



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

Tabled by the  
Minister of Digital  
Government & Service NL

2023-14-03

*Sarah Stoodley*

March 30, 2023

BY EMAIL

Minister Sarah Stoodley  
Digital Government and Service NL  
[SarahStoodley@gov.nl.ca](mailto:SarahStoodley@gov.nl.ca)

Dear Minister Stoodley,

I write in response to your letter of March 29, 2023 in which you raise a number of points about my news release related to Bill 22. I will respond to them in turn.

I am pleased to learn that it is your interpretation that Bill 22 would not exempt records related to the Cabinet decision-making process from the duty to document. Given the existing section 5.4 of the *Management of Information Act (MOIA)* states that Cabinet records shall be managed in the manner determined by Cabinet Secretariat, this was not an intuitive interpretation. Understood as part of the scheme of *MOIA*, and appearing under the heading "Exceptions" our interpretation has been that Cabinet records are excluded from *MOIA* altogether – and thus would be also excluded from this new duty to document. The alternative interpretation you offer hinges upon a narrower interpretation of "management" that excludes creation of records. As the title of the statute uses the word management and includes provisions related to the creation of records, it would seem more intuitive to understand that word in its broader sense. I therefore disagree with your assertion that it is clear that section 5.4 does not create a broad exception to the Act. However, if government intends to proceed on the basis that cabinet records are fully subject to the new provisions in Bill 22 relating to duty to document, I view that as a positive development, as it addresses a concern that we have raised about the implementation of duty to document.

I note that we have brought up this concern about the exclusion of Cabinet documents at the officials level, at the executive level, and at the Ministerial level both verbally and in writing on a number of occasions going back initially to a meeting between officials of this Office and OCIO in December 2020 and a letter summarizing that discussion that was sent to OCIO in January 2021. Further communication addressing this point was forwarded to your officials in the summer of 2022 and then later in the fall of 2022 in my letter directly to you. This is the first time that we have heard that it was the government's intention to interpret *MOIA* as including Cabinet documents within the duty to document. On previous occasions there has been no response to the concern other than that the advice was not accepted. I consider it unfortunate that we could not have had this discussion before introduction of the Bill as I think a relatively simple change in language could have clarified the intent to include Cabinet documents in the duty to document.

In your letter, you also suggested that my news release questioned the objectivity of public servants and stated that it is inappropriate to suggest that a public servant would disregard their statutory obligations due to the manner of their appointment. I was not implying that at all. Instead, I can attest based on almost a decade as a provincial government executive and now more than half way through my term as an independent statutory officer of the House, that there is an enormous difference between these two roles in terms of the accountability that they provide. Public servants in the executive branch are counselled to advise fearlessly and implement faithfully. They are obliged, as are all of us, to meet their statutory obligations. However, there is substantial scope for variation in *how* those obligations are discharged.

The corollary of ministerial accountability is legislative oversight, and the presence of statutory officers is part of the *form* of that legislative oversight. To express such a position is not to suggest that ministers are answerable to statutory officers. Ministers are accountable to the legislature and, as its officers, statutory officers assist the legislature in how it does its oversight. The suggestion that independent oversight is required on a certain matter is not to minimize the role of Ministers and MHAs. On the contrary, to suggest that the principle of ministerial accountability obviates the need for independent oversight is to imply that there is no need for any statutory offices at all. Clearly the fact that there are statutory offices, like mine but also the Auditor General, the Child and Youth Advocate, the Citizens Representative, and others, in every jurisdiction in this country means that there is a consensus that on certain matters there is a need for legislative oversight to be supported by independent officers. Such oversight helps build trust in the institutions of government. There is a substantial and obvious difference between, for example, the Annual Report that the ATIPP office is required to table in the House regarding implementation of that statute, and the work that my Office does to provide oversight every day. It is my position, as it was the position of the 2014 ATIPPA Statutory Review Committee, that the duty to document is one of those subjects that requires independent oversight. I maintain that position. It is now to the legislature to consider that question.

As a final note, I would observe that section 112 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* describes a two stage process for me to provide advice on proposed legislation. The first stage obliges me to confidentially provide my analysis to the Minister. The OCIO engaged us repeatedly over a number of years on what would become Bill 22. In summer 2022, upon officials level consultation on the draft Bill itself we clearly expressed the three concerns that I would ultimately identify in my news release. We received no response to these concerns, other than an indication that the advice was not accepted. This was repeated again at the executive level with the predecessor of the current Chief Information Officer. No explanation was provided for why the government had chosen not to address our concerns, other than "information management is an internal affair of the government". I was so concerned about this that I wrote you directly on the matter, again clearly expressing my three concerns, noting that this was a matter on which I would have to speak publicly, and offering to meet about the subject, but I received no response. I reached out again, in early March, to the new CIO, again clearly expressing the three concerns, indicating again that I would be compelled to speak publicly, and offering to meet further with him or you. This offer was not accepted, which is unfortunate but entirely your prerogative.

The second stage of the process provided for by section 1.1.2 of *ATIPPA, 2015* authorizes me to speak publicly about a Bill once it has been made public. The purpose of this section is so that I might provide my analysis to the public and Members of the House while the Bill is under consideration. I have now done that, I stand by these positions, and my role in the process is now complete.

This matter notwithstanding, I wish to note that I am generally supportive of your Department's and the provincial government's general approach to digital government because to date it appears to be focused on improving access and being privacy protective. While we do not always agree, officials in both the OCIO and the Department have been excellent to work with and carefully consider our feedback. I look forward to opportunities to work together and provide constructive feedback on your initiatives as you continue to advance your mandate.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael Harvey", with a long, sweeping horizontal stroke extending to the right.

Michael Harvey  
Information and Privacy Commissioner

