
# COMPREHENSIVE REVIEW OF THE ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT

**June 19, 2017**

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# INTRODUCTION

In November, 2015, the Standing Committee on Public Accounts, Independent Officers and Other Entities asked that I undertake a comprehensive review of the *Access to Information and Protection of Privacy Act* with a view to beginning the discussion on amendments necessary to modernize and update this 20 year old legislation. A comprehensive review is a significant task. Most Canadian jurisdictions have recently completed or are in the process of completing a similar review of their original access and privacy laws. There are plenty of resources, therefore, to assist in any such review. I rely heavily on the work done in Newfoundland and Labrador in 2014. The Report of the 2014 Statutory Review, completed by three eminent and well qualified experts in the field, was extremely thorough and thoughtful. Although Nunavut is a very different jurisdiction and not all of the recommendations made in that report (and subsequently adopted by the Legislative Assembly in the form of new legislation) are necessarily going to translate well in Nunavut, much can be taken from the consultation process and the thorough analysis of the committee. In the discussion which follows, I have outlined what I consider to be some of the most important and necessary amendments, keeping in mind the stated purposes of the Act.

## 1. THE PURPOSES OF THE ACT

To begin at the beginning, it is important to address the purposes of the Act as set out in Section 1:

> 1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records held by public bodies;
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
>
> ( c) specifying limited exceptions to the rights of access;
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
>
> (e) providing for an independent review of decisions made under this Act.

In *Dagg v. Canada (Minister of Finance)* [1997] 2 SCR 403, Justice LaForest set out the principles inherent in Canada's access and privacy laws. While the case is now some twenty years old, this case continues to define the significance of such laws:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.(para 61)

With respect to the nature of the right to privacy, he wrote:

> The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions...Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*.

In later decisions, access and privacy statues have been held to be "quasi-constitutional" in nature. In *Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773 at para 25, Justice Gonthier addressed this:

> The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having.

Over the twenty years since the *Access to Information and Protection of Privacy Act* first came in to effect, technology has changed the world dramatically. "Information" has always been a valuable commodity. New technologies have made information of all descriptions more valuable than ever before and government collects and creates vast amounts of information. All of these developments increase the importance of a strong *Access to Information and Protection of Privacy Act*. I therefore largely echo and substantially adopt the first recommendation of the ATIPPA 2014 Statutory Review Committee (Newfoundland and Labrador) (page 39).

**Recommendations:**

1. I recommend that the purpose of the ATIPPA set out in the existing version of section 1 be recast to read:

    1. The purpose of this Act is to facilitate democracy through:
        (a) ensuring that citizens have access to all government information subject only to necessary exemptions that are limited and specific;
        (b) increasing transparency in government and public bodies so that elected officials, and officers and employees of public bodies remain accountable; and
        (c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

    2. The purpose set out in section 1 is to be achieved by:
        (a) giving the public a right of access to records,
        (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
        (c) specifying that the default in all cases is to be disclosure of requested records subject only to the limited exceptions to the rights of access that are necessary to:
            i. preserve the ability of government to function efficiently, as a cabinet government in a parliamentary democracy,
            ii. accommodate established and accepted rights and privileges of others, and
            iii. protect from harm the confidential proprietary and other rights of third parties,
        (d) providing that some discretionary exceptions will not apply where the public interest in disclosure outweighs the reason for the exception,

(e) preventing the unauthorized collection, use or disclosure of personal information by public bodies,

(f ) providing for an independent oversight agency having duties to:

i. be an advocate for access to information and protection of privacy,

ii. facilitate timely and user friendly application of the Act,

iii. provide independent review of decisions made by public bodies under the Act,

iv. provide independent investigation of privacy complaints,

v. make recommendations to government and to public bodies as to actions they might take to better achieve the objectives of the Act, and

vi. educate the public on all aspects of the Act.

## 2. PRO - ACTIVE DISCLOSURE

The trend throughout the country is toward systems that support proactive disclosure of records and “access by design”. Jurisdictions across the country have passed or are contemplating legislation that gives public bodies the responsibility to be more proactive in disclosing information. Where possible, information held by public bodies should be readily disseminated and not simply provided in response to a formal Access to Information request. Such pro-active disclosure should be encouraged and supported by legislation. While there are some pieces of legislation that, in a limited way, provide for disclosure of records, there is nothing in the *Access to Information and Protection of Privacy Act* (ATIPPA) that requires public bodies to pro-actively make information available. Some public bodies are making some strides (for example in the posting of procurement information) but the commitment to proactive disclosure is uneven. There is still a lot of work to do within government to change the culture of protectiveness and secrecy that tends to pervade government generally. Changes in attitudes will not happen with “policies and programs” alone. All of this said, there will always be records

which should not be disclosed, and care must be taken to implement pro-active disclosure legislation, policy and procedure in such a way as to protect that information.

As noted in the Newfoundland Report:

> Data is a dynamic commodity with tremendous economic value and social utility....Of course, even with the limitless potential for use, data and data sets have to be protected to ensure that personal information is not disclosed.

Most Canadian jurisdictions now have some form of legislation which requires disclosure of certain information. For example, many jurisdictions now have a published "Sunshine List" which lists the names and enumeration paid to all employees earning over a given base salary (in most cases, over $100,000.00 per annum).

With today's technologies, it is important that data be accessible and available in machine readable and useable format. This will be particularly important for those seeking information for commercial purposes - the development of "apps" or programs or systems to meet a specific need. Governments often create significant databases which developers and businesses are interested in analysing and using for commercial purposes. Since government uses public funds to create these databases, the argument is that they should be publicly available. Again, this must be subject to the protection of personal information and similar information. The US *Federal Freedom of Information Act* was amended almost 10 years ago to provide for the disclosure of records in electronic form. At the time it was noted:

> [T]he information technology currently being used by executive departments and agencies should be used in promoting greater efficiency in responding to FOIA requests. This objective includes using technology to let requesters obtain information in the form most useful to them.

Most work done by public bodies today is recorded and retained electronically. With the proper redaction software, disclosure of records in electronic format would significantly reduce the time and effort necessary for disclosure. Furthermore, this will result in the records being provided to the Applicant in a format which is likely going to be far more useful to him/her than a paper record.

**Recommendations:**

2. I recommend that amendments be made to the *Access to Information and Protection of Privacy Act* which would require public bodies to pro-actively disclose certain, specific types of information, such as factual material, statistical surveys, public opinion polls, environmental impact statements, procurement information, and other records often of interest to the public.

3. I recommend amendments to address the disclosure of incomes of public servants earning incomes over a stated amount, as well as the pro-active disclosure of information such as employee travel costs. This would bring Nunavut in line with most other Canadian jurisdictions.

4. I recommend that public bodies be required, where requested, to be able to provide access to records in machine-readable formats so that Applicants can have access to and easily use databases and data sets (provided that personal information is protected).

5. I recommend that section 6 the Act be amended so as to allow for the individual to seek a “copy of the record in electronic or paper form”...

6. I recommend amendments to require public bodies to conduct “access assessments” and to incorporate “access by design” into new initiatives on a

go-forward basis to help to ensure that the future of access to information in Nunavut remains robust and up to date.

## 3. ADMINISTRATION OF THE ACT

It is standard practise to protect the identity of an applicant who has initiated an access to information request throughout the processing of that request. Access and Privacy Coordinators normally share the identity of a requester within their public body on a "need to know" basis only. The new legislation in Newfoundland and Labrador includes a provision that requires public bodies to anonymize the identity internally, until the final response is sent to the applicant. This does not apply to requests for personal information where the identity of the applicant is necessary in order to process the request.

There are a number of good reasons for such an approach. The first is that the general spirit and intention of the Act which dictates that when the Applicant is an individual, they have the right to privacy as granted under the Act. This, however, would apply only to an "individual" applicant. There are no privacy rights granted to corporate entities under the Act. There are, however, good reasons to protect the identity of corporate applicants as well, however, so as to prevent political interference in access requests. The Newfoundland legislation made a change to their legislation to protect the identity of the applicant because there was evidence of significant political interference in some ATIPP requests. The Commission which prepared the Newfoundland Report noted:

> This process of focussing on the identity of the requester rather than the merit of the request may account for the delays experienced by media and opposition parties.....
>
> Two observations can be made here. The first is that the time spent on certain categories of requesters perceived as problematic through prior identification adds to delays and negates the duty to assist.

The second observation is that the current system, where requests are scrutinized by staff, the deputy minister, and often the minister, facilitates the interpretation of ATIPPA in a partisan political way rather than in a fair, principled way.

While this may not yet have manifested itself as a problem in Nunavut, the possibility certainly exists, particularly where the issue might be of significant political sensitivity.

**Recommendation:**

7. I recommend the inclusion of a provision which would limit the disclosure of the name of the Applicant in the ATIPP process similar to the provision in the Newfoundland legislation

## 4. DEFINITIONS

There are a number of definitions contained in section 2 of the Act which require updating or clarification.

**Recommendation:**

8. I recommend the following changes to section 2:

    a) subsection (a) of the definition of “personal information” should include “personal email address”, “personal IP address” and “other personal electronic contact information” and reference to business contact information should be removed.

b) subsection (e) of the definition of “personal information”, should include a general reference to “other biometric information” about the individual, rather than just “fingerprints”, “bloodtype” or “inheritable characteristics”.

c) the definition of “record” should be updated to include a specific reference to electronic records, data and data sets.

d) subsections (b) and (c) of the definition of “law enforcement” are far too broadly focussed and suggests that **any** action that might end in any kind of sanction or penalty is included, even though the “law enforcement” exception is clearly focussed on criminal and/or quasi-criminal proceedings. I recommend that these subsections be replaced with something more focussed, such as “ investigations 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”.

## 5. EXCLUDED RECORDS (Section 3)

Section 3 of the Act provides that “all records in the custody or under the control of a public body” are subject to the Act with the exception of six categories of records. As noted by Suzanne Legault, the Federal Information Commissioner in her presentation to the review panel in Newfoundland and Labrador:

> I really do believe strongly and I agree with Commissioner Ring [the Newfoundland and Labrador IPC] when he says whenever – whenever we want to carve out exceptions to the general application of the access Acts...there has to be a very, very strong policy case made that this is absolutely necessary in that in fact the general provisions under the Act cannot apply appropriately. (Report Pg 129)

None of the existing exclusions in section 3 of the current Act have been much of an issue in any review conducted by my office since the coming into force of the Act and

there are good public policy reasons for the exclusions. I would not advocate for the removal of any of them. Nor, however, would I advocate for adding any additional categories of exemptions.

## 6. PARAMOUNTCY (Section 4)

Section 4 of the Act stipulates that where there is a conflict between the *Access to Information and Protection of Privacy Act* and another piece of legislation, the ATIPP Act applies unless the other legislation specifically states that it prevails over the provisions of ATIPPA. This is an important section of the Act which underlines the "quasi-constitutional" nature of the legislation. In the public consultation undertaken in the Northwest Territories with respect to the comprehensive review of the NWT legislation, the Department of Justice questioned whether criteria needed to be developed to assist departments who are developing legislation to determine if an act or sections of the Act should be "notwithstanding" to ATIPPA.

Paramountcy provisions remove access and privacy rights. As Former Alberta IPC Frank Work stated in a 2011 study of paramountcy clauses in Alberta legislation overriding the FOIP Act:

> Left unchecked, the practice of taking other enactments out of FOIP by making them "paramount" to FOIP has the potential to turn FOIP into "a piece of Swiss cheese", causing its death "by a thousand cuts" or bringing about its virtual "repeal by degrees."
>
> A number of existing paramountcy provisions may be unnecessary as the FOIP Act provides sufficient privacy protection. A mandatory requirement that proposed paramountcy provisions be submitted to me for review and

comment can help in reducing the number of unnecessary paramountcy provisions.[1]

I adopt Former Commissioner Work's analysis.

**Recommendation:**

9. I recommend that there be an amendment to the Act which would require that any proposed paramountcy provision in new or amending legislation be submitted to the IPC for review and comment.

## 7. FEES

Access and privacy legislation is intended to give individuals the right of access to general information held by public bodies as well as the right to access their own personal information or request a correction to it. Therefore, it's important that the fee structure relating to accessing information does not become a deterrent to access.

A number of jurisdictions have lowered or eliminated the initial application fees for general requests and photocopying fees have been decreased. While some jurisdictions have increased the hourly fees relating to locating and preparing records, this has been somewhat offset by an increase in the number of "free" hours applicants may get.

There is a very good review of the "fees" issue in the Newfoundland Report at pages 51 to 58, which I have attached as Appendix I to this submission. From my perspective, the current fee structure in Nunavut's legislation is cumbersome, unclear, dated and somewhat inconsistently applied.

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1. *Becoming a Leader in Access and Privacy, Submissions to the 2013 Government of Alberta FOIP Act Review*, Office of the IPC of Alberta, pg 13

The issue here is in determining the intention of imposing fees. Fees should not be

used to frustrate or discourage access to information requests. The spirit and intention of the legislation is to allow access, not place barriers in the way. If fees are to be part of the legislative scheme, then, they must be reasonable and not such that they will deter applicants. As noted in the Newfoundland Report:

> Any change related to fees and charges should facilitate, not frustrate access. Changes should make the *Act* more, rather than less, user friendly. (Page 57)

It has always been acknowledged that the fees structure under the *Act* is not intended to achieve full cost recovery. In fact, I would venture to guess that the real cost of administering the $25.00 application fee alone is greater than the $25.00 received, making for a net loss, before we even get to the point of starting to respond to the request. The only real purpose of the fees, then, would be to act as a check/balance to those who would abuse the system and application fees are of limited assistance in this regard.

The current $25.00 “Application Fee” for access to information requests for general information is at the top of the scale nationally (application fees range between $0 and $25.00). There is no application fee for someone seeking his or her own personal information. I note that the expert panel reviewing the Newfoundland and Labrador Act concluded that there is “little merit in retaining the application fee” (page 57).

**Recommendation:**

10. I recommend that the Application Fee be eliminated.

In terms of the fees for searching for and responding to access requests, our act currently provides for what amounts to five and a half hours of “free” processing time before the

additional fees kick in. There is a significant amount of confusion over the way in which this time is calculated. In the Newfoundland Report, the Committee recommended that:

> It makes sense to lengthen the "free search" period from four hours to 15 hours.....The only time that would count toward processing charges would be the direct searching time for the records. Time spent narrowing the request with an applicant would not count toward the free time allotment, and neither would the time spent to determine if exemptions should apply.

**Recommendation:**

11. I recommend that an Applicant be allowed up to 15 hours of search time before a fee is assessed on a general access to information request. There should continue to be no limit for requests for personal information.

There have been a number of Reviews done by my office over the years addressing the interpretation of the regulations in terms of what a public body can and cannot apply fees to. The current wording of the regulations in this regard is very unclear and, in fact, appears to be internally contradictory. As a result of the Reviews done, however, it is now generally accepted that a fee cannot be applied to the time spent reviewing and redacting a record for disclosure.

**Recommendations:**

12. I recommend that amendments be made, either to the Act or to the Regulations to make it clear that only the time spent actually searching for records can be considered for calculating both the "free" time and the "fee" time.

13. Where paper records are concerned, I recommend that the regulations be amended to clarify that the Applicant should only be charged for one set of records regardless of whether or not the public body has to make additional

copies for their own records.

14. I recommend that the cost for photocopies be adjusted downward to reflect the decreased cost of photocopies, perhaps to 5 cents per page.

15. I recommend that there be a maximum fee imposed of $2,000.00.

The Regulations currently provide for a fee for “computer processing and related charges” which may well have been a real cost factor 20 years ago, but which today is not relevant because virtually all written records are created and stored electronically. The current fees for “floppy disks, computer tapes, microfiche and microfilm” need to be reconsidered, as do those charges associated with video and audio cassettes. While these medium may still be subject to requests for information, it seems to me that in most cases, records today are more likely to be converted to an electronic format for the purposes of disclosure than to be recreated in their original format. This said, the current fee schedule does not provide a fee for disclosure of records in electronic medium.

**Recommendations:**

16. I recommend that the regulations be updated to reflect the realities of the form which records take in today’s electronic world.

17. I recommend that the regulations be updated to reflect the costs of electronic disclosure - for example, if a jump drive or other removable apparatus is necessary, a cost can be associated with that. In the event that disclosure is entirely electronic (ie: by email) there should be no cost to the applicant for such disclosure.

The Regulations currently allow for the head of a public body to waive the fees “if, in the opinion of the head, the applicant cannot afford the payment or, for any other

reason, it is fair to excuse payment". While this appears to be a fairly open option in that the fees may be waived if "for any other reason it is fair to excuse payment", in practice the focus has generally been only on whether or not the Applicant can afford to pay, which often results in the Applicant having to provide significant personal information to prove that fact. What is missing from this provision is a more general provision which allows for a waiver of fees where it would be in the public interest to disclose the information. This is in keeping with the other recommendations in this paper which suggest that the public interest over-ride should be playing a more prominent role in the application of the Act so that the stated purposes of the Act can be better met.

**Recommendation:**

18. I recommend that there continue to be provisions for a waiver of fees in circumstances of financial hardship and/or when for another reason it is fair to excuse payment, but that these provisions be expanded to include "where it would be in the public interest" to disclose the information.

Finally on the issue of fees, the section 28 of the Act provides that a person who has made a request for information may ask the Information and Privacy Commissioner to review "any decision, act or failure to act of the head that relates to that request. This would include a decision by the head of the public body to deny a fee waiver. Because, in the end, the Information and Privacy Commissioner makes recommendations only, this is a bit of a hollow opportunity and one that can take, potentially, up to six months. One of issues with the current Act is the length of time it takes a request to work its way through the system.

**Recommendation:**

19. I recommend that the *Act* be amended so as to provide that when the Information and Privacy Commissioner reviews a matter concerning fees, her

determination on that issue be final (i.e. - giving order making power over issues in relation to fees).

For most, if not all, of these recommendations, appropriate wording can be found in the Newfoundland and Labrador legislation.

## 8. MAKING AN ACCESS REQUEST

Section 6(1) of the Act provides that an access to information request must be "written". It may be appropriate, with today's technology, to clearly provide that the request may be submitted in person, by conventional mail, or by email to the public body.

**Recommendation:**

20. I recommend that section 6(1) be amended to clarify the manner in which an access to information request can be made so as to clarify that email is an acceptable method of making a request for information.

Section 6(3) provides that an Applicant may ask for a copy of the record or ask to examine the record. While it is not unusual for records to be disclosed without any redactions, the more records involved in an access request, the more likely it is that at least some information will be required to be withheld pursuant to one of the mandatory exceptions to disclosure or the public body will choose not to disclose pursuant to a discretionary exemption. When an applicant seeks to "examine" the record, therefore, in many cases he/she will be examining a redacted copy of the original and not the original itself, which rather defeats the purpose. For these reasons, the option to examine the record should be qualified. Similarly, in light of today's technology, it should also be clear that an Applicant can ask that the response be provided in electronic format. Again, however, there must be reasonable limits on this option. For example, it may be that the record requested is a bound book or is a very long record which only exists in paper form making it expensive and time consuming to create an

electronic document from the record.

**Recommendations:**

21. I also recommend that subsection 6(3) be amended so as to acknowledge that an applicant may request that the response to his/her access to information request be provided in electronic or machine readable form.

22. I recommend that section 6 be amended by adding a new subsection which clarifies that although the applicant may seek to examine a record the public body has the discretion to refuse to allow the applicant to examine the record where the record or part of the record is subject to an exception to disclosure as outlined in sections 13 to 24 of the Act.

23. I recommend that section 6 be amended to clarify that, notwithstanding subsection (3), the public body may elect to provide the response in a different format in specified circumstances (for example: where the record cannot be reproduced electronically using the public body's normal computer hardware and software and technical expertise)

## 9. TIME FOR RESPONDING TO A REQUEST

Sections 8 and 9 of the Act address the obligation of public bodies to respond to an access to information request. Section 8 provides that the public body "shall respond to an applicant not later than 30 days after a request is received" unless the time is extended pursuant to section 11 or the request is transferred to another public body pursuant to section 12.

For a number of reasons, including the reality that communication in and around Nunavut is sometimes challenging, I would not recommend changing this time frame, except, perhaps, to change the time period from 30 calendar days to 20 work days.

This would help to

ensure that public bodies have sufficient time to respond, even when, for example, a request is receive around a holiday period.

**Recommendation:**

24. I recommend that s. 8 be amended so as to provide that a request for information is to be responded to within 20 working days.

25. I recommend that s. 8 be reworded to make it clear that the 20 working days for responding is a maximum and that all ATIPP requests should be responded to "as soon as practically possible" with an outside time limit of 20 working days.

I note, as well, that the combination of ss. 8, 9 and 10 suggest that a "response" may or may not include the actual disclosure of responsive records. Section 9(1)(b) in particular suggests an open ended time frame for giving access once the "response" has been provided to the Applicant. It is the general practice of most public bodies to include the responsive records with the section 8 response but I can quite easily imagine a situation in which this wording might be used as a tool to delay the actual disclosure of records.

**Recommendation:**

26. I recommend that sections 8, 9 (in particular 9(b)) and 10 be amended to make it clear that a "response" includes disclosure of the responsive records unless the Applicant has indicated that he/she wishes to view the records in the offices of the public body, in which case a time and a date for that should be provided with a specific time limit (within 7 working days).

## 10. TIME EXTENSIONS

Section 11 of the Act allows a public body to extend the time for responding to an access request for a "reasonable period" in certain, defined circumstances. This has become one of the most abused sections of the Act, with some public bodies taking extensions upon extensions upon even more extensions. In one case, the public body managed to extend the response period for more than nine months before the Applicant sought a review from my office. This is clearly not in keeping with the spirit and intention of the Act. The requirement to ensure that extensions be for a "reasonable" period of time has lost all meaning.

**Recommendations:**

27. I recommend that the extension public bodies are able to take be limited to one extension of no more than 20 working days;

28. I recommend that notice of that extension be given to the Applicant no less than five business days **before** the end of the initial 20 working days period, and that the notice include a statement advising that the extension can be referred to the Information and Privacy Commissioner for review;

29. I recommend that in the event that the public body is not able to respond within the initial 40 working days, they must apply to the IPC for a further extension and that application must be made no less than five business days **prior to** the end of the extended period.

30. I recommend that any request to the IPC for a second extension include a detailed explanation as to the issues which are preventing the disclosure within the time frames outlined.

31. I recommend that public bodies be required to continue to actively work on

responses during any review by the IPC.

32. I recommend that the decision of the IPC in these cases is final (i.e. - not a recommendation, but an order)

In some circumstances, an Applicants use the *Access to Information and Protection of Privacy Act* on a very regular basis, to the extent that in a small public body it is close to impossible to keep up with the requests. This is an issue throughout the country. Every jurisdiction has persistent applicants. In Alberta, this created a situation in which applicants were bringing both the public bodies and the IPC to court to enforce the times for responding to requests. As a result, an amendment was made to the Alberta legislation that I consider a good compromise - it does not prohibit persistent applicants from continuing to request records, but allows for extensions of time in certain circumstances. That amendment reads as follows:

> 14(2) The head of a public body may, with the Commissioner's permission, extend the time for responding to a request if multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other.

**Recommendation:**

33. I recommend that a section similar to the above be added to section 11 of our Act.

## 11. TRANSFERRING REQUESTS TO ANOTHER PUBLIC BODY

Section 12 of the ATIPP Act provides that a public body may transfer a request for access to a record to another public body for response where the second public body is the more appropriate one to respond to the request. There is, however, nothing in the

provision which dictates when that should be done and, more often than not, the transfer takes place on the last possible date before the response is due. If a request is to be transferred to another public body, that should be done quickly so as to avoid unnecessary delay in getting the applicant the information they seek. Across Canada, the majority of jurisdictions have set out specific time frames that a public body must meet when they transfer an access to information request. The time frames range between 5-20 days.

In most cases, it will be evident very quickly if some or all of a Request for Information received by a public body needs to be transferred to another public body for response. This determination should be made as one of the first steps in the process of responding to an ATIPP Request.

**Recommendation:**

34. I recommend that transfers be completed within five (5) working days of receipt of the request.

## 12. EXCEPTIONS TO DISCLOSURE

Sections 13 to 25 of the Act outline those instances in which public bodies have either a positive obligation not to disclose certain records or parts of records or a discretion as to whether or not to disclose. Much discussion always surrounds whether there should be more or fewer such exceptions. Perhaps more important, however, is the need to clarify the application of some of these exemptions so that there is less room for misinterpretation or misapplication.

**Section 13** - Cabinet Confidences

All jurisdictions provide exceptions to the right of access in order to protect information that falls within the category of cabinet confidences. As noted in the 2014 Statutory Review Report (Newfoundland), there is a clear historical context for this exception.

> The renowned authority on Cabinet government, as it evolved in Britain and as it has been adopted in the developed nations that were once colonies of Britain, is Sir Ivor Jennings. His *Cabinet Government*, originally published in 1936, has been described as the standard and indispensable work on its subject. In it he explains the origins of and basis for continuing the principle of Cabinet secrecy. He writes:
>
> > The Cabinet deliberates in secret; its proceedings are confidential. The Privy Councillor's oath imposes an obligation not to disclose information; and the Official Secrets Acts forbid the publication of Cabinet as well as other documents. But the effective sanction is neither of these. The rule is, primarily, one of practice. Its theoretical basis is that a Cabinet decision is advice to the Queen, whose consent is necessary to its publication. Its practical foundation is the necessity of securing free discussion by which a compromise can be reached, without the risk of publicity for every statement made and every point given away.
>
> Sir Ivor Jennings also notes that the secrecy principle was carried so far as to require that the Cabinet papers of previous governments be locked in a government strong room and not be available to a successor government. He notes, however, that there comes a time when Cabinet proceedings pass into history and, after a significant period, full information becomes available. He also observes that it is difficult to

prevent revelation of Cabinet discussions when they relate to politically controversial matters.

In the case of the Nunavut legislation, the provision notes that public bodies shall refuse to disclose to an applicant information that would “reveal a confidence” of the Executive Council. This is a mandatory provision. If the record would “reveal a confidence” of the executive council, it cannot be disclosed. The section goes on to outline some of the kinds of information that are included in the exception.

It is to be noted that the wording of this section is slightly different than that of most other jurisdictions. The legislation in most jurisdictions refers to “information that would reveal the substance of deliberations” of the executive council. This is not the same as “revealing a confidence” of the executive council. The Nunavut legislation as currently drafted, to my mind, protects a wider range of records. Information can be considered a “confidence” without ever being part of a deliberation. I am not sure that this difference was intentional. Further, the subsections of section 13 are very broadly worded and difficult to reconcile with the historical reasons for the exclusion.

This is a provision that is used with some frequency by public bodies, most often improperly. Nunavut is not alone in struggling to interpret what the section means. Some jurisdictions have tried to clarify what falls under the definition of cabinet confidence by listing more specific types of cabinet information that would fall under the mandatory protection of this section. Recently, for example, Newfoundland included a provision within this section, which defined "cabinet records" and included the following list of records considered to be cabinet confidences:

"cabinet record" means:

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

b) draft legislation or regulations submitted or prepared for submission

to the Cabinet;

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

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

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

f) 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;

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

h) a record created during the process of developing or preparing a submission for the Cabinet; and

i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h)."

The approach in Newfoundland in Labrador seems to me to be much clearer and easier to interpret. Not only does it define what a cabinet record includes, it then provides that:

a) "cabinet records" are protected from disclosure;

b) with respect to all other records, that information in the records that would reveal the substance of Cabinet deliberations is not to be disclosed;

c) the Information and Privacy Commissioner has unfettered jurisdiction to require the production of all "cabinet records" and all records which would "reveal the substance of Cabinet deliberations" for the purposes of reviews;

d) a designated individual within the executive council has the discretion to disclose cabinet records and records which would reveal the substance of Cabinet deliberations where the public interest in disclosure outweighs the reason for the exception;

e) all cabinet records and records which would reveal the substance of Cabinet deliberations are to be disclosed after 20 years

**Recommendation:**

35. I recommend the same approach as has been taken in Newfoundland and Labrador for Nunavut, including the definition of "cabinet record". Furthermore, with the exception of (e) above, (which should remain at the current 15 years), I recommend that Nunavut adopt these provisions of the Newfoundland Act.

**Section 14** - Advice and Recommendations

All Canadian jurisdictions include an exemption within their legislation relating to "advice and recommendations" however the types of information identified differ substantially. In Nunavut, s. 14 provides for a discretionary exemption from disclosure. As noted elsewhere in this report, I have recommended that amendments to the Act make it clear that in the case of discretionary exemptions, disclosure must be the rule and only where there is a demonstrable need to withhold the information should that be done. That is perhaps most particularly true for the application of this section, because much of what goes on in public bodies is the exchange of research, advice, discussions, policy considerations and options. The potential of this section being used to thwart access to information is real. The general practice of public bodies when refusing access to a record is simply to refer to the section of the Act they are relying on, with no further explanation. This is of little assistance to most Applicants who are not access or privacy experts.

**Recommendations:**

36. I recommend that s. 14 be amended to provide that, where a public body relies on this (or any other discretionary exemption), the public body must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

37. I further recommend removal of (b) - consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council. This exemption is far too wide. The words "consultation" and "deliberation" could refer to virtually everything done within a public body. This is clearly not within the spirit or intention of the Act. Everything needed to ensure that public servants can freely and openly give advice is contained in subsection (a).

I do not understand the reasons for the exemption provided in subsection (f) which gives public bodies the discretion to refuse to disclose "the contents of agenda or minutes of meetings of an agency, board, commission, corporation, office or other body that is a public body. This subsection is over broad. While there may be reason not to disclose certain portions of the minutes of meetings, most meeting minutes should, to my mind, be accessible. The same goes for agendas, which rarely contain anything that relate to deliberations or consultations, other than the fact that something is the subject of discussion. To the extent that there may be content in either agendas or meetings that need, for some reason, to be withheld, that content can be protected by other exemptions within the Act.

**Recommendation:**

38. I recommend that subsection 14(f) be removed.

**Section 15** - Privileged records

In *Solicitor-Client Privilege*, Professor Adam Dodek discusses the origin of the idea and the rationale for protecting communications between a lawyer and client. With respect to its origin, he writes:

> The privilege is the oldest of the recognized privileges for confidential communications—priest-penitent, doctor-patient and lawyer-client. It dates back to the 16th century. As explained by J. Sopinka in *The Law of Evidence in Canada*: "the basis for the early rule was the oath and honour of the solicitor, as a professional man and a gentleman, to keep his client's secret. Thus, the early privilege belonged solely to the solicitor, and the client benefitted from it only incidentally. This basis for the privilege became known as the Honour Theory.
> ....
> By the early 19th century, the rationale for the privilege had shifted from the honour of the solicitor to more utilitarian justifications based on the efficacy of the justice system. While these justifications were developed in the 19th century, they continue to resonate today and continue to provide the dominant rationale for the privilege today.[2]

As noted by the authors of the Newfoundland Statutory Review:

> Clearly, the Supreme Court views solicitor-client privilege as fundamental to the justice system in Canada and, in the words of Justice Major:
>
> > The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of

wrongful conviction.
*Pritchard* v *Ontario (Human Rights Commission)*, 2004 SCC

I have no recommendations to make with respect to this section.

**Section 16** - Disclosure prejudicial to intergovernmental relations

All Canadian jurisdictions include an exemption that allows public bodies to refuse disclosure of information considered to be prejudicial to intergovernmental relations. It is a discretionary exemption. That said a decision to disclose such records requires the approval of the executive council, which limits the exercise of discretion by the head of the public body. That discretion is further limited by requiring the both the approval of executive council **and** the consent of the other government when the record could be reasonably expected to reveal "information received, explicitly or implicitly, in confidence" from the other government agency. Section 16 of the Nunavut Act provides for this exemption. This section has been relied on, from time to time, to refuse access, most often with little explanation being given.

**Recommendation:**

39. I recommend that s. 16 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the criteria used in the exercise of the discretion to deny access to the record, or partial record, whether or not the executive council has been consulted

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2. Dodek, *Solicitor-Client Privilege* (2014) para 1.4.

and in the case of subsection 16(1)( c), whether the consent of the other government has been sought.

**Section 17** - Economic and other interests of public bodies

Section 17 gives public bodies the discretion to refuse access to information "the disclosure of which could reasonably be expected to harm the economic interest" of the government or a public body or the ability of the government to manage the economy. The section has rarely, if ever, been relied on to deny access to records since the Act's inception.

**Recommendation:**

40. I recommend that s. 17 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

**Section 18** - Testing procedures, tests and audits

Section 18 gives public bodies the discretion to refuse access to information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted where the disclosure "could reasonably be expected to prejudice" the results. Again this section has rarely, if ever, been relied on to deny access to records since the Act's inception.

**Recommendation:**

41. I recommend that s. 18 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

**Section 19** - Disclosure harmful to the conservation of heritage, culture, endangered species or fossil/natural sites.

All Canadian jurisdictions provide a similar exemption within their access and privacy legislation. This section has been used, on occasion, in Nunavut to deny access to information which contains specifics about endangered or threatened species as well as cultural/heritage sites. Again, the only comment I have with respect to this exemption is with respect to how notice must be given to applicants when the section is relied on to deny disclosure.

**Recommendation**

42. I recommend that s. 19 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

**Section 20** - Disclosure prejudicial to law enforcement

All jurisdictions include a provision that allows public bodies to refuse to disclose information that may harm law enforcement matters. The current list of law enforcement matters within this provision is also similar to other jurisdictions. I have no recommendations to make with respect to section 20(1).

Section 20(2)(a), however, gives public bodies the discretion to refuse to disclose information where 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". To date, I have not dealt with any review in which this exemption has been relied on. But beyond that, it seems to me that if someone does something or says something that might be actionable in a civil court, it is not appropriate to be hiding that information. Access to information legislation is often the only way for an individual to obtain information which might suggest wrongdoing. It is contrary to the focus of the legislation to allow public bodies to hide information which might expose wrongdoing.

**Recommendations:**

43. I recommend that s. 20 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

44. I recommend that section 20(2)(a) be repealed.

**Section 21** - Disclosure harmful to the safety of individuals

Section 21 allows a public body to refuse to disclose information where that disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual. Some Canadian jurisdictions have expanded this provision to provide public bodies with discretion to refuse to disclose information that may interfere with public safety. This has been generally defined to mean information where the disclosure 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. This might be something to consider. That said, nothing in my experience to date suggests that the "safety" provisions should be expanded to include a broader public safety focus. To the extent that there might be information which should not be disclosed for public safety reasons, these appear to be fully covered by the other exemptions in the Act.

**Recommendation:**

45. I recommend that s. 21 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

**Section 22** - Confidential evaluations

This section provides public bodies with the discretion to refuse access to personal information that is "evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability" for employment where the information has been provided in confidence. This section really addresses the need for public bodies to be able to rely on the veracity of those from whom they seek references for new employees. Reference checks are an important and valuable part of the hiring process. It is important that those who provide references to know that they can be honest about

the potential employees strengths and weaknesses without that information getting back to the employee. On the other hand, where the opinion of one individual is being used to make decisions that will affect the livelihood of another, the person the opinion is about should have the right to know what has been said so that he/she has the opportunity to address any negative comments. This is particularly true where the policy within Human Resources is that certain references are mandatory - i.e. the references given must include the potential employee's last supervisor. In a place like Nunavut, one bad reference, which may or may not be based on a bad interpersonal relationship between the two individuals, can potentially make it close to impossible for a person to gain government employment in any public body. It is vital, therefore, to balance the need for candid references and the right of the individual the opinion is about to address any negative comments received from references.

**Recommendations:**

46. I recommend that s. 22 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

47. I further recommend that when this section is used to deny access, that there be an obligation on the public body to provide an Applicant with a statement outlining a summary of the comments received.

**Section 23** - Unreasonable Invasion of Privacy

This is one of the most used exceptions to disclosure used by public bodies, and with good reason. This is where “access” and “privacy” intersect. Government collects and retains huge amounts of personal information about individuals. If we want to have access to medical services or to obtain a drivers license or obtain an education, we must, as individuals, give up our personal information to public bodies. As important as access to information is, the right to privacy is as important and, in today’s world, perhaps more important. There must be a balance and this section is at the heart of that balance. Public bodies must make a determination as to whether disclosure would constitute an unreasonable invasion of privacy and, where it would, the public body must refuse to disclose. This is a mandatory exception to disclosure.

Section 23(2) through 23(4) provide guidance as to when disclosure would amount to an unreasonable invasion of privacy. In particular, section 23(2) outlines circumstances in which the disclosure of personal information will be presumed to be an unreasonable invasion of the person’s privacy, section 23(3) outlines criteria that should be used to determine whether or not disclosure would amount to an unreasonable invasion of

privacy and section 23(4) provides for situations in which disclosure will not amount to an unreasonable invasion of privacy.

For the most part, these subsections do a good job of outlining a relatively clear formula for determining when the section 23(1) should be applied to deny access to a record or part of a record. There are, however, some amendments that can and should be made to address changing societal values and technological capabilities since the Act was first passed twenty years ago.

**Recommendations:**

48. I recommend that sexual orientation and sexual identification be added to the list of information which, if disclosed, would raise a presumption of an unreasonable invasion of privacy pursuant to section 23(2).

49. I recommend that section 23(2)(h) either be deleted or, alternatively, that new wording be found which would narrow the scope of the presumption. As currently worded, the presumption of an unreasonable invasion of privacy applies any time an individual's name appears with any other information about them - what they said, what they did, who they talked to, that they were present in a room at a particular time, that they know another individual....the list goes on. While some of these things, in context, might lead to a conclusion that the disclosure would amount to an unreasonable invasion of privacy, it really does depend on the circumstances and context of the record. As currently written, however, any time an individual's name appears, really, the presumption arises and this should not be the case. While there are going to be instances where the disclosure of a name, in conjunction with other information, will amount to an unreasonable invasion of privacy, I do not believe that it should presumptively be so.

50. In light of the rapidly expanding use of biometric technologies, I recommend that section 23(2) be amended to include, presumptively, that the disclosure of biometric information about an individual would constitute an unreasonable invasion of privacy.

In addition, there are some criteria that should, in my opinion, be added to section 23(4) - situations in which the disclosure is not considered to be an unreasonable invasion of privacy. For example, an individual's business contact information should not constitute an unreasonable invasion of privacy.

**Recommendation:**

51. I recommend that section 23(4) be amended to include:

a) where the personal information identifies the individual as an employee of a public body; and
b) where the personal information relates to the individual's business contact information.

52. I recommend that section 23(4)(h) be amended to include words which would clarify that the gross amount of a negotiated payout made to an employee or former employee upon termination of his/her employment with a public body are included in the term "discretionary benefit".

An issue which has arisen in the last few years is whether or not an employee involved in a workplace investigation is entitled to know who filed the complaint and what was said about them. There seems to be a reluctance on the part of human resources personnel to allow the employee who is the subject of a complaint to know the nature of the complaint, know who has made it or know what has been said by the complainant and other witnesses about him/her. This is not acceptable. Employees should always have the right to fully respond to allegations made about them, particularly when their livelihood is at stake. This is personal information about the employee involved and where a complaint is made, the employee has the right to know. To suggest otherwise flies in the face of all of the policy imperatives which underline the purposes of the Act. I have been told that this reluctance stems from the desire to protect individuals who feel compelled to file a complaint. It has been suggested, in fact, that there have been instances in which a person who has filed a complaint has been beaten up for doing so. While I am, obviously, appalled that this might be the case, surely there are ways of dealing with this kind of violence that do not entail trampling upon the rights of the affected party to know the allegations against him/her. I have heard human resources personnel say that they need to be able to assure those who file complaints or give references that the information will not be disclosed to the employee or potential

employee involved so as to encourage frank and open responses. The *Act* currently deals with this by including under the definition of "personal information" opinions about the individual so that the opinion itself is subject to disclosure but the name of the person who voiced the opinion would be protected as that person's own personal information, the disclosure of which would be an unreasonable invasion of privacy (in most cases). I most adamantly do not support any amendment that would hide this kind of information from the individual whose livelihood might be affected by an allegation, complaint or bad reference. I have addressed this issue in more detail below under the heading "Personal Information and Workplace Issues".

Another issue that much of the country is dealing with is whether or not more detailed information about the salaries of those highest paid GN employees should be disclosed. Many Canadian jurisdictions have created new legislation which provides for what is referred to as a "Sunshine List" which provides for the disclosure of specific income information for the highest paid public employees and elected officials, notwithstanding the privacy legislation in place. The justification for such disclosure, which clearly amounts to an invasion of privacy, is a recognition of the fact that the public has become more interested in knowing how their tax dollars are being spent and that one of the largest expenses for government is its payroll. Such disclosures provide more accountability and transparency generally.

**Recommendation:**

53. I recommend that the legislation be amended to provide for the pro-active disclosure of remuneration paid to the highest paid GN employees and officials

Another area of concern raised in relation to the personal information of third parties is the application of section 23 when an individual is deceased. Currently, the privacy protections of Section 23 apply whether an individual is alive or deceased. However

some jurisdictions have determined that the privacy interests of a deceased individual is considered to decrease over time and a disclosure after a set time period may not be considered an unreasonable invasion of privacy. Time limits reviewed range between 20-25 years before a disclosure may be considered. Other jurisdictions have raised concerns about a specific cut-off date being used. While the length of time since death is a consideration to be reviewed, a specific cut-off date is not considered the proper measure on how disclosures should be considered. Instead, public bodies should focus on whether the disclosure of information would be an unreasonable invasion of that individual's privacy.

I agree with the latter argument.

**Recommendation:**

54. I recommend that there be no changes to the Act which would deal with the personal information of deceased individuals in any way differently than that of the living.

While on the issue of the privacy rights of deceased individuals, there are amendments that I feel are necessary. I have seen a number of instances in which individuals were denied access to information about a child, a spouse, a parent or another close relative because of the privacy rights of the deceased person. While section 52(1) allows that any right conferred on an individual may be exercised by a personal representative (executor, administrator or trustee), this is a fairly narrowly worded provision. In many cases an estate is not large enough to require a formal application for probate to confirm an executor, administrator or trustee. Furthermore, in the case of a death of an employed individual, it may well be that the most valuable asset may be their pension, benefits, etc. and before a legal representative can be appointed by the courts, the necessary information has to be gathered.

**Recommendation:**

55. I recommend that an amendment be made to section 48 so as to allow the disclosure of personal information to the executor, administrator or trustee of a deceased person's estate, to the spouse or next of kin of a deceased person or to such other person as might be determined necessary for the settling of the deceased person's affairs.

**Section 24 - Business Interests of Third Parties**

Section 24 is a mandatory exception to disclosure. Public bodies are prohibited from disclosing information which would reveal trade secrets of a third party or that meets other criteria as outlined in subsection 24(1).

This subsection needs some work to bring it into line with the way in which business interests are protected in most other jurisdictions in Canada. In most other jurisdictions, the legislation outlines a clear three part test to determine whether third party business information is protected from disclosure:

(a) would the disclosure reveal trade secrets, commercial, financial, labour relations, scientific or technical information of a third party?

(b) was the information supplied, explicitly or implicitly, in confidence, **and**

(c) would the disclosure reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information

continue to be supplied, or

(iii) result in undue financial loss or gain to any person or organization.

Our legislation, as currently drafted, does not require a three part test for any of business information categories. Instead:

- section 24(1)(a) prohibits the disclosure of information that would reveal trade secrets - full stop (a one part test)

- section 24(1)(b) prohibits the disclosure of financial, commercial, scientific, technical or labour relations information (part one of the test) that has been obtained in confidence from a third party or is of a confidential nature and obtained from a third party in compliance with a lawful requirement (part two of the test)

- section 24(1)( c) prohibits the disclosure of ANY information which might result in undue financial loss or gain to any person, prejudice the competitive position of a third party, interfere with contractual or other negotiations of a third party, or result in similar information not being supplied to a public body (a one part test)

**Recommendations:**

56. I recommend the approach adopted by Alberta, Ontario, Newfoundland and others, which requires a three part test be met in order to justify a refusal to disclose under section 24. This approach is more in keeping with most other jurisdictions and the trend, generally, toward more openness in contracting and procurement matters. In particular, I would recommend the adoption of wording such as that contained in Alberta's FOIPP Act, Section 16, which reads as follows:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure,

(b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,

57. Further, I recommend that this provision be clarified insofar as what is meant by the term “prejudice to the competitive position of a third party” and “interference with contractual or other negotiations of a third party”. These are issues that are often raised by third party companies seeking to protect contract numbers, not only in Nunavut but across the country. As a result, there have been many orders and recommendations made across the country dealing with this issue. A good summary of what would qualify for this exemption law was laid out in a 2013 Order made by the Information and Privacy Commissioner’s Office of British Columbia, in *City of Abbotsford* (Order F13-20):

> It is clear that the disclosure of existing contract pricing and related terms that may result in the heightening of competition for future contracts is not a significant harm or an interference with competitive or negotiating positions. Having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather it is an inherent part of the bidding and contract negotiation process. (pg. 10)

I therefore recommend a provision be added to the Act which makes it clear that section 24(1)(c) does not apply to “pricing and related information in existing contracts”.

58. I recommend that clarification be brought to Section 24(1)(f) and (g). Section 24(1)(f) prohibits the disclosure of “a statement of financial assistance provided to a third party by a prescribed corporation or board”. Subsection 24(1)(g) prohibits the disclosure of information supplied by a third party to support an application for financial assistance mentioned in paragraph (f). I note that there has never been a “prescribed corporation or board” to which section 24(1)(f) or (g) would apply so that these provisions really have no meaning. If the intention was that prescribed corporation or boards really is a reference to public lending

corporations, this needs to be set out in regulations.

59. Quite apart from defining what a “prescribed corporation or board” is, I recommend the repeal of section 24(1)(f). A business receiving loans from a public lender should know that some details of such loans would be subject to public scrutiny. One of the basic pieces of information that should be available, pro-actively, to the public, is what companies have received public funding and how much. These businesses would still have the protection afforded by subsection 24(1) generally if they can establish that disclosure of the information would result in a harm to the business as outlined in the previous subsections.

**Section 25 - Information that is or will be available to the public**

This section allows a public body to refuse to disclose a record if that record is already available to the public or “is required to be made available within six months after the applicant’s request is received. All jurisdictions have a similar provision however only the NWT and Nunavut provide for a six month time frame. All other time frames range between 30-90 days.

I have said in many of my review reports that, like justice, access delayed is access denied. A six month delay can be an impossibly long time for anyone on a deadline. In today’s digital electronic world, I find it hard to think of a situation in which a public body would be justified in refusing to disclose a record (if it is available) even if it is “required” to be published within a stated time period. As an example, in the case of procurement information, contracts awarded are reported publicly once a year. But someone who has an interest in that information should not have to wait for six months or more to be able to have information about a particular tender award.

**Recommendation:**

60. I recommend the removal of section 25. As an alternative, I recommend that the time frame be reduced to no more than 30 days.

**Other Issues - Public Interest Over-rides**

Currently, exceptions to access identified under our legislation provide for only very limited of application of a public interest overrides in relation to the exemptions to disclosure under the Act. Most other Canadian jurisdictions have a provision which provides that exemptions do not apply in cases in which there is a real public interest in disclosure.

Our legislation has some references to public interest over-rides. The first is in section 23(3) which outlines some of the circumstances which should be considered by a public body when evaluating whether or not the disclosure of personal information would amount to an unreasonable invasion of privacy. This section provides that some of the circumstances to be considered include:

a) whether the disclosure is desirable for the purpose of subjecting a public body to public scrutiny;
b) whether the disclosure is likely to promote public health and safety or to promote the protection of the environment; and
c) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people

These are all "public interest" issues which must be considered in determining whether or not the disclosure of personal information amounts to an unreasonable invasion of privacy.

Furthermore, section 48(s) provides that a public body may disclose (or use) personal information:

for any purpose when, in the opinion of the head,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,

It is noteworthy that both of these provisions apply only to the disclosure of personal information.

The authors of the Newfoundland Report came to the following conclusion on this point:

> The Committee concludes that in a modern law and one that reflects leading practices in Canada and internationally, it is necessary to broaden the public interest override and have it apply to most discretionary exemptions. This would require officials to balance the potential for harm associated with releasing information on an access request against the public interest in preserving fundamental democratic and political values. These include 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; general good decision making by public officials.

More generally, it has always been my position that disclosure of records is the rule and the only time access should be declined is when there is a good, thoroughly considered reason for the refusal and this is particularly so when the exemption being relied on is a discretionary one. In other words, it is my position that disclosure is the starting point.

**Recommendation:**

61. I recommend, as a starting point, an amendment or amendments to the Act which explicitly and clearly state that in the case of discretionary exemptions, disclosure is the rule and discretion can be exercised to refuse access only after

a review of all of the relevant considerations, including the public interest in the disclosure of the record in question.

As noted above, in the case of section 23, a limited public interest over-ride already exists. I would agree that there is merit in establishing provisions such as those in Ontario which require public bodies to specifically consider the public interest in disclosure when exercising disclosure in dealing with discretionary exemptions, as well as mandatory ones. It should be noted that the Supreme Court of Canada concluded, in the case of *Criminal Lawyers' Association* [2010] SCC 23 which arose out of Ontario, that the law in that jurisdiction requires a public official exercising discretion under the access to information legislation to weigh all relevant considerations for and against disclosure, including private and public interests.

**Recommendation**

62. I recommend that the legislation be amended to emulate the Ontario legislation which requires, specifically, that public bodies must weigh public interest when exercising discretion.

## 13. THIRD PARTY CONSULTATIONS

When a public body is considering disclosing personal information that might result in an unreasonable invasion of the privacy of a third party, they are required to consult with the third party before disclosure. The consultation process is extremely lengthy and confusing. By the time the notice to third parties goes out, it is often late in the initial response time frame - 30 days. Third parties have 60 days from the time they get the notice to provide their input, bringing us to close to 90 days. The public body then has an additional 30 days to make a decision whether or not to disclose the information, bringing us to 120 days. Where the public body decides to disclose the records in question, they must give notice of that intention to the third party and give them yet

another 30 days to seek a review from the IPC - now 150 days - five full months from the date the applicant made his/her request for information. If the third party chooses to seek a review of the public body's decision to disclose, that review process can take up to another six months.

Not only is this process very long and time consuming, it is a complicated and confusing process, particularly for third parties. The only way to reduce this confusion, I think, might be to remove the initial consultation with the third party altogether. Instead, where the public body intends to disclose a record which might affect the interests of a third party, both the Applicant and the third party should be given notice of the decision and of their right to seek a review by the IPC. This is how the Newfoundland legislation is set up. It would also reduce the response time in situations where there are third parties rather dramatically.

**Recommendations:**

63. I recommend that the third party consultation process be revamped to reflect a similar process as exists under the Newfoundland and Labrador legislation (see Appendix II)

64. In the alternative, I recommend that third parties be allowed no more than 15 working days to register any objections they might have to disclosure, that the public body be required to make a decision with respect to disclosure no more than 10 working days after that and that the third party have an additional 15 working days to submit a Request for Review to the IPC. This would reduce the total time for the consultation process from 5 months to about 3 months, which is still longer than many Applicants would like, but is significantly shorter than the current process.

## 14. PERSONAL INFORMATION AND WORKPLACE ISSUES

A large number of access requests for personal information about the applicant arise out of some kind of workplace dispute. Individuals who have made complaints against a co-worker or who are the subject of a workplace complaint often request access to all of the information related to the complaint. These are difficult requests to process because they all involve some degree of third party personal information and it is often difficult to give the Applicant the information he/she needs and should be able to access while at the same time protecting the personal information of other parties involved. It is often a delicate balancing exercise to review these records and come up with consistent and predictive results. Often times, when the Applicant is the subject of a workplace complaint, they end up with only a partial picture of how the issue arose and how the matter was handled internally. These kinds of requests also tend to generate large numbers of responsive records and it takes a lot of time to review them page by page, line by line, word by word for the purposes of applying mandatory and discretionary exemptions. This often results in delays in providing the requested records. A new provision, specific to workplace investigations, could permit public bodies to disclose to applicants who are part of that investigation (complainant and respondent) all relevant information created or gathered without conducting a third party consultation. This would allow access to all relevant records without having to vet them as carefully for third party personal information. It would avoid the necessity of undertaking third party consultations in some circumstances. And it would limit access to the information to the parties involved and to the extent that their interests lie. This approach would undoubtedly reduce not only the time and effort to respond to access to information requests surrounding workplace disputes, but would reduce fairly dramatically the number of reviews requested of my office.

**Recommendation:**

65. I recommend an amendment which would allow disclosure of records relating to a workplace complaint to a complainant or a respondent in a workplace

investigation, such disclosure to be without edits (except for the personal information of unrelated third parties) or third party consultations.

66. I recommend that for any person other than an applicant or a respondent seeking access to these records, the regular rules with respect to access would apply, including the third party consultation process.

67. I recommend that records outlining the outcome of workplace dispute investigations should be available for their precedential value to anyone who seeks the information. To accomplish this in a privacy protective way, these reports/records will have to be drafted in such a way as to avoid the use of names and detailed specifics. There might also be a time period in which these kinds of records are not available to the public, again as a measure to help protect against a breach of privacy.

## 15. REVIEWS AND APPEALS

### Time for filing of Requests for Review

Under the current Act, an Applicant or Third Party has 30 days after receiving a response from the public body to seek a review from the Office of the Information and Privacy Commissioner. As noted above, I have recommended reducing the time available to a third party to seek a review from my office after being told that a public body that a decision has been made to disclose records. This would not, in my opinion, result in any significant hardship for the third party, who has already gone through the Third Party Consultation process and should be well informed about the nature and content of the records to be disclosed and have considered any objections they have to the disclosure. They should not need another 30 days to consider whether or not to seek a review from the IPC's office.

On the other hand, in any other circumstance, there should be no time limit for the filing of Requests for Review from the IPC. There are no consequences of a delay by an Applicant to request a review. Sometimes the number of records involved in a response are significant and the Applicant will take more than 30 days to shift through them and to analyse what has been received, what appears to be missing and whether there appears to be any missing records. I have often received a Request for Review after the 30 day limit but I have yet to refuse to deal with it because it was received beyond the appeal period. There is, however, potential, for a public body to refuse to participate in a review in these circumstances.

**Recommendation:**

68. I recommend that section 29 be amended so as to remove the reference to a time limit to seek a review except in the case involving third party objections to disclosure. In the alternative, I recommend that the IPC be given the authority to extend the time for filing where such an extension would not result in any prejudice to any person.

**The Process**

I have heard from applicants from time to time that the process relating to conducting reviews are confusing.

As noted above, the process relating to third party consultations is somewhat complicated and confusing and my recommendations for third party consultations are set out above.

The Request for Review process itself is not, to my mind, overly complicated. It mirrors the process for most parts of the country and does not need any significant changes

and I would not recommend any significant changes to this process.

**Appeals to the Court**

It should be noted that in the 18 years since the legislation came into effect, I don't think there has been even one appeal to the Nunavut Court of Justice under the *Access to Information and Protection of Privacy Act*. One might hope that this is because we do such a good job in the response and review stages that everyone is satisfied with the outcome. That, however, would be naive. One of the main reasons that there are so few appeals to the court is that the process of taking that step is complicated and expensive. Furthermore, there are no real "processes" in place to guide an Applicant or the court in terms of how that appeal process should work. For example, there is nothing to suggest how the cause should be styled, or what the Notice of Appeal should look like, or what should accompany that notice (an affidavit? A copy of the Review Recommendation? A copy of the decision of the head of the public body?). I have been told quite bluntly by the owner of a corporate Applicant with fairly deep pockets that he felt he had no option but to withdraw his appeal because it became clear that the processes expected by the court were far beyond his abilities and it would have cost too much to hire a lawyer to assist. If that is the case for a corporate Applicant with some financial depth, it is unlikely in the extreme that an individual will have the resources or the ability to appeal to the court. One way to address this would be to change the format of our legislation to provide the Information and Privacy Commissioner with the power to make Orders. That would necessitate changes to the review process which is currently fairly informal. Without getting into a discussion of the relative merits of order making power v. the ombudsperson model at this point, I simply raise the issue. The inability of most people to seek court redress is a barrier to access to information that should be addressed in some way. One option might be to consider the Manitoba model which provides for a specialized adjudicator to make final order.

**Recommendation:**

69. I recommend that consideration be given to amending the Act so as to the adopt the Manitoba model of providing a final appeal to a specialized adjudicator, with a specific process to be included in the legislation or the regulations to assist appellants.

**Time for Completion of Reviews**

The Act gives the Information and Privacy Commissioner up to 180 days (six months) to complete a review and provide a recommendation. As with all of the other time frames provided for in the Act, I am recommending that this time frame be reduced as well. That, however, comes with the proviso that any shortening of the time frames will require an increase in resources for the office. The workload of the IPC's office has exploded, particularly in the last three years and even without oversight over municipalities (which is coming) or a stand alone Health Information Act (also in the works), it is becoming impossible to meet the current time frame in most cases. More resources are going to have to be dedicated to the office.

An access to information complaint requires correspondence with both the public body and the Applicant who each provide written submissions. This phase takes about 70 days. Then each responsive record must be reviewed and analysed. Depending on the number of pages (this can range anywhere from a single page to thousands of pages) this can take up to 60 hours of time, over the course of several weeks. There is, therefore, not much time to play with in the current time limit. That said, six months is too long.

**Recommendation**:

70. I recommend that the time for the Information and Privacy Commissioner to complete a review of an access to information matter to be reduced from 180 days to 120 days or, in keeping with the recommendation above to change time references from calendar days to working days, to 86 working days.

The investigation of a privacy complaint is different from an investigation of an access to information matter. While access reviews often require a page by page, paragraph by paragraph review of records, privacy reviews are more of a fact finding/policy review exercise. Sometimes they can be completed quite quickly but in some circumstances it takes a bit of time and effort to determine what happened to lead to the breach, how existing policies were implemented and to analyse what changes might be made to prevent a similar breach in the future. It should be noted that, in terms of the harm done, there is nothing that can be done to "undo" a privacy breach. The breach has already been committed and the damage to the Complainant, if any, has already been done by the time the matter reaches the IPC. In the vast majority of cases, shortening the length of time taken to review the incident and address it is not going to improve the complainant's situation, but it may reduce the thoroughness of the review. In other words, the time frame for dealing with a privacy complaint, unless the breach is ongoing (which is something that has not yet crossed my desk) is less critical.

**Recommendation:**

71. I recommend that the current 180 day time frame for completing a review of a privacy breach complaint be maintained, but that it be re-defined as 130 business days.

**Section 34 - Powers of the Information and Privacy Commissioner on Review**

In order to assess whether or not public bodies have properly applied any exceptions to disclosure provided for in sections 13 to 25, it is absolutely necessary for the IPC to be able to review the un-redacted documents. On December 2nd, 2016, I wrote a long letter to the Department of Executive and Intergovernmental Affairs about the necessity for the IPC to be able to review, in particular, those records claimed to be subject to solicitor/client privilege. Rather than repeat that letter, I attach it as Appendix III to this

report.

**Recommendation:**

72. I strongly recommend that section 34 of the Act be amended to include the words “including solicitor/client privilege” after the words “any privilege available at law”.

## 16. PROTECTION OF PRIVACY

**Section 40 (c)(ii)**

Section 40 outlines when a public body can collect personal information. This includes where:

- there is express authorization for such collection in legislation,
- where there is consent to the collection, or
- where the information is required for research or statistical purposes.

Currently under section 40(c)(ii), information can be collected where there is approval from Executive Council for the collection in circumstances where it is necessary to collect personal information in advance of a program or activity being operational. This approval is intended to provide an added protection to individuals whose personal information may be collected before a program's purposes are fully defined or documented. This provision is no longer appropriate in our current privacy environment. The provision has been relied on at least once to authorize the collection, use and disclosure of sensitive personal health information of all Nunavummiut without consent. Rather than protect personal information, in this case the provision was used to undermine privacy rights. It was used to authorize the collection of significant and detailed personal information without consent from the patients for an ongoing health surveillance program which had no legislated mandate. The Minister of Health, relied on

the section of the *Hospital Insurance and Health and Social Services Administration Act* which allows the Minister to conduct surveys and research programs as well as a decision made by the Executive Council to approve the collection and consolidation of health data on a mandatory basis without the requirement of consent for an ongoing health surveillance program. In my opinion, public bodies should not be allowed to collect personal information, let alone personal health information, for a "proposed" program or activity, let alone an ongoing program such as this one.

**Recommendation:**

73. I recommend that section 40(c)(ii) be repealed.

**Section 41**

This section provides that, whenever possible, personal information should be collected directly from the individual the information is about but it sets out a number of exceptions to that rule which suggests that public bodies are free to collect the information from other sources when certain criteria exist - as, for example, when the information is necessary in order to determine the eligibility of an individual to participate in a program of or receive a benefit, product or service from the GN. The wording suggests that if the collection is for one of the purposes set out, the public body need not even attempt to obtain the information from the individual. This seems to be contrary to the general privacy protection scheme provided for in the Act.

**Recommendation:**

74. I recommend that section 41(1) of the Act be amended by dividing it into two parts as follows:

41.(1) A public body must, where reasonably possible, collect personal

information directly from the individual the information relates.

41.(1.1) Where it is not reasonably possible to collect personal information directly from the individual the information relates, a public body may collect that information from another source if:

(a) another method of collection is authorized by that individual or by an enactment;

(b) the information may be disclosed to the public body under Division C of this Part;

(c) the information is collected for the purpose of law enforcement;

(d) the information is collected for the purpose of collecting a fine or a debt owed to the Government of Nunavut or a public body;

(e) the information concerns the history, release or supervision of an individual under the control or supervision of a correctional authority;

(f) the information is collected for the purpose of providing legal services to the Government of Nunavut or a public body;

(g) the information

(i) is necessary in order to determine the eligibility of an individual to participate in a program of or receive a benefit, product or service from the Government of Nunavut or a public body and is collected in the course of processing an application made by or on behalf of the individual the information is about, or

(ii) is necessary in order to verify the eligibility of an individual who is participating in a program of or receiving a benefit, product or service from the

Government of Nunavut or a public body and is collected for that purpose;

(h) the information is collected for the purpose of informing the Public Trustee about potential clients;

(i) the information is collected for the purpose of enforcing a support order under the *Family Support Orders Enforcement Act*; or

(j) the information is collected for the purpose of hiring, managing or administering personnel of the Government of Nunavut or a public body.

75. I recommend the addition of a provision that would require a public body, when reasonably possible, to advise an individual when personal information has been collected from a third party source.

76. I recommend that section 41(2) be amended such that any time a public body collects personal information about an individual, whether directly or indirectly, there be an obligation for the public body to inform the individual of the purpose for the collection, the specific legal authority for the collection and the contact information for an officer or employee of the public body who can answer questions about the collection.

**Privacy Impact Assessments**

A privacy impact assessment (PIA) is a tool that can be used to evaluate the privacy impact of programs, policies or activities or proposed/new legislation so that any privacy issues can be addressed. All jurisdictions in Canada, including Nunavut, use PIAs to some degree. Some jurisdictions provide for the use of PIAs through policy directives

and some have such requirements set out in their legislation.

I strongly believe that there should be a legislated requirement for PIAs to be completed at the preliminary stages of establishing new policies, programs or activities or when new legislation is proposed that may affect the privacy interests of Nunavummiut. Notwithstanding an existing policy that PIAs be conducted in Nunavut, it is my experience that PIAs are currently the exception when public bodies are considering new programs, procedures, policies and legislation. Policies and directives are not, in my opinion, ensuring adequate consideration of privacy issues at the right stages of new projects. The earlier in the development process that privacy issues are identified, the more likely it is that they can be dealt with in a substantive and effective way.

**Recommendation:**

77. I recommend a legislated requirement that PIAs be conducted for all new programs, procedures, policies, activities and legislation in which there is any possibility that personal information will be involved.

78. I recommend that the legislation include a requirement that PIAs be conducted any time there is a possibility that third party contractors will have access to personal information collected or in the possession of a public body.

79. I recommend that the legislation include a requirement that any purchase of new technology undergo a formal PIA to ensure that it will comply with the privacy and security requirements imposed by the ATIPPA.

80. I recommend all PIAs be provided to the Information and Privacy Commissioner for review and comment and that public bodies be required to consider any issues raised by the IPC.

**Use of Personal Information**

Government and business alike are generally excited about the ability that technology affords to use information collected for one purpose for entirely new purposes. Currently, the Act does not include a specific provision dealing with the collection of personal information for the purpose of planning or evaluating a program or activity of a public body. Planning and evaluation information from a program is typically not considered information that relates directly to the administration of the program, therefore public bodies are restricted on what they can collect for this purpose. However with the increase in planning and evaluation related activity there may be a desire to provide specific authority. That said, I can think of few, if any, circumstances in which it should be necessary to have personal information in identifiable form to either plan future programs or evaluate existing ones. This can be done with statistical or de-identified information. If for some reason there is a real need to collect personal information for these purposes, those purposes should be outlined at the time of collection and the individual should be given the option to opt out of such use. In other words, if a public body is collecting information for the purpose of program evaluation or planning, they know or should know at the time of collection that that is the purpose for the collection and this should be disclosed to the individual.

Similarly, the current legislation does not allow for the collection or disclosure of personal information for the delivery of common or integrated programs. Public bodies are required to create and administer a series of consent forms for the disclosure of information between public bodies. The argument is that this can result in delays in the delivery of services to clients and add to the administrative burden. Some Canadian jurisdictions have addressed this issue by including a provision in their legislation that permits the indirect collection and disclosure of personal information if the information is necessary for delivery and evaluation of a common or integrated program or activity.

In my opinion, if a public body is planning to collect information for integrated program services, the individual should be made aware that the information is being shared and have the opportunity to refuse the disclosure. At the core of the issue is the right of the individual to determine what and how much personal information will be collected/used and for what purpose. While it may be viewed as more efficient to allow the sharing/ collecting of personal information for such programs indirectly, the information does not belong to the GN, but to the individual and the individual should be able to decide how that information is used. Consent should be required for any secondary use of identifiable personal information.

**Disclosure of Personal Information**

Section 48 of the Act outlines circumstances in which public bodies can disclose personal information. It has been twenty years since this legislation was first passed and if there is to be a comprehensive amendment to the Act, section 48 clearly bears some attention.

**Section 48(q)**

This subsection allows for the disclosure of personal information "when necessary to protect the mental or physical health or safety of any individual". There has been some question in various jurisdictions as to when this subsection might apply. It may be of some benefit to provide more clarification.

**Recommendation:**

81. I recommend that section 48(q) be amended to read as follows:

> q) 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 in the form appropriate in the circumstances to the individual the information is about;

I would also recommend changes to section 48( r) to clarify that, in the case of emergency, the appropriate individual can be notified. Right now, the section allows disclosure only to "next of kin". This should be expanded.

**Recommendation:**

82. I recommend that section 48(r) be amended to read as follows:

> r) so that the next of kin, spouse or adult interdependent partner, relative or close friend of an injured, ill or deceased individual may be contacted.

Section 48(t) allows the disclosure of personal information when that information is "otherwise available to the public". This section is so widely worded that it would allow the disclosure of information by a public body where that information or similar

information has already been made public in some way. For example, if it generally known in a community that an individual is sick, that could be said to be "otherwise available to the public". Public bodies should not be commenting on this kind of thing. I therefore propose wording that will narrow the scope of this section.

**Recommendation:**

83. I recommend that section 48(t) be amended to read as follows:

> t) if the personal information is information of a type routinely disclosed in a business or professional contact and the disclosure is limited to an individuals' name and business contact information and does not reveal any other personal information about the individual.

As discussed above, there should be some provision which allows a public body to disclose limited information about a deceased person to someone authorized to receive it, such as an executor or trustee, or in the absence of an executor or trustee, a spouse (being careful how we define this word) or next of kin. See recommendation 54 above.

## 17. DATA BREACH NOTIFICATION

Nunavut was the first jurisdiction in Canada to require privacy breach notification by all public bodies. This was a very progressive step that made Nunavut a leader in this area of ATIPP.

We have now had a few years of the privacy breach reporting provisions and I am receiving more such reports each year. For the most part, the provisions are working well and are helping to identify gaps in physical, technological and administrative security of personal information so that these gaps can be addressed. The only

amendment that I would suggest to these provisions is to specify that the Information and Privacy Commissioner can, if she considers it appropriate, conduct and investigation of the breach under the relevant sections of the Act.

**Recommendation:**

84. I recommend that a section be included in the breach notification section of the Act after section 49.11 to the following effect:

> Upon receipt of a Breach Notification pursuant to section 49.9, the Information and Privacy Commissioner may, where he or she is of the opinion that a review is appropriate, conduct a review of the breach in accordance with Part 2, Division D.

## 18. THE TERM OF THE INFORMATION AND PRIVACY COMMISSIONER

Currently, under the Act an Information and Privacy Commissioner may serve for five years or until they are reappointed or a successor is appointed. There is no limit on the number of terms that an Information and Privacy Commissioner can serve. In other Canadian jurisdictions, appointments for IPCs typically range between 5-7 years and in most cases the term can be renewed either once or indefinitely. However the federal government and five other provinces and territories have restricted the IPC's term of office to either one term only (New Brunswick) or two successive terms, (Yukon, Newfoundland, New Brunswick, Manitoba and Saskatchewan). The obvious purpose of this limitation is to avoid stagnation. That said, the talent pool in Nunavut is not as deep as it is in other jurisdictions and I would hesitate to limit the term of a good, knowledgeable Information and Privacy Commissioner to ten or 14 years simply to avoid stagnation. This is said with the caveat and caution that I have served as the part-time IPC for some 20 years (including in the Northwest Territories prior to division) and

am confident that Nunavut is well served by the work I do. I become more, rather than less, engaged in the subject area every year. There is much to be said for consistency and continuity, particularly in a complicated area of practice such as this where expertise is limited. This is even more so where there are no other expert area staff in the office who could afford corporate knowledge and continuity. That said, change can be a good thing and at some point is necessary. The Legislative Assembly has the option not to reappoint an IPC every 5 years if they so choose. The five year term is, in my opinion, an appropriate length of time for each term of office. Until such time as there is a deeper pool of expertise in the area of access and privacy within Nunavut, however, I would not recommend limiting the number of terms an IPC can serve.

## 19. THE POWERS OF THE INFORMATION AND PRIVACY COMMISSIONER

There is always some debate about whether or not the Information and Privacy Commissioner should have the power to make orders rather than only recommendations.

I have previously noted there are pros and cons for both models, but of the two I prefer the ombudsperson model as it provides the ability to meet the spirit and the intention of the Act in a more collegial way. The benefits of an "ombuds-model" for the office of the IPC include:

- the process is less formal and, therefore, can be completed much more quickly;

- there is more room to make suggestions for change which may fall outside of what can/should be ordered. For example, when it comes to a privacy complaint, the IPC can make expansive suggestions for changes to policies and procedures and recommend that those changes be made

throughout several departments. If making orders, the orders would have to be far more focussed;

- the process is not adversarial

There are drawbacks to this system that would at least partially be addressed by an "order making" model:

- the lack of order making power encourages a lack of respect for both the office of the IPC and the ATIPP Act itself. In one of the very few applications under the Act to go to the court in the Northwest Territories, *CBC v. Northwest Territories (Commissioner)* 1999 CanLII 6806 (NWTSC), Justice Vertes made the following comments at paragraphs 16 and 17:

> The purposes of the Act, as recited above in s.1, are to make public bodies more accountable to the public and to protect personal privacy by, among other things, providing for an independent review of decisions made under the Act. Presumably that is a reference to the Commissioner. Yet the Commissioner, while empowered to review, can only make recommendations. The government is free to ignore those recommendations. The head of the public body may make any other decision the head considers appropriate : s.36(a). So, could it be that the legislature intended to create a position that performs inconsequential functions (irrespective of the expertise that the Commissioner may develop in analyzing and applying the Act)? I think a broader question to ask is whether an independent review can be at all meaningful if there is no enforcement power or where the

results of that review bind no one.

Based on my analysis of the role of the Commissioner, and the fact that it is the department head's decision that is the focus of the appeal, the recommendations and report of the Commissioner, insofar as they were adopted by the head, are entitled to little or no deference.

This attitude is toward the office, though perhaps surprising in light of the fact that there are many IPCs in Canada who have only the authority to make recommendation, is not unique. There are more than a few who see the lack of order making authority in the IPC as limiting the respect to be afforded to the office.

- public bodies often provide only cursory and incomplete submissions to the IPC in responding to the review process and in meeting their onus under the Act to establish, for example, when an exemption applies. If the public body knew that a failure to respond completely and thoroughly would result in an enforceable order against them, they would be more likely to provide more thorough explanations, which will lead to more consistency, and a better understanding of the Act overall;

- the onus will be on the public body (rather than on the Applicant) to bring a matter to court if they disagree with the Order made. Public bodies are in a much better position to do this than most applicants.

The "order making" model would certainly require additional staff in the office of the IPC to address the more formal approach to inquiries and to allow mediation attempts between the parties without the participation of the IPC him/herself.

If Order making power were to be considered, I would suggest that there may be some merit in applying it only to Requests for Review with respect to Access to Information matters. Access to Information deals with physical records and whether or not they should be disclosed and this is more conducive to the making of an order. Privacy complaints, on the other hand, are received after the damage has already been done and, in most cases, the only thing that can be done on review is to make recommendations (or orders) with respect to changes in policies or procedures or legislation. To limit the IPC's authority to "order making" power in the case of privacy concerns would be to reduce the focus of the IPC's reports to the very narrow complaint and limit her ability to influence policy and approaches on a larger scale.

Newfoundland and Labrador have recently passed legislation which imposes what they call a "hybrid" model. The IPC still makes recommendations only. The difference is in how a public body responds to the recommendations. Public bodies now have two choices: they can accept the recommendations made, or they can apply to the court for a declaration that, by law, the public body is not required to comply with the recommendation. This model holds some attraction for me as the IPC, in particular because it maintains the efficiency and informality of the ombuds-model while shifting the onus of an appeal to the public body which is far better placed to undertake such an endeavour. Keeping in mind that approximately 90% of recommendations are accepted by public bodies, the extra burden on public bodies would not be overly significant, particularly if it also results in better submissions to the IPC in the first place.

Another option would be to give the IPC the authority to appeal decisions of public bodies to the courts on behalf of Applicants. Knowing that this is possible might encourage public bodies to be more thorough in their initial submissions to the IPC. It would also make public bodies pay closer attention to the recommendations made and take a more purposeful approach to their decisions. It would simply give the IPC that extra measure of authority which would make public bodies a little more careful in dealing with him/her. This option, however, would also have budgetary implications for

the OIPC, which would have to hire outside counsel to represent the office or hire in-house counsel to litigate these matters.

Yet another option would be to follow the model in Manitoba which allows an applicant the ability to “appeal” the decision of the head of a public body to a specialized Adjudicator, appointed by the Legislative Assembly for that purpose, with the decisions of that person to be final. The adjudicator would hold formal hearings and take evidence under oath. This officer would, however, have to have specialized knowledge of access and privacy matters.

**Recommendations:**

85. I recommend that Nunavut adopt the Manitoba model which allows an appeal to a specialized adjudicator for a final and binding decision.

86. I further recommend that the IPC be given order making power with respect to administrative matters, such as the calculation of fees, requests for waivers of fees, extensions of time and the authority to disregard a Request for Information.

**Mediation**

Currently, the IPC's review powers do not formally provide for mediation between public bodies and applicants. In Newfoundland, their legislation allows the IPC to take the steps necessary to attempt to resolve a request for review regarding access to information or a privacy complaint informally, to the satisfaction of the parties and adds time for this purpose to the time allowed to the IPC for completing a review. This time is 30 business days. If the matter cannot be resolved informally, the IPC may then undertake a formal review of the matter.

Even withoutthe formal power to mediate a matter, I often offer mediation or make

informal attempts to mediate complaints that are made to my office. It may be of some benefit to include a specific provision in the Act which would give the IPC the power to refer a matter to mediation in circumstances which she considers it appropriate. This would have the benefit of requiring parties to co-operate in the mediation process when ordered. In some cases I have met with resistance, either from the Applicant/ Complainant or from the public body when mediation is suggested as an alternative. Once again, however, this may result in the need for additional manpower and expertise within the office. It would be difficult for the IPC to undertake a formal mediation and then move on to completing a review report while maintaining the appearance of impartiality. The IPC would have to either engage someone outside her office to undertake mediations or hire an employee who has mediation training and skills.

**Recommendation:**

87. I recommend giving the IPC the jurisdiction to refer a matter to an early resolution process and to provide additional time to undertake such efforts. I do not, however recommend making mediation a mandatory step in the process.

**Other Powers**

Several jurisdictions have expanded the IPC's "general powers" to specifically include;

- providing educational programs to inform the public about the Act and their rights
- the authority to consult with any person with experience or expertise in any matter related to the purpose of this Act;
- providing comments on the privacy implications relating to the use of information technology in the collection, storage, use or transfer of personal information;
- taking action to identify and promote adjustments to practices and procedures that will improve public access to information and protection of personal information;
- bringing to the attention of the head of a public body a failure to fulfil the duty to assist applicants;
- inform the public from time to time of apparent deficiencies in the system, including the office of the IPC.

While many of these activities are not specifically included as powers given to the Information and Privacy Commissioner, these are all activities that I have undertaken over the years. I would argue that at least some of them are implied in the wording of various sections of the current Act. That said, as the IPC's jurisdiction to act arises exclusively from the Act, adding these as explicit powers will ensure that when these powers are used and activities undertaken, there can be no question as to the IPC's jurisdiction.

**Recommendation**

88. I recommend the addition of all of the new "general powers" identified above.

## 20. GENERAL AND OTHER MATTERS

### Legislative Assembly

By definition, the term "public body" currently excludes the Legislative Assembly and members of the Legislative Assembly from coverage under the Act. I would not change that insofar as Part I of the Act is concerned. I do, however, think that the Legislative Assembly and elected officials should be subject to the privacy provisions of the Act such that they are limited in their collection, use and disclosure of personal information and are required to have adequate physical, administrative and technological safeguards in place.

**Recommendation:**

89. I recommend that the Act be amended so as to provide that staff of the Legislative Assembly and MLAs are subject to the privacy provisions of the Act and can be liable for the unauthorized collection, use or disclosure of personal (which, in most cases, will mean obtaining the individual's express consent to the disclosure and the specifics of the disclosure). This may have to be nuanced to some extent to address an MLA's parliamentary privilege or other rules that apply to legislators.

### Power of the IPC to authorize public bodies to disregard requests

Section 53 of the Act currently gives the IPC the power to authorize a public body to disregard access requests that are frivolous or vexatious, are not made in good faith, concern a trivial matter, amount to an abuse of the right to access or would unreasonably interfere with the operations of the public body because of its repetitious or systemic nature. As noted above, one persistent applicant can create unreasonable demands on a small office and affect the rights of other applicants to a speedy

response.

**Recommendation:**

90. I recommend that, in addition to the power given to the Information and Privacy Commissioner in section 53, the IPC be given the additional authority to limit the number of concurrent access to information requests from one person or group of persons working together making multiple requests, along the following lines:

> (2) If multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other, the Information and Privacy Commissioner may, at the request of the head of a public body, authorize the public body to limit the number of access to information requests which the public body is required to deal with at any one time from the same applicant or group of applicants working together or apparently working together.

**Offences**

Other jurisdictions have included the following activities as offences:

- If someone destroys records that are subject to the Act, or directs someone else to destroy records for the purpose of evading a request for access to the records,

- If someone either attempts to gain access or in fact gains access to personal information under which they have no authority to do so.

Fines in relation to these offences generally range between $1,000 to $10,000. These issues have become significant ones throughout the country. This needs to be

addressed in Nunavut as well.

**Recommendation:**

91. I recommend the addition of offences that would address the improper destruction of records and unauthorized access to or viewing of personal information and that fines be attached to such offences of up to $5,000.00.

**Duty to Document**

Appropriate file management and failure to adequately document decisions made by government and government agencies is becoming a serious and significant issue across the country. The BC Information and Privacy Commissioner recently issued a detailed report outlining some of the issues being dealt with in British Columbia surrounding the failure to properly document (and the improper destruction) of important working records in certain B.C. government departments. Her conclusion:

> Government is well advised to introduce a legislated duty to document its key actions and decisions as well as oversight of information management and destruction of records, with sanctions for non-compliance.
> *Investigation Report F-15-03 - Access Denied; Records Retention and Disposal Practices of the Government of British Columbia*, CanLII 2015 BCIPC No. 63

British Columbia is not the only jurisdiction dealing with these issues, in terms of both proper record keeping in the first instance (largely as a result of technology such as email, pin-to-pin messages and texts which allow communications in a form which is not always retained or backed up) and in the improper destruction of important government records, in particular email communications. We are naive if we think that similar situations have not happened in this jurisdiction and, in fact, I am currently dealing with a number of reviews in which the Applicant is seeking to gain access to business communications sent or received from a personal email account and/or text messages, instant messages and social media messages from non-government accounts. If

Nunavut is doing a comprehensive review of our legislation, it is important to include provisions that addresses these issues, including a positive duty to document contained in legislation (not policy), including making the failure to properly document an offence under the Act with significant penalties attached.

**Recommendation:**

92. I strongly recommend that a new Part be added to the Act which provides for a clear “duty to document” and that there be a consequent amendment to the offences section to provide that it is an offence to fail to properly document the work of government employees and agents.

**ATIPP Co-Ordinators**

Currently the ATIPP Act defines both who the head of a public body is as well as the Minister who is responsible for the administration of the Act. All public bodies are required under the Act to delegate specific processing functions to a position within the public body; however the Act is silent on the position of the Access and Privacy Coordinator. These positions are critical to the effective implementation of the Act. The new legislation in Newfoundland has defined the role of the "coordinator" and further detailed functions relating to this position within their legislation. In fact, in the *Report of the 2014 Statutory Review: Access to Information and Protection of Privacy Act*, the role of the ATIPP Co-Ordinator was the very first substantive issue dealt with. That report notes:

> The ATIPP coordinator is at the centre of the process to gain access to information while ensuring personal information is kept confidential. This person coordinates both the processing of the request to a public body and the ensuing response. The coordinator’s key role affects the quality of the requester’s experience and the consistency with which the ATIPPA is

followed.

The recommendations made in the Newfoundland Report in relation to ATIPP Coordinators were twofold:

- that the Act be amended to give delegated authority for handling access to information requests solely to the ATIPP Co-Ordinator

- that no officials other than the ATIPP Coordinator be involved in the request unless they are consulted for advice in connection with the matter or giving assistance in obtaining and locating information

These recommendations were incorporated in the new legislation in Newfoundland.

I have often commented on the fact that in Nunavut the role of ATIPP Coordinator is most often given to someone with a host of additional roles and responsibilities and that the ATIPP work gets done “off the side of the desk” as and when there is time to do it as a secondary job responsibility. The provisions in the new Newfoundland legislation are a good start to professionalizing this role within government.

**Recommendation:**

93. I recommend a more prominent and professional role for ATIPP Coordinators, including a requirement that they have specialized training in the field and that provisions similar to those in Newfoundland and Labrador be added to our Act.

**Open Government and Access by Design**

Section 72 of the Act currently permits public bodies to specify categories of record that are available without an access to information request, however it does not require this to be done. In British Columbia, it is a requirement under their legislation for public bodies to establish categories of information that is available to the public without a formal request. The trend throughout the country is to find ways to provide more pro-active disclosure of records. Many provincial governments are working hard on open government initiatives. Requiring public bodies to establish categories of information that can be and will be made available to the public without the need for a formal ATIPP request would be a good step in this direction which will inevitably save time and resources which would otherwise be spend responding to Access to Information requests.

**Recommendation:**

94. I recommend that the Act be amended so as to require public bodies to establish categories of information which will be available to the public without a formal request similar to the BC legislation.

**Review of the Act**

Currently there are no provisions within the ATIPP Act that provide a requirement to undertake a comprehensive review of the Act, on a regular basis. The majority of jurisdictions require a review be undertaken, generally every 5- 7 years.

The *Access to Information and Protection of Privacy Act* has never been comprehensively reviewed in the 20 years since it was first passed in the Northwest Territories. This is despite the fact that technology has progressed far beyond anything that was even contemplated in 1997. The volume and the value of information has increased exponentially since 1997. If the legislation is to remain relevant to current trends and technology, I would advocate for regular mandatory reviews.

**Recommendation:**

95. I recommend a mandatory review of the Act every 5 years.

## 21. OTHER COMMENTS OR CONSIDERATIONS

### Enforcement of Accepted Recommendations

Once the public body has accepted recommendations made by the IPC, there is nothing in the Act which provides for or allows any follow up or enforcement. I have had a number of Applicants return to me after my role as the IPC is complete (I have made recommendations and those recommendations have been accepted by the public body) and ask me to follow up with the public body because they haven't done what they said they were going to do. This is particularly the case with respect to privacy reports in which the recommendations surround making changes to policies and procedures because the general public is not in a position to see such changes. Normally there is no follow up from public bodies and no obligation on public bodies to report when they have completed the steps recommended or how they have done so.

**Recommendation:**

96. I recommend that an amendment to the Act be made that would require public bodies to report their progress on implementing recommendations made by the Information and Privacy Commissioner on a periodic basis until the public body has completed implementation of the recommendations.

### Municipalities and Other Quasi-Governmental Organizations

I have been advocating for many years that municipalities either be added as "public bodies" under the Act or that separate legislation be passed to deal with municipalities.

Either way, municipalities in Nunavut must become subject to rules and procedures with respect to both access to information and protection of privacy. I understand that there have been attempts to work with municipalities to this end, but they have shown very little inclination to take on what most likely seems a new and significant responsibility. That said, these are public organizations spending public money and, as such, it is important for them to be open and accountable.

I would also strongly recommend that other quasi-public organizations be named as public bodies under the Act. Housing Authorities established under the Housing Corporation Act have in recent years been added. Regional Educational Authorities need to be included as well.

**Recommendation:**

97. I recommend that municipalities and school authorities be made subject to the Act.

**Power to Subpeona Records**

Sections 34(2)(iv) and 49.4 of the Act give the Information and Privacy Commissioner the power to compel "any person to produce any record to which this Act applies that is in the custody or under the control of the public body concerned". This power, however, ends at the doors of the public body. Particularly in the case of a breach of privacy, in order to be able to prove that privacy has been breached, it may be necessary to collect evidence, including records, from a third party. In at least one review my office was unable to conclude whether or not there was a breach of privacy because I was not authorized to subpeona the records I required from a third party and the third party chose not to co-operate. While this case arose in the Northwest Territories and not Nunavut, the issue is the same in either of the two Territories.

**Recommendation:**

98. I recommend that the Act be amended so as to give the IPC the power to subpeona any records relevant to a review, whether that record is in the possession of a public body or a third party.

## APPENDIX I

**Report of the 2014 Statutory Review - ATIPPA, Newfoundland and Labradour, Pgs 51-58**

### 2.3 Fees and charges

The fees and charges collected under Newfoundland and Labrador's ATIPPA do not come close to the cost of administering the Act. In his comments before the Committee, the Minister responsible for the Office of Public Engagement (OPE), the Honourable Sandy Collins, agreed, "it's not cost recovery in any sense of the term."[36]

In 2013–14, there were 450 access requests to departments and other public bodies for general information, and applicants were required to pay a $5 application fee. The application fees totaled $2,190 and public bodies levied an additional $4,518 in processing charges. This brought the average cost for fully processing each of the 450 requests to $14.90.[37]

Several submissions advised the Committee to recommend doing away with fees and charges. The OIPC said: "it is clear that the time and effort involved in estimating, assessing, and processing fees by public bodies is more of a burden than a boon."[38] Others, including Dr. Alex Marland of Memorial University's Political Science Department, recommended keeping fees, arguing that a "nominal application 'nuisance fee' (say $5) is an important principle to require that applicants consider whether a request is really necessary."[39] The Minister of OPE suggested the $5 application fee "shows the level of commitment by the person that's putting the inquiry forward."[40]

Pre-Bill 29

Before December 2012, it cost $5 to make an access request under the ATIPPA. Applicants were provided with two hours of free processing time and charged $15 an hour after that. The processing charge applied to locating, retrieving, and producing a record. Applicants were required to pay half of the cost estimate up front, and the remainder once the request was completed. Public bodies had the authority under the regulations to waive fees and charges where the cost would "impose an unreasonable

financial hardship on the applicant" or where the request related to the applicant's personal information and waiving the fee would be "reasonable and fair."

The Cummings report (2011)

Fees and charges were given significant attention in the last legislative review of the ATIPPA. Commissioner John Cummings ultimately concluded fees should stay as they were, and government should not consider implementing new ones. Most interesting, however, were the widely varying views from within public bodies. Some public bodies thought that for various reasons, fees and charges were not useful in the administration of the Act:

- they were applied inconsistently
- cost recovery was impossible
- they did not apply to requests for personal information (except for the application fee)
- they were too low to deter applicants from making unreasonable requests [41]

Other public bodies believe that fees deterred applicants from making unreasonable requests and helped them narrow the focus of their requests. Mr. Cummings concluded most public bodies wanted fees to be increased, but they could not decide what the increase should be.

Post–Bill 29

The ministerial fee schedule in the wake of the Bill 29 amendments continued the $5 application fee for general access and personal information requests, while the processing of personal requests continued to be provided for free. However, the fee schedule brought changes to the access to information fee structure and how the calculation was made. Applicants had their free processing time doubled to four hours. But after the four hours, the processing charge was increased to $25 an hour. In addition, public bodies could now include the cost for considering the use of various exemptions under the ATIPPA. As with the pre–Bill 29 fee schedule, there were

additional costs for making copies, producing electronic copies, and shipping. There was also a new method of calculating how processing charges were to be paid by applicants. The public body had to provide a cost estimate to the applicant. If charges were estimated to be $50 or more, an applicant who wanted the work to continue had to pay half the cost estimate before the work commenced. The second half of the charge was to be paid before the public body started working on the remaining 50 percent of the work. The regulation regarding the waiving of fees remained unchanged.

The law and practice in Canada

All Canadian jurisdictions except New Brunswick charge for providing information to requesters once they have made a formal request under access laws. Several provinces and the federal government charge both a $5 application fee and a further amount for processing the request, while other provinces, including Saskatchewan, Quebec, and British Columbia, have no application fee. British Columbia allows an applicant three free hours of processing time and cannot charge an applicant for the time spent severing information from a record.

Since New Brunswick is the only Canadian province without fees for access to information, it is useful to discuss the policy decision that eliminated them. New Brunswick's Right to Information Act was implemented in 1978 and replaced by a new Act in 2009. In the following year, the matter of fees for access requests had become an election issue. Progressive Conservative Leader David Alward promised to eliminate all fees for applicants, and later, as Premier, announced the decision to do so. The policy decision did away with the $5 application fee, the $15-an-hour processing charge, and additional charges for copying, computer time, and delivery. Mr. Alward said the decision was vital for New Brunswick democracy:

> Free access to information is vital for a healthier democracy and a more effective government. A more open and transparent public sector will help us grow a stronger New Brunswick. [42]

All Canadian jurisdictions give public bodies the authority to waive fees in certain circumstances. However, not all provinces and territories do it in the same way. Ontario, for example, allows the head of a public body the discretion to waive a fee if it would cause financial hardship to the applicant, if it would benefit public health and safety, and if the actual cost varies from the initial estimate. The head of a public body in British Columbia can agree to an applicant's request to waive fees if release of the information requested is in the public interest or if "the applicant cannot afford the payment or for any other reason it is fair to excuse payment." The territory of Nunavut has a fee-waiving provision similar to that of several provinces:

> The head of the public body may waive all or a portion of your fee if, in their opinion, you cannot afford to pay the fee or for any other reason they feel it is fair to waive that fee. [43]

International law and practice

Internationally, Australia, New Zealand and the United Kingdom do not charge an application fee. However, all three jurisdictions impose charges. The United Kingdom has the most generous cost structure, and the result is that only a small percentage of requesters are actually charged for their information request. [44]

UK authorities are obliged to fulfill requests if the cost of doing so comes within "the appropriate limit," [45] set at £600 for the central UK government and £450 for other public bodies. [46] Requests that fall below the threshold are to be charged only "communication costs," which include copying, postage, and other fees tied to complying with how an applicant wishes to receive the information. If the request does not exceed the appropriate limit, public bodies cannot charge for processing time, and they may not add a "handling" or "administrative" fee. [47]

> When calculating the time taken to respond to a request authorities can include searching for the information and drawing it together but not reading it to see if exemptions apply, redacting data or deciding whether it can be released. Few public authorities use the charging mechanism. [48]

In New Zealand, the first hour of search time is free for access to information requests, while each subsequent half hour or less costs $38. [49] Australia charges $15 an hour for searching and retrieval and $20 an hour for decision making with respect to the request.[50]

New South Wales has a variety of fee regimes, but all information requests must be accompanied by a $30 application fee. Requesters applying for general government information are charged $30 for each hour of search time, with no free processing time. An applicant requesting personal information receives 20 hours of free processing time, and is charged $30 an hour for the remaining time of a search. New South Wales applies a different fee regime to people who can demonstrate financial hardship (defined as pensioners, full-time students, and non-profit organizations). People in this category pay the $30 application fee and, like the person requesting personal information, they receive the next 20 hours for free. They are charged $30 an hour for the remaining processing time, but receive a 50-percent discount on all charges, including the application fee. New South Wales also has a public interest provision - officials can provide a 50-percent processing fee discount "if the agency is satisfied that the information applied for is of special benefit to the public generally." [51]

What we heard

Many of the submissions to the Committee addressed the issue of fees and charges, and while views were strongly expressed, there was no common theme. The most significant development was the position of the Commissioner, who initially accepted that fees should be part of the ATIPPA. However, after hearing and reading the various submissions before the Committee, the Commissioner's office did further study. In his supplementary submission in August, the Commissioner recommended all fees and charges be eliminated.

He suggested that any concerns public bodies have about becoming "overburdened through limitless access-to-information requests" can be addressed through section 43.1, which outlines the grounds on which public bodies can disregard requests.

The OIPC commented on the New Brunswick decision to eliminate fees, and stated that while that province has not experienced an appreciable increase in the number of access requests since fees were eliminated, “anecdotal evidence” suggests “the breadth of requests is starting to become problematic.” [52]

Although the Commissioner has recommended fees and charges be eliminated, it is useful to describe his earlier perspective when he addressed the existing ATIPPA provisions. One of his chief complaints was that as a result of the fee changes in 2012, public bodies can charge applicants for the time spent determining if exemptions should apply

> It seems wrong to charge the applicant a fee for time spent determining why the applicant cannot have access to a record or part of a record. [53]

He was concerned that poorly maintained and organized public records and complex requests can lengthen searches. The Commissioner cited the hypothetical example of two searches involving 100 pages of responsive records. [54] One case may take an hour because the records are easily located, with limited redaction required. The other case may be more complex, and require the involvement of legal counsel and senior executive officials to discuss the issues and harms involved in release. The Commissioner stated that the applicant “will not necessarily know or appreciate the difference in terms of the fee.” The Commissioner recommended that the OIPC should be able to investigate a fee complaint as part of a review where he can issue a report and recommendations, rather

than the current system where he has only the authority to “investigate and attempt to resolve complaints.”

The Centre for Law and Democracy recommended eliminating application and processing charges, while allowing public bodies to recoup direct costs such as those associated with photocopying and mailing. It objected to the current practice, which allows public bodies to charge for search and processing time:

> Essentially, this forces requesters to pay for poor record management practices or excessive caution in deciding whether exceptions apply.[55]

The Centre argued “direct employee time” spent in responding to access requests should be regarded as “part of the institution’s general mandate.”[56]

Official Opposition Leader Dwight Ball objected to the fee changes following Bill 29 and the addition of “activities now factored into the cost of labour,” such as the time spent determining which exemptions to apply. Mr. Ball contended the changes have made the ATIPPA “more cost-prohibitive, and thus, less accessible.” He also addressed the need for common standards in administration and information oversight:

> ATIPPA fees are rather arbitrary, subject to the discretion of the person processing the request, and dependent upon any number of factors, including their experience level, their familiarity with the Act, or the information management capabilities of that particular department.[57]

The OPE provided insight into the issues encountered by ATIPP coordinators trying to fulfill requests in the time since the amended ministerial fee schedule. They are feeling the impact of the changes described above concerning the fee structure and how the processing cost calculation is made. The OPE explained that the process can lead to delays:

> The current payment schedule can result in delays in responding to requests as coordinators are unable to complete the processing of a request until all fees are paid. In addition, it can be impractical for coordinators to determine at which point 50 percent of the request has been completed. [58]

Nalcor Energy recommended that the Committee review the $5 application fee, as such a fee is "only useful if it deters unreasonable requests." [59] Nalcor Energy told the committee it does not cash the $5 cheques that are sent with requests for records. It stated if the application fee is to be maintained, it should be "meaningful."

Several private citizens commented on how they thought fees and charges can sometimes be deliberately inflated to discourage applicants from seeking information. Terry Burry of Glovertown recommended there be no increase in the application fee, and that photocopying costs be held at 5 cents a copy, "not the $115.00 I was ripped off in 2008." [60] Mr. Burry also suggested the government release requested information as a PDF if the applicant can access electronic files. He also recommended there be no charge for files sent electronically.

Adam Pitcher suggested fees for access be "lower overall," and that they be standardized for all public bodies.[61] Scarlett Hann commented briefly on the time and cost involved in the initial access process, as part of a longer discourse on how costly the access to information system can become if a case goes all the way to court. She referred specifically to the "initial application review process by ATIPP staff and ATIPP departmental coordinators." [62]

Journalist James McLeod remarked that it is time for the ATIPPA access and payment system to go online. He referred to the troublesome practice of having to prepare, write, and mail a cheque for each access request. He prefers to do this online, and to be able to make a payment electronically.

Issues and analysis

Most of the submissions to the Committee assumed that gaining access through the ATIPPA will involve a charge. But many were of the view that if fees and charges are to be maintained, they must be fair. Several expressed the opinion that public bodies should not charge for deciding what information should be withheld. Others pointed to the need for a consistent approach to estimating costs. It was pointed out, for example, that officials handling access requests might not all have the same level of administrative skills, and that this can significantly affect estimates. The quality of information management may vary from one public body to another, making it easier to access information from one organization and more difficult from another. This can also affect cost estimates.

The Committee has also heard that seemingly simple matters, such as the change in the method for estimating charges, can have an impact on the public body's ability to respond quickly to a request. And the Committee was advised there is a need to revisit the ATIPPA application and payment system. It remains paper-and-cheque-based, as it was when the Freedom of Information Act was enacted in 1981.

The *Access to Information Regulations* have a provision that allows the public body to waive fees where they would "impose an unreasonable financial hardship" or where doing so would be "fair and reasonable" in relation to an applicant's own personal information. There is no provision for waiving fees when it is in the public interest to disclose the requested information. [63]

Any change related to fees and charges should facilitate, not frustrate access. Changes should make the Act more, rather than less, user friendly. And any change in the fee and charge structure should not lead to more problems, such as the current problems associated with estimating charges.

No one who appeared before the Committee, including government representatives, contemplates a future ATIPPA system with full or even near cost recovery. As a point of information, it was estimated that Canada's federal access to information system cost $47 million to administer in 2009–10, and that less than one percent of the cost was recovered through fees. [64]

The Constitution Unit at University College London concluded from its research with local authorities in the UK that close to 70 percent of them did not charge applicants in the first five years of the Freedom of Information Act 2000, from the time it came into effect in 2005 to 2009. The remainder of local authorities said they charged requesters in fewer than 5 percent of requests.[65]

Two reasons are given to support charging fees - cost or partial cost recovery, and deterring nuisance requests. The latter reason was expressed in the 2008 review of the Right to Information Act in the state of Queensland, Australia. The University of Southern Queensland commented on the purpose of user fees:

> Whilst the University does not recommend increasing the charges, neither does it wish to see the charges removed as they do act as a deterrent to uncommitted, nuisance making or vexatious applicants. [66]

During the ongoing review of Alberta's *Freedom of Information and Protection of Privacy Act*, Commissioner Jill Clayton recommended that the province's fee structure be reviewed to ensure that fees are appropriate and do not create a barrier to access, and that they are clear and understandable. But she did not recommend doing away with them. She stated: "In my view, while it is reasonable to charge a nominal fee to provide access—this helps to prevent frivolous requests—it is important that fees not be a deterrent to access."[67]

As discussed above, the Committee studied cost systems in place in other jurisdictions,

including the United Kingdom. The UK model provides for 18 hours of free processing time for a request to local public bodies such as municipalities and schools, and 24 hours for central government. This appears to provide a realistic amount of time to fulfill requests. It could also act as an incentive for an applicant to make requests that are specific and that would have a reasonable chance of being fulfilled free, apart from the direct costs described above. Broad-ranging and ill-defined requests and those made in bad faith would remain subject to the provision that is at present section 43.1, and should, in concert with additional powers for the Commissioner to review all aspects of the ATIPPA, provide the oversight and confidence that the public demands.

Conclusion

The quick and easy solution to fees and charges would be to adopt the New Brunswick system. And despite the fact that the Commissioner has recommended this approach, his caution is instructive. The New Brunswick experience with no fees is in its early days. More evidence will be needed to determine its strengths and weaknesses. It would be premature to adopt such a system in Newfoundland and Labrador without understanding a myriad of issues, including the effect it will have on the workload of public officials and on the staff in the Commissioner's Office.

The current cost recovery system under the ATIPPA lacks credibility with many users. There has been an especially strong negative reaction against the policy to count as processing time the effort public officials use to determine what exemptions might apply to a given access request.

People seem not to object to paying fees and other charges. But they do object to some cost estimates that can appear overstated and punitive. As well, the ATIPPA does not allow for the fact that some applicants request information that it would be in the public interest to disclose. This feature exists in the British Columbia legislation. [68] In such cases, even if the volume of information is large, and the attendant processing costs would be high, the public interest would be served by releasing the information with no

charge.

The Committee sees little merit in retaining the application fee. It makes sense to lengthen the “free search” period from 4 hours to 15 hours for government departments and other agencies, including health boards and school boards, and to 10 hours for municipalities. The only time that would count toward processing charges would be the direct searching time for the records. Time spent narrowing the request with an applicant would not count toward the free time allotment, and neither would the time spent to determine if exemptions should apply. Direct costs would be recouped, such as photocopying and mailing. However, the applicant would not be charged for time spent creating an electronic copy of the record, such as a PDF or a dataset.

Applicants could request a waiver of charges, either because of their personal financial circumstances, or because they believe the disclosure would be in the public interest. The public interest would not be limited to certain types of documents, such as those involving public health or safety or the environment. This approach aims to remove barriers to access in most cases, requiring charges only for requests that involve extensive searches. And even in those cases, the public interest provision can guide a public body to release the information without imposing a charge. In the event of an extensive search where the waiver does not apply, public bodies are required to work with the applicant to define or narrow their request.

As a final safeguard, disputes over charges, including a refusal of a public body to waive a charge, could be reviewed by the Commissioner, whose determination would be final.

36 Government NL Transcript, 19 August 2014, p 183.
37 Office of Public Engagement, ATIPPA Annual Report 2013-14.
38 OIPC Supplementary Submission, 29 August 2014, p 5.
39 Marland Submission, July 2012, p 3.
40 Government NL Transcript, 19 August 2014, p 183.
41 Cummings Report (2011), p 30.
42 NB Press Release, 26 August 2011.
43 NU ATIPP Fees.
44 UK Post-legislative scrutiny of the FOI Act 2000 (2012), para 25.
45 This term is used in section 12 of the UK FOI Act
46 Supra note 44 at para 24 (The standard cost is £25 an hour, which translates to 24 hours for the central UK government and 18 hours for other public bodies, including local bodies).
47 UK ICO, Fees that may be charged, p 4.
48 Supra note 44, p 25.
49 NZ Charging Guidelines.
50 Australia ICO, Freedom of Information – Charges
51 NSW IPC, GIPA Act fees and charges (2014).
52 OIPC Supplementary Submission, 29 August 2014, p 2.
53 OIPC Submission, 16 June 2014, p 82.
54 *Ibid*
55 CLD Submission, July 2014, p 12.
56 *Ibid*.
57 Official Opposition Submission, 22 July 2014, p 29
58 Government NL Submission, August 2014, p 18.
59 Nalcor Energy Submission, August 2014, p 7.
60 Burry Submission, July 2014, p 10.
61 Pitcher Submission, 27 December 2013, p 1.
62 Hann Submission, 27 July 2014, p 4.
63 BC IPC, Order F14-42, 24 September 2014. This recent case decided by the BC Information and Privacy Commissioner may be instructive. A journalist requested documents about an internal review of purchase card expenses by employees of BC Housing. The subsequent story stated there was widespread mismanagement of taxpayer-funded credit cards for items and services of low value. The journalist asked BC Housing for expense claims involving five employees, covering an 11-year period, and later narrowed the request to a period of nearly six years. BC Housing sent a fee estimate of more than $10,000 for the initial request, and an updated estimate of $3762.50 for the narrowed request. The journalist narrowed the request further to include just two employees. The third and final fee estimate was $2010. The journalist asked that the fees be waived under s. 75(5)(b) of FIPPA, which, upon a request, allows the head of the public body to waive fees if the information being sought relates to a matter of public interest. The Commissioner decided the credit card records in the 10-month period prior to the Credit Card Review were in the public interest, as were the records for the 22 months after the review was completed, as they would allow the journalist to compare credit card spending before and after the review. She ordered that fees be waived for that period.
64 Globe and Mail, Feds eye access-to-information fee hike, 11 March 2011
65 Supra note 44, p 25.
66 Queensland, Solomon Report (2008),p 186
67 Alberta IPC, *Becoming a Leader in Access and Privacy,* (2013), p 5
68 BC FIPPA, s 75(5)(b).

## APPENDIX II

## Third Party Consultation Process

Newfoundland and Labrador Access to Information and Protection of Privacy Act

Section 19

19.(1) Where the head of a public body intends to grant access to a record or part of a record that the head has reason to believe contains information that might be excepted from disclosure under section 39 or 40 , the head shall make every reasonable effort to notify the third party.

(2) The time to notify a third party does not suspend the period of time referred to in subsection 16 (1).

(3) The head of the public body may provide or describe to the third party the content of the record or part of the record for which access is requested.

(4) The third party may consent to the disclosure of the record or part of the record.

(5) Where the head of a public body decides to grant access to a record or part of a record and the third party does not consent to the disclosure, the head shall inform the third party in writing

(a) of the reasons for the decision and the provision of this Act on which the decision is based;

(b) of the content of the record or part of the record for which access is to be given;

(c) 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 Trial Division under section 53 ; and

(d) how to file a complaint or pursue an appeal.

(6) Where the head of a public body decides to grant access and the third party does not consent to the disclosure, the head shall, in a final response to an applicant, state that the applicant will be given access to the record or part of the record on the completion of the period of 15 business days referred to in subsection (5), unless a third party files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53 .

(7) The head of the public body shall not give access to the record or part of the record until

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

(b) a court order has been issued confirming the decision of the public body.

(8) The head of the public body shall advise the applicant as to the status of a complaint filed or an appeal commenced by the third party.

(9) The third party and the head of the public body shall communicate with one another under this Part through the coordinator.

## APPENDIX III

December 5, 2016

Government of Nunavut
Department of Executive and Intergovernmental Affairs
P.O. Box 1000, Stn. 200
Iqaluit, NU
X0A 0H0

Attention: Chris D'Arcy
Deputy Minister

Dear Sir:

Re: Access to Information and Protection of Privacy Act
My file: 16-139-5

I understand from our respective appearances before Committee this fall that EIA is preparing a legislative proposal to address amendments to the *Access to Information and Protection of Privacy Act*. I am not privy to the amendments being proposed or even the sections being considered for amendment at this time. I write this letter, however, to urge you to include an amendment to section 34 of the Act. This section currently reads as follows:

> 34. Despite any other Act or any privilege available at law, the Information and Privacy Commissioner may, after receiving a request for a review, require the production of and examine any record to which this Act applies that is in the custody or under the control of the public body concerned.

I am asking that an amendment be considered to include the words "including solicitor/client privilege" after the words "available at law".

**BACKGROUND**

This request arises as a result of a series of cases out of the Supreme Court of Canada on the issue of whether or not the language of access/privacy legislation in various Canadian jurisdictions is wide enough to allow Information and Privacy Commissioners undertaking a review, when necessary, to demand production of records for which public bodies claim solicitor/client privilege. The most recent such case, and the one in which the Supreme Court most clearly articulated its position is the case of the *Information and Privacy Commissioner of Alberta v. The Board of Governors of the University of Calgary.*

The University of Calgary had been sued by a former employee who brought a claim for constructive dismissal. The former employee made an access to information request seeking records about her in the university's possession. The University provided some records, but claimed solicitor-client privilege with respect to others and refused to disclose them. The former employee asked the Information and Privacy Commissioner (IPC) to compel disclosure under Alberta's freedom of information and privacy law. The investigator issued an order requiring the University of Calgary to produce a copy of the records over which solicitor-client privilege was claimed to allow him to determine whether solicitor-client privilege had been properly asserted. The University refused. The Privacy Commissioner sought a judicial review through the Court of Queen's Bench of Alberta. The application judge found that the IPC had correctly issued the notice, noting that the University had refused to substantiate in any other way its claims of solicitor-client privilege.

The Alberta Court of Appeal allowed the University's appeal, concluding that the Commissioner did not have the statutory authority to compel the production of records over which solicitor-client privilege was asserted. The Court of Appeal held that clear, explicit and specific reference to solicitor-client privilege was required in order to allow the Information and Privacy Commissioner access to those records over which such a claim was raised.

In light of the significant and negative impact that this decision would have on the ability of the Information and Privacy Commissioner to exercise her oversight function, the IPC of Alberta appealed the decision to the Supreme Court of Canada. I participated in this appeal with the other Information and Privacy Commissioners across Canada as an intervener.

**THE ISSUE**

One of the stated purposes of the *Access to Information and Protection of Privacy Act* is to "make public bodies more accountable to the public" by giving the public a right of access to records held by public bodies **and** by providing for an independent review of decisions made by the government under the ATIPP Act through the Information and Privacy Commissioner. The IPC is given the mandate to conduct independent and impartial reviews of government decisions. In conducting such reviews, the Commissioners' role is to arrive at findings about whether public bodies have properly justified any refusal to disclose records to Canadians exercising information and privacy rights. As such, the ATIPP Act represents a deliberate choice by the Government of Nunavut to, in effect, allow the IPC to scrutinize their compliance with the legislation. As noted in the factum filed on behalf of the IPCs of Canada:

> In particular, if Commissioners cannot review the records claimed to be privileged, in many cases they will not be able to arrive at a well-informed view on whether the exemption was applicable, and if so, whether it was reasonably claimed; the purpose of the first level of review will thereby be thwarted with the resulting effect of impeding the exercise of the rights conferred by the statutes.

> Reviewing the material first hand is often critical to determining whether all of the criteria for the privilege have been met in the circumstances, which is required to achieve the ends of the FOIP Acts. Determining whether solicitor-client privilege applies is a fact-driven exercise requiring application of the "complex and...constantly evolving" common law of solicitor-client privilege. In the public sector context, where in-house lawyers often have multiple responsibilities, the assessment also includes distinguishing between legal advice and policy or operational advice and discerning where communications that do not reveal legal advice could nonetheless provide clues about privileged communications.

**THE SUPREME COURT OF CANADA DECISION**

The Supreme Court of Canada, in a majority decision, held that:

> Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege[s] of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege.

In other words, the Supreme Court held that the wording of the Alberta legislation was not clear enough to allow the IPC to review documents over which solicitor-client privilege is claimed, even for the very limited purpose of evaluating whether or not the documents meet the necessary tests.

The wording of our legislation is somewhat different than the Alberta legislation in that the Alberta legislation refers to "any privilege of the law of evidence" whereas our legislation refers to "any privilege available at law" which, arguably, is not as limiting as the wording in the Alberta legislation. Regardless, it is vital to maintaining the integrity of the process that there be no question about whether or not the IPC has the ability to review documents for which solicitor-client privilege is claimed. Without the ability to see these records, there can be no independent oversight over those records. The ability of the IPC to see these records does not effect a general waiver of the solicitor-client privilege and the IPC is legislatively prohibited from disclosing anything contained in the records she reviews, or from disclosing any record that is subject to her review. The disclosure for the purposes of a review is, therefore, very narrow and limited in scope, but absolutely necessary to the integrity of the review process and the ability of the IPC to do her job.

As noted above, I understand that you are or will be considering some amendments to the *Access to Information and Protection of Privacy Act* in the near future so it is an opportune time to include this amendment so as to ensure the continued ability of the IPC to do her job fully and effectively. I thank you for your consideration. Please feel

free to contact me should you need any further information or have any questions for me.

Yours truly

Elaine Keenan Bengts
Information and Privacy Commissioner
/kb
c.c. Tom Sammurtok, Chair, Standing Committee on Legislation
c.c. Jessica Bell, Manager of ATIPP, EIA

SUMMARY OF RECOMMENDATIONS

1. I recommend that the purpose of the ATIPPA set out in the existing version of section 1 be recast to read:

    1. The purpose of this Act is to facilitate democracy through:
        (a) ensuring that citizens have access to all government information subject only to necessary exemptions that are limited and specific;
        (b) increasing transparency in government and public bodies so that elected officials, and officers and employees of public bodies remain accountable; and
        (c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

    2. The purpose set out in section 1 is to be achieved by:
        (a) giving the public a right of access to records,
        (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
        (c) specifying that the default in all cases is to be disclosure of requested records subject only to the limited exceptions to the rights of access that are necessary to:
            i. preserve the ability of government to function efficiently, as a cabinet government in a parliamentary democracy,
            ii. accommodate established and accepted rights and privileges of others, and
            iii. protect from harm the confidential proprietary and other rights of third parties,
        (d) providing that some discretionary exceptions will not apply where the public interest in disclosure outweighs the reason for the exception,

        (e) preventing the unauthorized collection, use or disclosure of personal information by public bodies,
        (f ) providing for an independent oversight agency having duties to:
            i. be an advocate for access to information and protection of privacy,
            ii. facilitate timely and user friendly application of the Act,
            iii. provide independent review of decisions made by public bodies under the Act,
            iv. provide independent investigation of privacy complaints,
            v. make recommendations to government and to public bodies as to actions they might take to better achieve the objectives of the Act, and
            vi. educate the public on all aspects of the Act.

2. I recommend that amendments be made to the *Access to Information and Protection of Privacy Act* which would require public bodies to pro-actively disclose certain, specific types of information, such as factual material, statistical surveys, public opinion polls, environmental impact statements, procurement information, and other records often of interest to the public.

3. I recommend amendments to address the disclosure of incomes of public servants earning incomes over a stated amount, as well as the pro-active disclosure of information such as employee travel costs. This would bring Nunavut in line with most other Canadian jurisdictions.

4. I recommend that public bodies be required, where requested, to be able to provide access to records in machine-readable formats so that Applicants can have access to and easily use databases and data sets (provided that personal information is protected).

5. I recommend that section 6 the Act be amended so as to allow for the individual to seek a "copy of the record in electronic or paper form"...

6. I recommend amendments to require public bodies to conduct "access assessments" and to incorporate "access by design" into new initiatives on a go-forward basis to help to ensure that the future of access to information in Nunavut remains robust and up to date.

7. I recommend the inclusion of a provision which would limit the disclosure of the name of the Applicant in the ATIPP process similar to the provision in the Newfoundland legislation

8. I recommend the following changes to section 2:

    a) subsection (a) of the definition of "personal information" should include "personal email address", "personal IP address" and "other personal electronic contact information" and reference to business contact information should be removed.

    b) subsection (e) of the definition of "personal information", should include a general reference to "other biometric information" about the individual, rather than just "fingerprints", "bloodtype" or "inheritable characteristics".

    c) the definition of "record" should be updated to include a specific reference to electronic records, data and data sets.

    d) subsections (b) and (c) of the definition of "law enforcement" are far too broadly focussed and suggests that **any** action that might end in any kind of sanction or penalty is included, even though the "law enforcement" exception is clearly focussed on criminal and/or quasi-criminal proceedings. I recommend that these subsections be replaced with

something more focussed, such as " investigations 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".

9. I recommend that there be an amendment to the Act which would require that any proposed paramountcy provision in new or amending legislation be submitted to the IPC for review and comment.

10. I recommend that the Application Fee be eliminated.

11. I recommend that an Applicant be allowed up to 15 hours of search time before a fee is assessed on a general access to information request. There should continue to be no limit for requests for personal information.

12. I recommend that amendments be made, either to the Act or to the Regulations to make it clear that only the time spent actually searching for records can be considered for calculating both the "free" time and the "fee" time.

13. Where paper records are concerned, I recommend that the regulations be amended to clarify that the Applicant should only be charged for one set of records regardless of whether or not the public body has to make additional copies for their own records.

14. I recommend that the cost for photocopies be adjusted downward to reflect the decreased cost of photocopies, perhaps to 5 cents per page.

15. I recommend that there be a maximum fee imposed of $2,000.00.

16. I recommend that the regulations be updated to reflect the realities of the form which records take in today's electronic world.

17. I recommend that the regulations be updated to reflect the costs of electronic disclosure - for example, if a jump drive or other removable apparatus is necessary, a cost can be associated with that. In the event that disclosure is entirely electronic (ie: by email) there should be no cost to the applicant for such disclosure.

18. I recommend that there continue to be provisions for a waiver of fees in circumstances of financial hardship and/or when for another reason it is fair to excuse payment, but that these provisions be expanded to include "where it would be in the public interest" to disclose the information.

19. I recommend that the *Act* be amended so as to provide that when the Information and Privacy Commissioner reviews a matter concerning fees, her determination on that issue be final (i.e. - giving order making power over issues in relation to fees).

20. I recommend that section 6(1) be amended to clarify the manner in which an access to information request can be made so as to clarify that email is an acceptable method of making a request for information.

21. I also recommend that subsection 6(3) be amended so as to acknowledge that an applicant may request that the response to his/her access to information request be provided in electronic or machine readable form.

22. I recommend that section 6 be amended by adding a new subsection which clarifies that although the applicant may seek to examine a record the public body has the discretion to refuse to allow the applicant to examine the record where the record or part of the record is subject to an exception to disclosure as outlined in sections 13 to 24 of the Act.

23. I recommend that section 6 be amended to clarify that, notwithstanding subsection (3), the public body may elect to provide the response in a different format in specified circumstances (for example: where the record cannot be reproduced electronically using the public body's normal computer hardware and software and technical expertise)

24. I recommend that s. 8 be amended so as to provide that a request for information is to be responded to within 20 working days.

25. I recommend that s. 8 be reworded to make it clear that the 20 working days for responding is a maximum and that all ATIPP requests should be responded to "as soon as practically possible" with an outside time limit of 20 working days.

26. I recommend that sections 8, 9 (in particular 9(b)) and 10 be amended to make it clear that a "response" includes disclosure of the responsive records unless the Applicant has indicated that he/she wishes to view the records in the offices of the public body, in which case a time and a date for that should be provided with a specific time limit (within 7 working days).

27. I recommend that the extension public bodies are able to take be limited to one extension of no more than 20 working days;

28. I recommend that notice of that extension be given to the Applicant no less than five business days **before** the end of the initial 20 working days period, and that the notice include a statement advising that the extension can be referred to the Information and Privacy Commissioner for review;

29. I recommend that in the event that the public body is not able to respond within the initial 40 working days, they must apply to the IPC for a further extension and that application must be made no less than five business days **prior to** the end of the extended period.

30. I recommend that any request to the IPC for a second extension include a detailed explanation as to the issues which are preventing the disclosure within the time frames outlined.

31. I recommend that public bodies be required to continue to actively work on responses during any review by the IPC.

32. I recommend that the decision of the IPC in these cases is final (i.e. - not a recommendation, but an order)

33. I recommend that a section similar to the above be added to section 11 of our Act.

34. I recommend that transfers be completed within five (5) working days of receipt of the request.

35. I recommend the same approach as has been taken in Newfoundland and Labrador for Nunavut, including the definition of "cabinet record". Furthermore, with the exception of (e) above, (which should remain at the current 15 years), I recommend that Nunavut adopt these provisions of the Newfoundland Act.

36. I recommend that s. 14 be amended to provide that, where a public body relies on this (or any other discretionary exemption), the public body must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

37. I further recommend removal of (b) - consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council. This exemption is far too wide. The words “consultation” and “deliberation” could refer to virtually everything done within a public body. This is clearly not within the spirit or intention of the Act. Everything needed to ensure that public servants can freely and openly give advice is contained in subsection (a).

38. I recommend that subsection 14(f) be removed.

39. I recommend that s. 16 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the criteria used in the exercise of the discretion to deny access to the record, or partial record, whether or not the executive council has been consulted and, in the case of subsection 16(1)( c), whether the consent of the other government has been sought.

40. I recommend that s. 17 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed

explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

41. I recommend that s. 18 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

42. I recommend that s. 19 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

43. I recommend that s. 20 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

44. I recommend that section 20(2)(a) be repealed.

45. I recommend that s. 21 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

46. I recommend that s. 22 be amended to provide that, where a public body relies on this exemption, it must provide the Applicant with a clear and detailed explanation outlining the reasons for the decision to deny access to the record, or partial record, in question, outlining both the section relied on for the exemption and the criteria used to exercise the discretion against disclosure.

47. I further recommend that when this section is used to deny access, that there be an obligation on the public body to provide an Applicant with a statement outlining a summary of the comments received.

48. I recommend that sexual orientation and sexual identification be added to the list of information which, if disclosed, would raise a presumption of an unreasonable invasion of privacy pursuant to section 23(2).

49. I recommend that section 23(2)(h) either be deleted or, alternatively, that new wording be found which would narrow the scope of the presumption. As currently worded, the presumption of an unreasonable invasion of privacy

applies any time an individual's name appears with any other information about them - what they said, what they did, who they talked to, that they were present in a room at a particular time, that they know another individual....the list goes on. While some of these things, in context, might lead to a conclusion that the disclosure would amount to an unreasonable invasion of privacy, it really does depend on the circumstances and context of the record. As currently written, however, any time an individual's name appears, really, the presumption arises and this should not be the case. While there are going to be instances where the disclosure of a name, in conjunction with other information, will amount to an unreasonable invasion of privacy, I do not believe that it should presumptively be so.

50. In light of the rapidly expanding use of biometric technologies, I recommend that section 23(2) be amended to include, presumptively, that the disclosure of biometric information about an individual would constitute an unreasonable invasion of privacy.

51. I recommend that section 23(4) be amended to include:

a) where the personal information identifies the individual as an employee of a public body; and
b) where the personal information relates to the individual's business contact information.

52. I recommend that section 23(4)(h) be amended to include words which would clarify that the gross amount of a negotiated payout made to an employee or former employee upon termination of his/her employment with a public body are included in the term "discretionary benefit".

53. I recommend that the legislation be amended to provide for the pro-active disclosure of remuneration paid to the highest paid GN employees and officials

54. I recommend that there be no changes to the Act which would deal with the personal information of deceased individuals in any way differently than that of the living.

55. I recommend that an amendment be made to section 48 so as to allow the disclosure of personal information to the executor, administrator or trustee of a deceased person's estate, to the spouse or next of kin of a deceased person or to such other person as might be determined necessary for the settling of the deceased person's affairs.

56. I recommend the approach adopted by Alberta, Ontario, Newfoundland and others, which requires a three part test be met in order to justify a refusal to disclose under section 24. This approach is more in keeping with most other

jurisdictions and the trend, generally, toward more openness in contracting and procurement matters. In particular, I would recommend the adoption of wording such as that contained in Alberta's FOIPP Act, Section 16, which reads as follows:

> 16(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
>
> (b) that is supplied, explicitly or implicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
>
> (2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.
>
> (3) Subsections (1) and (2) do not apply if
>
> (a) the third party consents to the disclosure,
>
> (b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,

57. Further, I recommend that this provision be clarified insofar as what is meant by the term "prejudice to the competitive position of a third party" and "interference with contractual or other negotiations of a third party". These are issues that are often raised by third party companies seeking to protect contract numbers, not only in Nunavut but across the country. As a result, there have been many orders and recommendations made across the country dealing with this issue. A good summary of what would qualify for this exemption law was laid out in a 2013 Order made by the Information and Privacy Commissioner's Office of British Columbia, in *City of Abbotsford* (Order F13-20):

> It is clear that the disclosure of existing contract pricing and related terms that may result in the heightening of competition for future

> contracts is not a significant harm or an interference with competitive or negotiating positions. Having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather it is an inherent part of the bidding and contract negotiation process. (pg. 10)

I therefore recommend a provision be added to the Act which makes it clear that section 24(1)(c) does not apply to "pricing and related information in existing contracts".

58. I recommend that clarification be brought to Section 24(1)(f) and (g). Section 24(1)(f) prohibits the disclosure of "a statement of financial assistance provided to a third party by a prescribed corporation or board". Subsection 24(1)(g) prohibits the disclosure of information supplied by a third party to support an application for financial assistance mentioned in paragraph (f). I note that there has never been a "prescribed corporation or board" to which section 24(1)(f) or (g) would apply so that these provisions really have no meaning. If the intention was that prescribed corporation or boards really is a reference to public lending corporations, this needs to be set out in regulations.

59. Quite apart from defining what a "prescribed corporation or board" is, I recommend the repeal of section 24(1)(f). A business receiving loans from a public lender should know that some details of such loans would be subject to public scrutiny. One of the basic pieces of information that should be available, pro-actively, to the public, is what companies have received public funding and how much. These businesses would still have the protection afforded by subsection 24(1) generally if they can establish that disclosure of the information would result in a harm to the business as outlined in the previous subsections.

60. I recommend the removal of section 25. As an alternative, I recommend that the time frame be reduced to no more than 30 days.

61. I recommend, as a starting point, an amendment or amendments to the Act which explicitly and clearly state that in the case of discretionary exemptions, disclosure is the rule and discretion can be exercised to refuse access only after a review of all of the relevant considerations, including the public interest in the disclosure of the record in question.

62. I recommend that the legislation be amended to emulate the Ontario legislation which requires, specifically, that public bodies must weigh public interest when exercising discretion.

63. I recommend that the third party consultation process be revamped to reflect a similar process as exists under the Newfoundland and Labrador legislation (see Appendix II)

64. In the alternative, I recommend that third parties be allowed no more than 15 working days to register any objections they might have to disclosure, that the public body be required to make a decision with respect to disclosure no more than 10 working days after that and that the third party have an additional 15 working days to submit a Request for Review to the IPC. This would reduce the total time for the consultation process from 5 months to about 3 months, which is still longer than many Applicants would like, but is significantly shorter than the current process.

65. I recommend an amendment which would allow disclosure of records relating to a workplace complaint to a complainant or a respondent in a workplace investigation, such disclosure to be without edits (except for the personal information of unrelated third parties) or third party consultations.

66. I recommend that for any person other than an applicant or a respondent seeking access to these records, the regular rules with respect to access would apply, including the third party consultation process.

67. I recommend that records outlining the outcome of workplace dispute investigations should be available for their precedential value to anyone who seeks the information. To accomplish this in a privacy protective way, these reports/records will have to be drafted in such a way as to avoid the use of names and detailed specifics. There might also be a time period in which these kinds of records are not available to the public, again as a measure to help protect against a breach of privacy.

68. I recommend that section 29 be amended so as to remove the reference to a time limit to seek a review except in the case involving third party objections to disclosure. In the alternative, I recommend that the IPC be given the authority to extend the time for filing where such an extension would not result in any prejudice to any person.

69. I recommend that consideration be given to amending the Act so as to the adopt the Manitoba model of providing a final appeal to a specialized adjudicator, with a specific process to be included in the legislation or the regulations to assist appellants.

70. I recommend that the time for the Information and Privacy Commissioner to complete a review of an access to information matter to be reduced from 180 days to 120 days or, in keeping with the recommendation above to change time references from calendar days to working days, to 86 working days.

71. I recommend that the current 180 day time frame for completing a review of a privacy breach complaint be maintained, but that it be re-defined as 130 business days.

72. I strongly recommend that section 34 of the Act be amended to include the words “including solicitor/client privilege” after the words “any privilege available at law”.

73. I recommend that section 40(c)(ii) be repealed.

74. I recommend that section 41(1) of the Act be amended by dividing it into two parts as follows:

41.(1) A public body must, where reasonably possible, collect personal information directly from the individual the information relates.

41.(1.1) Where it is not reasonably possible to collect personal information directly from the individual the information relates, a public body may collect that information from another source if:

(a) another method of collection is authorized by that individual or by an enactment;
(b) the information may be disclosed to the public body under Division C of this Part;
(c) the information is collected for the purpose of law enforcement;
(d) the information is collected for the purpose of collecting a fine or a debt owed to the Government of Nunavut or a public body;
(e) the information concerns the history, release or supervision of an individual under the control or supervision of a correctional authority;
(f) the information is collected for the purpose of providing legal services to the Government of Nunavut or a public body;
(g) the information
  (i) is necessary in order to determine the eligibility of an individual to participate in a program of or receive a benefit, product or service from the Government of Nunavut or a public body and is collected in the course of processing an application made by or on behalf of the individual the information is about, or
  (ii) is necessary in order to verify the eligibility of an individual who is participating in a program of or receiving a benefit, product or service from the Government of Nunavut or a public body and is collected for that purpose;
(h) the information is collected for the purpose of informing the Public Trustee about potential clients;
(i) the information is collected for the purpose of enforcing a support order under the *Family Support Orders Enforcement Act*; or

(j) the information is collected for the purpose of hiring, managing or administering personnel of the Government of Nunavut or a public body.

75. I recommend the addition of a provision that would require a public body, when reasonably possible, to advise an individual when personal information has been collected from a third party source.

76. I recommend that section 41(2) be amended such that any time a public body collects personal information about an individual, whether directly or indirectly, there be an obligation for the public body to inform the individual of the purpose for the collection, the specific legal authority for the collection and the contact information for an officer or employee of the public body who can answer questions about the collection.

77. I recommend a legislated requirement that PIAs be conducted for all new programs, procedures, policies, activities and legislation in which there is any possibility that personal information will be involved.

78. I recommend that the legislation include a requirement that PIAs be conducted any time there is a possibility that third party contractors will have access to personal information collected or in the possession of a public body.

79. I recommend that the legislation include a requirement that any purchase of new technology undergo a formal PIA to ensure that it will comply with the privacy and security requirements imposed by the ATIPPA.

80. I recommend all PIAs be provided to the Information and Privacy Commissioner for review and comment and that public bodies be required to consider any issues raised by the IPC.

81. I recommend that section 48(q) be amended to read as follows:

q) 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 in the form appropriate in the circumstances to the individual the information is about;

82. I recommend that section 48(r) be amended to read as follows:

r) so that the next of kin, spouse or adult interdependent partner, relative or close friend of an injured, ill or deceased individual may be contacted.

83. I recommend that section 48(t) be amended to read as follows:

t) if the personal information is information of a type routinely disclosed in a business or professional contact and the disclosure is limited to an

individuals' name and business contact information and does not reveal any other personal information about the individual.

84. I recommend that a section be included in the breach notification section of the Act after section 49.11 to the following effect:

Upon receipt of a Breach Notification pursuant to section 49.9, the Information and Privacy Commissioner may, where he or she is of the opinion that a review is appropriate, conduct a review of the breach in accordance with Part 2, Division D.

85. I recommend that Nunavut adopt the Manitoba model which allows an appeal to a specialized adjudicator for a final and binding decision.

86. I further recommend that the IPC be given order making power with respect to administrative matters, such as the calculation of fees, requests for waivers of fees, extensions of time and the authority to disregard a Request for Information.

87. I recommend giving the IPC the jurisdiction to refer a matter to an early resolution process and to provide additional time to undertake such efforts. I do not, however recommend making mediation a mandatory step in the process.

88. I recommend the addition of all of the new "general powers" identified above.

89. I recommend that the Act be amended so as to provide that staff of the Legislative Assembly and MLAs are subject to the privacy provisions of the Act and can be liable for the unauthorized collection, use or disclosure of personal (which, in most cases, will mean obtaining the individual's express consent to the disclosure and the specifics of the disclosure). This may have to be nuanced to some extent to address an MLA's parliamentary privilege or other rules that apply to legislators.

90. I recommend that, in addition to the power given to the Information and Privacy Commissioner in section 53, the IPC be given the additional authority to limit the number of concurrent access to information requests from on person or group of persons working together making multiple requests, along the following lines:

(2) If multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other, the Information and Privacy Commissioner may, at the request of the head of a public body, authorize the public body to limit the number of access to information requests which the public body is required to deal with at any one time from the same applicant or group of applicants working together or apparently working together.

91. I recommend the addition of offences that would address the improper destruction of records and unauthorized access to or viewing of personal information and that fines be attached to such offences of up to $5,000.00.

92. I strongly recommend that a new Part be added to the Act which provides for a clear “duty to document” and that there be a consequent amendment to the offences section to provide that it is an offence to fail to properly document the work of government employees and agents.

93. I recommend a more prominent and professional role for ATIPP Coordinators, including a requirement that they have specialized training in the field and that provisions similar to those in Newfoundland and Labrador be added to our Act.

94. I recommend that the Act be amended so as to require public bodies to establish categories of information which will be available to the public without a formal request similar to the BC legislation.

95. I recommend a mandatory review of the Act every 5 years.

96. I recommend that an amendment to the Act be made that would require public bodies to report their progress on implementing recommendations made by the Information and Privacy Commissioner on a periodic basis until the public body has completed implementation of the recommendations.

97. I recommend that municipalities and school authorities be made subject to the Act.

98. I recommend that the Act be amended so as to give the IPC the power to subpeona any records relevant to a review, whether that record is in the possession of a public body or a third party.