the final response.

ATIPP Coordinators should be aware that subsection 12(1) of the *Act* requires that the name and type of applicant (e.g. media, political party, etc.) is disclosed only to the individual who receives the request on behalf of the public body, the Coordinator, the Coordinator's assistant, and where necessary, the Information and Privacy Commissioner. This limitation applies until the final response is sent to the applicant (subsection 12(4)). This provision is intended to ensure that the focus of the response is on the merit of the request, as opposed to the identity or type of requester, and that each request is handled in an impartial, fair and principled manner.

This anonymity requirement does not apply, however, in respect of requests for personal information about the applicant or where the name of the applicant is necessary to respond to the request (for example, where it is required to perform the necessary search for records) or the applicant has consented to disclosure. Even where the requirement for anonymity does not apply, the disclosure of an applicant's name must be limited to the extent necessary to respond to the request (subsection 12(3)).

For a detailed overview of how an ATIPP Coordinator processes an ATIPP request, see Appendix I of this manual – "Handling an ATIPP Request".

2.4 Minister Responsible for this *Act*

The Minister responsible for this *Act* is the member of Cabinet appointed under the *Executive Council Act*. The Minister of the Department of Justice and Public Safety, through the ATIPP Office (a division of the Department of Justice and Public Safety), has the responsibility for central administration and coordination of the legislation.

The Minister responsible for this *Act* is required, under section 113, to submit an annual report to the House of Assembly which statistically summarizes the activities of public bodies in both requests for access and the protection of privacy. The head of a public body (not the Minister responsible for this *Act*) is accountable for the handling of ATIPP requests and personal information by that public body.

2.5 Exercising Rights on Behalf of Another

Section 108 states that a right or power of an individual given in the *Act* may be exercised by other people in specific and limited circumstances.

2.5.1 Authorized Person (paragraph 108(a))

Paragraph 108(a) states that a right or power of an individual given in the *Act* may be exercised by a person with written authorization from the individual to act on the individual's behalf.

Where a person authorizes another person to act on their behalf, the authorization must be in writing, signed and should be dated. It should also clearly set out the extent of the authority being granted. In most instances, a signed proof of authority form (see ATIPP Office website at http://www.atipp.gov.nl.ca/forms/) can be used in lieu of written authorization.

2.5.2 A Court Appointed Guardian of a Mentally Disabled Person (paragraph 108(b))

Paragraph 108(b) states that a guardian who has been appointed by the courts can exercise of the rights of powers of a mentally disabled person as it relates to the powers and duties of the guardian.

2.5.3 An Attorney Acting under a Power of Attorney (paragraph 108(c))

Paragraph 108(c) states that a right or power of an individual may be exercised by an attorney acting under a power of attorney, where the exercise of the right or power relates to the powers and duties conferred by the power of attorney.

A ***power of attorney*** is an authority given to one person (called the attorney) to perform certain acts or functions in the name of, and personally representing the person granting the power. A public body should satisfy itself that the power of attorney authorizes the attorney to exercise the individual's rights and powers under the *Act*.

2.5.4 A Parent or Guardian of a Minor (paragraph 108(d))

Paragraph 108(d) states that a parent or guardian of a minor can exercise the rights or powers of that minor where, in the opinion of the head of the public body concerned, the exercise of the right of power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy.

A **minor** is a person under the age of 19 years, as set out in the *Age of Majority Act*.

2.5.5 A Deceased Individual's Personal Representative (paragraph 108(e))

Paragraph 108(e) states that where an individual is deceased, an individual's personal representative (an executor under a will or an administrator under Letters of Administration) can exercise rights or powers related to the administration of the individual's estate.

Generally, proof of the right to act should be provided to the public body prior to disclosing a deceased individual's personal information to their representative. The ***proof of the right to act*** is typically a copy of the signed and attested document naming the representative to act in matters related to the estate.

It is important to ensure that a person claiming authority to act on behalf of another person is legally entitled to do so, especially where personal information or privacy is involved. If there are any questions or doubts about the existence, or the extent of such authority, your departmental solicitor should be contacted.

2.6 Giving Notice under the *Act*

A variety of notices and documents are required to be given under the *Act.* For example:

- a fee estimate (subsection 26(1));
- a notice of extension of time for responding to an access request (subsection 23(6));
- a notice of transfer of an access request from one public body to another (subsection 14(1));
- notices to third parties (section 19);
- whether access to the record is granted or refused (section 17); and
- notices with respect to privacy breaches (subsection 64(3)).

Notices given to a person under the *Act* should be given by:

- **Prepaid mail** – to the last known address;
- **Personal service**;
- **Email or fax**; or
- **Another means** – if authorized by the person receiving the notice.

Except where an appeal to court is involved, the choice of how to give notice or send a document under the *Act* is usually determined by the public body and will depend on the circumstances. A public body should assess the circumstances and choose the most effective and economical means of giving notice or providing a document.

2.7 Liability

Under subsection 114(1) of the *Act,* a public body and the officials involved in the administration of the *Act* are protected from liability for damages for:

- disclosing or failing to disclose, in good faith, a record or part of a record or information under the *Act* or a consequence of that disclosure or failure to disclose; or

- failing to give a notice required by this *Act* where reasonable care is taken to ensure that notices are given.

Subsection 114(2) protects Members of the House of Assembly from liability for disclosing information obtained from a public body in accordance with paragraph 68(1)(k) where they act in good faith on behalf of an individual.

2.8 Offences

A person who wilfully (i.e. deliberately or intentionally) contravenes the *Act*, can be found guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or both. Section 115 lists offences that individuals can be found guilty of under the *Act*:

- Wilfully collecting, using or disclosing personal information contrary to the *Act* or regulations;

- Attempting to gain or gaining access to personal information contrary to the *Act* or regulations;

- Making false statements to, or misleading or attempting to mislead the Information and Privacy Commissioner or another person performing duties or exercising powers under this *Act*;

- Obstructing the Information and Privacy Commissioner or another person performing duties or exercising powers under this *Act*;

- Destroying records or erasing information in a record that is subject to the *Act*, or directing another person to do so, with the intent to evade a request for access to the records; or

- Altering, falsifying or concealing a record that is subject to the *Act*, or directing another person to do so, with the intent to evade a request for access to the records.

Prosecutions for offences under the *Act* must be commenced within two years of the date of the discovery of the offence. Note that the date of discovery of an offence is not necessarily the date on which the offence occurred. Public bodies must be mindful of their obligation to report all privacy breaches to the Information and Privacy Commissioner.

It is important to note that once an ATIPP request has been received by a public body, no record in the custody or control of the public body that is responsive to the request can be destroyed. This includes transitory records such as emails or handwritten notes and any other records that could be destroyed in accordance with the public body's records retention policy.

CHAPTER 3: ACCESS TO RECORDS

This chapter outlines the right of access to records, making an ATIPP request, the duty to assist applicants, time limits for responding to requests, fees, extensions of time and transferring a request, as set out in Part II, Division 1 of the *Act*. Appendices I-III of this manual should be used to assist in managing ATIPP requests.

3.1 Right of Access (section 8)

Under section 8, the *Act* establishes a right of access to a record, or part of a record, in the custody or under the control of a public body. However, certain types of information are excluded from this right of access.

The right of access under the *Act* is not restricted by residency or citizenship and applies to businesses and other organizations, as well as individuals.

For additional information on records excluded by the provisions of another Act, see section 1.4.5 of this manual, "Conflict with Other Acts."

3.1.1 Right of Access to a Record (subsection 8(1))

Subsection 8(1) states that a person who makes a request under section 11 of the *Act* has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

Custody, where the *Act* refers to a record in the custody of a public body, means physical possession of a record.

Control, where the *Act* refers to a record under the control of a public body, means the authority to manage the record, including restricting, regulating and administering its use, disclosure and disposition. See section 1.4.1 of this manual, "Custody or Control of a Record", for more information on records which may be in the "control" of a public body.

3.1.2 Exempted Records (subsection 8(2))

The right of access does not extend to information exempted from disclosure under the *Act*. However, where that exempted information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.

For additional information on records exempted from the *Act* under section 5, see section 1.4.2 of this manual, "Records Excluded from the Act".

3.1.3 Payment of Fee (subsection 8(3))

While individuals have a right of access to a record, this right may be subject to the payment of the costs of reproduction, shipping and locating that record under section 25 of the *Act* (for more information on costs, see section 3.15 of this manual, "Costs" and Appendix II – "Cost Schedule"). The payment of costs may also be subject to a complaint of cost complaint or request for cost waiver (see section 3.15.2 of this manual, "Cost Waiver").

3.2 Duty to Assist (section 13)

The *Act* requires that public bodies try to respond quickly, accurately and fully to applicants and to help them to as reasonable an extent as possible.

Section 13(1) of the *Act* states:

> 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.

The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty that must be upheld throughout the entire request process. The duty to assist is generally summarized as "a duty to make every reasonable effort to identify and locate records responsive to a request, and to provide the applicant with information regarding the processing of the request in a timely manner."[4]

The duty to assist also entails clear communication between the ATIPP Coordinator and an applicant occur at all stages of the request to keep the applicant informed throughout the process. Subsection 13(2) of the *Act* requires that all communications between an applicant and the head of a public body occur through the ATIPP Coordinator. The Coordinator is also the point of communication for third parties (subsection 19(9)).

The ATIPP Coordinator should develop a working relationship with the applicant in order to better understand the applicant's request and what information they are looking for, and to ensure that he or she understands the process.

In meeting the duty to assist an applicant, some general obligations may include, but are not limited to:

- providing the necessary information to an applicant so that they may exercise their rights under the *Act*;

[4] The Duty to Assist: A Comparative Study, Office of the Information Commissioner of Canada

- clarifying the request with an applicant, where necessary;
- performing full and adequate searches for records responsive to an access request; and
- responding to an applicant openly and *without delay*.

In addition to these obligations, some examples of good practice in assisting applicants include:

- maintaining and documenting communication
  - make early contact with the applicant and maintaining open communication with them throughout the request process
  - ensure correspondence is in the applicant's preferred method (phone, email, etc.) whenever possible
  - ensure all communication with the applicant is documented
- considering the applicant's perspective
  - consider ways to improve the applicant's experience throughout the request process
  - provide best customer service possible
  - give the applicant an opportunity to discuss the final response to a request, including reasons for withholding information, if applicable
- providing records in the requested format
  - ask the applicant the format in which they would like to receive any responsive records (electronic, paper, Excel, PDF, etc.) and provide in that format whenever possible
  - if unable to provide records in the requested format, discuss with formats are available with the applicant

3.2.1 Providing Necessary Information to an Applicant

Applicants may not always be aware of the process relating to making a request for information under the *Act*. The public body should provide information to an applicant that explains the request process and what their rights are under the *Act*.

Public bodies are required to keep an applicant informed as to the progress of their request.[5] Failure to do this is considered a failure in the public body's duty to assist under section 13 of the *Act*.

[5] *Report A-2013-001*, Newfoundland and Labrador Information and Privacy Commissioner

3.2.2 Clarifying the Request

The duty to assist includes assisting an applicant in the formulation and clarification of their request.[6] Broad requests are often the result of applicants' lack of knowledge of the public body's activities and/or how to frame their question to fully capture the records they are seeking.

Clarification of the request may involve assisting the applicant in defining the subject of the request, the specific kinds of records of interest, and the time period for which records are being requested.

Where a request is clarified, ATIPP Coordinators should include the clarification of the request in the advisory response and in the final response letter.

3.2.3 Adequate Search

The head of a public body must conduct an adequate search for records that are responsive to a request from an applicant. An adequate search is one which is undertaken by "[…] knowledgeable staff in locations where the records in question might reasonably be located."[7]

Specifically, the public body must satisfy itself that a reasonable search has taken place and be able to demonstrate that it has done such a search.[8] This may include searching off-site locations where responsive records may reside.

An adequate search would include contacting any individuals who are likely to have responsive records or knowledge of responsive records. ATIPP Coordinators should document their search efforts to demonstrate the searches conducted in the event of a review by the Information and Privacy Commissioner.

In addition to conducting an adequate search, it is also incumbent upon the public body to ensure that responsive records are included or copied properly prior to releasing the records to the applicant.[9] Keeping records of searches conducted provides evidence of the public body's efforts to locate responsive records.

It is important to ensure that all relevant pages are included and copied pages are copied in such a way that all information is clear and legible. Pages that are fully severed should not be included in the package of records to be sent to an applicant. See section 3.11 of this manual, "Severing" for additional information on severing records.

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[6] *Report A-2011-006*, Newfoundland and Labrador Information and Privacy Commissioner
[7] *Order M-909*, Information and Privacy Commissioner of Ontario
[8] *Report 2007-016*, Newfoundland and Labrador Information and Privacy Commissioner
[9] *Report 2007-011*, Newfoundland and Labrador Information and Privacy Commissioner

3.2.4 Respond Openly and Without Delay

In Report A-2011-010, the Information and Privacy Commissioner of Newfoundland and Labrador found that delay in responding to an applicant's access request constituted a failure to fulfill its duty to assist. Specifically, the failure to respond to an applicant's access request within the timelines set out in the *Act* is considered a deemed refusal and a failure to meet the public body's duty to assist.[10]

3.2.5 Other General Duties

In meeting the duty to assist an applicant, some additional obligations include the following:

- clear communication between the ATIPP Coordinator and an applicant is crucial;
- document steps taken and deliberations and decisions made throughout the processing of a request;
- it is incumbent on the ATIPP Coordinator to ensure that time limits are met – if a public body does not provide records within the statutory deadline, it will be in default of its statutory responsibility;
- advisory responses must be provided with 10 business days (section 15) and requests must be answered within 20 business days (section 16), unless an extension is granted by the Office of the Information and Privacy Commissioner – public body officials cannot operate on a "do-your-best" deadline;
- where a public body finds itself in a deemed refusal situation, they must take whatever actions are available to it to mitigate the impact on the applicant's right of access and such measures should begin as soon as it is apparent that the extended time frame cannot be met;
- assign additional staff as early as possible, where necessary, to help process requests;
- designate a back-up ATIPP Coordinator who is trained and ready to assist in the processing of requests, as needed;
- protect the identity of applicants by limiting disclosure of an applicant's identity as required by section 12;
- provide interim releases of records to an applicant as records are processed to mitigate excessive delays; and
- develop a cooperative working relationship with the applicant – this may include working with an applicant to narrow large requests, prioritizing records or providing interim releases to the applicant.

[10] *Report A-2011-010*, Newfoundland and Labrador Information and Privacy Commissioner

3.3 Making an Access Request (section 11)

A person may access a record or seek a correction of personal information by making a request to the public body that the person believes has custody or control of the record or personal information (subsection 11(1)).

Subsection 11(2) provides that requests must be in the form set by the Minister responsible for the *Act* (see ATIPP request form) and must provide enough detail about the information requested to enable an experienced employee of the public body to identify and locate the record. The request must also indicate how and in what form the applicant would prefer to access the record.

Oral requests can also be made in limited circumstances. See section 3.3.1 of this manual, "Oral Requests" for additional information.

An ***applicant*** means an individual who makes a request for access to information that is in the custody or control of a public body.

Where practicable, the request form should be submitted to the ATIPP Coordinator at the office of the public body. A listing of ATIPP Coordinators for all public bodies can be found at http://www.atipp.gov.nl.ca/info/coordinators.html on the page titled "*Contact ATIPP Coordinators*".

If the applicant sends the request form to another office of the public body, it should be accepted, date stamped and forwarded immediately to the ATIPP Coordinator. If possible, it should be hand-delivered, faxed or emailed to the ATIPP Coordinator right away and the original sent by mail.

If the request is for records from another public body, it should be transferred immediately. For more information on transferring requests, see section 3.5 of this manual, "Transferring a Request to Another Public Body".

ATIPP request forms should be available in public body offices and from the ATIPP Coordinator. The forms are also available on the ATIPP Office website. The ATIPP Coordinator should maintain a sufficient supply in the appropriate offices. The front line staff should know where the forms are located and the name and address of the ATIPP Coordinator, which should be provided to the public along with the application form.

If an applicant submits an ATIPP request in a format other than the ATIPP request form, the ATIPP Coordinator should immediately fax, mail or email a request form to the applicant or instruct them how to obtain one electronically. The ATIPP Coordinator should process the request so long as all the information required to locate the records being requested is provided.

If the public body considers the verification of the applicant's identity or that of a third party necessary in order to respond to the ATIPP request, the public body may at any time request that the applicant provide suitable identification.

3.3.1 Oral Requests (subsection 11(3))

Subsection 11(3) of the *Act* allows an applicant to make an oral request for access to records or for correction of personal information if he or she has a limited ability to read or write English or has a disability or condition that impairs his or her ability to make a written request. In this situation, the ATIPP Coordinator or a staff member who is familiar with the process should fill out the request form as directed by the individual, have the individual sign it if possible, date stamp it and send it immediately to the ATIPP Coordinator.

Note: The standard procedure is to have the applicant submit a request form. Only those individuals meeting the criteria specifically stated above are permitted to make an oral request.

3.3.2 Electronic Requests (subsection 11(4))

Subsection 11(4) provides that a request made under subsection (2) may be transmitted by electronic means. Applicants may refer to the electronic/online application process at http://www.atipp.gov.nl.ca/info/accessrequestform.html.

3.4 Receiving an ATIPP Request

On the day an ATIPP request is received, the ATIPP Coordinator, or whichever employee first receives it, must date stamp the request form. The ATIPP Coordinator should then record the ATIPP request in the TRIM ATIPP database or an ATIPP request tracking log.

If you are an ATIPP Coordinator for a department with access to the TRIM ATIPP database, enter the details of the request at the earliest possible time, as well as add any additional information as it arises (e.g. if the deadline for responding is extended, a third party needs to be notified, a fee estimate is sent out, etc.).

The ATIPP Coordinators of all other public bodies must complete a Notification of ATIPP Request Form and either email it to atippoffice@gov.nl.ca or fax it to the ATIPP Office at (709) 729-2129 *immediately* upon receipt of the request (see Form 1A on ATIPP Office website at http://www.atipp.gov.nl.ca/forms/).

The name and type of applicant must only be disclosed to the individual who receives the request on behalf of the public body, the ATIPP Coordinator, the coordinator's assistant, and

where necessary the Information and Privacy Commissioner (section 12). If the ATIPP Coordinator needs to consult with subject experts or other officials in order to complete a search for responsive records or otherwise apply the provisions of the *Act*, the Coordinator should only provide them with the wording of the request, and **not** who the applicant is or the type of applicant (e.g. media, political party, individual, etc.). The only exceptions to this rule are:

- where the request is for the applicant's own personal information; or

- where the name of the applicant is otherwise necessary in order to respond to the request and the applicant has consented to the disclosure of their name.

Even in the above circumstances, the applicant's name must only be disclosed insofar as it is necessary to respond to the request.

On the same day the request is received, or as soon after as possible, the ATIPP Coordinator should review the request to determine:

- **Is the request understandable and complete?** – if the request is unclear, provides insufficient information, or is overly broad, the ATIPP Coordinator should contact the applicant as quickly as possible (preferably by telephone, fax, or email) to clarify what he or she is looking for.

  Vague or overly general requests are generally the result of a lack of understanding of the functions of the public body, its records or how to best articulate the request. If, despite the ATIPP Coordinator's best efforts to clarify the request with the applicant, there is still some confusion, the public body may apply to the Office of the Information and Privacy Commissioner for an extension of time under section 23 (for additional information on extending time limits, see section 3.14 of this manual, "Time Limits for Responding to a Request");

- **Has the request been sent to the appropriate public body?** – if the request should have been sent to another public body, the ATIPP Coordinator should transfer the request to the correct public body within 5 business days (subsection 14(1)) – see section 3.5 of this manual, "Transferring a Request to Another Public Body");

- **Is a formal ATIPP request required?** – if the information the applicant is seeking is available through routine channels, the ATIPP 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 ATIPP 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 his or her ATIPP request; and

- **Is notification to a third party required** – for information on notifying a third party, see section 4.6.4, "Notifying the Third Party".

The ATIPP Office will collect information about the type of applicant after the final response has been provided to the applicant, for reporting and statistical purposes. This information should be entered into the TRIM ATIPP database by those with access to this database or included on Form 8 by all other coordinators.

3.5 Transferring a Request to another Public Body (section 14)

Under subsection 14(1) of the *Act*, a public body may transfer an ATIPP request to another public body **within five (5) business days** of receiving the request if:

- the records being requested were produced by or for the other public body; or
- the records or personal information being requested are in the custody of or under the control of the other public body.

Where a public body who receives a request knows that another public body has the records sought by the applicant, the request should be transferred rather than advising the applicant that there are no responsive records and closing the request. This is consistent with the duty to assist.

Before transferring an ATIPP request to another public body, the ATIPP Coordinator should make sure that the second public body has the requested records and is the correct public body to which the request should be transferred.

If an ATIPP request is transferred to another public body, the applicant must first be notified of the transfer in writing (subsection 14(1) - see Form 3 on ATIPP Office website at http://www.atipp.gov.nl.ca/forms/). The notification of transfer must be sent by the public body that is transferring the request.

Where a request is transferred under subsection 14(1), the public body to which the request is transferred shall respond to the request, and the provisions of the Act shall apply, as if the applicant had originally made the request to and it was received by that public body on the date that it was transferred. As such, the head of the public body that receives the transferred request must respond within 20 business days after receiving it unless the time limit is extended under section 23.

It is important that a public body that is transferring a request must transfer it in the most expeditious manner available.

Where the head of a public body fails to respond within the 20 business day period or an extended period, the head will be considered to have refused access to the record.

3.6 Acknowledging Receipt of Request

When an ATIPP request is received by a public body and the ATIPP Coordinator has determined that the records being sought are under the custody and/or control of that public body, the ATIPP Coordinator must send a letter to the applicant acknowledging receipt of the access request (see Form 2 on ATIPP Office website at http://www.atipp.gov.nl.ca/forms/). The acknowledgement letter outlines the conditions under which the 20 business day time limit may be extended and the policy regarding fee estimates.

The acknowledgement will generally include

- confirmation of receipt of the request and the date on which the request was received;
- exact wording of the request made by the applicant;
- general time limits for responding; and
- notice that the applicant may be required to pay costs for locating records and the process relating to payment of any costs (Note: this is only for general access requests; no costs are chargeable for personal information requests).

3.7 Searching for Responsive Records

To respond to an ATIPP request in an efficient and timely manner, the public body must be able to locate and retrieve the requested records quickly. The requested records may be in one of the following locations:

- the office of the public body (in a central filing system or a staff member's office);
- the Newfoundland and Labrador Government Records Centre (government departments);
- an off-site records centre (public bodies other than government departments); or
- the Provincial Archives of Newfoundland and Labrador or the archives of another public body.

The search for electronic records may include electronic information management systems, business applications, shared directories, email systems, and websites. Electronic devices such as laptops, Blackberries, tablets, flash drives and other portable devices may need to be searched as well.

A public body is not required to search for records in the custody or under the control of other public bodies.[11]

After the requested records have been located, the next step is usually to scan or photocopy the original records. Once this has been done, the original records should be returned to their filing locations. At least two copies of the records will be required: a clean copy for the ATIPP file, and a copy to mark or highlight. The information to highlight may include:

- information which is excluded from the *Act* (section 5);

- information that is published (section 22);

- information that **must** be severed before the records are provided to the applicant:

  1. section 27 – cabinet confidences;
  2. section 33 – information from a workplace investigation;
  3. section 39 – disclosure harmful to the business interests of a third party;
  4. section 40 – disclosure of personal information; and
  5. section 41 – disclosure of House of Assembly service and statutory office records.

- information that **may** be severed before the records are provided to the applicant:

  1. section 28 – local public body confidences;
  2. section 29 – policy advice or recommendations;
  3. section 30 – legal advice;
  4. section 31 – disclosure harmful to law enforcement;
  5. section 32 – confidential evaluations;
  6. section 34 – disclosure harmful to intergovernmental relations or negotiations;
  7. section 35 – disclosure harmful to the financial or economic interests of a public body;
  8. section 36 – disclosure harmful to conservation;
  9. section 37 – disclosure harmful to individual or public safety; and
  10. section 38 – disclosure harmful to labour relations interests of public body as employer.

Each page of the records should be numbered consecutively and a list of all records prepared. The ATIPP Coordinator should develop a system that is best suited to his or her needs and the needs of their public body. Careful and thorough documentation at this stage can be especially helpful if a request for review or complaint is made to the OIPC concerning the request.

[11] *Order 97-006*, Information and Privacy Commissioner of Alberta

3.8 Preliminary Assessment of the ATIPP Request

After the nature and extent of the request have been considered (including any necessary discussion with the applicant) and the records have been located and reviewed, the ATIPP Coordinator should make a preliminary assessment of the request. The following issues need to be addressed in this assessment:

- Was a thorough search for responsive records completed? If not, you will need to ask for further searches to be completed.

- Are there any records that seem to be missing? If so, you may need to ask for further searches to be completed.

- Can the records, in whole or in part, be released immediately without a line-by-line review? Where, after preliminary assessment, it is determined that a requested record is available and it is clear that the public body is neither required not authorized to refuse access, the public body should release the record within 10 business days in accordance with section 15 (advisory response). For more information on section 15, see section 3.16.1 of this manual, "Advisory Response".

- Are some or all of the responsive records in the custody or control of another public body? If so, consultation with the other public body should be undertaken to determine coordination of responding to the request or transfer of the request.

- Is consultation needed with other program areas within a public body?

- Is external consultation needed with other public bodies and levels of government?

- Do the records contain third party business or personal information that may require third party notification under section 19?

- Is a time extension necessary (section 23)?

3.9 Third Party Notification

Public bodies hold information about individuals, corporations, groups and non-profit organizations which, if disclosed to others, may result in harm to these third parties.

In section 2(cc), a ***"third party"*** in relation to a request for access to a record or for correction of personal information is defined as "a person or group of persons other than (i) the person who made the request, or (ii) a public body." The third party notice provisions in section 19 of the *Act* are intended to protect the business and privacy interests of third parties who would be affected by disclosure of a record to an applicant under Part II of the *Act.*

3.9.1 Notifying a Third Party

Where the head of a public body intends to give access to a record that the head has reason to believe contains information that might be exempted from disclosure under section 39 (disclosure harmful to business interests of a third party) or section 40 (disclosure harmful to personal privacy), the head shall make every reasonable effort to notify the third party (section 19).

The requirement to give notice under section 19 is not engaged until the head of the public body has made the decision to release the information which may be subject to sections 39 or 40.

With respect to information that might be excepted under section 40 (personal information), public bodies should note that subsection 40(2) lists those circumstances in which a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. **Where a disclosure falls within one of the circumstances listed in paragraphs 40(2)(a) to (m), notice to the third party is not required under section 19 as the disclosure cannot be considered to be an unreasonable invasion of privacy and would not be excepted from disclosure under section 40.** Although notification is not required, there may be circumstances in which you may choose to advise an individual of the release of personal information that falls within subsection 40(2).

Subsection 19(4) states that a third party may consent to the disclosure.

3.9.1.1 When and How Notice Must be Given

A public body must give notice to a third party under section 19 within the original 20 business day time period for responding to the ATIPP request, or within the extended time period if the public body has notified the applicant of an extension pursuant to section 23 (Form 7). Notice to third parties should be given as early as possible in the process and the notice should be sent to a third party in the most expeditious manner. The time to notify a third party **does not** suspend the 20 business day timeframe established by subsection 16(1) (subsection 19(2)).

3.9.1.2 Content of Notice to Third Party and Applicant

In giving notice, the head of a public body may provide or describe to the third party the content of the record or part of the record that has been requested (subsection 19(3)).

Where the head of a public body intends to give access to a record or part of a record and the third party does not consent to the disclosure, subsection 19(5) requires that the head inform the third party, in writing

- of the reasons for the decision and the provision of the *Act* on which the decision is based;
- of the content of the record or part of the record for which access is to be given;
- that the applicant will be given access to the record or part of the record unless the third party, **not later than 15 business days** after the head of the public body informs the third party of this decision, files a complaint with the commissioner under section 42 or appeals directly to the Supreme Court, Trial Division under section 53; and
- how to file a complaint or pursue an appeal.

3.9.1.3 Content of Notice to Applicant

Where the head of a public body intends to grant access and the third party does not consent, subsection 19(6) also requires the head to advise the applicant, in the final response, that they will be given access to the record on the completion of the 15 business days referred to in subsection 19(5), unless the third party files a complaint with the commissioner or appeals directly to the Trial Division.

It is important to note that public bodies only have 20 business days to respond to a request from the date of receipt of the ATIPP request where it involves third party business information. Where public bodies are unable to meet the 20 business day timeline under the *Act*, they may apply to the Office of the Information and Privacy Commissioner to extend the timeline under section 23 and provide notice of the extension to the applicant where successful. Failure to respond to a request within 20 business days or failure to extend the timeline under section 23 is considered a deemed refusal under the Act. For more information on timelines, see section 3.14 of this manual, "Time Limits for Responding to a Request".

3.9.1.4 Decision to Give Access

Pursuant to subsection 19(7), the head of the public body must not give access to a record or part of a record that is the subject of a notice under subsection 19(1) until

- he or she receives confirmation from the third party or the commissioner that the third party has exhausted any recourse under the *Act* or has decided not to file a complaint or commence an appeal; or

- a court order has been issued confirming the decision of the public body.

3.10 Review of the Responsive Records

Once the preliminary assessment has been completed and any outstanding issues are resolved, the ATIPP Coordinator should review the records line-by-line. A line-by-line review is essential to make sure that any information that falls under a mandatory exception to disclosure is severed and that any information that falls under a discretionary exception to disclosure is reviewed to consider whether or not to sever.

This careful review of the records is necessary in order to properly determine whether or not an exception to disclosure applies. It is usually not possible to make this determination merely on the basis of the title, type, classification or format of a record.

It is important to ensure compliance with subsection 8(2), whereby information that is not subject to disclosure under the *Act* is severed and the remainder of the record is then made available.

More than one exception to disclosure may apply to information in a record. For example, information in a briefing note forming part of a cabinet submission may be withheld under section 27 (cabinet confidences) and subsection 29(1) (policy advice or recommendations). The reviewer should note all relevant exceptions that apply to a record.

3.10.1 Documenting Review

On a file copy of the record, the ATIPP Coordinator should mark the information in the record that he or she feels falls under one of the exceptions to disclosure found in the *Act.* The section, subsection and paragraph of the exception to disclosure should be noted next to the marked information (e.g. "paragraph 28(1)(b)"). This will make subsequent reviews and any consultation much easier.

The ATIPP Coordinator should document any exceptions they use including reasons for their decisions. This serves to streamline review processes and provides supporting documentation to an applicant and the OIPC, in the event of a review by the OIPC. This also provides a clear basis for internal consultations, when needed.

The ATIPP Coordinator should also document:

- staff time spent searching for and locating records;
- searches completed, including what was searched (file systems, offices, storage facilities, public body archives, etc.);

- internal consultations;
- any consultations with other public bodies and levels of government; and
- the line-by-line review of the records including the proposed exceptions to access.

3.10.2 Internal Consultations

An examination of the request and a thorough review of the records will often require internal consultations.

When a public body receives a request that deals with records originating in another public body or deals with matters in which another public body has direct interest, it should consult with that public body. This will ensure that all relevant factors are taken into consideration when deciding whether or not to sever information that falls under a discretionary exception to disclosure. Depending on the nature of the request, the following may be consulted in addition to appropriate officials within a public body:

- Cabinet Secretariat – If the records being sought may contain cabinet confidences (section 27), the public body must consult Cabinet Secretariat before releasing any records or information. The public body must also obtain sign-off from Cabinet Secretariat before a final response is sent to the applicant (see section 4.6.1 of this manual, "Cabinet Confidences" for further information).

- Intergovernmental Affairs (IGA) – If the records being sought may relate to intergovernmental relations and negotiations, the public body must consult IGA before releasing any records or information (see section 4.8.6 of this manual, "Disclosure Harmful to Intergovernmental Relations or Negotiations" for further information).

- Legal Counsel – If the public body requires legal advice or interpretation of the *Act* or any other legislation, they should consult with their solicitor (see section 4.8.3 of this manual, "Legal Advice" for further information).

The ATIPP Coordinator of the public body should incorporate these consultations into their ongoing review of the records.

In conducting internal consultations, ATIPP Coordinators must maintain the anonymity of the applicant, as required by section 12. If an ATIPP Coordinator needs to consult with others in order to complete a search for responsive records or otherwise apply the provisions of the *Act*, the Coordinator should only provide them with the wording of the request, and **not** who the applicant is or the type of applicant they are (e.g. media, political party, individual, etc.). The only exceptions to this rule are:

- where the request is for the applicant's own personal information; or

- where the name of the applicant is otherwise necessary in order to respond to the request and the applicant has consented to the disclosure of their name.

ATIPP Coordinators should also remember that they are responsible for the processing of the ATIPP request, and should only consult others where necessary to either locate a responsive record or to seek advice on the proper application of the *Act*.

3.11 Severing

Often a portion of the information in a record can be released to the applicant, while other portions of the record may or must be withheld under an exception to disclosure. In this circumstance, the public body may sever the information that falls under an exception (discretionary exception) or must sever the information (mandatory exception) and release the remainder of the information (subsection 8(2)). This process fulfills a public body's requirement to release as much information as possible to an applicant, while protecting information that falls under an exception to disclosure.

When a discretionary exception to disclosure applies, a public body must review the record and any policies that may apply and exercise its discretion in whether or not to apply the exception as well as to determine how much information should be severed.

There are limited exceptions where records do not require severing as the exception applies to the records as whole:

- a record that is excluded from the *Act* (section 5);
- a record falls that within the definition of a cabinet record (subsection 27(1));

Note: Severing should be done on copies only; the original record should not be altered or defaced.

Generally, the smallest unit of information to be disclosed after severing is a sentence.

3.11.1 Fully Severed Pages

If, after severing information from a record, the remaining information is meaningless, disclosure of the remaining information would not be appropriate. The Federal Court has held that information is meaningless if it produces nothing more than "disconnected snippets of releasable information."[12]

[12] *Information Commissioner of Canada v. Solicitor General of Canada*, [1988] 3 F.C. 551

Where an entire page or pages are severed in their entirety, these pages should be removed from the package of responsive records. The ATIPP Coordinator should then specifically reference those pages which are not included in the accompanying letter. Alternatively, the ATIPP Coordinator may include a notation in the package that references the pages which are not included. The ATIPP Coordinator should indicate which page(s) were severed in their entirety, citing the exceptions to access that apply to those records, and the page number(s) of the page(s) that are removed. Copying fees should not be charged in relation to fully severed pages that are not included in the package.

3.12 How to Sever

There are several different ways to sever a record. If the public body you work for continually receives ATIPP requests, you may wish to consider purchasing redaction software.

The following methods and processes can be used for severing records:

- Using redaction software, removable tape or a black marker, sever the information which is excepted from disclosure on a copy of the record.

- When information has been severed make sure to include the sections, subsections, and paragraphs of the applicable exception(s) next to the severed portion (e.g. “subsection 30(1)”). Remember to use all exceptions that apply.

- If you choose to remove pages from the records being provided to the applicant (where all the information on a page is excepted from disclosure), indicate the number of pages severed and the number of the section, subsection and paragraph of the applicable exception(s) to disclosure in the response letter to the applicant (e.g. “pages 1-16 (sections 27 and 29)”).

- A copy of the severed records will be provided to the applicant in the final response to the ATIPP request. The public body should keep a duplicate of these records (either electronic or paper) for future reference.

3.13 Maintaining Copies of ATIPP Requests

Public bodies should keep a file for each ATIPP request it receives and processes. The file should include the original request, all internal and external correspondence, a copy of the unmarked responsive records, and a copy of the severed records released to the applicant.

3.14 Time Limits for Responding to a Request

Public bodies must respond to requests for access to records or for correction of personal information "without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23" (subsection 16(1)).

"Business day" is defined in subsection 2(b) of the *Act*, and means "a day that is not a Saturday, Sunday or a holiday". While "holiday" is not defined in the *Act*, section 27(1)(l) of the *Interpretation Act* states that:

> "holiday" includes Sunday, New Year's Day, Good Friday, Easter Monday, Victoria Day, the birthday or the day appointed for the celebration of the birth of the reigning Sovereign, Labour Day, Remembrance Day, Armistice Day, Christmas Day, and a day appointed by an Act of the Parliament of Canada or by proclamation of the Governor General or of the Lieutenant-Governor for day of a general prayer or mourning or day of public rejoicing or thanksgiving or a public holiday, and whenever a holiday falls on a Sunday the expression "holiday" includes the following day.

Due to the constraints of these time limits, it is essential that the ATIPP Coordinator have a back-up person to assume ATIPP responsibilities when he/she is on leave or away from the office.

If a public body fails to respond to the applicant within the 20 business day period or an extended period, this is considered to be a refusal to provide access to the responsive records or to correct the personal information (i.e. deemed refusal) (section 16(2)).

Timeliness in responding to a request for access to information is of the utmost importance and unreasonable delay is considered synonymous to an explicit denial of access.[13]

As noted above, the 20 day time limit is based on business days, not calendar days. The 20 business days start on the day after the date that the application is received by any employee of the public body.

Note: Both section 16 and section 13 of the *Act* require that a public body make every reasonable effort to respond to an applicant without delay. Therefore, public bodies should try to respond to requests as quickly as possible.

If the request is incomplete and further information is required from the applicant, the ATIPP Coordinator should seek this information immediately. The official date of receipt **cannot be changed**. Nevertheless, the need to obtain more information may be grounds upon which a public body may seek an extension of the time limit under section 23.

[13] *Report A-2011-010*, Newfoundland and Labrador Information and Privacy Commissioner

3.14.1 Extending the Time Limit

Under section 23 of the *Act*, the head of a public body may, **not later than 15 business days after receiving a request**, apply to the Office of the Information and Privacy Commissioner to extend the time for responding to the request. All extensions of time under the Act require prior approval of the commissioner.

Where a public body seeks an extension of time from the commissioner, the public body should:

- Put the request in writing;
- Provide substantial details of the steps taken by the public body to date, including:
  - when the request was received;
  - the wording of the request;
  - attempts to clarify with the applicant, where applicable;
  - efforts undertaken to locate responsive records;
  - etc.
- Provide sound reasons for requesting the extension; and
- Provide the estimated time required to complete the request.

Requests for extension should be made as soon as possible to allow sufficient time for consideration and decision by the commissioner.

The commissioner may approve an application for extension of time where the commissioner considers that it is "necessary and reasonable to do so in the circumstances", for the number of business days that the commissioner considers appropriate (subsection 23(2)). Where an application for extension is made, the commissioner is required to make a decision not later than three (3) business days after receiving the application (subsection 23(3)).

Where the commissioner does not approve the request for extension, the timeline established in subsection 16(1) applies and the public body must respond not later than 20 business days after receiving the request (subsection 23(5)).

Where the commissioner does approve an extension, the head of the public body is required, without delay, to notify the applicant in writing

- of the reason for the extension;
- that the commissioner has authorized the extension; and

- when a response can be expected (subsection 23(6)).

It is important to note that the time to make an application for an extension of time and receive a decision from the commissioner does not suspend the 20 business day period established by subsection 16(1). Where an application for extension is made, ATIPP Coordinators should continue to process the request while awaiting the commissioner's decision.

3.14.2 Suspension of Time Limit Due to a Cost Estimate

When responding to an ATIPP request for general information, a public body may charge the applicant for search time (after the first 10 hours for local government bodies or 15 hours for other public bodies), copying costs, etc. Where a cost estimate is given to an applicant, the applicant has 20 business days from the day the estimate is sent to accept the estimate, modify the request in order to change the amount of the cost, or apply for a waiver of costs (subsection 26(2)).

Where a cost estimate is sent, the time within which the public body is required to respond to a request is suspended until the applicant notifies the head of the public body to proceed (subsection 26(6)). The head of a public body may require an applicant to pay 50% of the cost before commencing work on the request, with the remainder to be paid upon completion.

For example, if an ATIPP Coordinator sends an estimate of cost on day seven, the request is put on hold at day seven. Once the applicant responds and pays 50% of the costs, the "clock" for responding is no longer on hold and the ATIPP Coordinator must move forward as if it is day eight.

3.15 Costs

Under subsection 25(2) of the *Act* the head of a public body may require an applicant to pay a "modest cost" for locating a record, but only after:

- the first 10 hours of locating the record, where the request is made to a local government body; or

- the first 15 hours of locating the record, where the request is made to another public body.

In other words, the first 10 hours of searching/locating a record are free of charge in the case of a request made to a local government body. In the case of a request made to any other public body, the first 15 hours of searching/locating are free of charge.

Under subsection 25(3), the head of a public body may also require an applicant to pay:

- a modest cost for copying or printing a record, where the record is to be provided in hard copy form;
- the actual cost of reproducing or providing a record that cannot be reproduced or printed on conventional equipment then in use by the public body; and
- the actual cost of shipping a record using the method chosen by the applicant.

Public bodies are **not** permitted to charge an applicant for:

- making an application for access to a record;
- identifying, retrieving, reviewing, severing or redacting a record; or
- any service in response to a request for access to the personal information of the applicant (subsections 25(1) and (4)).

Any costs charged to an applicant must not exceed an estimate given to an applicant, or the actual cost of the services (subsection 25(5)).

Subsection 25(6) provides that the Minister responsible for the administration of the Act may set the amount of costs that may be charged to an applicant under this section. The **Schedule of Costs** (Appendix II), as set by the Minister of the Department of Justice and Public Safety provides as follows:

(a) Applicants shall not be charged for:
- making an application for access to a record; or
- identifying, retrieving, reviewing, severing or redacting a record.

(b) $25.00 for each hour spent locating a record after the first ten (10) hours, where the request is made to a local government body;

(c) $25.00 for each hour spent locating a record after the first fifteen (15) hours, where the request is made to another public body;

(d) for **reproducing or providing a record**, the actual cost of producing the record where the record cannot be reproduced or printed using conventional equipment then in use by the public body;

(d) for **shipping a record**, the actual costs of shipping using the method chosen by the applicant; and

(e) where the record is to be provided in **hardcopy** form and can be copied or printed using conventional equipment, 25 cents a page for providing a copy or print of the record.

3.15.1 Cost Estimates

Where an applicant is to be charged a cost under section 25, the public body is required to give the applicant a cost estimate. If the applicant wishes to proceed, the public body will require the applicant to pay 50 percent of the fee estimate prior to commencing the work required to respond to the request, with the remainder to be paid on completion of the request.

As soon as it appears likely that such fees will be charged, the ATIPP Coordinator must prepare an Estimate of Costs (Form 6A) and send it with a covering letter (Form 6) to the applicant.

As previously mentioned, when an Estimate of Costs is sent to an applicant, the time within which the public body is required to respond to the ATIPP request is suspended until the applicant notifies the public body that he or she wishes to proceed with the request and pays half or all of the costs (subsection 26(6)).

An applicant has up to 20 business days from the date the estimate is given to advise the public body if the estimate is accepted (and to pay 50%), to modify the request in order to change the cost, to apply to the public body for a waiver of all or part of the costs, or to apply to the commissioner for a review of the estimate (subsection 26(2)). **If the applicant does not respond to the Estimate of Costs notification within 20 days the public body may consider the ATIPP request to have been abandoned, unless the applicant applies for a waiver of all or part of the costs or applies to the commissioner to revise the cost estimate.**

NOTE: Where an applicant applies to the commissioner to revise a cost estimate or to review a decision of the head of the public body not to waive all or part of the costs, the 20 business day period ceases to run and public bodies should not consider the ATIPP request abandoned while the complaint is being reviewed by the commissioner (subsection 26(5)).

If the applicant wants the public body to proceed with the original request, he or she must send a signed copy of the Estimate of Costs form, along with a cheque or money order in the amount of 50% of the costs. Upon receipt of the applicant's deposit, the public body will commence work on the request. The applicant will then be asked to pay the remaining balance upon completion of the request. Upon receipt of the final 50% of the costs from the applicant, the public body will provide the remaining records to the applicant.

In certain circumstances the public body may be required to provide the applicant with a refund (subsection 25(5)). For example:

- when the actual cost of locating a record is less than the estimate, the difference should be refunded; and

- when access to **every** record requested by an applicant is refused, the amount of estimated costs paid by the applicant must be refunded.

Copying costs should not be charged for a page or pages that are withheld in their entirety (i.e. fully severed).

Public bodies should contact an applicant to advise if pages or records are to be withheld in their entirety and provide the applicant with the option to request the fully severed pages. Should an applicant request copies of fully severed pages, they should be advised that there may be a photocopying charge applied to the copying of these pages. This is in line with public bodies' duty to assist applicants.

3.15.2 Cost Waiver

Subsection 26(3) of the *Act* gives a public body the discretion, upon receipt of an application by an applicant, to waive the payment of all or part of the costs payable in relation to a request. The head of a public body may waive all or part of the costs where they are satisfied that:

- payment would impose an unreasonable financial hardship on the applicant; or

- it would be in the public interest to disclose the record.

Note: In accordance with the Schedule of Costs, an applicant seeking access to his/her own personal information is not subject any costs.

Within the 20 business days referred to in subsection 26(2), the head of a public body must notify the applicant in writing of its decision about whether or not they have decided to waive the costs. The applicant must either accept the decision or apply to the commissioner to review the decision (subsection 26(4)).

Pursuant to subsection 26(8), on an application to review the decision of the head of a public body not to waive all or part of costs payable by an applicant, the commissioner may:

- where the commissioner is satisfied that paragraph 26(3)(a) or (b) is applicable, waive payment of the costs or part of the costs in the manner and in the amount that the commissioner considers appropriate; or

- confirm the decision of the head of the public body.

The head of a public body is required to comply with the decision of the commissioner under this section (subsection 26(9)).

3.15.3 Revising a Cost Estimate

Pursuant to subsection 26(7), where an applicant applies to the commissioner to revise a cost estimate, the commissioner may:

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

- confirm the decision of the head of the public body.

As noted above, the head of the public body is required to comply with a decision of the commissioner under this section.

3.16 Responding to a Request

3.16.1 Advisory Response

Subsection 15(1) of the *Act* requires that the head of a public body shall, not later than 10 business days after receiving a request, provide an advisory response in writing to:

- Advise the applicant as to what will be the final response where

    - the record is available and the public body is neither authorized nor required to refuse access to the record; or

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

- In any other circumstances, advise the applicant of the status of the request.

Where access cannot be granted within the 10 business days in subsection 15(1), the advisory response should provide the applicant with the following information as set out in subsection 15(2), if known by the public body:

- A circumstance that may result in the request being refused in full or in part;

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

- Costs that may be estimated under section 26 to respond to the request;
- A third party interest in the request; and
- Possible revision to the request that may facilitate its earlier and less costly response.

The head of a public body shall, where it is reasonable to do so, provide the applicant with a further advisory response at a later date where additional circumstances, causes or other factors, costs or third party interests become known (subsection 15(3)).

This provision is closely linked to the duty to assist and is intended to ensure that public bodies assess requests for access or correction of personal information promptly, and that applicants are engaged in the process and receive timely information about the processing of their request.

Where a record is readily available and the public body determines that it is not required or authorized to refuse access, or where a request for correction of personal information is justified and can be readily made, the applicant should be advised that the record is to be released or the correction is to be made within 10 business days.

Otherwise, the public body must advise the applicant of the factors in paragraphs 15(2)(a) to (e) so that the applicant is aware of the status of the request.

3.16.2 Final Response

Where a request for access to a record is made, section 17 sets out that the applicant shall be informed, in a final response:

- whether access to the record or part of the record is granted or refused;
- if access to the record or part of the record is granted, where, when and how access will be given; and
- if access to the record or part of the record is refused,
    - the reasons for the refusal and the provision of the *Act* on which the refusal is based; and
    - that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52, and what the time limits are and how to file a complaint or pursue an appeal.

Where a request for correction of personal information is made, section 18 sets out that applicant must be informed, in a final response:

- whether the requested correction has been made; and
- if the request is refused,
    - the reasons for the refusal;
    - that the record has been annotated; and
    - that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52, and advise the applicant of the applicable time limits and how to file a complaint or pursue an appeal.

Where a requested correction to personal information is not made, the head of a public body must annotate the information with the correction that was requested but not made (subsection 18(2)). Where personal information is corrected or annotated, the head of the public body must notify any other public body or third party to whom the information has been disclosed during the one year period before the request for correction was made (subsection 18(3)). Where a public body is notified under subsection 18(3) of a correction or annotation of personal information, that public body shall make the correction or annotation on a record of that information in its custody or under its control (subsection 18(4)).

3.16.3 Full Disclosure

Access will be provided in full to the responsive records if:

- they fall within the scope of the *Act;*
- no mandatory exception to disclosure applies to the responsive records;
- no discretionary exception applies to the responsive records (or if a discretionary exception does apply but the public body chooses to use its discretion and release the records); and
- a discretionary exception listed in subsection 9(2) may apply to the responsive records, but it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception (subsection 9(1)).

See section 4.5 of this manual for a discussion of the public interest override provision.

The response (use **Form 4A**) must inform the applicant where, when and how access will be given.

3.16.4 Access Denied to All or Part of a Record

Access to responsive records may be denied in full, or access to part of a record may be denied, if:

- the record falls outside the scope of the *Act* (section 5);
- if the information sought is publicly available or is going to be published or released within 20 business days of receipt of an applicant's request (section 22);
- if some or all of the information in the record falls within a mandatory exception to disclosure; or
- if some or all of the information in the record falls within a discretionary exception to disclosure and the public body decides to deny access.

The response (**Form 4B** if partial access is given or **Form 4C** if access is fully denied) must provide the reasons for the refusal and the specific sections of the *Act* on which the refusal is based. Where refusal is based on an exception to disclosure, the number of the section, subsection and paragraph of the *Act* must be provided.

Finally, the response must also tell the applicant that he or she has the right to file a complaint with the OIPC, in accordance with section 42, or appeal the refusal to the Trial Division, in accordance with section 52. The response must inform the applicant of the applicable time limits for doing so (within 15 business days). Note, however, that the OIPC may allow a period longer than 15 business days for complaints to be made (subsection 42(5)).

3.16.5 Record Does not Exist or Cannot be Located

A requested record may never have existed, may have been destroyed in accordance with the *Management of Information Act* or other authority, or may have been lost.

The written response must inform the applicant that access is refused as the record does not exist or cannot be located and should explain the steps taken to locate the record or, in the case of a lawfully destroyed record, the disposal date and the authority for doing so.

Finally, the response must also tell the applicant that he or she has the right to file a complaint with the OIPC, in accordance with section 42, or appeal the refusal to the Trial Division, in accordance with section 52. In addition, the response must inform the applicant

of the applicable time limits for doing so (within 15 business days). Note, however, that the OIPC may allow a period longer than 15 business days (section 42(5)).

3.16.6 Refusal to Confirm or Deny Existence of a Record

In certain circumstances, the mere knowledge that a record exists may cause harm or be a disclosure of information. Subsection 17(2) lists the circumstances under which a public body can refuse to confirm or deny the existence of a record:

- if it contains information described in section 31 (disclosure harmful to law enforcement);
- if it contains personal information of a third party and the disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy under section 40; or
- if it contains information that could threaten the health and safety of an individual.

In this instance, the public body is not required to tell the applicant the reasons for the refusal and the provisions of the *Act* on which the refusal is based.

3.16.7 Disregarding a Request (section 21)

Section 21 provides that public bodies may, **not later than 5 business days after receiving a request**, apply to the Office of the Information and Privacy Commissioner for approval to disregard a request for access to information in specific and limited circumstances.

Section 21 states:

> 21 (1) The head of a public body may, not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard the request where the head is of the opinion that
>
> (a) the request would unreasonably interfere with the operations of the public body;
>
> (b) the request is for information already provided to the applicant; or
>
> (c) the request would amount to an abuse of the right to make a request because it is
>
> (i) trivial, frivolous or vexatious;

(ii) unduly repetitive or systematic;

(iii) excessively broad or incomprehensible; or

(iv) otherwise made in bad faith.

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

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

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

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

(6) The notice shall contain the following information:

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

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

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

All decisions to disregard a request under the *Act* must be approved by the Office of the Information and Privacy Commissioner in accordance with section 21. In determining whether or not to make an application to the commissioner for approval to disregard, ATIPP Coordinators should focus on the nature of the request (as opposed to the requester) and must assess each request on its own merits.

3.16.7.1 Unreasonable Interference with Operations of the Public Body (paragraph 21(1)(a))

Paragraph 21(1)(a) provides that the head of a public body may apply to the commissioner for approval to disregard a request "where the request would unreasonably interfere with the operations of the public body".

Unreasonable interference with the operations of a public body may be demonstrated by showing the impact that the request(s) are having on the resources of a public body,

including time and expense to provide a response.

The determination of what constitutes an unreasonable interference in the operations of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the *Act* by providing insufficient resources to its ATIPP officers.[14]

3.16.7.2 Information Already Provided to an Applicant (paragraph 21(1)(b))

Paragraph 21(1)(b) provides that the head of a public body may apply to the commissioner for approval to disregard a request where "the request is for information already provided to the applicant".

This provision will only apply where the **information** that is responsive to the request is exactly the same information that was previously provided to the applicant. The fact that the **wording** of the request is identical to a previous request is not determinative. For example, if, since the previous identical request was made, additional records have been created or located which are also responsive to the new request, paragraph 21(1)(b) will not apply.

3.16.7.3 Abuse of the Right to Make a Request (subsection 21(1)(c))

Abuse of process means excessive or improper use; intended to be applied to those circumstances where the right of access is being misused.

Generally, the following factors have been considered relevant in determining whether conduct amounts to an ***abuse of the right of access***:

- *the number of requests* – whether the number is excessive by reasonable standards;
- *the nature and scope of the requests* – whether they are excessively broad and varied in scope or unusually detailed, or whether they are identical to or similar to previous requests;
- *the timing of the requests* – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings; and
- *the purpose of the requests* – whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds.[15]

[14] *Report A-2009-001*, Information and Privacy Commissioner of Newfoundland and Labrador
[15] *Toronto Catholic District School Board (Re)*, 2009 CanLII 15431 (ON IPC)

3.16.7.4 Trivial, Frivolous or Vexatious Requests (clause 21(1)(c)(i))

Clause 21(1)(c)(i) states that the head of a public body may apply to the commissioner for approval to disregard a request where the request would amount to an abuse of the right to make a request because it is "trivial, frivolous or vexatious".

A ***trivial*** request is similar to a ***frivolous*** request. Like a ***frivolous*** request, an ATIPP request can be considered "trivial" when it is of little weight or importance or is without merit. It is important for a public body to consider, however, that information which may be ***trivial*** from one person's perspective may be of importance from another's.

Frivolous also means of little weight or importance. It may also refer to a request that is made primarily for a purpose other than gaining access to information. It is typically associated with matters that are trivial or without merit. However, it is important to note that information that may be trivial from one person's perspective may be of importance from another's. In this regard, for example, the Ontario Information and Privacy Commissioner has offered the following example: a request to a fire department for firefighters' shoe sizes over a certain period of time. Although on its face, this request appears to be trivial or without merit, it is important to the requester, a shoe manufacturer, who wishes to create an inventory of firefighters' shoes to market to fire departments.[16]

Vexatious means with intent to annoy, harass, embarrass, or cause discomfort. The Ontario Commissioner has stated that government officials may often find individual requests for information bothersome or vexing in some fashion or another.[17] One cannot disregard a request as vexatious simply because of a subjective view that a request has an annoying or vexatious component.

The Alberta Information and Privacy Commissioner has set out factors that may support a finding that a request is ***vexatious***:

- a request that is submitted over and over again by one individual or a group of individuals working in concert with each other;
- a history or an ongoing pattern of access requests designed to harass or annoy a public body;
- excessive volume of access requests; or
- the timing of access requests.

Depending on the circumstances of a given case, other factors may also be relevant in determining whether a request is vexatious or not.[18]

[16] *Order M-618*, Information and Privacy Commissioner of Ontario
[17] *Order M-618*, Information and Privacy Commissioner of Ontario
[18] Auth. (s.55) #3558 and #3449, Information and Privacy Commissioner of Alberta

3.16.7.5 Unduly Repetitive or Systematic Requests (clause 21(1)(c)(ii))

Clause 21(1)(c)(ii) states that the head of a public body may apply to the commissioner for approval to disregard a request where the request would amount to an abuse of the right to make a request because it is "unduly repetitive or systematic".

A request is ***repetitive*** when a request for the same records or information is submitted more than once.

Systematic nature includes a pattern of conduct that is regular or deliberate.[19] For example, the Alberta Commissioner has found that five access requests of similar scope over a period of two and a half years were of a systematic nature.[20] Similarly, the Alberta Commissioner has ruled that a fourth request for substantially the same records as in three previous requests was repetitious and an abuse of the right to make requests. The Commissioner stated that the access legislation was not intended to allow an applicant to resubmit the same or similar access requests to a public body simply because the applicant does not like the information obtained.[21]

3.16.7.6 Excessively Broad or Incomprehensible Requests (clause 21(1)(c)(iii))

Clause 21(1)(c)(iii) states that the head of a public body may apply to the commissioner for approval to disregard a request where the request would amount to an abuse of the right to make a request because it is "excessively broad or incomprehensible".

ATIPP Coordinators should, before making an application to disregard under clause 21(1)(c)(iii), be mindful of the duty to assist set out in section 13 of the *Act*, and discussed at section 3.2 of this manual.

ATIPP Coordinators should attempt to narrow the scope of a request that appears to be excessively broad or clarify a request that appears to be incomprehensible prior to requesting approval of the OIPC to disregard the request. This is in keeping with the public body's duty to assist.

3.16.7.7 Bad Faith Requests (clause 21(1)(c)(iv))

Clause 21(1)(c)(iv) states that the head of a public body may apply to the commissioner for approval to disregard a request where the request would amount to an abuse of the right to make a request because it is "otherwise made in bad faith".

[19] Auth. (s.55(1)) #F3885, Information and Privacy Commissioner of Alberta
[20] Auth. (s.55), Town of Ponoka, Information and Privacy Commissioner of Alberta
[21] Auth. (s.55), Alberta Municipal Affairs, Information and Privacy Commissioner of Alberta

Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purpose. It contemplates a state of mind which views the access process with contempt and for the nuisance it creates, rather than a valid means of obtaining information.

Information and Privacy Commissioners have considered the term *bad faith* and suggest the following questions be asked:

- Is there a "wrong" or "dishonest" purpose in the applicant's request?
- Is there something morally wrong with the applicant's alleged motives in making the request?
- What indications are there that the request might be being made in bad faith?[22]

3.16.7.8 Procedure

Where a public body is requesting approval from the Office of the Information and Privacy Commissioner to disregard a request under section 21, the public body should:

- prepare a written request addressed to the OIPC;
- include details relating to the request and provide information on any attempts made to narrow the scope of or clarify the request, to identify responsive records, or to otherwise exercise the duty to assist;
- provide an detailed explanation of how the request unreasonably interferes with the operations of the public body, if applicable;
- provide evidence of the fact that the requested information has already been provided to the applicant, where applicable;
- provide an explanation of why the applicant's request can be seen to trivial, frivolous or vexatious, where applicable;
- provide evidence as to the repetitive or systematic nature of the request, where applicable;
- provide evidence that the applicant is otherwise not using the Act for purposes for which it was intended and the applicant is not acting in good faith, where applicable.

The Information and Privacy Commissioner is required to make a decision with respect to an application to disregard not later than 3 business days after receiving it (subsection 21(3)). The time to make an application to disregard a request and receive the commissioner's

[22] *Northwest Territories (Education, Culture and Employment) (Re)*, 2002 CanLII 53328 (NWT IPC)

decision does not suspend the 20 business day period for responding to the request under subsection 16(1) (subsection 21(4)).

3.16.7.9 Notice to Applicant of Disregarded Request (subsection 21(5))

Where the commissioner does not approve an application to disregard a request under subsection 21(1), the head of the public body must respond to the request in the manner required under the *Act* (subsection 21(4)).

Subsection 21(5) requires a public body to notify an applicant where the commissioner approves the decision to disregard the request. Pursuant to subsection 21(6), this notice shall contain the following information:

- that the request is refused because the head of the public body is of the opinion that the request falls under subsection 21(1) and of the reasons for the refusal;
- that the commissioner has approved the decision of the head of the public body to disregard the request; and
- that the person who made the request may appeal the decision to the Trial Division under subsection 52(1).

3.16.8 Explaining a Record

The head of the public body giving access to a record may give the applicant any additional information that he/she believes may be necessary to explain it. This is in keeping with section 13 of the *Act* (Duty to Assist an Applicant). This can be especially helpful when dealing with records where a significant portion of the information has been severed.

Time spent preparing or giving the applicant an explanation of a record is not an activity for which the applicant can be charged costs.

3.17 Giving Access

An applicant may request to examine a record or to receive a copy of it.

3.17.1 Copy of a Record is Requested

If the record can reasonably be reproduced, a copy of the record (or part of it) must be provided to the applicant (paragraph 20(1)(a)). If the ATIPP request is for general

information, the public body may require the applicant to pay the copying fee. An exact copy of the record (either electronic or paper) provided to the applicant should be made for the file.

3.17.2 Examination of a Record is Requested

The applicant has the right to examine the record (paragraph 20(1)(b)) unless information in it falls within an exception to disclosure and the record must be severed. In this circumstance, the applicant is entitled to examine a copy of the severed record, not the original.

A public body may also permit an applicant to examine a record where the record cannot be reasonably reproduced.

If the applicant is permitted to examine the record, the ATIPP Coordinator must, in the response to the applicant, inform him/her when and where the record may be viewed. The name and contact information of the ATIPP Coordinator should also be provided to the applicant so he/she can make specific arrangements to view the records.

3.17.3 Access to Electronic Records

As more and more information is maintained in electronic form, applicants will increasingly ask for access to electronic records. The definition of a ***record*** (paragraph 2(y)), and subsections 20(2) to (4) (access to records electronic form) of the *Act* make it clear that records in electronic form are subject to ATIPP requests in the same way as paper records.

When an electronic record responsive to an applicant's request can be produced using normal computer hardware and software and technical expertise of the public body, and producing it would not interfere unreasonably with the operations of the public body, then it must be provided to the applicant (subsection 20(2)).

3.17.4 Datasets

Where requested information is in electronic form and is (or forms part of) a dataset, the head of the public body must produce the information for the applicant in an electronic format that is capable of re-use where

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

- producing it would not unreasonably interfere with the operations of the public body; and

- it is reasonably practicable to do so.

"Dataset" is defined in paragraph 2(g) of the *Act*. It means information which comprises a collection of information held in electronic form where all or most of the information

- has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or carrying out another function of the public body;

- is factual information which is not the product of analysis or interpretation (other than calculation) and to which s. 13 of the *Statistics Agency Act* does not apply; and

- remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded.

As recognized by the 2014 Statutory Review Committee, public bodies must become responsive for requests for raw data, in addition to records. Datasets and other machine-readable data must be viewed in the same manner as other information and records held by public bodies; the same exceptions apply and this information must be disclosed or withheld on the same basis as information found in other records.

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

3.17.5 Creating a Record in the Form Requested

Where a record exists, but not in the form requested by an applicant, subsection 20(5) enables the public body to comply with the request by creating a record in the form requested if it is of the opinion that to do so would be simpler or less costly than to produce the records as they exist.

It should be noted that where no record exists in any form, there is no obligation to create one.

3.18 Varying ATIPPA Procedures in Extraordinary Circumstances

Subsection 24(1) of the *Act* allows the head of a public body, an applicant or a third party to apply, **in extraordinary circumstances**, to the Office of the Information and Privacy Commissioner to vary a procedure, including a time limit imposed under a procedure, in Part II.

Where the commissioner determines that such extraordinary circumstances exist and that it is necessary and reasonable to do so, the commissioner may vary the procedure as requested or in another manner that the commissioner considers appropriate (subsection 24(2)).

The commissioner must decide on applications to vary procedures under section 24 within 3 business days of receipt (subsection 24(3)). The time to make an application to vary a procedure and receive the commissioner's decision does not suspend the period of time established in subsection 16(1).

If the commissioner decides to vary a procedure upon the application of the head of a public body or a third party, the head of the public body in question must notify the applicant, in writing, of the reason for the procedure being varied and the fact that the variance has been authorized by the commissioner (subsection 24(5)).

Where the commissioner varies a procedure at the request of an applicant, the commissioner is required to notify the head of the public body of the variance (subsection 24(6)).

CHAPTER 4: EXCEPTIONS TO DISCLOSURE

Under Part II of the *Act,* an applicant has a right of access to records in the custody or control of a public body. However, the right of access does not extend to information which is excluded from the *Act* under section 5. The right of access is also subject to limited and specific exceptions to disclosure, as set out in Part II, Division 2 of the *Act*. This chapter will review the exceptions to disclosure, as set out in Part II, Division 2.

In general, access to a record cannot be refused because of its type, title or form. Rather, the information in the record must be carefully examined to determine if an exception to disclosure applies.

The exceptions to disclosure in sections 27 to 41 of the *Act* authorize or require a public body to refuse to disclose "information." The term information, rather than the term ***record***, is used to indicate that the exceptions apply to the information found within a record and not necessarily to the record as a whole, with the exception of cabinet records under section 27 (Cabinet Confidences). The exception to disclosure of cabinet records set out in paragraph 27(2)(a) refers to **a record** and therefore applies to the record as a whole.

The *Act* requires that, where an exception applies to a portion of the information in a record, only that portion is severed while the remainder of the information is provided to the applicant (unless another exception to disclosure applies). The purpose of severing is to release as much information in a record as possible, without disclosing the information protected by an exception.

4.1 Interpretation of Exceptions to Disclosure

Except where the Act does not apply (i.e. section 5), a refusal to disclose information in a record must be based on one or more of the exceptions to disclosure set out in sections 27-41.

For example, it is not appropriate to refuse access simply because disclosure may cause embarrassment to the public body – embarrassment is not an exception to disclosure under the *Act.*

When considering whether an exception to disclosure applies to information in a requested record, the following principles should be kept in mind:

- The purpose of the *Act* is to facilitate democracy through ensuring that citizens have the information they require to participate meaningfully and to increase transparency and accountability in government. This purpose is achieved, in part, by giving the public a right of access to records, subject to limited and specific exceptions as set out in the *Act* (section 3).

- Generally, the public body bears the burden of proving that an exception to disclosure is justified if there is a complaint made to the OIPC or an appeal to court (section 43).

4.2 Limits to an Exception

In determining whether an exception to disclosure applies, it is important to read all of the subsections and paragraphs in the section of the *Act* which may limit its use.

An example of an exception to disclosure which contains a specific limit is section 29 (policy advice or recommendations). Subsection 29(1) sets out the exceptions to disclosure, while subsection 29(2) sets out numerous records and types of information which cannot be withheld using this exception. The records and information described in subsection 29(2) must be disclosed unless an exception in another section of the *Act* applies.

The following exceptions to disclosure contain provisions limiting their application:

- Section 28 – Local Public Body Confidences (subsection 28(2));
- Section 29 – Policy Advice or Recommendations (subsections 29(2) & (3));
- Section 31 – Law Enforcement (subsection 31(3));
- Section 34 – Intergovernmental Relations or Negotiations (subsection 34(3));
- Section 35 – Economic and Financial Interests of a Public Body (subsection 35(2));
- Section 38 – Disclosure Harmful to Labour Relations Interests of Public Body as Employer (subsection 38(2));
- Section 39 – Business Interests of a Third Party (subsection 39(3)); and
- Section 40 – Personal Information.

4.3 Reasonable Expectation of Harm

Many of the exceptions to disclosure contain a ***reasonable expectation of harm*** test (or harms test). These exceptions are concerned with the consequences that would result to the public body or another party if the information were disclosed.

A harms test is indicated by wording such as:

- "could reasonably be expected to harm"
- "could reasonably be expected to interfere with"
- "could reasonably be expected to result in (a specific harm)," etc.

Examples of exceptions which contain a harms test include section 39 (Business Interests of a Third Party) and section 31 (Disclosure Harmful to Law Enforcement).

When considering whether such an exception applies, the public body must determine whether disclosure of the requested information ***could reasonably be expected*** to cause harm described in the exception provision. This is a question of fact which must be determined in the circumstances of each ATIPP request and in the context of the information contained in the records requested. There must be a clear and direct link between the disclosure of the information and the harm that is alleged – the expectation of harm must be reasonable.

Reasonableness is judged by an objective standard. A ***reasonable expectation*** is one which is not fanciful, imaginary or contrived but rather, one which is based on reason. However, the requirement that an expectation be reasonable does not require that it be a certainty. It is not necessary to prove that disclosure of the requested records will actually result in the alleged harm. The fact that disclosure of a similar record in the past did not result in the alleged harm is a relevant consideration but is not determinative of the issue. There needs to be evidence of a reasonable expectation of probable harm.

There must be a clear and direct causal link between the disclosure of the information specified and the harm alleged. That link must be based on evidence, not merely speculation or argument. The evidence must be convincing, not just theoretically possible. The alleged harm must be specific. The public body must demonstrate the nature of the harm that is expected to result and how it is likely to result, and it must show the harm to be probable, not merely possible.[23]

In short, the harms test requires that the facts establish a likelihood that the specified harm will result from the disclosure of the records or part of the records.

4.4 Exceptions Protecting Third Parties

Certain exceptions to disclosure protect information which has been provided by, is about, or could affect, a third party.

Third party in relation to a request for access to a record or for correction of personal information is defined in paragraph 2(cc) of the *Act* to mean "a person or group of persons other than the person who made the request, or a public body." The word ***person*** is defined in paragraph 2(t) and includes "an individual, corporation, partnership, association, organization or other entity".

The following exceptions apply to third party information:

- Section 37 – Individual or Public Safety;
- Section 39 – Business Interests of a Third Party; and

[23] *Report A-2014-005*, Newfoundland and Labrador Information and Privacy Commissioner

- Section 40 – Personal Information.

Information in a record must be carefully reviewed to ensure that privacy and other third party rights are protected under the *Act*. This includes when an applicant has applied for access to records containing personal information about himself or herself, as the records may also contain information provided by, about, or affecting one or more third parties (including the personal information of another individual).

4.5 Disclosure in the Public Interest

Section 9 of the *Act* provides a "public interest override" in certain circumstances. Section 9 states:

> 9 (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception.
>
> (2) Subsection (1) applies to the following sections:
>
> (a) section 28 (local public body confidences);
>
> (b) section 29 (policy advice and recommendations);
>
> (c) subsection 30(1) (legal advice);
>
> (d) section 32 (confidential evaluations);
>
> (e) section 34 (disclosure harmful to intergovernmental relations or negotiations);
>
> (f) section 35 (disclosure harmful to the financial or economic interests of a public body);
>
> (g) section 36 (disclosure harmful to conservation); and
>
> (h) section 38 (disclosure harmful to labour relations interests of public body as employer).
>
> (3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health and safety of the public or a group of people, the disclosure of which is clearly in the public interest.

(4) Subsection (3) applies notwithstanding a provision of this Act.

(5) Before disclosing information under subsection (3), the head of a public body shall, where practicable, give notice of disclosure in the form appropriate in the circumstances to a third party to whom the information relates.

4.5.1 Public Interest Outweighs Reason for Exception

Pursuant to subsection 9(1), where the head of a public body determines that a discretionary exception listed in subsection 9(2) applies to requested information, the head must also consider whether it has been **clearly demonstrated** that the **public interest in disclosure** outweighs the **reason for the particular exception**.

For example, where the head of a public body determines that information in a requested briefing note could be excepted from disclosure under subsection 29(1) as "advice, proposals, recommendations, analyses or policy options" developed for a minister, the head must also consider whether it is clearly demonstrated that the public interest in disclosing that advice, proposal, recommendation, analysis or policy option outweighs the reason for protecting the information in subsection 29(1). If so, subsection 29(1) does not apply, and the information should be released (unless another exception to disclosure applies).

Determining whether the public interest in disclosure outweighs the reason for a particular exception must be done on a case-by-case basis. Public bodies must balance the reason for the exception (i.e. reason why the information must be protected under the *Act*) against the public interest in preserving fundamental democratic and political values, such as:

- Good governance, including transparency and accountability;
- The health of the democratic process;
- The upholding of justice;
- Ensuring the honesty of public officials;
- And general good decision-making by public officials.[24]

In determining whether there is a public interest in disclosure, the head of a public body should consider whether the information in a record serves the purpose of informing or enlightening the citizenry about the activities of government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[25] Public interest does not exist where the

[24] Report of the 2014 Statutory Review Committee at p. 78.
[25] *Re Ontario (Community Safety and Correctional Services)*, 2015 CanLII 8307 (ON IPC)

interests advanced are essentially private in nature, but where a private interest in disclosure raises issues of more general application, a public interest may be found to exist. A public interest is not automatically established where the requester is media or where a member of the public asserts interest.

The Office of the Information and Privacy Commissioner has developed guidelines that may be used by the head of a public body in applying this test available at http://www.oipc.nl.ca/pdfs/PublicInterestOverride.pdf

4.5.2 Risk of Significant Harm to the Environment or Health or Safety

Subsection 9(3) is a general override provision that obligates a public body to promptly disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm, where disclosure is clearly in the public interest, **whether or not a request for access is made**. Subsection 9(3) applies notwithstanding **any** other section in the *Act*. Unlike subsection 9(1), which only applies to discretionary exceptions listed in subsection 9(2), subsection 9(3) will apply to require the release of information regardless of the application of **any** exception (whether it be mandatory or discretionary).

Before disclosing information under this subsection, the public body must, if practicable, notify any third party to whom the information relates.

It is important to note that the decision to disclose information pursuant to subsection 9(3) rests with the head of the public body. When employees of public bodies become aware of information that may be subject to subsection 9(3), they should immediately inform the head of the public body. There is no obligation on an employee (other than the head) under the *Act* to disclose the information to the public, the affected group or an applicant.

The head of the public body must approve any release of information under subsection 9(3). This approval must not be delegated below the Deputy Minister or equivalent level. The head of a public body must disclose information falling under subsection 9(3) even if there has been no formal access request under the *Act*.

4.6 Mandatory Exceptions

There are two types of exceptions to disclosure in the *Act* – mandatory exceptions and discretionary exceptions. A mandatory exception to disclosure contains the following words:

"The head of a public body ***shall*** refuse to disclose information…"

If facts exist or may exist which bring the information, or part of the information, contained in a record within a mandatory exception, the public body must refuse to disclose the information – there is no discretion to give access. The only exception is in subsection

27(3), where the Clerk of the Executive Council has the discretion to disclose a cabinet record where he or she is satisfied that the public interest in disclosure outweighs the reason for the exception.

The five mandatory exceptions to disclosure are:

- Section 27 – Cabinet Confidences;
- Section 33 – Information from a Workplace Investigation;
- Section 39 – Disclosure Harmful to the Business Interests of a Third Party;
- Section 40 – Disclosure of Personal Information; and
- Section 41 – Disclosure of House of Assembly Service and Statutory Office Records.

4.6.1 Cabinet Confidences (section 27)

Section 27 sets out a mandatory exception for cabinet records or information that would reveal the substance of deliberations of Cabinet. However, the exception does not apply to information in a record that have been in existence for 20 or more years, or to information in a record of a decision made by Cabinet on an appeal under an Act.

Section 27 is a mandatory exception and requires a public body to refuse to disclose to an applicant:

- a "cabinet record," or

- information in a record other than a "cabinet record" that would reveal the substance of deliberations of Cabinet

Public bodies must consult with Cabinet Secretariat in regards to records that may be excepted from disclosure under section 27.

4.6.1.1 Cabinet Records

A ***Cabinet record*** is defined in subsection 27(1) as:

- advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;

- draft legislation or regulations submitted or prepared for submission to the Cabinet;

- a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;

- a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual and background material;

- an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;

- a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy;

- a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet;

- a record created during the process of developing or preparing a submission for the Cabinet; or

- that portion of a record which contains information about the contents of a record within a class of information referred to in the previous bullets.

Pursuant to paragraph 27(2)(a), "cabinet records" must be withheld from disclosure. Cabinet records generally do not require a line-by-line review as there is no information that can be severed as the record is withheld in its entirety. However, a line-by-line review is necessary for those records which fall within paragraphs 27(1)(d), as factual and background material cannot be withheld unless disclosure of that information would reveal the substance of cabinet deliberations (paragraph 27(2)(b)). Similarly, a line-by-line review will be necessary for records to which paragraph 27(1)(i) may apply, in order to identify those portions of the record that contain the excepted information.

4.6.1.2 Substance of Deliberations

Where a record does not meet the definition of a "cabinet record" set out in subsection 27(1) but would otherwise reveal the substance of deliberations of Cabinet, the information in the record must be withheld under paragraph 27(2)(b).

The "substance of deliberations" test has been interpreted as protecting information the disclosure of which would allow a reader to draw accurate inferences about Cabinet deliberations.[26] The head of a public body should consider how the information is labeled or characterized by government, what it purports to be or do, and what, in fact, it is or does. A description or heading attached to the document or information in question will not be determinative.

[26] Re Executive Council, 2005 CanLII29653 (NL IPC); *O'Connor v. Nova Scotia*, 2001 NSSC 6 (CanLII)

Unlike a "cabinet record," which is generally severed in its entirety, information in a record which constitutes the "substance of deliberations of Cabinet" can be severed in accordance with subsection 8(2) and the remainder of the record may be released where appropriate.

4.6.1.3 Disclosure by the Clerk of the Executive Council

The Clerk of the Executive Council may, notwithstanding subsection 27(2), disclose a cabinet record or information that would reveal the substance of deliberations where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception (subsection 27(3)). For a discussion of the application of the public interest test, see section 4.5 of this Manual, "Disclosure in the Public Interest".

In order for the Clerk of the Executive Council to exercise his or her discretion under subsection 27(3), all records to which section 27 applies must be forwarded to the Clerk for review prior to finalizing a response to an applicant.

4.6.1.4 Procedure

If section 27 may apply, the public body must:

- notify Cabinet Secretariat's ATIPP Coordinator that a request has been received for records which may be cabinet records. **Note: All decisions related to applying section 27 to any record or any part of a record must be made in consultation with Cabinet Secretariat;**

- forward any records that may be related to section 27 to Cabinet Secretariat for review;

- remove any records that fall under section 27(1) as "cabinet records". Ensure these records are referenced in the final response letter indicating which records and the number of pages that are withheld under section 27;

- review any remaining records to determine whether any information would reveal the substance of deliberations of Cabinet. If so, sever this information; and

- determine the age of the records. If the records have been in existence for 20 or more years, section 27 does not apply, and the records must be released unless another exception applies.

4.6.1.5 Review of Cabinet records

The Information and Privacy Commissioner has the right to require the production of and to review all records of Cabinet in order to determine whether section 27 has been properly applied.

4.6.1.6 Application of Section 27

Section 27 does not apply to information in a record that has been in existence for 20 years or more or to information in a record of a decision made by the Cabinet in an appeal under an Act, as set out in subsection 27(4). However, after that time, the record is still subject to the other requirements of the *Act* and release of the information must be determined by reference to the exemption provisions.

Specifically, a cabinet record that has been in existence for more than 20 years can no longer be withheld under section 27. A line-by-line review of the record would be done and any exceptions that may apply to information contained in the record would be considered and applied, as necessary. Cabinet Secretariat should be engaged to review such records.

4.6.2 Information from a Workplace Investigation (section 33)

Section 33 protects information relating to a workplace investigation. It requires a public body to refuse to disclose all relevant information created or gathered for the purpose of a workplace investigation to an applicant (subsection 33(2)). Conversely, in some instances where an applicant is a party to the investigation, a public body may be required to disclose information that is relevant to a workplace investigation (subsection 33(3)).

A ***workplace investigation*** means an investigation related to:

- the conduct of an employee in the workplace;
- harassment; or
- events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

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

Harassment means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended.

A *party* means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation.

Generally, where the applicant is the **complainant or respondent** to the workplace investigation, a public body must disclose **relevant** information created or gathered for the purpose of that workplace investigation to the applicant (subsection 33(3)).

Where an applicant is a **witness** in a workplace investigation, the head of a public body shall disclose only the information which relates to the witness' statements provided in the course of the investigation (subsection 33(4)). Witnesses, therefore, are entitled only to their own statements which they provided during the investigation.

Who is an employee?:

2(i), as it relates to a public body, as "includes a person retained under a contract to perform services for the public body"

Court decisions have found that this definition can include independent contractors if, "by virtue of their contract", they can be considered a "functional cog in the institutional structure of the organization".[27] It does not include an elected member of the House of Assembly.[28]

Relevance:

When determining whether section 33 applies (either for withholding information or the requirement to disclose), it is important to assess whether the information in question is relevant. If the information is not relevant to the workplace investigation, s. 33 does not apply. For instance, if an applicant who is a party to the investigation makes a request for all witness statements, it is possible that some information contained within would not be relevant to the investigation (e.g. personal details about the witness such as a medical condition, etc). In some instances, the names of the witnesses may be determined irrelevant as well. However, relevance will depend on the context of the investigation.[29]

Interaction between s. 33 and Other Exceptions:

Recent court decisions have found that the requirement to disclose relevant information under subsection 33(3) this is not absolute, and that disclosure requirements must be considered in conjunction with other exceptions. For example, the courts have found that s.33(3), which requires disclosure of all relevant information, does not prevail over solicitor-client privileged information (s.30)[30] or personal information (s.40)[31].

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[27] *College of the North Atlantic v. McBreairty,* 2020 NLCA 19 at 91

[28] *Kirby v. Chaulk,* 2021 NLSC 86 (CanLII) at 74-76

[29] In *College of the North Atlantic (Re)*, 2020 CanLII 1438 (NL IPC), one of the questions was whether the identity of witnesses should be disclosed to the applicant. The OIPC determined that most of the names should be withheld and were not relevant to the investigation. However, the OIPC also determined that the name of one of the witnesses was indeed relevant and should be disclosed to the applicant. See paragraphs 18-19.

[30] *Oleynik v. Memorial University of Newfoundland,* 2021 NLSC 51 (CanLII) at 89-98

In relation to section 40, the public body must take into consideration subsection 40(5), which outlines factors to consider when determining whether the disclosure of personal information is an unreasonable invasion of privacy.

Furthermore, in another decision the judge noted that there is nothing in the language of section 33 "standing alone, to render the other exceptions to access as being qualified by section 33".[32] Therefore, public bodies must take into consideration other exceptions to disclosure when determining whether disclosure under s.33(3) is required.

4.6.3 Disclosure Harmful to the Business Interests of a Third Party (section 39)

Section 39 protects information which, if disclosed, would harm a third party's business interests.

Paragraphs 39(1)(a) to (c) provide a three-part test – the information in question must meet **all parts** of the test for section 39 to apply:

- the information would reveal third party trade secrets or commercial, financial, labour relations, scientific or technical information of a third party (e.g. information about the third party's finances, proprietary processes or approaches, labour negotiations, scientific or technical information, etc.);

- the information was supplied, implicitly or explicitly, in confidence; and

- the disclosure of the information could reasonably be expected to:

    - harm significantly the competitive position of a third party or interfere significantly with the negotiating position of the third party;

    - 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;

    - result in undue financial loss or gain to any person; or

    - 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.

[31] *College of the North Atlantic (Re),* 2021 NLSC 120 (CanLII) at 23-38
[32] *Kirby v. Chaulk,* 2021 NLSC 86 (CanLII) at 43

Much of the information relating to third parties that will be contemplated for protection by section 39 will be commercial interests which have been supplied by private sector enterprises to government. **However, the exception is not limited to information supplied by commercial third parties – it also applies to information supplied by any individual or organization that meets all parts of the test.**

The phrase ***third party*** is defined in paragraph 2(cc) of the *Act*:

> ***Third party***, in relation to a request for access to a record or for correction of personal information, means a person or group of persons other than
>
> (i) the person who made the request, or
>
> (ii) a public body.

The word "***person***" is defined in paragraph 2(t) and an individual, corporation, partnership, association, organization or other entity. The exceptions in section 39 protect sensitive business information from or about corporations, businesses and organizations (for profit and not for profit), as well as sensitive business information from or about individuals.

4.6.3.1 Trade Secrets, Commercial, Financial, Labour Relations, Scientific, Technical Information

Commercial, financial, scientific or technical information would include information that "[...] relate[s] or pertain[s] to matters of finance, commerce, scientific or technical matters as those terms are commonly understood."[33]

Commercial information may include information that relates to buying, selling or exchange of merchandise or service. It may also include a third party's associations, history, references, bonding and insurance policies as well as pricing structures, market research, business plans, and customer records.

Financial information is commonly understood to include information such as a company's revenues and expenses, its assets and liabilities, and its profits, losses and solvency situation. It would include financial statements, statements of profit and loss, balance sheets, proposed budgets and all of the other data commonly included in a company's internal accounting processes, as well as annual reports. There may also be other

[33] *Air Atonabee v. Canada (Minister of Transport)* (1989) 37 Admin. L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d) 180

documents which indirectly reveal financial information but which do not fall into the accounting category which may also be captured.[34]

Labour relations information relates to the management of personnel by a person or organization and includes relationships between workers, working groups and their organizations as well as managers, employers and their organizations.

Scientific information is "[...] information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field."[35]

Technical information is information relating to a particular subject, craft or technique.[36] Examples are system design specifications and plans for an engineering project.

4.6.1.2 Supplied in Confidence

Information ***supplied*** includes information which is of a proprietary nature, which is not subject to negotiation between a third party and a public body. Information which is the result of contractual negotiations cannot be said to have been supplied.[37]

To meet the threshold for requested information to be considered to be supplied ***in confidence***, the test is objective and will generally depend on its content, its purposes and the circumstances in which it is compiled and communicated.[38] Specifically:

- the content of the record should be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own;

- the information should originate and be communicated in a reasonable expectation of confidence that it will not be disclosed; and

- the information should be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public

[34] *Report A-2010-002*, Newfoundland and Labrador Information and Privacy Commissioner
[35] *Order PO-1842*, Information and Privacy Commissioner of Ontario
[36] *Order 2000-017*, Information and Privacy Commissioner of Alberta
[37] *Corporate Express Canada Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski*, 2014 CanLII 55800 (NL SCTD), *Report A-2009-006*, Newfoundland and Labrador Information and Privacy Commissioner.
[38] *Corporate Express Canada Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski*, 2014 CanLII 55800 (NL SCTD).

interest, and which relationship will be fostered for public benefit by confidential communication.[39]

4.6.3.3 Reasonable Expectation of Harm

Where a "reasonable expectation of harm" is required (for example in clause 39(1)(c)(i)), a public body must be able to show a reasonable expectation of probable harm. Mere speculation or possibility of harm will not suffice. There must be clear and convincing evidence of the link between the disclosure of the information in question and the probable harm that is alleged.[40]

4.6.3.4 Exceptions

Section 39 addresses the information about the business interests of a third party where that information is held by a public body. It protects the information from disclosure where all three parts of the test are met, whether the third party whose business interests may be affected supplied the information or whether it was supplied by another party.

Information that was obtained on a tax return, gathered for the purposes of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information in non-identifying aggregate royalty information, is exempt from disclosure and is not required to meet the three-part harms test (subsection 39(2)).

Section 39 does not apply where the third party consents to disclosure (paragraph 39(3)(a)) or where the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more (paragraph 39(3)(b)).

4.6.3.5 Policy

Public bodies must apply subsection 39(1) when **all three parts** of the harms test is met.

When collecting information, public bodies should have policies and procedures in place to protect the confidentiality of information if there is an expectation that information supplied by the third party will be in confidence.

Information generated by public bodies from which third party confidential information can be inferred shall be subject to the same policies as information directly supplied in confidence by the third party.

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[39] *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.), at paragraph 42.
[40] *Corporate Express Canada Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski*, 2014 CanLII 55800 (NL SCTD).

Public bodies must apply subsection 39(2) to any information related to taxation in order to protect third party information supplied to the public body for taxation purposes. Public bodies must not apply this exception if the third party consents to the release of the information or if the records have been in existence for 50 years and is in the Provincial Archives of Newfoundland and Labrador or the archives of a public body.

4.6.3.6 Procedure

First, ATIPP Coordinators should determine the age of the records. If the records have been in existence for 50 or more years and are in the custody and control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body, then this exception does not apply.

If section 39 may apply:

- Business information may exist in an aggregate form relating to several third parties. In such cases, information may be withheld under section 39 if it can be linked to a particular third party and meet the harms test. In determining whether aggregate business information may harm a particular third party consider: (1) the number of firms that comprise the industry; and (2) the market share distribution among the firms.

- Make sure the three-part harms test in subsection 39(1) applies to any records that do not fall under subsection 39(2).

  A public body must be able to present evidence of a reasonable expectation of probable harm that led to the expectation that harm would occur if the information were disclosed. There must be a link between the disclosure of specific information and the harm which is expected from release.

  It is not necessary to demonstrate that actual harm will result or that actual harm resulted from a similar disclosure in the past, although such past experience could be part of the factual considerations upon which the expectation of harm is based.

- When deciding whether to sever or release information which falls under section 39, consider:

  - the nature of the information and the type of harm its release might cause; and

  - the monetary or other value of the harm, if it can be determined that it meets the definition of significant ***harm***.

Under clause 39(1)(c)(ii), the public body should consider all relevant facts and circumstances to determine whether it is in the public interest that the supply of similar information continue and whether disclosure would discourage third parties from voluntarily supplying information to public bodies in the future. It is unlikely that similar information would no longer be supplied where there is a financial or other incentive to continue supplying that information (e.g. the public body purchases the information), where it is legally required, or where it is supplied under a contract where no breach of contract is expected or reasonably foreseeable.

- Once all relevant information has been considered, sever any information that falls within section 39.

- Where a public body intends to give access to records that may fall within subsection 39(1), the public body must provide notice to the third party of the request. The notice to the third party must state that a request has been made for access to records containing information which, if disclosed, might affect the business interests of the third party (Form 7). It should also include a copy of or a description of the records and advise the third party that he or she may consent to the disclosure or make a complaint to the Office of the Information and Privacy Commissioner or appeal directly to the Trial Division (within 15 business days of being notified of the public body's decision to give access).

  When notice is given to a third party, the applicant must also be given written notice indicating that access will be granted on the completion of the 15 business day period within which the third party may complain or appeal.

  If the third party consents to the release of information, that information cannot be withheld under this exception. If the public body receives consent to the release of the information from the third party, the public body should check to see if another exception applies.

4.6.4 Notifying the Third Party (section 19)

Section 19 states that where the head of 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 39, the head shall give the third party a written notice.

4.6.4.1 Notice to the Third Party (subsection 19(5))

Where the head of the public body intends to give access and the third party does not consent, the written notice to the third party must:

- advise of the reasons for the decision and the provision of the *Act* upon which the decision is based;
- describe the contents of the record to which access is to be given;
- state that the applicant will be given access to the record unless the third party, not later than 15 business days after the head of the public body informs the third party of the decision, files a complaint with the Information and Privacy Commissioner under section 42 or appeals to the Trial Division under section 52; and
- advise the third party of how to file a complaint or pursue an appeal.

4.6.4.2 Notice to Applicant (subsection 19(6))

Where the head of the public body intends to give access and the third party does not consent, the written notice to the applicant must advise that the applicant will be given access to the record on the completion of the 15 business day period referenced in subsection 19(5), unless the third party file a complaint with the commissioner or appeals directly to the Trial Division.

4.6.4.3 Giving Access (subsection 19(7)*)*

Subsection 19(7) provides that where third party notice is given, the head of a public body shall not give the applicant access to the record or part of the record until:

- He/she receives confirmation from the third party or the commissioner that the third party has exhausted any recourse under the *Act* or has decided not to file a complaint or commence an appeal; or
- A court order has been issued confirming the decision of the public body.

4.6.5 Disclosure Harmful to Personal Privacy (section 40)

Section 40 limits the disclosure of an individual's personal information where a request is made by someone other than the individual. In this exception, the individual the information is about is referred to as a ***third party***. The personal information of a third party must not be

disclosed to an applicant where the disclosure would constitute an unreasonable invasion of the third party's personal privacy.

A public body shall not release personal information as defined in paragraph 2(u) unless the disclosure is not an unreasonable invasion of the third party's personal privacy.

Procedure:

First, determine if information in the responsive records falls within the definition of personal information contained in paragraph 2(u).

If section 40 may apply:

- Review subsections 40(2), (3), (4) and (5) to determine whether the information would be an unreasonable invasion of a third party's personal privacy.

- **Consider subsection 40(2)** - If the type of personal information requested is listed in subsection 40(2) or any of the circumstances listed in subsection 40(2) exist, then disclosure is not an unreasonable invasion of privacy and it should be recommended to the head that the record be released if no other exception applies.

- **Consider subsection 40(4)** – If the type of personal information requested is listed in subsection 40(4), the disclosure of the personal information is presumed to be an unreasonable invasion of personal privacy. Subsection 40(4) identifies types of personal information that are very sensitive in nature, the release of which is presumed to be an unreasonable invasion of privacy. There may be circumstances where personal information that meets the conditions of this subsection is deemed not an unreasonable invasion of privacy and therefore may be released, subject to other exceptions.

- **Consider subsection 40(5) –** Whether or not the information is of a type listed in subsection 40(4), subsection 40(5) requires the public body to consider all relevant circumstances surrounding the request in deciding if release would result in an unreasonable invasion of personal privacy. This includes, but is not limited to, those circumstances listed in subsection 40(5). For example, even in a case where information falls under subsection 40(4), exceptional circumstances may exist that rebut the presumption of unreasonable invasion of privacy. However, the considerations listed in subsection 40(5) will be most helpful in making this determination in those cases where the personal information requested does not fall in either subsections 40(2) or 40(4).

- **Provide notice under section 19 where required** – Where the personal information is of a type listed in subsection 40(2) or where any of the circumstances listed in subsection 40(2) exist, the disclosure would not be an unreasonable invasion of privacy and notice would not be required under section 19. Where the personal

information falls within subsection 40(4) and the head of the public body is of the view that the presumption is rebutted by factors in subsection 40(5), or where the head of a public body otherwise weighs the factors in subsection 40(5) and intends to release personal information, notice to the third party must be given under section 19. Although notification is not required, there may be circumstances in which it is appropriate to notify a third party of the release of personal information that falls within subsection 40(2).

- **Consider third party consent** – If a third party consents to disclosure then the information should not be withheld, unless another exception to disclosure applies.

- Sever any information that falls under section 40.

Refusal to confirm or deny the existence of a record – There are situations in which the disclosure of the existence of a record could in and of itself unreasonably invade a third party's personal privacy. For example, disclosure that a public body has a file on a third party's psychiatric treatment would in itself reveal sensitive personal information about the third party.

In such circumstances, subsection 17(2) permits the head to refuse to confirm or deny the existence of a record. Where the public body refuses to confirm or deny the existence of a record, the public body must notify the applicant of the refusal under subsection 17(1) of the *Act.*

A refusal to confirm or deny the existence of a record is a significant limit to the right of access. If an applicant asks the OIPC to review this decision, the public body will be required to provide detailed and convincing reasons why section 17(2) was claimed.

For more information on when to consider refusing to confirm or deny the existence of a record, see section 3.16.6 of this manual, "Refusal to Confirm or Deny Existence of a Record".

4.6.5.1 Refuse to Disclose Personal Information where Disclosure Unreasonable Invasion

Subsection 40(1) provides a mandatory prohibition against the disclosure of personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 40 sets out a number of factors to consider when determining whether disclosure of personal information is or is not an unreasonable invasion.

4.6.5.2 Disclosure Not an Unreasonable Invasion

Subsection 40(2) provides a list of circumstances where the disclosure of personal information would **not** be considered an unreasonable invasion of a third party's personal privacy.

Where one or more of the circumstances set out in subsection 40(2) applies, a public body may not rely on section 40 to refuse disclosure of personal information. The public body should, however, consider other sections of the *Act* when considering whether or not to disclose information.

The courts and Information and Privacy Commissioners have held that where it has been determined that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy, then it is not necessary to refer to the provisions setting out what would be considered an unreasonable invasion of personal privacy. Therefore, where section 40(2) applies, disclosure is not an unreasonable invasion of personal privacy and the information is not exempt under section 40 and it is not necessary to refer to the provisions in subsections 40(3), (4) and (5).[41]

Section 40(2) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where:

- the applicant is the individual to whom the information relates;
- the third party to whom the information relates has, in writing, consented to or requested the disclosure;
- there are compelling circumstances affecting a person's health or safety and notice of disclosure is given in the form appropriate in the circumstances to the third party to whom the information relates;
- an Act or regulation of the province or of Canada authorizes the disclosure;
- the disclosure is for a research or statistical purpose and is in accordance with section 70;
- 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;
- the disclosure reveals financial and other details of a contract to supply goods or services to a public body;
- 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;

[41] *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217 (CanLII)

- public access to the information is provided under the *Financial Administration Act*;

- the information is about expenses incurred by a third party while travelling at the expense of a public body;

- the disclosure reveals details of a licence, 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;

- the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including

    - personal information that is supplied in support of the application for the benefit; or

    - personal information that relates to eligibility for income and employment support under the *Income and Employment Support Act* or to the determination of income or employment support levels; or

- the disclosure is not contrary to the public interest as described in subsection (3) and reveals only the following personal information about a third party:

    - attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip; or

    - receipt of an honour or award granted by or through a public body.

Applicant is Individual to Whom the Information Relates (paragraph 40(2)(a))

Paragraph 40(2)(a) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the applicant is the individual to whom the information relates.

Where the applicant is requesting information and their personal information is included in the responsive records, it is not an unreasonable invasion of their personal privacy to disclose their own personal information to them.

Consent To or Request for Disclosure (paragraph 40(2)(b))

Paragraph 40(2)(b) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the third party to whom the information relates has, in writing, consented to or requested the disclosure.

An individual may provide their consent to a public body for the release of their personal information or may have requested that a public body disclose their personal information. Where an individual provides consent or requests disclosure, written or verbal consent of the individual is permitted.

Generally, consent is provided after consultation with the individual. Implied consent is not sufficient to satisfy this condition.

Where an individual has consented to or requested the disclosure, it would not be an unreasonable invasion of their personal privacy to disclose their personal information.

Under section 19(1), where the head of the public body intends to give access to a record or part of a record that the head has reason to believe might be an unreasonable invasion of privacy, the head shall make every reasonable effort notify the third party.

Compelling Circumstances Affecting Health or Safety (paragraph 40(2)(c))

Paragraph 40(2)(c) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the head of the public body determines that compelling circumstances exist that affect a person's health or safety and where notice of disclosure is given to the individual the information is about in the form appropriate in the circumstances.

This provision permits the disclosure of the personal information of *any individual*, not only an individual who endangers health or safety, or an individual whose health or safety is endangered.

The public body will have to consider all the circumstances and all the information in its possession about an individual when making a decision. Past behaviour of the individual is one factor that may assist in decision-making.

When disclosing personal information under paragraph 40(2)(c), the public body is required to advise the individual of the disclosure of their personal information. Public bodies are given the flexibility to provide notice in the means most appropriate to the circumstances at hand.

Act or Regulation Authorizes Disclosure (paragraph 40(2)(d))

Paragraph 40(2)(d) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where an Act or regulation of the province or of Canada authorizes the disclosure.

If disclosure of personal information is authorized – but not required – by an enactment, the head of the public body has more discretion as to whether or not to disclose the information.

Before disclosing personal information under section 40(2)(d) in response to a request, a public body should ask the body requesting the information to provide their legal authority for collecting the information. A public body requesting personal information from another body should provide the disclosing body with their legal authority for collecting the information.

Disclosure for Research or Statistical Purpose (paragraph 40(2)(e))

Paragraph 40(2)(e) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the disclosure is for a research or statistical purpose and is in accordance with section 70.

Section 70 permits, (but does not require), a public body to disclose personal information for a purpose related to research, providing four conditions have been met:

> *70 A public body may disclose personal information for research purposes, including statistical research, only where*
>
> *(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form;*
>
> *(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest;*
>
> *(c) the head of the public body concerned has approved conditions relating to the following:*
>
> *(i) security and confidentiality;*
>
> *(ii) the removal or destruction of individual identifiers at the earliest reasonable time; and*
>
> *(iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body; and*
>
> *(d) the person to whom that information is disclosed has signed an agreement to comply with the approved conditions, this Act and*

> *the public body's policies and procedures relating to the confidentiality of personal information.*

A ***research purpose*** means for the purpose of a systematic investigation or study of materials or sources in order to establish facts or to verify theories.

Statistical research is research based on the collection and analysis of numerical data using, in this case, quantifiable personal information to study trends and draw conclusions.

Third Party's Position, Functions or Remuneration as a Public Body Employee (paragraph 40(2)(f))

Paragraph 40(2)(f) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where 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.

The current employment status of the third party is not relevant when considering whether to disclose this information (i.e. applies to past employees and permanent, temporary and contractual employees). The phrase, "as an officer, employee, or member" refers to the position, function, or remuneration received by the third party in their capacity as an officer, employee or member of a public body.[42]

The ***position*** of a third party would include the title held by a person as an employee of a public body.

The ***functions*** of a public body employee may include a general outline of the responsibilities and duties of the employee. This may be found in a general position description for the employee.

"Remuneration" is defined in paragraph 2(z) of the *Act*. It includes:

- salary;
- wages;
- overtime pay;
- bonuses;
- allowances;

[42] *Order F2007-025*, Information and Privacy Commissioner of Alberta

- honorariums;
- severance pay; and
- the aggregate of the contributions of a public body to pension, insurance, health and other benefit plans.

Consideration must be given to the specific circumstances of each individual when using this provision.

A Court of Appeal decision found that when releasing information under this section, it is **not** an unreasonable invasion of privacy to include the name of the individual employee.[43]

The *Public Sector Compensation Transparency Act*, which was passed by the House of Assembly in 2016, requires certain government entities to proactively disclose names, titles and total compensation of persons who earn more than the threshold of $100,000.

Contract to Supply Goods or Services to a Public Body (paragraph 40(2)(g))

Paragraph 40(2)(g) states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the disclosure reveals financial and other details of a contract to supply goods or services to a public body.

Financial details include amounts paid under a contract.

Other details may include names of the parties to the contract, the subject of the contract as well as standard language included in the terms and conditions of the contract.

When disclosing information under paragraph 40(2)(g), public bodies should ensure that they have considered section 39 which is a mandatory exception to disclosure information that would be harmful to the business interest of a third party.

Opinions of a Third Party Given in the Course of Performing Services for a Public Body (paragraph 40(2)(h))

Paragraph 40(2)(h) states that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where 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.

[43] Newfoundland and Labrador v Newfoundland and Labrador Teachers' Association, 2018 NLCA 54 (CanLII)

Public Access to Information is Provided under the Financial Administration Act (paragraph 40(2)(i))

Paragraph 40(2)(i) states that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where public access to the information is provided under the *Financial Administration Act*.

Information about Expenses Incurred by Third Party while Travelling at Expense of Public Body (paragraph 40(2)(j))

Paragraph 40(2)(j) states that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the information is about expenses incurred by a third party while travelling at the expense of a public body.

Licence, Permit or Similar Discretionary Benefit Granted to Third Party by Public Body (paragraph 40(2)(k))

Paragraph 40(2)(k) states that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the disclosure reveals details of a licence, 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.

Licence or ***permit*** means authorization to carry out an activity, such as operating a particular establishment, or carrying on a professional or commercial activity. This may include business licences and building and development permits.

Discretionary Benefit of a Financial Nature Granted to Third Party by Public Body (paragraph 40(2)(l))

Paragraph 40(2)(l) states that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including:

- personal information that is supplied in support of the application for the benefit; or
- personal information that relates to eligibility for income and employment support under the *Income and Employment Support Act* or to the determination of income or employment support levels.

A **discretionary benefit of a financial nature** is any monetary allowance that the public body may decide to provide (e.g. a scholarship or a grant). The Office of the Information and Privacy Commissioner has stated that:

- a "benefit" means, among other things, a favorable or helpful factor or circumstance, or an advantage, or compensation or an indemnity paid in money, financial assistance or services, and

- "discretionary'" means that a decision-maker has a choice as to whether, or how, to exercise a power.[44]

Details of a financial discretionary benefit are not limited to the amount paid to the third party, but may include the third party's name, the reasons for providing the benefit and any consideration given to the public body in exchange for granting the benefit.

Disclosure not Contrary to Public Interest (paragraph 40(2)(m))

Paragraph 40(2)(m) states that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:

- attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip; or

- receipt of an honour or award granted by or through a public body.

4.6.5.3 Unreasonable Invasion Where Information Requested not to be Disclosed

Subsection 40(3) states that the disclosure of personal information under paragraph 40(2)(m) is an unreasonable invasion of personal privacy where the third party whom the information is about has requested that the information not be disclosed.

A public body is not expected to seek an individual's consent to disclose personal information in relation to paragraph 40(2)(m).

However, a public body should implement processes for notifying individuals that they have the right under the *Act* to request that their personal information under paragraph 40(2)(m) not be disclosed in order for them to have the opportunity to request non-disclosure. Notice of this right can be given in the same way and at the same time as information is given

[44] Report A-2008-011, Newfoundland and Labrador Information and Privacy Commissioner.

about the collection of personal information. The notice may be given orally, on a form, or in a brochure or other publication.

4.6.5.4 Disclosure Presumed to be Unreasonable Invasion

Subsection 40(4) sets out a number of circumstances in which disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. While personal information should generally not be disclosed in these circumstances, the presumption may be rebutted after consideration of the factors in subsection 40(5).

Medical, Psychiatric or Psychological History (paragraph 40(4)(a))

Paragraph 40(4)(a) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

When considering these types of personal information, public bodies should determine whether the *Personal Health Information Act* may apply and comply with its provisions in the event it is engaged.

Identifiable Part of Law Enforcement Record (paragraph 40(4)(b))

Paragraph 40(4)(b) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation.

Law enforcement is defined in paragraph 2(n). Law enforcement, under this section, means (i) policing, including criminal intelligence operations; or (ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment.

The second category (investigations, inspections or proceedings) under the definition of law enforcement includes a broader list of activities. In order for an activity to fall within this category, there must be an investigation, inspection or proceeding which leads or has the potential to lead to some penalty or sanction.[45] In addition to this, the proceedings and penalty or sanction must be set out in legislation.

Paragraph 40(4)(b) does not apply to administrative investigations where there is no contravention of law. For example, an investigation into a breach of employment policy

[45] *Report 2007-003*, Newfoundland and Labrador Information and Privacy Commissioner

which may result in disciplinary action may not be considered law enforcement for the purposes of paragraph 40(4)(b). Such an investigation may be captured under section 33 which specifically addresses workplace investigations.

Information Relates to Employment or Educational History (paragraph 40(4)(c))

Paragraph 40(4)(c) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information relates to employment or educational history.

Employment history is a complete or partial chronology of a person's working life such as might appear in a résumé or personnel file.

Educational history refers to any information regarding an individual's schooling and formal training, including names of schools, colleges or universities attended, courses taken, and results achieved.

Information Collected on Tax Return or for Collecting a Tax (paragraph 40(4)(d))

Paragraph 40(4)(d) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information was collected on a tax return or gathered for the purpose of collecting a tax.

Gathered for the purpose of collecting a tax means collected by authorities for the purpose of collecting due or overdue municipal, federal, or provincial taxes.

Bank Account or Credit Card Information (paragraph 40(4)(e))

Paragraph 40(4)(e) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information consists of an individual's bank account information or credit card information.

Personal Recommendations or Evaluations, Character References or Personnel Evaluations (paragraph 40(4)(f))

Paragraph 40(4)(f) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information consists of personal recommendations or evaluations, character references or personnel evaluations.

Name of Individual with other Personal Information or that would Reveal other Personal Information (paragraph 40(4)(g))

Paragraph 40(4)(g) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information consists of the third party's name where it appears with other personal information about the third party; or the disclosure of the name itself would reveal personal information about the third party.

Racial or Ethnic Origin or Religious or Political Beliefs or Associations (paragraph 40(4)(h))

Paragraph 40(4)(h) states that the disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

Racial origin means information identifying common descent that connects a group of persons.

Ethnic origin is similar to racial origin in that it identifies a common descent that connects a group of persons but extends to other common attributes such as language, culture or country of origin.

Religious or political beliefs or associations refers to an individual's opinions about religion or a political party, an individual's membership or participation in a church, a religious organization or political party or an individual's association or relationship with a church, a religious organization (including native spirituality), or a political party.

4.6.5.5 Relevant Circumstances to Consider for Whether Disclosure Unreasonable Invasion

Subsection 40(5) sets out a number of factors to consider when determining whether disclosure would be presumed to be an unreasonable invasion of a third party's personal privacy.

Specifically it states, in determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether:

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable;

(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;

(i) the personal information was originally provided to the applicant; and

(j) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

This list is not exhaustive but offers some factors to consider in making a determination relating to disclosure of personal information. Public bodies are required to consider all relevant factors which may include factors which are not specifically referenced in subsection 40(5).

Generally, paragraphs 40(5)(a) to (d) weigh in favour of disclosure of personal information. Paragraphs 40(5)(e) to (h) generally weigh in favour of withholding personal information.

Circumstances Weighing in Favour of Disclosure

Public Scrutiny (paragraph 40(5)(a))

Paragraph 40(5)(a) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny.

This provision speaks to the requirement of subjecting the public body or the activities of a public body to scrutiny which requires public accountability, public interest, and public

fairness.[46] Examples of information which promote public accountability of public bodies include disclosure of ministerial expenses.

Promote Public Health and Safety (paragraph 40(5)(b))

Paragraph 40(5)(b) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the disclosure is likely to promote public health and safety or the protection of the environment.

Public health refers to the well-being of the public at large. This may include physical, mental or emotional health.

Public safety refers to the safety or well-being of all or a significant part of the public. The public body must consider whether disclosure of personal information would reduce the community's exposure to a particular risk or danger.

Relevant to Fair Determination of Applicant's Rights (paragraph 40(5)(c))

Paragraph 40(5)(c) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the personal information is relevant to a fair determination of the applicant's rights.

The Ontario Information and Privacy Commissioner has stated that in order for their corresponding provision to be regarded as a relevant consideration, four factors must be established:

1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[47]

[46] *University of Alberta v. Pylypiuk*, 2002 ABQB 22 (CanLII)
[47] *Ontario (Government Services) (Re)*, 1992 CanLII 4156 (ON IPC)

Applicant's rights refers to any claim, entitlement, privilege or immunity of the applicant who is requesting someone else's information. For example, disclosure of third party personal information may be necessary so that an individual can initiate legal proceedings to prove his or her inheritance rights.

Fair refers to administrative fairness, which is comprised of the right to know the case to be met and the right to make representations.[48]

An applicant's desire to pursue civil action met the requirements of the test in Alberta Information and Privacy Commissioner Order 99-028.[49] In a subsequent Order, however, the commissioner gave little weight to this factor because all relevant information, other than the third party's identity, had already been disclosed to the applicant.[50]

Paragraph 40(5)(c) will not apply where the applicant is claiming a moral right to the information, rather than a legal right under statute or common law.[51]

If an applicant has agreed to waive future claims on a matter, the applicant has no rights to be determined and cannot rely on this provision to pursue the matter.[52]

Research or Validate Claims, Disputes or Grievances of Aboriginal People (paragraph 40(5)(d))

Paragraph 40(5)(d) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people.

Validating means confirming a legally sufficient conclusion or one that has merit, based on the facts presented.

The phrase ***claims, disputes and grievances*** is interpreted broadly to include controversies, debates and differences of opinion regarding a range of issues, and is not restricted to differences over land claims or treaty or membership status.

Third Party Exposed Unfairly to Financial or Other Harm (paragraph 40(5)(e))

[48] *Order F2008-012*, Information and Privacy Commissioner of Alberta
[49] *Order 99-028*, Information and Privacy Commissioner of Alberta
[50] *Order F2002-010*, Information and Privacy Commissioner of Alberta
[51] *Order F2005-001*, Information and Privacy Commissioner of Alberta
[52] *Order 98-008*, Information and Privacy Commissioner of Alberta

Paragraph 40(5)(e) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the third party will be exposed unfairly to financial or other harm.

Harm as it refers to "other harm" may include serious mental distress or anguish or harassment.[53]

Personal Information Supplied in Confidence (paragraph 40(5)(f))

Paragraph 40(5)(f) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the personal information has been supplied in confidence, either implicitly or explicitly.

Some factors to consider when determining whether or not personal information was supplied in confidence include:

- the existence of a statement or agreement of confidentiality, or lacking this, evidence of an understanding of confidentiality;
- the understanding of a third party as set out in his or her representations as a result of third party notice;
- past practices in the public body, particularly with regard to keeping similar personal information confidential;
- the type of personal information, especially its sensitivity and whether it is normally kept confidential by the third party; and
- the conditions under which the information was supplied by the third party, voluntarily or through informal request by the public body or under compulsion of law or regulation, and the expectations created by the collection process.

Personal Information Likely to be Inaccurate or Unreliable (paragraph 40(5)(g))

Paragraph 40(5)(g) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the personal information is likely to be inaccurate or unreliable.

Where personal information is likely to be inaccurate or unreliable, the information should not be disclosed.

[53] *British Columbia (Ministry of Children and Family Development), Re,* 2004 CanLII 43766 (BC IPC)

Inaccurate information means wrong, incomplete or misleading information or information which does not reflect the truth.

Unreliable means of unsound or inconsistent character or quality. In most cases, it will be necessary to check the source of the personal information to determine whether or not it is reliable.

Where there is sufficient reason to question the accuracy or reliability of the records, it may be an unjustified invasion of personal privacy to release it.

Unfair Damage to Reputation of Person (paragraph 40(5)(h))

Paragraph 40(5)(h) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant.

Where disclosure may unfairly damage a person's reputation, a public body should not disclose the information.

Unfairly means without justification, legitimacy or equity.

Damage the reputation of a person means to harm, injure or adversely affect what is said or believed about the individual's character. An example of information which, if disclosed, would unfairly damage a person's reputation would be allegations of sexual harassment against an individual before an internal investigation is concluded.

Personal Information Originally Provided to the Applicant (paragraph 40(5)(i))

Paragraph 40(5)(i) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the personal information was originally provided to the applicant.

Where information was originally provided to the applicant, generally disclosure of this information weighs in favour of disclosure. There are exceptions to this general approach. For example, where circumstances may have changed between the applicant and the third party, it may not be appropriate to disclose the third party's information to the applicant.

Personal Information about a Deceased Person (paragraph 40(5)(j))

Paragraph 40(5)(j) states that in determining whether the disclosure of personal information constitutes an unreasonable invasion of privacy, the public body should consider whether

the information is about a deceased person. Where the information is about a deceased person, the public body should consider whether the length of time that person has been deceased affects the impact of disclosure on personal privacy.

This section acknowledges that privacy rights do not cease upon death, but that the privacy interests of deceased persons are generally considered to decrease over time. It is not appropriate to set an arbitrary limit after which all personal information of a deceased is available to requesters (for example, 20 years), as this does not take into account the possible effect on family members or friends of the deceased who may be living long after the period has ended.

Paragraph 40(5)(j) sets out an individualized, circumstantial test which allows consideration of the length of time that has passed since death, along with other factors.

4.6.6 Disclosure of House of Assembly Service and Statutory Office Records (section 41)

Section 41 states that 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 information:

- where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;

- that is advice or a recommendation given to the Speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission established under the *House of Assembly Accountability, Integrity and Administration Act* that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; and

- 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.

In a 2013 Newfoundland and Labrador Supreme Court, Trial Division decision, the Court ruled that a public body that is not a statutory office can rely on section 41 to deny access to records in the custody of the public body that are connected to the investigatory functions of a statutory office - specifically, correspondence between the statutory office and the public body exchanged during an investigation conducted by the statutory office.[54]

As a result of the 2015 amendments to the *Act*, the phrase "the head of a public body" has now been expressly included in section 41 to clarify that not only must the Speaker or the statutory office refuse access, but any public body receiving a request for such records must

[54] *Hennessey v. Eastern Regional Integrated Health Authority*, 2013 CanLII 8492 (NL SCTD)

refuse access.

4.7 Discretionary Exceptions

A discretionary exception to disclosure contains the following words:

> "The head of a public body ***may*** refuse to disclose information…"

A discretionary exception to the right of access permits the public body to disclose information in a record, even though the information falls within the exception.

In determining whether to apply a discretionary exception, the public body should follow a two stage process:

1. Determine whether or not some or all of the information in the responsive records fall within a discretionary exception; and

2. Determine whether or not to disclose the information, even though the exception could be relied upon as a basis for refusing access. In other words, if a discretionary exception applies, the public body must still consider whether it is appropriate to disclose the information in the circumstances (unless an exception in another section of the *Act* applies).

The discretionary exceptions to disclosure are:

- Section 28 – Local Public Body Confidences;
- Section 29 – Policy Advice or Recommendations;
- Section 30 – Legal Advice;
- Section 31 – Disclosure Harmful to Law Enforcement;
- Section 32 – Confidential Evaluations;
- Section 34 – Disclosure Harmful to Intergovernmental Relations or Negotiations;
- Section 35 – Disclosure Harmful to the Financial or Economic Interests of a Public Body;
- Section 36 – Disclosure Harmful to Conservation;
- Section 37 – Disclosure Harmful to Individual or Public Safety; and
- Section 38 – Disclosure Harmful to Labour Relations Interests of Public Body as Employer.

Public bodies should note that the following discretionary exceptions are subject to the "public interest override" provision in section 9 of the *Act*:

- Section 28 (local public body confidences);
- Section 29 (policy advice or recommendations);

- Subsection 30(1) (legal advice);
- Section 32 (confidential evaluations);
- Section 34 (disclosure harmful to intergovernmental relations or negotiations);
- Section 35 (disclosure harmful to the financial or economic interests of a public body);
- Section 36 (disclosure harmful to conservation); and
- Section 38 (disclosure harmful to labour relations interests of a public body as employer).

Where any of the above discretionary exceptions may apply, the head of the public body must consider whether it is **clearly demonstrated** that the **public interest in disclosure of the information** in question outweighs **the reason for the exception**. For a discussion on the application of section 9, see section 4.5 of this Manual, "Disclosure in the Public Interest".

4.8 Exercising Discretion

The discretionary exceptions to disclosure recognize that a public body may decide, after considering all relevant factors, that it is appropriate to disclose the requested information even though an exception could be relied upon as a basis for refusing access.

Exercising discretion is not simply a formality where the public body considers issues before routinely saying no. The public body must consider whether or not to exercise discretion to disclose information with respect to each request, taking into consideration the information requested and the particular circumstances of the case. The public body must not replace the exercise of discretion with a blanket policy that information will not be released, simply because it can be withheld under one of the discretionary exceptions. A public body may develop guidelines on exercising discretion but should not treat them as binding rules – in exercising discretion the public body must "have regard to all relevant considerations" and to the spirit and purposes of the *Act.*

In *Ministry of Public Safety and Security and Attorney General of Ontario v. Criminal Lawyer's Association*[55], the Supreme Court of Canada clarified how discretion is to be exercised in the context of access to information legislation. The Court held that a discretion conferred by a statute must be exercised consistently with the purposes underlying the grant of the discretion. In order to properly exercise discretion, the head of a public body must weigh considerations for and against disclosure, including the public interest in disclosure.

The discretion to disclose information or not (in accordance with a discretionary exemption) must be "exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case".[56] The exercise of discretion is a two-step process:

[55] [2010] 1 S.C.R. 815.
[56] Ibid., at para. 66.

1. The head of the public body must determine whether the particular discretionary exception applies; and

2. If so, the head of the public body must ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.

While some discretionary exceptions are expressly subject to the public interest override in section 9 of the *Act*, the public interest in disclosure should be considered whenever the head of a public body is determining the application of any discretionary exception.

4.8.1 Local Public Body Confidences (section 28)

Subsection 28(1) gives a local public body the discretion to refuse to disclose information that would reveal a draft legal instrument (e.g. resolution, by-law), a draft of a private bill or the substance of deliberations of an private (in camera) meeting of its governing body.

A "local public body" is defined in paragraph 2(p) of the *Act*.

Specifically, section 28(1) states

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

Subsection 28(1) is intended to prevent the harm to local public bodies that is presumed to occur if the substance of deliberations is revealed before or too soon after the issues were considered or revealed prior to being ready for public review. Matters considered in camera, usually related to land, legal issues, legislation and human resources, are deemed to present potential harm to the local public body.

Subsection 28(1) operates in conjunction with other Acts or Regulations made under paragraph 116(f) of the *Act* to provide limited protection for the substance of deliberations of meetings of a local public body's elected officials, or its governing body or a committee of its governing body. Paragraph 28(1)(c) may be used only to withhold information from an in camera meeting where another Act or Regulation authorizes the holding of that meeting in the absence of the public.

Paragraph 28(1)(c) and any Regulation created under paragraph 116(f) govern only what recorded information may be withheld under the local public body confidences exception. They do not in any way limit what may be discussed in camera or affect a local public body's right to regulate procedures for their meetings.

Subsection 28(2) sets out specific circumstances where the exceptions listed in subsection 28(1) do not apply.

> 28(2) Subsection (1) does not apply where
>
> (a) the draft of a resolution, by-law or other legal instrument, a private Bill or the subject matter of deliberations has been considered, other than incidentally, in a meeting open to the public; or
>
> (b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.

Paragraph 28(2)(a) provides that where information is discussed intentionally and openly at a public meeting, the discretionary exception does not apply and therefore this information cannot be withheld under subsection 28(1).

Inversely, where such information is incidentally referenced at a public meeting and was not intended to be discussed publicly, a public body may still invoke the protection of subsection 28(1) to protect the information.

Draft Resolution, By-Law or Other Legal Instrument (paragraph 28(1)(a))

A ***draft*** means a version of a resolution, by-law or other legal instrument which has not yet been finalized for consideration in public by the local public body.

A ***resolution*** means a formal expression of opinion or will of an official body or public assembly, adopted by a vote of those present. The term is usually employed to denote the adoption of a motion such as an expression of opinion, a change to rules or a vote of support or censure.

A ***bylaw*** means a rule adopted by a local public body with bylaw-making powers, such as a municipal council.

Other legal instrument by which a local public body acts is intended to cover other legal or formal written documents, other than resolutions or bylaws, that relate to the internal governance of a local public body or the regulation of the activities over which it has jurisdiction.

Drafts of resolutions, by-laws or other legal instruments may be withheld under subsection 28(1), however final versions of these instruments cannot.

Draft of Private Bill (paragraph 28(1)(b))

A ***private bill*** relates directly to the affairs of an individual or group of individuals, including a corporation, named in the bill; the bill seeks something which cannot be obtained by means of the general law and is founded on a petition from an individual or group of individuals.[57]

Where a private bill is still in draft form (i.e. not in final form), paragraph 28(1)(b) provides a local public body with a discretionary exception to access.

Substance of Deliberations of Private Meeting (paragraph 28(1)(c))

Substance means the essence or essential part of a discussion or deliberation. [58]

Deliberation means the act of weighing and examining the reasons for and against a contemplated act or course of conduct. It also includes an examination of choices of direction or means to accomplish an objective.[59]

Meeting means an assembly or gathering at which the business of the local public body is considered. It includes both the meeting in its entirety and a portion of a meeting.

Elected officials means those individuals publicly elected through a balloting process to conduct the business of the local public body.

Governing body means the assembly of persons that is responsible for the administration of the local public body.

Committee of its elected officials or governing body means a group of people who have been elected or designated by the governing body of the local public body to act on its behalf and consider a particular issue or subject (e.g. a collective bargaining or negotiating committee). A committee may be composed of elected officials or appointed members of the local public body.

In the absence of the public means in the absence of the public at large. A meeting may still be considered to be held in the absence of the public if it is attended by a member of a local

[57] "*House of Common Procedure and Practice*", [2000]. Parliament of Canada. http://www.parl.gc.ca/MarleauMontpetit/DocumentViewer.aspx?Sec=Ch23&Seq=1&Language=E
[58] *Order 97-010*, Information and Privacy Commissioner of Alberta
[59] *Order 97-010*, Information and Privacy Commissioner of Alberta

public body who is not an elected official, member of the governing body or member of a committee of the governing body.

Procedure:

First, determine the age of the records being requested. If the records have been in existence for 15 or more years, this exception does not apply (section 28(2)(b)) and the records must be released unless another exception applies.

If section 28 may apply:

- determine whether the draft or the subject matter of the deliberations which would be revealed has been intentionally considered in a meeting open to the public. If it has, you cannot sever the information under this exception;

- once you have determined what information falls under this exception, decide whether or not you will use this exception to withhold the information;

- apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the local public body confidences exception;

- once you have decided what information will be withheld under this section, sever the records.

4.8.2 Policy Advice or Recommendations (section 29)

Subsection 29(1) gives a public body the discretion to refuse to disclose advice or recommendations prepared by or for a minister or a public body. There are some circumstances under which a public body cannot refuse to disclose information under subsection 29(1), as set out in subsection 29(2). A public body cannot refuse to disclose information under this exception if it falls within the list provided in subsection 29(2).

Section 29 states:

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

(b) the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made within 65 business days of delivery of the report; or

(c) draft legislation or regulations.

(2) The head of a public body shall not refuse to disclose under subsection (1)

(a) factual material;

(b) a public opinion poll;

(c) a statistical survey;

(d) an appraisal;

(e) an environmental impact statement or similar information;

(f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;

(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;

(h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a report on the results of field research undertaken before a policy proposal is formulated;

(j) a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body;

(k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;

(l) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or

(m) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

Policy:

Section 29 may be applied by public bodies in circumstances where the withholding of information will protect the open and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny, while allowing information to be released which would not cause real harm.

In exercising discretion under section 29, public bodies are encouraged to consider the release of advice and recommendations which have been approved and announced, or

implemented.

Although section 29 does not require the head of the public body to consider potential harm in making a decision whether to withhold records, potential harm can be a factor in considering its use. For example, public bodies may consider whether the possible disclosure of policy information may have the potential to be harmful to the public body or to the deliberative process.

Background methodology, data, analyses, questions, and factual information of all reports, studies or information in the scope of subsection 29(2) must not be withheld under subsection 29(1).

Advice and recommendations developed by or for a public body or a minister, and related to but prepared separately from any of the reports mentioned in subsection 29(2), may be covered by subsection 29(1). This includes advice or recommendations in briefing, decision or discussion notes, or any subsequent reports.

A public body may not apply subsection 29(1) to a record if 15 years have passed since the date the record was created.

Procedure:

First, determine the age of the record. If the record has been in existence for 15 or more years, section 29 does not apply. However, after that time the record is still subject to the other requirements of the *Act* and release of the information must be determined by reference to the exemption provisions.

Specifically, a record that has been in existence for more than 15 years can no longer be withheld under section 29. Where a record has been in existence for more than 15 years, a line-by-line review of the record would be done and other exceptions in Part II of the *Act* that may apply to information contained in the record would be considered and applied, as necessary.

Records which have not been in existence for more than 15 years must be carefully reviewed in order to determine whether or not section 29 may apply to the record or portions of the record. It is generally not possible to make this determination merely based on the title, type, classification or format of a record.

If section 29 may apply:

- determine if any of the information identified as policy advice or recommendations falls under subsection 29(2). If it does, it cannot be withheld using this exception;

- once you have determined what information can be withheld under subsection 29(1), decide whether or not you will use this exception to withhold the information;

- apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the policy advice or recommendations exception;

- once you have decided what information will be withheld under this section, conduct a line-by-line review of the record to determine what information is excepted under this section and sever the relevant information.

4.8.2.1 Advice, Proposals, Recommendations, Analyses or Policy Options (paragraph 29(1)(a))

This provision provides protection for information that would reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister.

Advice

The Supreme Court of Canada, in *John Doe v. Ontario (Finance)*[60], stated that "advice" must have a distinct meaning from "recommendations". "Advice" must have a broader meaning than "recommendations", or else it would be redundant.

The Newfoundland and Labrador Information and Privacy Commissioner has stated that ***advice*** means an expression of opinion on policy-related matters, including proposals, recommendations, analysis, policy options and draft legislation or regulations. It is not limited to a suggested course of action. For example, 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 would generally be considered ***advice***.[61]

Factual, background, analytical or evaluative material should not be captured as advice or recommendations under paragraph 29(1)(a).[62]

Recommendations

"Recommendations" relates to a suggested course of action.[63]

Proposals, Analyses and Policy Options

"Proposals and analyses or policy options" are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

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[60] [2014] 2 S.C.R. 3
[61] *Report A-2009-007*, Newfoundland and Labrador Information and Privacy Commissioner
[62] *Order PO-2028*, Information and Privacy Commissioner of Ontario
[63] *Report A-2009-007*, Newfoundland and Labrador Information and Privacy Commissioner

4.8.2.2 Formal Research or Audit Report that is Incomplete (paragraph 29(1)(b))

This provision provides a discretionary exception allowing a public body to protect the contents of a formal research or audit report that, in the opinion of the head of the public body, is incomplete where the head of the public body has made a request or order for completion within 65 business days of the report's delivery. This permits a public body to withhold information that could be misleading or inaccurate due to the fact that it is incomplete.

A *formal research or audit report* is one that has been compiled in accordance with procedures intended to ensure the validity of the research or audit process. The research or audit is carried out in accordance with a recognized methodology.

Audit is defined as a financial or other formal and systematic examination or review of a program, portion of a program or activity.

Incomplete means that the report is in preliminary or draft format, or is under review for consistency with the terms of reference for the report or for accuracy or completeness.

Where there has been no request or order for completion within 65 business days, or where the report is completed, the head of a public body cannot refuse access to the record under paragraph 29(1)(b). If the report forms part of a cabinet record, consideration may be given to whether section 27 applies.

4.8.2.3 Draft Legislation or Regulations (paragraph 29(1)(c))

This provision states that the head of a public body may refuse to disclose information that would reveal draft legislation or regulations. This protection includes bills and regulations while they are being drafted for the purpose of bringing to the House of Assembly for publication or public consultation but also includes regulations that do not go to the House of Assembly as well. This protection covers all editions of draft bills or regulations.

4.8.2.4 Records to Which the Exception Does Not Apply (subsection 29(2))

Subsection 29(2) sets out specific circumstances where the exceptions listed in subsection 29(1) do not apply.

Where information falls within one of the categories set out in subsection 29(2), it cannot be withheld under section 29.

4.8.2.5 Factual Material (paragraph 29(2)(a))

Paragraph 29(2)(a) states that the head of a public body shall not refuse to disclose information under subsection 29(1) that is factual material.

Factual material means information which does not set out or imply options or recommended courses of actions. Such information is factual and cannot be withheld under subsection 29(1).[64] The context of factual information is not relevant when considering applying this exception. Specifically, the location of factual information (for example, factual information contained in key messages in a briefing note) does not itself reveal advice.[65]

4.8.2.6 Public Opinion Poll (paragraph 29(2)(b))

Paragraph 29(2)(b) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a public opinion poll.

A ***public opinion poll*** means a survey or inquiry of public opinion generally conducted by interviewing a random sample of people.

4.8.2.7 Statistical Survey (paragraph 29(2)(c))

Paragraph 29(2)(c) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a statistical survey.

Statistics is the study of the collection, organization, analysis, interpretation, and presentation of data.

A ***statistical survey*** consists of general views or opinions of subjects using numerical data.

Where a statistical survey may be included in a record that may be withheld under subsection 29(1), the statistical survey should be disclosed and the remaining information severed.

4.8.2.8 Appraisal (paragraph 29(2)(d))

Paragraph 29(2)(d) states that the head of a public body shall not refuse to disclose, under subsection 29(1), an appraisal.

An ***appraisal*** is an act of assessing the worth, value or quality of something or someone.

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[64] *Order 02-38*, Information and Privacy Commissioner of British Columbia
[65] *Report 2005-005*, Newfoundland and Labrador Information and Privacy Commissioner

4.8.2.9 Environmental Impact Statement or Similar Information (paragraph 29(2)(e))

Paragraph 29(2)(e) states that the head of a public body shall not refuse to disclose, under subsection 29(1), an environmental impact statement or similar information.

Environment means the natural and physical environment which includes land, water, air, structures, living organisms, environmental values, and the social, cultural and economic aspects.

An ***environmental impact statement*** is a record that describes the effects of proposed activities on the environment and provides an assessment of the potential positive and negative impact a proposed project or activity may have on the environment.

4.8.2.10 Final Report or Final Audit on Performance or Efficiency of a Public Body on its Programs or Policies (paragraph 29(2)(f))

Paragraph 29(2)(f) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies.

An ***audit*** means an evaluation of the efficiency, effectiveness and economy of the operations of a public body, its programs or its policies.

Consideration of whether other sections may apply to records, such as section 27, is required.

4.8.2.11 Consumer Test Report or a Report of Test Carried out on a Product to Test Equipment of Public Body (paragraph 29(2)(g))

Paragraph 29(2)(g) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a consumer test report or a report of a test carried out on a product to test equipment of the public body.

4.8.2.12 Feasibility or Technical Study Relating to Policy or Project of Public Body (paragraph 29(2)(h))

Paragraph 29(2)(h) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body.

A ***feasibility study*** means an assessment of the practicality of a proposed plan or method.

A ***cost estimate*** means an approximation of the probable cost of a project or policy, calculated on the basis of available information.

4.8.2.13 Report on Results of Field Research Undertaken Before Policy Proposal is Formulated (paragraph 29(2)(i))

Paragraph 29(2)(i) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a report on the results of field research undertaken before a policy proposal is formulated.

Field research means collecting data or conducting research undertaken in a natural setting rather than in structured environments such as laboratories.

4.8.2.14 Report of External Task Force, Committee, Council or Similar Body Established to Consider a Matter and Make a Report or Recommendations (paragraph 29(2)(j))

Paragraph 29(2)(j) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body.

4.8.2.15 Plan or Proposal to Establish a New Program or to Change a Program (paragraph 29(2)(k))

Paragraph 29(2)(k) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body.

4.8.2.16 Information a Public Body has Cited Publicly as the Basis for Making a Decision or Formulating a Policy (paragraph 29(2)(l))

Paragraph 29(2)(l) states that the head of a public body shall not refuse to disclose, under subsection 29(1), information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy.

Basis for making a decision means the motive, rationale, justification or facts leading to a decision.

There must be compelling evidence to support the withholding of information under an exception to access when that same information has already been released to the public.[66]

[66] *Report 2005-005*, Newfoundland and Labrador Information and Privacy Commissioner

Public bodies should carefully review the record which sets out the basis for making a decision to ensure that any other information included in the record is reviewed and any exceptions that may apply are considered and applied, where appropriate.

4.8.2.17 A Decision, Including Reasons, That is Made in the Exercise of a Discretionary Power or an Adjudicative Function (paragraph 29(2)(m))

Paragraph 29(2)(m) states that the head of a public body shall not refuse to disclose, under subsection 29(1), a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

Adjudicative function means a function conferred upon an administrative tribunal, board or other non-judicial body or individual that has the power to hear and rule on issues involving the rights of people and organizations.

4.8.2.18 Record in Existence for 15 Years or More (subsection 29(3))

Subsection 29(3) states that the information in a record that has been in existence for 15 years or more cannot be withheld under subsection 29(1).

Once the 15 year time period has expired, consideration of whether other sections may apply to records is required.

4.8.3 Legal Advice (section 30)

Section 30 states:

> 30. (1) The head of a public body may refuse to disclose to an applicant information
>
> (a) that is subject to solicitor and client privilege or litigation privilege of a public body; or
>
> (b) that would disclose legal opinions provided to a public body by a law officer of the Crown.
>
> (2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

Section 30 gives a public body the discretion to refuse to disclose legal advice and communications that are subject to solicitor and client privilege or litigation privilege or that would otherwise disclose legal opinions provided to a public body by a law officer of the Crown.

The purpose of the exception is to facilitate full and frank consideration and discussion of the circumstances on which legal advice is sought, so that the advice may be informed and effectual, and to facilitate the preparation of a case for trial. The Supreme Court of Canada has confirmed the fundamental nature of solicitor-client privilege to the justice system in Canada, and has held that the privilege must be "as near to absolute as possible."[67]

Under solicitor and client privilege, a legal advisor must refuse to disclose communications between the legal advisor and the client, unless the client consents to the disclosure. The privilege belongs to the client and can only be waived by the client.

Generally, the decision on whether it is required by law or otherwise in the public interest to waive privilege will be determined in the course of routine consultations between the client public body and the Department of Justice and Public Safety or designated legal advisor.

Section 30 protects information flowing in both directions between the legal advisor and the client. This means that solicitor and client privilege applies to client-generated documents, as well as legal opinions. The document may be as formal as a communication between lawyer and client or as simple as notes on file made to assist the lawyer in litigation.

Section 30 is not limited to the protection of legal advice and communications between a legal advisor and a minister or public body. The client can be a third party which is not a public body under the *Act*, but whose privileged documents are in the custody or control of a public body, and where the client has not waived the privilege.

Policy:

Decisions on whether to waive privilege should be determined through consultations between the client public body and the Department of Justice and Public Safety or the public body's designated legal advisors.

Public bodies shall undertake a review, and shall determine (in consultation with their solicitor) whether section 30 applies to a particular record. A request made under a concurrent process should not be a factor in the public body making a decision with respect to access to that record.

Procedure:

[67] See e.g. *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at paras. 24 and 26; *R. v. McClure*, [2001] 1 S.C.R. 445 at paras.23, 33 and 35; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 at para. 36; *Pritchard v. Ontario (Human Rights Commission)*, *supra*, at paras. 17-18.

If section 30 may apply:

- consult with your departmental solicitor or designated legal advisor;
- once you have determined what information can be withheld under section 30, decide whether or not you will use this exception to withhold the information;
- apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the legal advice exception;
- once you have decided what information will be withheld under this section, sever the records.

Note: **Government public bodies must consult their departmental solicitor/designated legal counsel before disclosing records that may fall under section 30. The legal advisor will assist with the determination of whether the information is privileged, and whether the public interest in disclosure outweighs the reason for the exception in accordance with section 9.**

4.8.3.1 Solicitor and Client Privilege (paragraph 30(1)(a))

There are specific criteria which a document must meet for solicitor and client privilege to apply:

- it is a communication between solicitor and client;
- it entails the seeking or giving of legal advice; and
- is intended to be confidential by the parties.[68]

Solicitor and client privilege is intended to protect communication between a lawyer and his or her client for the purpose of seeking or giving legal advice.[69]

4.8.3.2 Litigation Privilege (paragraph 30(1)(a))

Unlike solicitor-client privilege, litigation privilege is not directed at, or restricted to, communications between solicitor and client. Its object is to ensure the efficacy of the adversarial process. To achieve this purpose, parties to litigation, whether represented or

[68] *Solosky v. The Queen*, [1980] 1 SCR 821
[69] *Report A-2009-010*, Newfoundland and Labrador Information and Privacy Commissioner

not, must be left to prepare their positions in private, without adversarial interference and without fear of premature disclosure.[70]

In order to be protected by litigation privilege, a document must be prepared, gathered or annotated for the **dominant purpose** of use in actual, anticipated or contemplated litigation.[71]

This can include notes that set out a solicitor's mental impressions, strategies, legal theories or draft questions, whether or not they were actually sent to the client. It can also apply to documents prepared by third parties for the dominant purpose of litigation (for example, a medical or other expert report).

Once litigation has ended, litigation privilege no longer applies. [72] Litigation does not end until all possible appeals are exhausted and all appeal periods have expired in all related actions.[73]

4.8.3.3 Legal Opinions Provided to a Public Body (paragraph 30(1)(b))

Legal opinion includes an opinion provided by a law officer of the Crown about a legal issue and a recommended course of action based on legal considerations. It does not include information which was provided about a matter having legal implications where no legal opinion was expressed or where no course of action based on legal considerations was recommended. The fact that a lawyer reviewed a record does not of itself mean that the record falls within the exception.

This provision protects legal opinions provided by lawyers employed by the Crown. The ***Crown*** is defined as "the Crown in right of the Province of Newfoundland and Labrador."[74]

4.8.3.4 Privileged Information of a Person other than a Public Body (subsection 30(2))

Subsection 30(2) provides that the head of a public body must refuse to disclose information that is subject to solicitor-client privilege or litigation privilege of a person other than a public body.

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[70] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII) at para. 27.
[71] R.W. Hubbard, S. Magotiaux & S.M. Duncan, *The Law of Privilege in Canada*, looseleaf, vol. 2 (Aurora: Canada Law Book, 2006) at para. 12.10.
[72] *Corner Brook (City) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2020 NLSC 37 (CanLII) at 67
[73] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII)
[74] *Interpretation Act*, R.S.N.L. 1990, c. I-19

This section requires a public body to withhold information that is in its custody and control but which is subject to the solicitor-client or litigation privilege of a person who is not a public body under the *Act* (for example, the government of another province).

4.8.4 Disclosure Harmful to Law Enforcement (section 31)

Section 31 is a discretionary exception that permits the head of a public body to withhold information the disclosure of which **could reasonably be expected to harm** law enforcement. Section 31 lists the types of harms to law enforcement.

Law enforcement is defined in section 2(n).

> "Law enforcement" means
>
> (i) policing, including criminal intelligence operations, or
>
> (ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment.

This section requires that there must be objective grounds to believe that disclosure will reasonably result in one of the harms contemplated in paragraphs 31(1)(a) to (p).

Under section 31(3), a public body cannot refuse to provide an applicant:

- a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act;
- a report, including statistical analysis, on the degree of success achieved in a law enforcement program, unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters listed in subsections 31(1) and (2), or if any other exception applies; or
- statistical information on decisions to approve or not approve prosecutions.

If a record contains information the disclosure of which would be harmful to law enforcement, subsection 17(2) permits the public body to refuse to confirm or deny its existence. A refusal to confirm or deny the existence of a record is a significant limit to the right of access.

The degree of harm to law enforcement will depend, in part, on the sensitivity of the law enforcement information.

Policy:

Public bodies may refuse to disclose information which would harm a law enforcement matter.

Although it is not necessary to demonstrate that actual harm will result, or that actual harm resulted from a similar disclosure in the past, public bodies should consider past experiences as a factor in determining whether harm to a law enforcement matter has occurred.

If a public body has started an investigation, records that are relevant to the investigation are excepted from disclosure regardless of when the record was created.

When considering the use of section 31, it is important to remember that records relating to certain investigations by the Royal Newfoundland Constabulary are excluded under section 5(1)(k)-(m).

Procedure:

If section 31 may apply:

- decide whether or not you will use this exception to withhold the information;

- once you have decided what information will be withheld under this section, sever the records.

- determine whether it is appropriate to refuse to confirm or deny the existence of the records – There are situations where the disclosure of the existence of records could result in harm to law enforcement. If a public body refuses to confirm or deny the existence of a record, it must notify the applicant of the refusal under subsection 17(1) of the *Act*;

  A refusal to confirm or deny the existence of a record is a significant limit to the right of access. If an applicant asks the OIPC to review a refusal to confirm or deny the existence of a record, the public body will be required to provide detailed and convincing reasons why subsection 17(2) was claimed.

Section 31 is not subject to the public interest override in subsection 9(1).

4.8.4.1 Interfere With or Harm a Law Enforcement Matter (paragraph 31(1)(a))

Paragraph 31(1)(a) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to interfere with or harm a law enforcement matter.

A public body contemplating a decision to withhold information needs to be able to demonstrate that there is a reasonable likelihood of harm if the specific information is disclosed.

4.8.4.2 Prejudice the Defence of Canada or of Any Foreign State Allied to or Associated with Canada (paragraph 31(1)(b))

Paragraph 31(1)(b) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to prejudice the defence of Canada or of a foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism.

Prejudice in this context refers to detriment to national defence.

An ***allied state*** is one with which Canada has concluded formal alliances or treaties.

An ***associated state*** is one with which Canada may be linked for trade or other purposes outside the scope of a formal alliance.

4.8.4.3 Reveal Investigative Techniques and Procedures Used in Law Enforcement (paragraph 31(1)(c))

Paragraph 31(1)(c) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement.

Investigative techniques and procedures mean the methods or processes by which examinations, enquiries or observations are carried out. The meaning of this phrase includes the equipment and technology employed to conduct these examinations, enquiries or observations.

4.8.4.4 Reveal Identity of a Confidential Source of Law Enforcement Information (paragraph 31(1)(d))

Paragraph 31(1)(d) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal the identity of a confidential source of law enforcement information or reveal information provided by that source with respect to a law enforcement matter.

Identity includes the name and any identifying characteristics, symbols and numbers relating to the source.

A ***confidential source*** is someone who supplies law enforcement information, as defined in the *Act*, to a public body with the reasonable expectation that his or her identity will remain secret. Employees, whether directly employed or under contract, are not "confidential sources" where they are a part of the public body and are supplying information as part of their jobs.[75]

When considering paragraph 31(1)(d), public bodies must also be mindful of subsection 5(1)(l) relating to excluded records. Specifically, subsection 5(1)(l) excludes "a record relating to an investigation by the Royal Newfoundland Constabulary that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter."

4.8.4.5 Reveal Law Enforcement Intelligence Information (paragraph 31(1)(e))

Paragraph 31(1)(e) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal law enforcement intelligence information.

Law enforcement intelligence means information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.[76]

When considering paragraph 31(1)(e), public bodies must be mindful of subsection 5(1)(k) relating to excluded records. Specifically, subsection 5(1)(k) excludes "record relating to an investigation by the Royal Newfoundland Constabulary if all matters in respect of the investigation have not been completed."

4.8.4.6 Endanger Life or Physical Safety of a Law Enforcement Officer (paragraph 31(1)(f))

Paragraph 31(1)(f) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or another person.

"Endanger the life or physical safety" refers to situations in which disclosure of information could threaten, or put in peril, someone's life or physical well-being. An individual's physical safety can be threatened as a result of a physical attack or an attack against property that is likely to cause casualties.

[75] *Order 99-010*, Information and Privacy Commissioner of Alberta
[76] *Metropolitan Toronto Police Services Board (Re)*, 1993 CanLII 5020 (ON IPC)

4.8.4.7 Reveal Information Relating to or Used in Exercise of Prosecutorial Discretion (paragraph 31(1)(g))

Paragraph 31(1)(g) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion.

Prosecutorial discretion means the exercise of a prosecutor's discretion related to his or her power to prosecute, negotiate a plea, withdraw charges, enter a stay of proceedings, and appeal a decision or verdict.[77] Prosecutorial discretion involves the ultimate decision as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for, that is, the nature and extent of the prosecution and the Attorney General's participation in it.[78]

The exercise of prosecutorial discretion may be with respect to offences under the *Criminal Code* (Canada) and any other enactment of Canada for which the Attorney General for Newfoundland and Labrador may initiate and conduct a prosecution. Prosecutorial discretion may also be exercised with respect to offences under an enactment of Newfoundland and Labrador, including prosecution of provincial regulatory offences.

When considering paragraph 31(1)(g), public bodies must be mindful of subsections 5(1)(j) and (m) relating to excluded records. Specifically, subsection 5(1)(j) excludes "a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed." Subsection 5(1)(m) excludes "a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation."

4.8.4.8 Deprive a Person of Right to a Fair Trial or Impartial Adjudication (paragraph 31(1)(h))

Paragraph 31(1)(h) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication.

Fair trial means a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after consideration of evidence and facts as a whole.

Impartial adjudication means a proceeding in which the parties' legal rights are safeguarded and respected.

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[77] *Orders 2001-011*, *2001-030* *and* *2001-031*, Information and Privacy Commissioner of Alberta

[78] *Order F2006-005*, citing the Supreme Court of Canada in *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372]

This exception applies not only to civil and criminal court actions but also to proceedings before tribunals established to adjudicate individual and collective rights.

4.8.4.9 Reveal a Record Confiscated by a Peace Officer (paragraph 31(1)(i))

Paragraph 31(1)(i) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal a record that has been confiscated from a person by a peace officer in accordance with an Act or regulation.

For a definition of ***peace officer***, please refer to section 2 of the *Criminal Code of Canada*.

4.8.4.10 Facilitate the Escape from Custody of a Person Under Lawful Detention (paragraph 31(1)(j))

Paragraph 31(1)(j) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to facilitate the escape from custody of a person who is under lawful detention.

Under lawful detention means any person held in custody pursuant to a valid warrant or other authorized order.

The exception also extends to individuals remanded in custody (i.e. charged but not yet tried or convicted). It does not apply to individuals released under bail supervision.

4.8.4.11 Facilitate Commission of an Offence (paragraph 31(1)(k))

Paragraph 31(1)(k) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to facilitate the commission or tend to impede the detection of an offence under an Act or regulation of the province or Canada.

4.8.4.12 Reveal Arrangements for Security of Property or a System (paragraph 31(1)(l))

Paragraph 31(1)(l) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system.

Security generally means a state of safety or physical integrity. The security of a building includes the safety of its inhabitants or occupants when they are present in it. Examples of

information relating to security include methods of transporting or collecting cash in a transit system, plans for security systems in a building, patrol timetables or patterns for security personnel, and the access control mechanisms and configuration of a computer system.

4.8.4.13 Reveal Technical Information about Weapons Used in Law Enforcement (paragraph 31(1)(m))

Paragraph 31(1)(m) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal technical information about weapons used or that may be used in law enforcement.

4.8.4.14 Adversely Affect the Detection, Investigation, Prevention or Prosecution of an Offence (paragraph 31(1)(n))

Paragraph 31(1)(n) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention.

The term prosecution is used in a criminal context.[79]

4.8.4.15 Reveal Information in a Correctional Record Supplied in Confidence (paragraph 31(1)(o))

Paragraph 31(1)(o) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal information in a correctional record supplied, implicitly or explicitly, in confidence.

A *correctional record* refers to information collected or compiled while an individual, either an adult or young person, is in the custody or under the supervision of correctional authorities or their agents as a result of legally imposed restrictions. It may include records relating to imprisonment, parole, probation, community service orders, bail supervision, or temporary absence permits.

It is not necessary for the correctional record itself to be in the custody or control of the public body. Should a record contain information that is in the correctional record, it may be withheld under paragraph 31(1)(o).

[79] *Report 2007-003*, Newfoundland and Labrador Information and Privacy Commissioner

4.8.4.16 Harm the Conduct of Existing or Imminent Legal Proceedings (paragraph 31(1)(p))

Paragraph 31(1)(p) states that the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to harm the conduct of existing or imminent legal proceedings.

A ***legal proceeding*** includes any civil or criminal proceeding or inquiry in which evidence is given or may be given and any proceeding authorized or sanctioned by law and brought or instituted for the acquiring of a right or the enforcement of a remedy. This would also include an arbitration hearing.[80]

4.8.4.17 Additional Exceptions (subsection 31(2))

Subsection 31(2) provides additional circumstances where the head of a public body may refuse to disclose information to an applicant in relation to law enforcement.

- Paragraph 31(2)(a) states that the head of a public body may refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure would be an offence under an Act of Parliament. A disclosure is an ***offence under an Act of Parliament*** where a federal statute prohibits the disclosure and makes it an offence.

- Paragraph 31(2)(b) states that the head of a public body may refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record.

- Paragraph 31(2)(c) states that the head of a public body may refuse to disclose information to an applicant if the information is about the history, supervision or release of a person who is in custody or under supervision and the disclosure could reasonably be expected to harm the proper custody or supervision of that person.

4.8.4.18 Public Body Shall Not Refuse to Disclose under Section 31 (subsection 31(3))

Subsection 31(3) provides certain circumstances where the head of a public body shall not refuse to disclose information under section 31.

- ***Report Prepared in the Course of Routine Inspections by an Agency*** (paragraph 31(3)(a)) – The head of a public body shall not refuse to disclose under section 31 a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act. ***Routine inspections*** involve scheduled

[80] *Report A-2008-002*, Newfoundland and Labrador Information and Privacy Commissioner

inspections by public officials to ensure that standards or other regulatory requirements are being met. They take place without specific allegations or complaints having been made. Examples include public health inspections, fire inspections, and liquor licensing inspections. Such reports are usually factual in nature and report the conditions found by the inspector. They may include advice or other information that could be excepted under other sections of the *Act*.

- ***A Report on Success Achieved in a Law Enforcement Program*** (paragraph 31(3)(b)) – The head of a public body shall not refuse to disclose under this section a report, including statistical analysis, on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to interfere with or harm the matters referred to in subsections 31(1) or 31(2). This provision encourages the disclosure of reports which set out the degree of success of a law enforcement program. Such reports may also be identified for routine disclosure. Where disclosure of such a report could reasonably be expected to interfere with or harm matters set out in the preceding sections, it may continue to be protected under section 31. Examples of law enforcement reports include the Report of the Task Force on Criminal Justice Efficiencies published by the Department of Justice.

- ***Statistical Information on Decisions to Approve or Not Approve Prosecutions*** (paragraph 31(3)(c)) – The head of a public body shall not refuse to disclose under this section statistical information on decisions to approve or not to approve prosecutions.

4.8.5 Confidential Evaluations (section 32)

Section 32 gives public bodies the discretion to refuse to disclose personal information that is evaluative or opinion material, provided in confidence, and compiled for specific and limited purposes:

- determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body (subsection 32(a));

- determining suitability, eligibility or qualifications for admission to an academic program of an educational body (subsection 32(b));

- determining suitability, eligibility or qualifications for the granting of tenure at a post-secondary educational body (subsection 32(c));

- determining suitability, eligibility or qualifications for an honour or award to recognize outstanding achievement or distinguished service (subsection 32(d)); or

- assessing the teaching materials or research of an employee of a post-secondary educational body or of a person associated with an educational body (subsection 32(e)).

Section 32 is a discretionary exception allowing the head of a public body to determine whether it is appropriate to disclose or withhold information that may fall within scope of confidential evaluations. The exception applies to information, rather than the record as a whole. The exception does not provide a blanket exception to the record as whole. Therefore, the record must be reviewed line-by-line to determine what information, if any, may be withheld under this section.

Evaluative material means information which provides a determination of merit, worth or significance using criteria against a set of standards. This can include opinions provided about an individual's skills and suitability for an employment position. [81]

Opinion material means information containing a view or judgment formed about something or someone.

Suitability means having the properties or qualities that are right for a specific purpose.

Eligibility means qualified or entitled to be selected or chosen.

Qualification means a quality, ability or accomplishment that makes a person suitable for a specific task.

Personal information is ***explicitly provided in confidence*** when the party providing it expressly requests or indicates that it is to be kept confidential.

Personal information is ***implicitly provided in confidence*** when an intention or expectation that the information will be treated as confidential can be implied from the circumstances in which it was provided.

When determining whether information would be considered a confidential evaluation under section 32, a three-part test should be considered:

1. The information must be personal information that is evaluative or opinion material;
2. The personal information must be compiled solely for one of the following purposes:
    a. Determining the applicant's suitability, eligibility or qualifications for employment, or
    b. Awarding a government contract, or
    c. Awarding other benefits;
3. The personal information must be provided, explicitly or implicitly, in confidence.[82]

The personal information included in the record in order for this section to apply is generally an applicant's personal information but also may include a third party's personal information. [83]

[81] *Report 2014-014*, Newfoundland and Labrador Information and Privacy Commissioner
[82] *Report 2014-014*, Newfoundland and Labrador Information and Privacy Commissioner

Procedure:

If section 32 may apply:

- consider what policies and procedures your public body already has in place concerning confidential evaluations;
- if feasible, consult with the individuals that provided the evaluation to see if they consent to the release of information;
- decide whether or not it is appropriate to use this exception to withhold information;
- apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the confidential evaluations exception;
- once you have decided what information (if any) will be withheld under this section, sever the records.

4.8.5.1 Employment or Awarding of Contracts by Public Body (subsection 32(a))

Subsection 32(a) states that the head of a public body may refuse to disclose personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body.

Note: You may wish to check with the Public Service Commission regarding policies related to the release of information on candidates for employment.

4.8.5.2 Admission to an Academic Program of an Educational Body (subsection 32(b))

Subsection 32(b) states that the head of a public body may refuse to disclose personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of determining suitability, eligibility or qualifications for admission to an academic program of an educational body.

4.8.5.3 Granting Tenure at a Post-Secondary Educational Body (subsection 32(c))

Subsection 32(c) states that the head of a public body may refuse to disclose personal information that is evaluative or opinion material, provided explicitly or implicitly in

[83] *Report 2014-014*, Newfoundland and Labrador Information and Privacy Commissioner

confidence, and compiled for the purpose of determining suitability, eligibility or qualifications for the granting of tenure at a post-secondary educational body.

4.8.5.4 Honour or Award to Recognize Outstanding Achievement (subsection 32(d))

Subsection 32(d) states that the head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of determining suitability, eligibility or qualifications for an honour or award to recognize outstanding achievement or distinguished service.

4.8.5.5 Assess Teaching Materials or Research of Post-Secondary Educational Body Employee (subsection 32(e))

Subsection 32(e) states that the head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of assessing the teaching materials or research of an employee of a post-secondary educational body or of a person associated with an educational body.

4.8.6 Disclosure Harmful to Intergovernmental Relations or Negotiations (section 34)

Subsection 34(1) gives public bodies the discretion to refuse to disclose information which, if disclosed, could reasonably be expected to harm the normal process of intergovernmental relations or the supply of intergovernmental information.

This section protects from release the following categories of intergovernmental information:

- information the disclosure of which could reasonably be expected to harm the conduct of relations between the government of Newfoundland and Labrador and the following external governmental entities or their agencies:
    - the government of Canada;
    - another provincial government;
    - the council of a municipality;
    - a government of a foreign state;
    - an international organization of states; or
    - the Nunatsiavut government; or
- information received in confidence from any of the above mentioned governments,

councils or organizations, or their agencies.

Section 34 cannot be applied to records which have been in existence for 15 or more years, unless the information in the records is law enforcement information (subsection 34(3)).

Policy:

Section 34 is discretionary giving the head of the public body the responsibility for exercising that discretion in deciding whether to release records. However, before releasing any information to which subsection 34(1) may apply, the head of a public body must seek the approval of:

- The Attorney General, with respect to law enforcement information; or
- The Lieutenant-Governor in Council, with respect to any other type of information.

Intergovernmental and Indigenous Affairs Secretariat should be consulted, as soon as practicable, when the subject matter of the request fits, or may fit, within section 34.

Public bodies may apply paragraph 34(1)(a) regardless of the identity of the applicant. The applicant may be one of the governments listed in clauses 34(1)(a)(i) through (iv), yet the information may be withheld if disclosure could reasonably be expected to harm relations between the government of Newfoundland and Labrador and the government that has requested the information or another government.

Public bodies should consult with Intergovernmental and Indigenous Affairs Secreatariat with regard to records of a local government body.

Public bodies should consult with the Department of Justice and Public Safety with regard to records relating to law enforcement.

Procedure:

Determine the age of the record. Section 34 cannot be applied to records which have been in existence for 15 or more years unless the information is law enforcement information, or another exception applies.

If section 34 may apply:

- determine whether the records contain information that may be excepted in any of the following categories:
    - Harm to the conduct of relations - Determine whether a reasonable person would expect that releasing the record would result in harm to the conduct of relations between the government of Newfoundland and Labrador and any of the

governments, councils, or organizations listed in clauses 34(1)(a)(i) through (iv), or their agencies (paragraph 34(1)(a)). In making this determination, appropriate internal consultations should be made;

- Information received in confidence - Determine whether a reasonable person would expect that release of the requested record would reveal information received in confidence from any of the governments, councils, or organizations listed in clauses 34(1)(a)(i) through (iv), or their agencies (paragraph 34(1)(b));

- consult with the ATIPP Coordinator of Intergovernmental and Indigenous Affairs Secretariat (Intergovernmental Affairs);

- consult with the ATIPP Coordinator of the Department of Justice and Public Safety for section 34 records containing law enforcement information;

- advise the ATIPP Coordinator of Intergovernmental and Indigenous Affairs Secretariat (Intergovernmental Affairs) for all cases where the consideration of the use of section 34 involves local government bodies;

- consult with the other public bodies (ministries, agencies, governments, etc.) whose information is responsive to the request - consultations with the other government(s) involved assist in determining whether or not the exception applies, and ensure that public body is aware of all relevant factors in exercising discretion whether to release all or part of the record;

- consultations with other governments are carried out through appropriate channels:

    - the government of Canada or the government of a province

      In most cases requiring consultation with the federal government or another provincial government, the public body will contact the ATIPP Coordinator in the other government.

    - the council of a local government body

      Where relations with a local government body may be affected, the public body may consult with the ATIPP Coordinator for that local government body.

      Note: In cases of doubt regarding the relevance of a document or the appropriate protocol for contact, consult with the ATIPP Coordinator for Intergovernmental and Indigenous Affairs Secretariat (Intergovernmental Affairs).

    - the government of a foreign state

      When consultation is required with a foreign government, Intergovernmental

Affairs coordinates the consultation unless another established channel for direct liaison exists. If a public body, with the consent of Intergovernmental Affairs, then undertakes direct liaison, keep Intergovernmental Affairs informed of the communications. In cases of doubt on the appropriate protocol for contact, consult with the ATIPP Coordinator for Intergovernmental Affairs at an early state of the line-by-line review if international relations or any significant intergovernmental issues are involved.

- decide whether or not you will use this exception to withhold the information;

- apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the intergovernmental relations exception;

- once you have decided what information will be withheld under this section, sever the records;

- seek consent of Lieutenant Governor in Council or Attorney General for section 34;

  If the public body decides to exercise discretion to disclose non-law enforcement information to which section 34 applies, consent of the Lieutenant Governor in Council (i.e. Cabinet) must be obtained prior to disclosure. The ATIPP Coordinator for the public body coordinates/obtains Cabinet consent. This includes drafting any necessary Cabinet submissions.

  For law enforcement information to which section 34 applies, the public body must obtain the consent of the Attorney General. For law enforcement information, the ATIPP Coordinator for the public body contacts the ATIPP Coordinator for the Department of Justice and Public Safety to obtain the consent of the Attorney General.

- notify any other government(s) involved of the final decision on whether or not to release information to which section 34 applies.

4.8.6.1. Harm to Intergovernmental Relations (paragraph 34(1)(a))

Paragraph 34(1)(a) states:

> 34.(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of the province of relations between that government and the following or their agencies:

(i) the government of Canada or a province,

(ii) the council of a local government body,

(iii) the government of a foreign state,

(iv) an international organization of states, or

(v) the Nunatsiavut Government.

Relations is intended to cover both formal negotiations and more general exchanges and associations between the Government of Newfoundland and Labrador and other governments or their agencies.

Harm means damage or detriment to negotiations and general associations and exchanges. To satisfy the harms test, there must be a reasonable probability that disclosure would harm and not merely hinder, impede or minimally interfere with the conduct of intergovernmental relations or negotiations.

There must be more than a possibility of harm with a clear link between the disclosure of specific information and the harm being alleged.[84]

4.8.6.2. Reveal Confidential Information from a Government (paragraph 34(1)(b))

Paragraph 34(1)(b) states that the head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal information received in confidence from a government, council or organization listed in paragraph 34(1)(a) or their agencies.

In confidence usually describes a situation of mutual trust in which private matters are related or reported.

4.8.6.3. Disclosure of Information (subsection 34(2))

Subsection 34(2) states that the head of a public body shall not disclose information referred to in subsection 34(1) without the consent of:

- the Attorney General, for law enforcement information; or
- the Lieutenant-Governor in Council, for any other type of information.

If a public body intends to exercise discretion to disclose information in spite of the applicability of this exception, consent from the Department of Justice and Public Safety or

[84] Canada *(Information Commissioner) v. Canada (Prime Minister),* (1993) 1 F.C. 427, 1992 CarswellNat 185 (eC).

Lieutenant Governor in Council must be obtained (subsection 34(2)).

4.8.6.4. Limitation Period (subsection 34(3))

Subsection 34(3) states that subsection 34(1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.

Information which may fall within section 34 but which is 15 years old or more, must be disclosed unless another exception applies to it.

4.8.7 Disclosure Harmful to the Financial or Economic Interests of a Public Body (section 35)

Public bodies hold significant amounts of financial and economic information critical to their financial management and the management of the provincial economy. Section 35 provides public bodies with the ability to refuse to disclose information which could reasonably be expected to disclose specific types of information. Specifically, subsection 35(1) gives public bodies the discretion to refuse to disclose information which could reasonably be expected to disclose:

- trade secrets of a public body or the government of the province;
- financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;
- plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
- information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;
- scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;
- positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;
- information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or

- information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.

Section 35 does not apply to the results of product or environmental testing carried out by or for the public body, unless the testing was done on a fee for service basis or for the purpose of developing methods of testing (subsection 35(2)).

Policy:

Public bodies may refuse to disclose information listed in subsection 35(1). In determining whether to refuse to disclose such information, the head of the public body should consider all aspects of the mandate and activities of the public body, and not limit that consideration only to the records requested.

Economic interests refer to both the broad interests of a public body and, for provincial public bodies, of the government as a whole, in managing the production, distribution and consumption of goods and services. The term also covers financial matters such as the management of assets and liabilities by a public body and the public body's ability to protect its own or the government's interests in financial transactions.

The ***financial interests*** of the Government of Newfoundland and Labrador include the ability to collect taxes and generate revenues.

Public bodies must not refuse to disclose under subsection 35(1) the results of product or environmental testing carried out by or for that public body, unless the testing was done for a fee or as a service to someone other than the public body, or for the purpose of developing methods of testing.

In order for section 35 to apply, a public body must present evidence that establishes a clear and direct linkage between the disclosure of the information in question and the probable harm to the financial or economic interests of a public body. In order to prove this linkage, a public body is required to give detailed and convincing evidence explaining how or why the alleged harm would result from the disclosure of specific information.[85]

Where a reasonable expectation of harm, prejudice or injury is required, a public body must be able to demonstrate, on a balance of probabilities and through clear and convincing evidence, that there is a reasonable expectation of probable harm from the disclosure of the specific information. There must be a clear and direct causal link between the disclosure and the harm alleged. Evidence must be convincing, not just theoretically possible. Alleged harm must be specific. A public body must be able to show the nature of the harm expected to result, how it is likely to result, and that the harm is probable, not merely possible.

Procedure:

[85] *Report A-2014-005*, Newfoundland and Labrador Information and Privacy Commissioner

If section 35 may apply:

- make sure the information you are considering severing under this section fits into one of the categories set out in paragraphs 35(1)(a) through (h);
- determine if the information in the record is the result of product or environmental testing and, therefore, may not be withheld under section 35, unless performed for a fee as a service or for developing methods of testing;
- determine whether you need to consult with any other public bodies;
- decide whether or not you will use this exception to withhold the information;
- apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the financial/economic interests exception;
- once you have decided what information will be withheld under this section, sever the records.

4.8.7.1 Trade Secrets of a Public Body (paragraph 35(1)(a))

Paragraph 35(1)(a) states that the head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose trade secrets of a public body or the government of the province.

Trade secret means information that a public body keeps secret and which provides a competitive edge or contains economic value. Trade secrets may include formulas, methods, techniques or processes.

A trade secret must be:

- owned by the public body or the Government of Newfoundland and Labrador; or
- the public body or the government must be capable of proving a claim of legal right in the information (such as under a license agreement).

Section 35 does not protect trade secrets of a third party. Section 39 provides protection for trade secrets of a third party.

4.8.7.2 Financial, Commercial, Scientific or Technical Information that Has Monetary Value (paragraph 35(1)(b))

Paragraph 35(1)(b) states that the head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value.

In order for this exception to apply, three conditions must be met:

- the information is financial, commercial, scientific or technical;
- the information belongs to a public body or to the Government of Newfoundland and Labrador; and
- the information has, or is reasonably likely to have, monetary value.

The following definitions for financial, commercial, scientific and technical information were previously defined in section 4.6.3 of this manual, "Disclosure Harmful to the Business Interests of a Third Party".

Commercial, financial, scientific or technical information would include information that "[...] relate[s] or pertain[s] to matters of finance, commerce, scientific or technical matters as those terms are commonly understood."[86]

Financial information is commonly understood to include information such as a company's revenues and expenses, its assets and liabilities, and its profits, losses and solvency situation. It would include financial statements, statements of profit and loss, balance sheets, proposed budgets and all of the other data commonly included in a company's internal accounting processes, as well as annual reports. There may also be other documents which indirectly reveal financial information but which do not fall into the accounting category which may also be captured.[87]

Commercial information may include information that relates to buying, selling or exchange of merchandise or service. It may also include a third party's associations, history, references, bonding and insurance policies as well as pricing structures, market research, business plans, and customer records. The names and titles of key personnel and contract managers is commercial information when the information relates to how the third party proposes to organize its work.

Scientific information is "[...] information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information

[86] *Air Atonabee v. Canada (Minister of Transport)* (1989) 37 Admin. L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d) 180
[87] *OIPC Report A-2010-002,* Newfoundland and Labrador Information and Privacy Commissioner

to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field."[88]

Technical information is information relating to a particular subject, craft or technique.[89] Examples include system design specifications and plans for an engineering project.

4.8.7.3 Plans Relate to Management of Personnel of a Public Body Not Yet Implemented (paragraph 35(1)(c))

Paragraph 35(1)(c) states that the head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public.

4.8.7.4 Premature Disclosure of a Proposal or Project (paragraph 35(1)(d))

Paragraph 35(1)(d) states that the head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party.

4.8.7.5 Scientific or Technical Information by Employee of Public Body (paragraph 35(1)(e))

Paragraph 35(1)(e) states that the head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication.

4.8.7.6 Positions, Plans, Procedures, Criteria or Instructions for Contractual or Other Negotiations (paragraph 35(1)(f))

Paragraph 35(1)(f) states that the head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations.

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[88] *OIPC Report A-2010-001,* Newfoundland and Labrador Information and Privacy Commissioner, & *Order PO-1842, Information and Privacy Commissioner of Ontario*

[89] *Order 2000-017*, Information and Privacy Commissioner of Alberta

Negotiation is the process of attempting to reach agreement by discussion with others.

4.8.7.7 Prejudice Financial or Economic Interest of the Government (paragraph 35(1)(g))

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

4.8.7.8 Information Expected to be Injurious to Manage Economy of the Province (paragraph 35(1)(h))

Paragraph 35(1)(h) states that the head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.

4.8.7.9 When the Exception Does not Apply (paragraph 35(2))

Paragraph 35(2) sets out specific and limited circumstances where a public body is not permitted to withhold information under paragraph 35(1). Specifically, the head of a public body shall not refuse to disclose the results of product or environmental testing carried out by or for that public body, unless the testing was done:

- for a fee as a service to a person, a group of persons or an organization other than the public body; or

- for the purpose of developing methods of testing.

The intent of the provision is to ensure that a public body does not withhold information resulting from product or environmental testing carried out either by the employees of a public body or on its behalf by another organization. Examples include information on products such as air filters, environmental test results on water quality or air quality and commercial product testing and soil testing.

Information may be withheld when the public body performs the testing, for a fee, as a service to a private citizen or private corporate body.

The information may also be withheld if the testing was done for the purpose of developing testing methods, such as a new methodology for tire recycling. There would have to be evidence in such cases that methodology development was the sole purpose of the testing.

4.8.8 Disclosure Harmful to Conservation (section 36)

Section 36 gives public bodies the discretion to refuse to disclose information which, if disclosed, could reasonably be expected to result in damage to or interfere with the conservation of:

- fossil sites, natural sites or sites that have an anthropological or heritage value;
- endangered, threatened, or vulnerable species, sub-species or a population of a species; or
- a rare or endangered living resource.

Damage refers to destruction, disturbance, alteration, deterioration or reduction in the value of an historic resource or a vulnerable species or living resource.

Policy:

Public bodies shall consult with the Department of Tourism, Culture, Industry and Innovation before disclosing information concerning sites that have an anthropological or heritage value.

If a public body identifies information that is aimed at conservation of endangered, threatened or rare living resources, it shall consult with the Department of Municipal Affairs and Environment to determine if other circumstances are relevant in making its decision.

Procedure:

If section 36 may apply:

- consult with the Department of Tourism, Culture, Industry and Innovation if the responsive records concern sites that have or may have an anthropological or heritage value;

- consult with the Department of Tourism, Culture, Industry and Innovation if the responsive records concern the conservation of endangered, threatened or rare living resources;

- decide whether or not you will use this exception to withhold the information;

  A relevant factor in exercising discretion under section 36 is safeguarding the public body's ability to preserve or protect from harm any of the sites, species or resources listed in paragraphs 36(a), (b) or (c). In many cases, the exact whereabouts or attributes of a site, species or resource this section seeks to protect are not common

knowledge. The fact alone may be the main safeguard the public body must preserve;

- apply section 9 of the Act – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the conservation exception;

- once you have decided what information will be withheld under this section, sever the records.

4.8.9 Disclosure Harmful to Individual or Public Safety (section 37)

Subsection 37(1) gives public bodies the discretion to refuse to disclose information, including an individual's own personal information, where the disclosure could reasonably be expected to:

- threaten the safety or mental or physical health of a person other than the applicant, or

- interfere with public safety.

Subsection 37(2) also gives public bodies the discretion to refuse to disclose an applicant's personal information if disclosing the information to the applicant would result in *immediate and grave harm* to the individual's safety or mental or physical health. You will note that this subsection requires a higher degree of harm.

Policy:

Public bodies shall apply subsection 37(1) only where there are reasonable grounds for the head to believe that a threat to anyone's safety or mental or physical health, or an interference with public safety could result from a disclosure.

Public bodies shall act prudently in applying subsection 37(1) and shall regard the safeguarding of public health and safety as a priority in exercising discretion.

Application of the exception must be based on a reasonable expectation that immediate and substantial harm would result from the disclosure of information to the individual.

An example where this exception may be relevant is where an individual with a long and difficult history of mental instability might suffer grave mental or physical trauma if certain diagnoses were made available to him or her without the benefit of medical or mental health intervention.

Procedure:

If section 37 may apply:

- Decide whether or not you will use this exception to withhold the information.
- Apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the individual/public safety exception;
- Once you have decided what information will be withheld under this section, sever the records.

4.8.9.1 Threaten Safety or Mental or Physical Health or Interfere with Public Safety (subsection 37(1))

Subsection 37(1) states that the head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to:

- threaten the safety or mental or physical health of a person other than the applicant; or
- interfere with public safety.

Threaten means to expose to risk or harm, and safety implies relative freedom from danger or risks.

Mental health refers to the functioning of a person's mind in a normal state.

Physical health refers to the well-being of an individual's physical body.

Interference with public safety would occur where the disclosure of information could reasonably be expected to hamper or block the functioning of organizations and structures that ensure the safety and well-being of the public at large.

Where a public body is considering withholding records under subsection 37(1), they must be satisfied that there is sufficient evidence of a reasonable expectation of a threat to the safety or mental health of a person if the records were to be released.[90]

4.8.9.2 Harm to the Applicant's Safety or Mental or Physical Health (subsection 37(2))

[90] *Report 2007-001*, Newfoundland and Labrador Information and Privacy Commissioner

Subsection 37(2) states that the head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

Immediate and grave harm to an applicant's health or safety means serious physical injury or mental trauma or danger to the applicant that could reasonably be expected to ensue directly from disclosure of the personal information.

4.8.10 Disclosure Harmful to Labour Relations Interests of Public Body as Employer (section 38)

Subsection 38(1) provides public bodies with the discretion to refuse to disclose information that would reveal

- labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or

- labour relations information the disclosure of which could reasonably be expected to

    - harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer;

    - result in significant financial loss or gain to the public body as an employer; or

    - reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.

Subsection 38(2) states that subsection 38(1) does not apply where the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Under previous versions of the *Act*, only third party labour relations records could be protected. Under section 38, the protection afforded to third party labour relations records is extended to public bodies as an employer.

Procedure:

First, determine the age of the records. If they are 50 or more years old and are held in the public body's archives, section 38 does not apply.

If section 38 may apply:

- determine if the information was prepared or provided in confidence (implicitly or explicitly);

  Note: If you are considering severing information because it was provided in confidence, ensure that it has been treated consistently as confidential information by the public body – if it has not been treated confidentially consistently, paragraph 38(1)(a) cannot be used.

- decide whether or not to use this exception to withhold information;

- apply section 9 of the *Act* – consider whether it has been clearly demonstrated that the public interest in disclosure outweighs the reason for the labour relations exception;

- once you have decided what information may be withheld, if any, sever the records.

CHAPTER 5: OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

One of ways in which the purposes of the *Access to Information and Protection of Privacy Act* are achieved is by providing for an independent oversight agency to review the decisions of public bodies respecting access to information and protection of personal information under the *Act* (paragraph 3(2)(f)). This purpose is carried out through the Office of the Information and Privacy Commissioner (OIPC).

This Chapter discusses the appointment of the commissioner, term of office, removal or suspension of the commissioner, appointment of an acting commissioner, the commissioner's staff, as well as the general powers of the commissioner and his or her reporting requirements.

5.1 General Overview

Newfoundland and Labrador's Information and Privacy Commissioner (the commissioner) is an officer of the House of Assembly who is appointed under the *Access to Information and Protection of Privacy Act*. As an officer of the House of Assembly, the commissioner is independent of the Government of Newfoundland and Labrador (section 86).

The commissioner is appointed by the Lieutenant-Governor in Council on a resolution of the House of Assembly (subsection 85(2)). Before an appointment is made, the Speaker of the House of Assembly must establish a selection committee consisting of:

- The Clerk of the Executive Council or his or her deputy;
- The Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly;
- The Chief Judge of the Provincial Court or another judge of that court as designated by the Chief Judge; and
- The President of Memorial University or a vice-president of Memorial University designated by the President.

This selection committee must develop a roster of qualified candidates and may invite expressions of interest from the public for the position of commissioner (subsections 85(3) and (4)). Once the selection committee has developed this roster of qualified candidates, it must be submitted to the Speaker of the House of Assembly, who must then consult with the Premier, the Leader of the Official Opposition and the leader of any other registered political party that is represented on the House of Assembly Management Commission and

place a resolution to appoint one of the candidates before the House of Assembly (subsections 85(5) and (6)).

The commissioner holds office for a term of six (6) years, unless he or she resigns, dies or is removed from office (subsection 87(1)). A person may be reappointed as commissioner for one further term of six (6) years (subsection 87(2)). A commissioner may be reappointed by the Lieutenant-Governor in Council, with the approval of the majority of members on the government side of the House of Assembly and separate approval of the majority of members on the opposition side of the House of Assembly. In the event of a tie vote on either or both sides of the House of Assembly, the Speaker casts the deciding vote.

The commissioner may be removed or suspended from office only by the Lieutenant-Governor in Council on a resolution of the House of Assembly carried by a majority vote of the members of the House of Assembly. If the House of Assembly is not in session, the Lieutenant-Governor in Council may suspend the commissioner for incapacity, neglect of duty or misconduct, but the suspension does not continue beyond the end of the next session of the House of Assembly. The House of Assembly must determine if the suspension is to continue or if the commissioner should be removed from office. In other words, the commissioner cannot be removed from office by the Government acting on its own (section 88).

An acting commissioner may be appointed by the Lieutenant-Governor in Council, on the recommendation of the House of Assembly Management Commission, in specific and limited circumstances:

- the commissioner is temporarily unable to perform his or her duties (paragraph 89(1)(a));
- the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is not in session (paragraph 89(1)(b)); or
- the office of the commissioner becomes vacant or the commissioner is suspended when the House of Assembly is in session, but the House of Assembly does not pass a resolution to fill the office of the commissioner before the end of the session (paragraph 89(1)(c)).

Where the office of the commissioner becomes vacant and an acting commissioner is appointed under paragraphs 89(1)(b) or (c), the term of the acting commissioner does not extend beyond the end of the next sitting of the House of Assembly (subsection 89(2)).

Where an acting commissioner is otherwise appointed, that person holds office until:

- the commissioner returns to his or her duties after a temporary inability to perform;
- the suspension of the commissioner ends or is dealt with in the House of Assembly; or

- a person is appointed as commissioner under section 85.

Sections 90 and 91 of the *Act* set out the salary, pension, benefits and expenses of the commissioner.

The commissioner has the authority, subject to the approval of the House of Assembly Management Commission, to appoint assistants and employees considered necessary to carry out the commissioner's functions under this *Act* and the *Personal Health Information Act*. Persons employed under the commissioner are members of the public service of Newfoundland and Labrador (section 92). The commissioner may delegate any of his or her powers or duties under the *Act* to a person on his or her staff (section 103).

5.2 General Powers and Duties of the Commissioner

Section 95 of the *Act* sets out the general powers and duties of the commissioner.

In general terms, the responsibilities of the commissioner under the *Act* fall into three categories:

- monitor compliance with the *Act* and the regulations by public bodies;
- promote public awareness of the *Act*; and
- investigate and deal with complaints under the *Act*.

In addition to the commissioner's powers and duties under parts II and III of the *Act*, the commissioner may, pursuant to subsection 95(1):

- conduct investigations to ensure compliance with the *Act* and regulations;
- monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities and duties under the *Act*;
- review and authorize the collection of personal information from sources other than the individual the information is about;
- consult with any person with experience or expertise in any matter related to the purpose of the *Act*; and
- engage in or commission research into anything relating to the purpose of the *Act*.

Subsection 95(2) further provides that the commissioner shall also exercise and perform the following powers and duties:

- inform the public about the *Act*;
- develop and deliver an educational program to inform people of their rights and the reasonable limits on those rights under the *Act* and to inform public bodies of their responsibilities and duties, including the duty to assist, under the *Act*;
- provide reasonable assistance, upon request, to a person;
- receive comments from the public about the administration of the *Act* and about matters concerning access to information and the confidentiality, protection and correction of personal information;
- comment on the implications for access to information or for the protection of privacy of proposed legislative schemes, programs or practices of public bodies;
- comment 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;
- take actions necessary to identify, promote, and where possible, cause to be made adjustments to practices and procedures that will improve public access to information and protection of personal information;
- bring to the attention of the head of a public body a failure to fulfill the duty to assist applicants;
- make recommendations to the head of a public body or the minister responsible for the *Act* about the administration of the *Act*;
- inform the public from time to time of apparent deficiencies in the system, including the office of the commissioner; and
- establish and implement practices and procedures in the office of the commissioner to ensure efficient and timely compliance with the *Act*.

5.3 Legislative Consultation

With respect to the commissioner's power/duty to comment on the implications of proposed legislative schemes, programs or practices on access to information or protection of privacy (paragraph 95(2)(e)), public bodies should note section 112 of the *Act*. This section requires

a minister to consult with the commissioner on any proposed legislation that could impact upon access to information or the protection of privacy.

Section 112 states:

> 112.(1) A minister shall consult with the commissioner on a proposed Bill that could have implications for access to information or protection of privacy, as soon as possible before, and not later than, the date on which notice is given to introduce the Bill into the House of Assembly is given.
>
> (2) The commissioner shall advise the minister as to whether the proposed bill has implications for access to information or protection of privacy.
>
> (3) The commissioner may comment publicly on a draft Bill any time after that draft Bill has been made public.

5.4 Investigations and Audits (paragraphs 95(1)(a) and (b))

As noted above, paragraphs 95(1)(a) and (b) give the commissioner the authority to:

- conduct investigations to ensure compliance with the Act and regulations; and
- monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities under the Act.

These investigations and audits are in addition to the commissioner's powers to investigate complaints respecting access to records under Part II and privacy complaints under Part III. Investigations and audits under paragraphs 95(1)(a) and (b) are not dependent upon the commissioner receiving a complaint; the commissioner may commence these investigations and audits on his or her own initiative.

Subsection 95(3) states that the commissioner's investigative powers and duties are not limited to an investigation under paragraph 95(1)(a), but also apply to investigations in respect of "a complaint, privacy complaint, audit, decision or other action that the commissioner is authorized to take under the Act."

As a result, the commissioner's power to compel the production of documents (section 97) and the right of entry (section 98) apply where the commissioner conducts an investigation or an audit on his or her own initiative with respect to a public body's compliance with or performance of responsibilities under the *Act*.

Where the commissioner completes an investigation under paragraph 95(1)(a) or an audit under paragraph 95(1)(b), the commissioner is required to:

- Prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations (subsection 107(a); and

- Send a copy of the report to the head of the public body concerned (subsection 107(b)).

The commissioner may make the report public (subsection 107(c)).

5.5 Annual Report (section 105)

Section 105 requires the commissioner to submit an annual report to the House of Assembly through the Speaker. This report includes information on:

- the exercise and performance of his or her duties and functions under the *Act*;

- a time analysis of the functions and procedures in matters involving the commissioner in a complaint, from the date of receipt of the request for access or correction by the public body to the date of informal resolution, the issuing of the commissioner's report, or the withdrawal or abandonment of the complaint, as applicable;

- persistent failures of public bodies to fulfil the duty to assist applicants, including persistent failures to respond to requests in a timely manner;

- the commissioner's recommendations and whether public bodies have complied with the recommendations;

- the administration of the *Act* by public bodies and the minister responsible for the *Act*; and

- other matters about access to information and protection of privacy that the commissioner considers appropriate.

5.6 Special Reports (section 106)

Section 106 provides that the commissioner may, at any time, make a special report to the House of Assembly relating to:

- the resources of the office of the commissioner;

- another matter affecting the operations of the Act; or

- a matter within the scope of the powers and duties of the commissioner under the Act.

CHAPTER 6: COMPLAINTS

The right to an independent review of the decisions and actions of public bodies under the *Act* is fundamental to guaranteeing access to information and protection of personal information. The right to make a complaint to Newfoundland and Labrador's Information and Privacy Commissioner under Part II, Division 3 of the *Act* (sections 42 to 51) helps ensure that the purposes of the *Act*, as set out in section 3, are achieved. In addition, the right to make a complaint about specific actions under the *Act* helps ensure a fair and equitable process.

A fundamental right under the *Act* is the right to ask the commissioner to review a decision of a public body respecting:

- requests for access to records under Part II of the *Act*; or
- correction of personal information.

This complaint process is set out in Part II, Division 3 of the *Act*.

Applicants and third parties are given the right to make a complaint to the commissioner in respect of a public body's decision, act or failure to act in relation to requests for information. The commissioner is given the authority to investigate and make recommendations, to which the public body must respond in within 10 business days. If the head of the public body does not agree with the commissioner's recommendations and does not intend to comply, he or she must seek a declaration from the Supreme Court, Trial Division that the public body is not required to comply.

Where the public does not respond to a commissioner's report, or does not comply with the commissioner's recommendations in the required time, the commissioner is given the authority to prepare and file an excerpt of his or her report, containing his or her recommendation to grant access or correct personal information, with the Registry of the Supreme Court, Trial Division, giving it the same effect as an order of that court.

The commissioner is also given the power to investigate complaints from individuals that their personal information (or the personal information of others) has been collected, used or disclosed in contravention of the *Act* (section 73). For more information with respect to privacy complaints, please refer to the **Protection of Privacy Policy and Procedures Manual**.

6.1 Complaints (section 42)

Section 42 states that a person who has made a request to a public body for access to a record or for correction of personal information may file a complaint with the commissioner respecting a decision, act or failure to act of the head of the public body that relates to the

request.

The 2015 Statutory Review Committee recommended that the commissioner should have the right to access both cabinet and solicitor-client privileged records in order to determine whether the exceptions in the *Act* have been properly applied.[91] These recommendations were adopted in the 2015 legislative amendments.

A third party who is given notice under section 19 of a decision by the head of a public body to give access to a record containing information affecting the third party's business interests or personal privacy may also file a complaint with the commissioner respecting a public body's decision to grant access (subsection 42(3)).

A person who has made a request for access or correction or a third party notified under section 19 may also appeal directly to the Supreme Court, Trial Division if they have not filed a complaint with the commissioner under section 42 (subsections 52(1) and 53(1)).

Where an appeal is made directly to the Trial Division, a complaint cannot be made to the commissioner, and the commissioner must refuse to investigate any such complaint (subsections 42(6) and (7)).

6.2 Filing a Complaint (section 42)

A complaint made under section 42 by a person respecting his or her request for access to or correction of a record must be made in writing and filed with the commissioner not later than **15 business days**:

- after the person is notified of the decision of the head of the public body, or the date of the act or failure to act; or

- after the date the head of the public body is considered to have refused the request under subsection 16(2) (subsection 42(2)).

A complaint by a third party who received notice under section 19 of the *Act* must be also made to the commissioner within **15 business days** after notice of the head's decision to grant access is given to the third party (subsection 42(4)).

It is important to note, however, that the commissioner maintains the discretion to extend this period (subsection 42(5)).

Pursuant to subsection 42(8), there is no right to make a complaint to the commissioner with respect to:

[91] Report of the 2014 Statutory Review Committee, Recommendations 101 and 121.

- a request that is disregarded under section 21;
- a decision respecting an extension of time under section 23;
- a variation of a procedure under section 24; or
- an estimate of costs or a decision to waive a cost under section 26.

In each of the above situations, the commissioner is already tasked to give approval or review a public body's decision; it would be inappropriate for the commissioner to receive and hear a complaint respecting a matter they have already decided upon.

The commissioner shall provide a copy of a complaint to the head of the public body concerned (subsection 42(9)).

Where the commissioner has five (5) active complaints from the same applicant that deal with similar or related records, the commissioner may hold an additional complaint in abeyance and not commence an investigation until one of the five (5) active complaints has been resolved (subsection 44(7)).

6.3 Investigations

6.3.1 Making Representations (subsections 44(1) and section 96)

When investigating a complaint, the commissioner shall notify the parties and advise them that they have 10 business days from the date of notification to make representations to the commissioner (subsection 44(1)).

Parties to a complaint may include:

- the person requesting the review;
- a third party who was notified under section 19;
- the head of the public body concerned; and
- any other person the commissioner considers appropriate.

Parties to a complaint may make representations to the commissioner in accordance with section 96, which provides that:

- the commissioner may give a person an opportunity to make a representation during

an investigation;

- an investigation may be conducted in private, and a person who makes representations during an investigation is not, except to the extent they are invited by the commissioner, entitled to be present during or comment on representations made by others;

- the commissioner can decide whether representations are to be made in writing or orally; and

- representations may be made through counsel or other agent.

6.3.2 Informal Resolution (subsections 44(3)-(6))

The commissioner may take additional steps that he or she considers appropriate to resolve a complaint informally to the satisfaction of the parties, and in a manner consistent with the *Act* (subsection 44(3)).

Generally, any informal resolution must be reached within 30 business days of the commissioner's receipt of the complaint, after which time the commissioner must conduct a formal investigation where satisfied there are reasonable grounds to do so (subsection 44(4)). The commissioner may, however, extend the informal resolution process for a maximum of 20 business days where each party to the complaint provides a written request to do so (subsection 44(5)).

In no circumstances can the informal resolution process be extended beyond 50 business days from the date the commissioner received the complaint (subsection 44(6)).

6.3.3 Refusal to Investigate (section 45)

Section 45(1) provides that the commissioner may, at any stage of an investigation, decide not to conduct a review where he or she is satisfied that:

- the head of a public body has responded adequately to the complaint;

- the complaint has been or could be more appropriately dealt with by a procedure or proceeding other than a complaint under the *Act*;

- the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was filed is such that a review would be likely to result in undue prejudice to a person or that a report would not serve a useful purpose; or

- the complaint is trivial, frivolous, vexatious or is made in bad faith.

Where the commissioner refuses to conduct an investigation, he or she will notify the complainant of that decision (together with reasons) and advise them of their right to appeal the decision of the public body to the Trial Division under sections 52(3) or 53(3), as well as the time limit for appeal (subsection 45(2)).

6.3.4 Production of Records (section 97)

Subsection 97(2) states that the commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*.

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

A public body is required to produce any record or a copy of a record that is requested by the commissioner as soon as possible, and in any event, no later than 10 business days after the request is made (subsection 97(4)).

In certain circumstances, the head of a public body may require the commissioner to examine an original record, rather than provide the commissioner with a copy. Under subsection 97(5), the head of a public body may require this examination where:

- the head has a reasonable basis for concern about the security of a record that is subject to solicitor-client privilege or litigation privilege;
- the head has a reasonable basis for concern about the security of another record and the commissioner agrees that there is a reasonable basis for concern; or
- it is not practicable to make a copy of the record.

The head of a public body cannot, however, place any other condition on the ability of the commissioner to access or examine a record (subsection 97(6)).

Section 102 of the *Act* places restrictions on disclosure by the commissioner, and by the commissioner's staff, of information they obtain in performing duties or exercising powers under the *Act*. The commissioner and his or her staff cannot disclose information obtained in performing duties or exercising powers under the *Act*, except as provided in subsections 102(2) to (5).

Subsection 97(1) expressly provides that the commissioner's power to compel the production of documents and the right of entry under section 98 apply to a certain records, notwithstanding the fact that the Act does not apply to them under subsection 5(1). As such, the commissioner **does** have the authority to compel the production of and examine the

following records to determine whether they fall within the commissioner's jurisdiction or are properly exempted from the application of the *Act*:

- Personal or constituency records of a MHA (paragraph 5(1)(c));
- Records of a registered political party or caucus (paragraph 5(1)(d));
- Personal or constituency records of a minister (paragraph 5(1)(e));
- Records of a question to be used on an examination or test (paragraph 5(1)(f));
- Records containing teaching materials or research information of an employee of a post-secondary institution (paragraph 5(1)(g));
- Material placed in the custody of the Provincial Archives by or for a person other than a public body (paragraph 5(1)(h)); and
- Material placed in the archives of a public body by or for a person other than the public body (paragraph 5(1)(i)).

The commissioner **does not** have the authority to compel the production of or examine the following records in subsection 5(1):

- Records in a court file, records of a judge of the Court of Appeal, Trial Division or Provincial Court, judicial administration records or records relating to support services provided to judges of those courts (paragraph 5(1)(a));
- Notes, communications or draft decisions of a person acting in a judicial or quasi-judicial capacity (paragraph 5(1)(b));
- Records relating to a prosecution if all proceedings in respect of the prosecution have not been completed (paragraph 5(1)(j));
- Records relating to an investigation by the RNC if all matters in respect of the investigation have not been completed (paragraph 5(1)(k));
- Records relating to an investigation by the RNC that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter (paragraph 5(1)(l)); and
- Records relating to an investigation by the RNC in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation (paragraph 5(1)(m)).

The commissioner's powers under section 97 and 98 also apply notwithstanding:

- subsection 7(2) (where another Act or regulation prohibits or restricts access);
- another Act or regulation; or

- a privilege under the law of evidence.

The commissioner's ability to examine information in a record, and a public body's requirement to produce a record to the commissioner, includes records exempt under solicitor-client privilege (section 30) or cabinet confidences (section 27).

6.3.5 Right of Entry (section 98)

The commissioner has the right:

- to enter an office of a public body and examine and make copies of a record in the custody of the public body (paragraph 98(a)); and

- to converse in private with an officer or employee of the public body (paragraph 98(b)).

As discussed above, section 98 applies notwithstanding paragraphs 5(1)(c) to (i), subsection 7(2), another Act or regulation, or a privilege under the law of evidence.

6.3.6 Admissibility of Evidence (section 99)

Subsection 99(1) states that a statement made, or answer or evidence given by a person in the course of an investigation by or a proceeding before the commissioner under the *Act* is not admissible in evidence against a person in a court or at an inquiry or in another proceeding, and no evidence respecting a proceeding under the *Act* shall be given against a person except:

- in a prosecution for perjury;

- in a prosecution for an offence under the *Act*; or

- in an appeal to, or an application for a declaration from, the Trial Division under the *Act*, or in an appeal to the Court of Appeal respecting a matter under the *Act*.

The commissioner, and anyone acting for or under the direction of the commissioner, shall not be required to give evidence in a court or in any other proceeding about information that comes to the knowledge of the commissioner in performing duties or exercising powers under the *Act* (subsection 99(2)).

6.3.7 Privilege (section 100)

Subsection 100(1) states that where a person speaks to, supplies information to or produces a record during an investigation by the commissioner under the *Act*, what he or she says, the information supplied and the record produced are privileged in the same manner as if they were said, supplied or produced in a proceeding in a court. Section 100 is intended to protect those records that are supplied to or produced for the commissioner as part of the informal or formal complaint resolution process. In considering section 55 of the former Act (which is identical to the current subsection 100(1)), the Newfoundland and Labrador Supreme Court, Trial Division commented on the application of this privilege, and determined that:

> ...the correct interpretation of section 55 is that in regard records produced during either [the commissioner's informal or formal resolution process] they are privileged from production under a later request for records to the public body involved in the prior investigation by the Commissioner. To find otherwise would not only hamper the resolution processes of the Commissioner but could also result in revealing the substance of a record the public body may have successfully claimed to be exempt from disclosure, thus defeating the purpose of the Act.[92]

The Newfoundland and Labrador Court of Appeal has also commented that the privilege "preserves the privilege over documents in the hands of the Commissioner, to the same extent as if the documents had been tendered in court..."[93]

Where a record does not contain information that was supplied to the commissioner as part of an investigation or where the document itself was not produced to the commissioner, the privilege in section 100 will not apply.

Subsection 100(2) provides that solicitor-client privilege and litigation privilege are not affected by production of records to the commissioner. The fact that a record to which solicitor-client privilege or litigation privilege applies has been disclosed to the commissioner as part of an investigation will not result in the privilege being waived with respect to any other third party who makes request the information.

6.3.8 Section 8.1 of the Evidence Act (section 101)

Section 101 provides that section 8.1 of the *Evidence Act* does not apply to an investigation conducted by the commissioner under the *Act*.

Section 8.1 of the *Evidence Act* restricts, in the context of a legal proceeding, the

[92] McBreairty v. College of the North Atlantic, 2010 NLTD 28.
[93] Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General), 2011 NLCA 69

admissibility of information and records relating to the Provincial Perinatal Committee; the Child Death Review Committee under the *Fatalities Investigations Act*; a quality assurance committee of a member, as defined under the *Hospital and Nursing Home Association Act*; and a peer review committee of a member, as defined under the *Hospital and Nursing Home Association Act*.

This restriction has no applicability with respect to proceedings conducted by the commissioner.

6.3.9 Time limit for review (section 46)

The commissioner is required to complete a formal investigation and make a report under section 48 **within 65 business days** of receiving a complaint, whether or not the time for the informal resolution process has been extended (subsection 46(1)).

Where extraordinary circumstances exist, the commissioner may apply to a judge of the Trial Division to extend the time period for completing an investigation and filing a report (subsection 46(2)).

6.3.10 Burden of Proof (section 43)

Where the commissioner investigates a complaint relating to a decision to refuse access to a record or part of a record, the burden is on the **head of the public body** to prove that the applicant has no right of access to the record (subsection 43(1)).

Where the commissioner investigates a complaint relating to a decision to give an applicant access to a record or part of a record that contains the personal information of a third party, the burden is on the **head of the public body** to prove that the disclosure would not be contrary to the *Act* or regulations (subsection 43(2)).

Where the commissioner investigates a complaint relating to a decision to give an applicant access to a record or part of a record that contains information, other than personal information, of a third party, the burden is on the **third party** to prove that the applicant has no right of access (subsection 43(3)).

6.4 Commissioner's Report (sections 47 and 48)

On completing an investigation, the commissioner may recommend that:

- the head of the public body grant or refuse access to the record or part of the record (paragraph 47(a));

- the head of the public body reconsider its decision to refuse access to a record or part of a record (paragraph 47(b));

- the head of the public body either make or not make the requested correction to personal information (paragraph 47(c)); and

- other improvements for access to information be made within the public body (paragraph 47(d)).

On completing an investigation, the commissioner is required to:

- prepare a report containing his or her findings and, where appropriate, his or her recommendations and the reasons for those recommendations (paragraph 48(1)(a)); and

- send a copy of the report to the person who filed the complaint, to the head of the public body concerned and to a third party who was notified under section 44 (paragraph 48(1)(b)).

The report must also include information respecting the obligation of the head of the public body to notify the parties of the head's response to the commissioner's recommendations within 10 business days of receiving them (subsection 48(2)).

6.5 Response of Public Body (section 49)

Where the commissioner issues a report in response to a complaint, subsection 49(1) requires the head of a public body to:

- make a decision whether or not to follow the recommendation of the commissioner in whole or in part; and

- give written notice of the decision to the commissioner and a person who was sent a copy of the report.

The head of the public body must respond to the commissioner's recommendations **not later than 10 business days** after receiving them.

The written notice must include:

- notice of the right of the applicant or third party to appeal under section 54 to the Trial Division and of the time limit for such an appeal; and

- notice of the right of the commissioner to file an order with the Trial Division in one of the circumstances listed in subsection 51(1).

Where the head of the public body does not give written notice within 10 business days after receiving the commissioner's report, the head of the public body is considered to have agreed to follow the recommendation of the commissioner (subsection 49(2)).

6.6 Application for Declaration from Court (section 50)

Where the commissioner recommends that the head of a public body grant access to a record or make a requested correction of personal information, and the head decides not to comply, the head is required to apply to the Trial Division for a declaration that the public body is not required to comply with the recommendation (subsections 50(1) and (2)).

This application must be made within 10 business days of after receiving the commissioner's recommendation.

Public bodies should consult with their legal counsel when considering filing an application for a declaration under section 50.

An application must seek a declaration that the head of the public body is not required to comply with the commissioner's recommendation on the grounds that:

- the head is authorized under Part II of the *Act* to refuse access to the record and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception (paragraph 50(2)(a));

- the head is required under Part II to refuse access (paragraph 50(2)(b)); or

- the decision of the head not to make the requested correction to personal information is in accordance with the Act or regulation (paragraph 50(2)(c)).

Where the head of a public body makes an application for a declaration from the Trial Division, a copy of the application must be served on the commissioner, the minister responsible for the administration of the Act, and a person who was sent a copy of the commissioner's report within 10 business days after receiving the recommendations (subsection 50(3)).

The commissioner, the minister responsible for the administration of the *Act*, or any other person who was sent a copy of the commissioner's report may intervene in an application for a declaration by filing a notice to that effect with the Trial Division (subsection 50(4)).

6.6.1 Procedure on Application for Declaration

Subsection 50(5) states that sections 57 to 60 apply, with necessary modifications, to an application to the Trial Division for a declaration.

As a result, the practice and procedure under the Rules of the Supreme Court, 1986 providing for an expedited trial, or such adaptation of those rules as the court or judge considers appropriate in the circumstances, will apply to the application (section 57).

Solicitor-client privilege and litigation privilege in a disputed record will not be affected by disclosure to the Trial Division for the purposes of an application (section 58).

The Trial Division must review the application and the decision of the head of the public body to refuse access to a record or correction of personal information as a new matter, and may receive evidence by affidavit (subsection 59(1)). This means that the Trial Division may hear evidence, and is not restricted to the same evidence that was produced during the commissioner's investigation of the complaint.

The burden of proof as set out in section 43 continues to apply (subsection 59(2)).

Where the Trial Division exercises its powers to compel the production of documents for examination, it must take reasonable precautions to avoid disclosure of:

- any information or other material if the nature of the information or material could justify a refusal by the head of a public body to give access to a record or part of a record; or

- the existence of information, where the head of the public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2).

These reasonable precautions may include, where appropriate:

- receiving representations without notice to another person,

- conducting hearings in private, and

- examining records in private (subsection 59(3)).

6.6.2 Disposition of Application

Section 50(5) and subsection 60(1) provide that where the Trial Division hears an application for a declaration under section 50, the court may:

- grant the application, where it determines that the head of the public body is authorized to refuse access to a record and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;

- grant the application, where it determines that the head of the public body is required to refuse access to all or part of a record; or

- order the head of the public body to give access to all or part of a record (or make such other order that the court considers appropriate), where it determines that the head of the public body is not authorized or required to refuse access to all or part of the record.

The Trial Division may also order that personal information be corrected and order the manner in which it must be corrected, it finds that doing so would be in accordance with the *Act* (subsection 60(3)).

Where the Trial Division finds that a record or part of a record falls within an exception to access under the Act and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, the court **shall not** order the head to give access to the record or part of a record, regardless of whether the exception is discretionary or mandatory (subsection 60(2)).

6.7 Filing an Order with the Trial Division (section 51)

Under section 51, the commissioner can file an order with the Trial Division to give binding effect to his or her recommendation in certain circumstances.

Section 51(1) gives the commissioner the authority to prepare and file an order with the Trial Division where:

- the head of the public body agrees or is considered to have agreed under section 49 to comply with the commissioner's recommendation in whole or in part but fails to do so within 15 days after receipt of the recommendation; or

- the head of the public body fails to apply to the Trial Division for a declaration under section 50.

An order filed under this section shall be limited to a direction to the head of a public body either:

- to grant the applicant access to the record or part of the record or part of the record; or

- to make the requested correction to personal information (subsection 51(2)).

The commissioner may not file an order with the Trial Division until the later of the time periods in paragraph 51(1)(a) and section 54 have passed (subsection 51(3)). The commissioner may not file an order with the Trial Division if the applicant or a third party has commenced an appeal in the Trial Division under section 54 (subsection 51(4)).

Where the commissioner files an order with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court (subsection 51(5)).

6.8 Disclosure of Information (section 102)

Section 102 of the *Act* places restrictions on disclosure by the commissioner, and by the commissioner's staff, of information they obtain in performing duties or exercising powers under the *Act*.

Specifically, subsection 102(1) states that the commissioner and a person acting for or under the direction of the commissioner, shall not disclose information obtained in performing duties or exercising powers under the *Act*, except as provided in subsections 102(2) to (5).

Subsection 102(2) states that the commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information that is necessary to:

- perform a duty or exercise a power of the commissioner under the *Act*; or
- establish the grounds for findings and recommendations contained in a report under the *Act*.

In conducting an investigation and in performing any other duty or exercising any power under the *Act*, the commissioner, and anyone acting for or under the direction of the commissioner, shall take reasonable precautions to avoid disclosing and must not disclose:

- any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record; or
- the existence of information, where the head of a public body is authorized under subsection 17(2) of the *Act* to refuse to confirm or deny that the information exists in response to a request for access to information under the *Act* (subsection 102(3)).

In addition, the commissioner may disclose to the Attorney General information relating to the commission of an offence under the *Act* or under any other Act of Newfoundland and Labrador or Canada where the commissioner has reason to believe an offence has been

committed (subsection 102(4)).

Subsection 102(5) states that the commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information in the course of a prosecution or an appeal referred to in subsection 99(1).

6.9 Protection from Liability (section 104)

Section 104 states that an action does not lie against the commissioner or against a person employed under him or her for anything he or she may do or report or say in the course of the exercise or performance, or intended exercise or performance, of his or her functions and duties under the *Act*, unless it is shown he or she acted in bad faith.

CHAPTER 7: APPEALS

7.1 Appeal to Trial Division

Rather than make a complaint to the Office of the Information and Privacy Commissioner, an applicant who makes a request to a public body for access to a record or for correction of personal information or a third party who has received notification under section 19 can appeal directly to the Supreme Court, Trial Division in some circumstances.

Where the commissioner has investigated a complaint and issued recommendations, the applicant or the third party that made the complaint can also appeal to the Trial Division where they are not satisfied with the public body's decision, whether or not the public body has decided to comply with the commissioner's recommendations.

7.1.1 Direct Appeal by Applicant (section 52)

Where an applicant has made a request for access or correction **and has not filed a complaint with the commissioner under section 42**, the applicant may appeal the decision, act or failure to act of the head of the public body that relates to the request directly to the Trial Division (subsection 52(1)).

The applicant must start this appeal not later than 15 business days:

- after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

- after the date the head of the public body is considered to have refused the request under subsection 16(2).

Where the applicant has made a complaint to the commissioner and the commissioner has refused to investigate under section 45, the applicant may appeal the head of the public body's decision, act or failure to act to the Trial Division (subsection 52(3)). Where the commissioner refuses to investigate, any appeal to the Trial Division must be started within 15 business days after the applicant is notified of the commissioner's refusal (subsection 52(4)).

7.1.2 Direct Appeal by a Third Party (section 53)

Where a third party is notified under section 19 of a decision to grant access to a record which may affect their business interests or personal privacy, and where they have not made a complaint to the commissioner, the third party may appeal directly to the Trial Division

(subsection 53(1)). This appeal must be commenced within 15 business days after the third party is notified of the head of the public body's decision (subsection 53(2)).

Where the third party has filed a complaint under section 42 and the commissioner has refused to investigate, the third party may commence an appeal of the head of the public body's decision to grant access in the Trial Division within 15 business days of being notified of the commissioner's refusal (subsections 53(3) and (4)).

7.1.3 Appeal after Receipt of Commissioner's Decision (section 54)

Subsection 54 provides that an applicant or a third party may appeal a public body's decision to grant or refuse access or not make a requested correction of personal information, where that decision is made in response to a recommendation from the commissioner.

The applicant or third party must file their appeal in the Trial Division not later than 10 business days from the date they receive the public body's decision in response to the commissioner's recommendation under section 49.

7.1.4 No Right of Appeal (section 55)

Section 55 provides that there is no appeal to the Trial Division in respect of:

- a decision respecting an extension of time under section 23;
- a variation of a procedure under section 24; or
- an estimate of costs or a decision not to waive a cost under section 26.

7.2 Starting an Appeal (section 56)

Where a person appeals a decision of the head of a public body to the Trial Division, the notice of appeal must name the head of the public body as respondent (subsection 56(1)). The appellant must serve a copy of the notice of appeal on the commissioner and the minister responsible for the *Act* as well (subsection 56(2)).

The minister responsible for the *Act*, the commissioner of a third party may intervene in appeal as a party by filing a notice to that effect with the Trial Division (subsection 56(3)). The commissioner cannot, however, intervene where an appeal relates to:

- a decision of the head of the public body under section 21 to disregard a request; or

- a decision, act or failure to act of the head of a public body in respect of which the commissioner has refused to investigate under section 45.
  (subsection 56(4))

Where the head of a public body that has refused access to a record receives a notice of appeal, they must make reasonable efforts to give written notice to a third party who:

- was notified of the request for access under section 19; or

- would have been notified under section 19 if the head had intended to give access to the record (subsection 56(5)).

Where an appeal is brought by a third party, the head of the public body must give notice to the applicant (subsection 56(6)).

The record for the appeal must be prepared by the head of the public body who is named as respondent to the appeal (subsection 56(7).

7.3 Procedure on Appeal (sections 57-59)

The practice and procedure under the Rules of the Supreme Court, 1986 providing for an expedited trial, or such adaptation of those rules as the judge or court considers appropriate in the circumstances, will apply to an appeal to the Trial Division (section 57).

The solicitor-client privilege or litigation privilege of a document in dispute on an appeal is not affected by disclosure to the Trial Division in the course of an appeal (section 58).

On an appeal, the Trial Division is required to review the public body's decision, act or failure to act relating to a request for access or correction of personal information as a new matter (subsection 59(1)). This means that the court will hear evidence, which is not restricted to the evidence which was produced during a complaint before the commissioner (if there was such a complaint). The court may hear evidence by affidavit.

The burden of proof as set out in section 43 applies in respect of appeals to the Trial Division (subsection 59(2)).

The Supreme Court, Trial Division has considerable power to compel the production of documents for examination on appeal. In exercising those powers, however, the Trial Division must take reasonable precautions, including where appropriate, receiving representations without notice to another person, conducting hearings in private and examining records in private, to avoid disclosure of:

- any information or other material if the nature of the information or material could

justify a refusal by a head of a public body to give access (paragraph 59(3)(a)); or

- the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 17(2) of the Act (paragraph 59(3)(b)).

7.4 Disposition of Appeal (section 60)

Section 60 states that on hearing an appeal under the *Act*, the Trial Division may:

- dismiss the appeal, where it determines that the head of the public body is authorized to refuse access to a record and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;

- dismiss the appeal, where it determines that the head of the public body is required to refuse access to all or part of a record; or

- order the head of the public body to give access to all or part of a record (or make such other order that the court considers appropriate), where it determines that the head of the public body is not authorized or required to refuse access to all or part of the record.

The Trial Division may also order that personal information be corrected and order the manner in which it must be corrected, where it finds that doing so would be in accordance with the *Act* (subsection 60(3)).

Where the Trial Division finds that a record or part of a record falls within an exception to access under the *Act* and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception, the court **shall not** order the head to give access to the record or part of a record, regardless of whether the exception is discretionary or mandatory (subsection 60(2)).

CHAPTER 8: REPORTING

The ATIPP Office requires information from all public bodies about the administration of ATIPP requests. This includes the number and nature of requests, exceptions applied, number of requests for correction of personal information, costs charged for ATIPP requests, response time, and final outcome. In addition to requiring the information to prepare the Minister's Annual Report to the House of Assembly (required under section 113 of the *Act*), this knowledge is required to monitor activity under the *Act* and to ensure consistent application by public bodies.

ATIPP Coordinators should note their obligation under section 12 of the Act to ensure that the name and type of applicant is not disclosed. This information should not be included on the ATIPP Notification Form (Form 1A) forwarded to the ATIPP Office. The type of applicant should be included on the ATIPP Request Summary Report (Form 8) following completion of the ATIPP request which is forwarded to the ATIPP Office.

Departments of government will be using TRIM, an electronic database specifically designed for ATIPP and, accordingly, the statistical information required by the ATIPP Office will be supplied electronically. Users should refer to the ATIPP TRIM Manual.

8.1 Notify ATIPP Office of ATIPP Requests

To maintain a central record of the topics of ATIPP requests received under Part II of the *Act* by all public bodies, ATIPP Coordinators must advise the ATIPP Office of each request as soon as it is received. Departments using TRIM must enter the details of the request at the earliest possible time.

The ATIPP Coordinators of all other public bodies must send the ATIPP Notification Form (Form 1A) to the ATIPP Office either by fax at 709 729-2129 or by email at atippoffice@gov.nl.ca as soon as the request is received.

8.2 ATIPP Summary Report

The ATIPP Summary Report ("the Report") is used to collect statistical information about activity under the *Act*, for administrative purposes of the Newfoundland and Labrador government. The Report is also used to provide information for the Annual Report of the Minister of the Department of Justice and Public Safety (the Minister responsible for the *Act*), as required in section 113 of the *Act*.

The ATIPP Coordinator of each public body is responsible for ensuring that the Report is prepared accurately and in a timely manner for each access request.

All public bodies (excluding Departments with access to TRIM) must fill out an ATIPP Summary Report (Form 8) on completion of each access request. This report must be faxed to the ATIPP Office at 709-729-2129 or emailed to atippoffice@gov.nl.ca.

Public bodies must also notify the ATIPP Office of the progress made with respect to ATIPP requests, including: fee estimates sent to applicants; extensions of time; and notices to third parties under section 19.

8.2.1 Instructions for Completing the ATIPP Summary Report

Only requests for information or records or requests for the correction of personal information that are made pursuant to the *Act* should be recorded on an ATIPP Summary Report.

If an application is transferred to another public body, this should be indicated in the Final Outcome section of the Report.

Requests for records that do not fall under the *Act*, such as a personal or constituency record of a member of the House of Assembly, should not be included. This issue is discussed in more detail in section 1.4.2 of this manual, "Records Excluded from the Act".

Section 1: Type of Request

Indicate the type of request.

General Request – requests for general information/records.

Personal Information Request – requests from an individual or a representative of that individual seeking records containing information about themselves.

Federal Access to Information Request – requests from the Government of Canada.

Section 2: Final Outcome

Record the final outcome, or access decision, taken with respect to the request.

Abandoned	Applicant has failed to provide appropriate fees to support a request, and the request is closed
Access Denied	Records are withheld from release
Full Disclosure	All requested records are supplied to the applicant with no severing
Partial Disclosure	Some of the records requested are

	being released while other information is being withheld in accordance with the exceptions listed in the *Act*
Public Domain	The information/records being sought have already been published or are available for purchase by the public
Available in 30 business days	The information/records being sought will be published or released to the public within 30 business days after the applicant's request is received (if not published within 30 business days, application is reactivated)
Non-Existent Records	No records within the scope of the request have been found
No Confirmation or Denial of Records	Request has been denied pursuant to section 17(2)
Disregard Request with OIPC Approval – Unreasonably interfere with operations of the public body	Request is disregarded by public body (with approval of the OIPC) where the request would unreasonably interfere with the operations of the public body
Disregard Request with OIPC Approval – Information Already Provided to Applicant	Request is disregarded by public body (with approval of OIPC) on the basis that the information requested has already been provided to the Applicant
Disregard Request with OIPC Approval – Trivial, Frivolous or Vexatious	Request is disregarded by public body (with approval of OIPC) as an abuse of the right to make a request on the basis of it being trivial, frivolous or vexatious
Disregard Request with OIPC Approval – Unduly Repetitive or Systematic	Request is disregarded by public body (with OIPC approval) as an abuse of the right to make a request on the basis of it being repetitive or systematic
Disregard Request with OIPC Approval – Excessively Broad	Request is disregarded by public body (with OIPC approval) as an abuse of the right to make a request on the basis of it being excessively broad or incomprehensive
Disregard Request with OIPC Approval – Bad Faith	Request is disregarded by public body (with OIPC approval) as an abuse of the right to make a request on the basis of it being otherwise in bad faith
Informal/Routine Disclosure	Records were supplied informally or had previously been designated as records which could be released in the event of a request without requiring the

	formalized ATIPP process.
Transferred	Request is transferred to another public body which has custody and/or control of the records sought
Withdrawn	The applicant has chosen not to pursue the request and has notified the public body

Section 3: Exceptions

Record each exception to disclosure applied in the access request by noting the sections and subsections of the *Act*.

A record or part of a record may be withheld under several exceptions. Be sure to indicate all that apply.

For example, the information being sought is the advice given to the Minister of Justice and Public Safety by a senior official in the Department. That advice, containing a possible course of action, potentially may be protected under 29(1) – Policy Advice or Recommendations; 30 – Legal Advice; and 35(1) – Disclosure Harmful to the Financial or Economic Interests of a Public Body.

Section 4: Response Time

First, indicate whether the access request was responded to within 20 business days, or more than 20 business days with OIPC approval. Then, indicate the length of the extension granted by the OIPC and whether or not the deadline was met.

For example, if the 20 business day time limit was extended for an additional 20 business days by the OIPC, and the response was provided to the applicant on day 40, then the deadline was met.

Response time means the total length of time that a public body takes to fully respond to a request. This includes locating the requested records, making the decision about access, doing any severing that may be required, and providing the final response to the applicant.

The exact number of days for processing an ATIPP request from the date of receipt to the completion date must be calculated and included on Form 8 or in TRIM.

Section 5: Third Party Notice

If third party notification was required under section 19 because some or all of the information being sought in the access request involved a third party (or parties), indicate whether the third party consented to release, or you sent a notice under section 19.

Third Party Consent	Third party consents in writing to release of the records, as described by the public body
Provide Third Party Notice	Public body notifies third party of intent to release information that may harm their business interests and provides them with 15 business days to request a review by the OIPC.

Section 6: Extensions

If the 20 business day time limit was extended, indicate that the OIPC's approval was received under section 23 and the number of days of the extension..

Section 7: Advisory Response

Indicate the date on which the advisory response was sent to the applicant.

Section 8: Cost Estimate Sent to Applicant

You must record any cost estimate sent to the applicant.

Section 9: Costs Paid by Applicant

You **must** record all costs collected from the applicant. If your Department uses TRIM, fees collected can be found in the **Red "COSTS" folder of TRIM**.

Indicate the total number of search hours, after the first 10 hours (for local government bodies) or the first 15 hours (for other public bodies), it took to complete the request, rounded down to the nearest hour, and also record any copying costs.

Section 10: Cost Waivers

If fees were waived, indicate the amount waived.

Record the total number of hours, after the first 10 or 15 hours (as appropriate), it took to complete the request, even if costs were waived, rounded down to the nearest hour.

Section 11: Time Spent

Indicate the total hours spent in the processing of the ATIPP request.

Section 12: Notes

If you wish to provide any additional information on the access request, use this section.

The ATIPP Summary Report should then be signed and dated, with contact details provided, and faxed to the ATIPP Office, Department of Justice and Public Safety, at fax # 709-729-2129. Alternatively, complete the Report electronically (obtained from the ATIPP Office) and submit via e-mail to atippoffice@gov.nl.ca. .

8.2.2 Federal Access to Information Requests

Under its *Access to Information Act*, the federal government sometimes receives access requests which require them to seek consent from a public body of Newfoundland and Labrador. If a department or other public body receives such a request for consent from the federal government, the ATIPP Office must be advised. Departments using the TRIM database will use the database for this purpose. All other public bodies should complete the cover page and Part B of the ATIPP Summary Report, which requires you to provide the following details on this type of request:

- nature/subject of request;
- name of individual and federal public body making request (this information is provided on the cover page under "Applicant" and "Organization");
- date received;
- date response is due;
- date reply sent; and
- any notes to be added.

8.2.3 Complaints and Appeals

If your public body receives notification from the OIPC that their office has received a complaint and/or is undertaking an investigation of an ATIPP request handled by your public body, the ATIPP Office must be advised.

Similarly, if your public body receives notice of an Appeal to the Supreme Court, Trial Division of a decision made by your public body, **the ATIPP Office must be advised**. Such an appeal may be initiated by the applicant or a third party.

APPENDIX I - Handling an ATIPP Request

Workflow Process for Access Requests

			ACTION	MANUAL
DAY 1	**Request Received from Applicant**	ATIPP TRIM	• Create new case file in OPE TRIM database. TRIM will provide a file #. This ATIPP file # should always be referenced on outgoing correspondence to applicant. • If not using TRIM, notify ATIPP Office of the request (Form 1A)	3.4 / 8.1
		Advise applicant of request	• Send acknowledgement letter to applicant, reference ATIPP file # (20 business day clock starts day after receiving ATIPP request).	3.6
		Executive Communication	• Notify Executive of wording of request keeping the confidentiality of applicant private.	3.4
DAY 2-5	**Analyze Request**	If request is not clear	• Contact applicant to clarify contents of request. (phone/letter/email) • If applicant is able to refine their requirements, follow-up clarification by email confirming new wording/direction of request. • Complete a preliminary search of records to determine if clarification is necessary.	3.2 / 3.4 / 3.7

DAY 2-5	**Analyze Request**	If request is not clear	• Contact applicant to clarify contents of request. (phone/letter/email) • If applicant is able to refine their requirements, follow-up clarification by email confirming new wording/direction of request. • Complete a preliminary search of records to determine if clarification is necessary.	3.2 / 3.4 / 3.7
DAY 2-5	**Disregarding Requests, if appropriate**	Frivolous; Vexatious; Bad Faith; Excessively Broad; Repetitive and Systematic	• If request appears to fall under section 21, discuss with Executive whether to seek permission to disregard. • Contact OIPC for permission to disregard request. • If approved contact applicant and update OPE TRIM database for applicable file #.	3.16.7
	Determine Transfer	Transfer	• Assess request to decide whether transfer to another dept. or public body is necessary. • Discussion with other departments or public bodies may be required to determine a transfer. • If transfer is appropriate, send “Notice of Transfer” to applicant within first 5 business days. • Update OPE TRIM database for applicable file #.	3.5

DAY 2-5	**Analyze Request**	If request is not clear	• Contact applicant to clarify contents of request. (phone/letter/email) • If applicant is able to refine their requirements, follow-up clarification by email confirming new wording/direction of request. • Complete a preliminary search of records to determine if clarification is necessary.	3.2 / 3.4 / 3.7
	Conduct Search/ Retrieve Records	Record Search	• Identify and advise applicable staff who will need to search for responsive records (e.g. IM, Exec) • Begin collecting responsive records, records include paper/electronic, and any other forms (e.g. microfiche, photos) • Ensure all potential areas and applications (e.g. Email, TRIM) are searched for responsive records. As Coordinator specify a short time frame to get records to you. • Ask staff involved in search to keep track of their time locating records and provide an estimate in the event a fee is charged (first 15 hours are free for public bodies, 10 hours free for local public bodies).	3.2.3 / 3.7 / 3.15

DAY 5-10	**Analyze Responsive Records**	Eliminate any duplicates or non-responsive documents	• Once records are collected eliminate any duplicates – unless the duplicate records had changes made to them (handwritten notes). Keep good notes why some records were deemed non-responsive (in the event of an OIPC review or an appeal before the courts.	
		Compile remaining responsive records	• The compiled file should be Coordinator's working copy from this point forward.	

		Applicant advisory update	• Within 10 business days after receiving a request, coordinator must provide an advisory response in writing to direct the applicant about status of their request. • If records are prepared for release by day 10, they must be disclosed to applicant. See section 15 of Act for further details on applicant advisory.	3.16.1

DAY 10-15	**Analyze Responsive Records**	Cost Estimate	• Assess whether collecting costs is appropriate. See cost schedule. • If applicable send cost estimate to applicant. • Update OPE TRIM database.	3.15
		Extension (see examples)	• Are there a large volume of records responsive to the request? Have you received several ATIPP requests in a short period of time? • If appropriate contact the OIPC to request an extension (this request to OIPC must be made as soon as possible, but no later than day 15). • If approved by OIPC, send notice to applicant on details of extension and new expected due date. • Update OPE TRIM database for this ATIPP request using the applicable file #.	3.14.1
	Record Review	Apply Exceptions	• Use Rapid Redact and the scanned working file to begin processing/applying appropriate exceptions to records. • Internal consultation with Executive and/or other content experts may be necessary to ensure a full understanding of the material. This is sometimes necessary in order to make informed decisions on redactions/disclosure. • Coordinate communications with external stakeholders (e.g. other departments) • Finalize record redactions for Executive review.	Ch. 4 / 3.11

DAY 15-20	**Organize File for DM Review/ Approval**	Prepare ATIPP Package & Draft Response Letter	• Arrange audit file for DM review (from Rapid Redact) • Ensure all pages are numbered on redacted records • Review file with DM and answer any questions/provide clarification as needed. • Review draft final response letter with DM citing exceptions used (See ATIPP final response form letter)	3.12

DAY 20	**Send Records to Applicant**		• The final package including final response letter and records (redacted copy) should be sent no later than close of business on the 20th business day. • The package may be sent electronically via email (if file is not too large) or through the mail. This should be the applicant's choice.	2.6 / 3.16 / 3.17
	Final Coordinator Admin Processing	IM Record Keeping	• Working files for ATIPP requests should be retained either in TRIM, a secure shared drive or registry for six years as required by the C-RIMS retention policy. • Once request is closed update the ATIPP TRIM database for the appropriate file # and indicate exceptions applied. • Send the ATIPP office the completed ATIPP request (responsive records). • Request will be publicly available on ATIPP website 72 hours after they have been sent to applicant.	3.13 / 8.2

APPENDIX II - Cost Schedule

Establishment of Costs for the *Access to Information and Protection of Privacy Act*

Pursuant to Section 21 of the *Executive Council Act*, Section 25 of the *Access to Information and Protection of Privacy Act* and all other powers enabling him in this regard, the Minister of the Office of Public Engagement has been pleased to establish the costs, effective from the 1st day of June, 2015.

Dated at St. John's in the Province of Newfoundland and Labrador, on the 1st day of June, 2015.

_____
The Honourable Steve Kent

Minister of the Office of Public Engagement

COSTS

1. In this cost schedule "applicant" refers to a person who makes a request for access to a record pursuant to the *Access to Information and Protection of Privacy Act*.

2. A public body shall not charge an applicant:
   (a) for making an access to information request; or
   (b) for identifying, retrieving, reviewing, severing or redacting a record;

3. A public body may charge an applicant:
   (a) $25.00 for each hour spent locating a record after the first ten (10) hours, where the request is made to a local government body; or
   (b) $25.00 for each hour spent locating a record after the first fifteen (15) hours, where the request is made to another public body.

4. A public body may charge an applicant:
   (a) 25 cents a page for providing a copy or print of the record, where the record is stored or recorded in printed form and can be reproduced or printed using conventional equipment;
   (b) the actual cost of reproducing or providing a record, where a record cannot be reproduced or printed on conventional equipment then in use by the public body; and
   (c) The actual cost of shipping a record using the method chosen by the applicant.

5. A person who requests access to his or her own personal information shall not be required to pay any costs for access to that personal information.

6. (a) Where costs are to be charged, the public body is required to give the applicant an estimate of the total cost before providing the service. The public body will require the applicant to pay 50 percent of the cost estimate prior to commencing the work required to respond to the request, with the remaining 50 percent to be paid upon completion of the services.

   (b) Upon being provided with a cost estimate, the applicant has 20 business days from the day the estimate is sent to:

      (i) accept the estimate and pay 50 percent of the costs;
      (ii) modify the request in order to change the amount of the cost;
      (iii) apply to the public body to waive all or part of the costs; or
      (iv) submit a complaint to the commissioner about the costs.

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

   (d) If the applicant does not respond to the cost estimate as set out in (b), the applicant is considered to have abandoned the request.

   (e) The costs charged to the applicant shall not exceed either the actual cost of the services or the estimate given to the applicant.

7. (a) The head of a public body may, upon receipt of an application from an applicant, waive the payment of all or part of the costs payable where the head is satisfied that:

      (i) payment would impose an unreasonable financial hardship on the applicant; or
      (ii) it would be in the public interest to disclose the record.

   (b) Where an applicant applies for a waiver, the head of the public body shall inform the applicant in writing as to the head's decision about waiving all or part of the costs.

   (c) The head shall refund any amount paid by an applicant that is subsequently waived.

8. Any new cost estimate for access to information requests shall be calculated in accordance with this cost schedule effective immediately.