OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2014-15

Annual Report

PROMOTING ACCESS & PROTECTING PRIVACY
FINDING THE BALANCE

Access

"... the overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps 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."

Justice Laforest, Supreme Court of Canada,
Dagg v. Canada

Privacy

"This Court has recognized that the value of privacy is fundamental to the notions of dignity and autonomy of the person [...] Equally, privacy in relation to personal information and, in particular, the ability to control the purpose and manner of its disclosure, is necessary to ensure the dignity and integrity of the individual. [...] We also recognize that it is often important that privacy interests be respected at the point of disclosure if they are to be protected at all, as they often cannot be vindicated after the intrusion has already occurred [...]"

R. v. Osolin, [1993] 4 S.C.R. 595
L'Heureux-Dubé J. (Dissenting)

PHIA

"I say, Mr. Speaker, this piece of legislation is intended to be a comprehensive piece of legislation to protect the integrity of your personal health information, protect the privacy and the sensitivity of the information through laying out, in a step-by-step mechanism, the whole process of storing and releasing and how personal health information gets used. It has been constructed on the basis of a wide consultation process. I say, Mr. Speaker, it reflects the principles as outlined in both the federal legislation that currently exists, as well as provincial legislation that currently exists with respect to this."

Hon. Ross Wiseman, Minister of Health and Community Services
House of Assembly Hansard, May 26, 2008

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

November 27, 2015

Speaker
House of Assembly
Newfoundland and Labrador

I am pleased to submit to you the Annual Report for the Office of the Information and Privacy Commissioner in accordance with the provisions of section 59 of the *Access to Information and Protection of Privacy Act* and section 82 of the *Personal Health Information Act*. This Report covers the period from April 1, 2014 to March 31, 2015.

Edward P. Ring
Information and Privacy Commissioner

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Commissioner's Message

Under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), Newfoundlanders and Labradorians are given legal rights to access government information with limited exceptions. Access to information refers to the public's right to access records relating to the operations of public bodies in the Province, ranging from general administrative records, financial records, permits, policies, etc. The *ATIPPA* also gives individuals a right of access to their own personal information which is held by a public body. The basic objective is to make government open and transparent, and in doing so to make government officials, politicians, government departments, agencies and municipalities more accountable to the people of the Province.

The manner in which public bodies respond to OIPC involvement is a key factor in how the public measures the true commitment of the government and its agencies to the principles and spirit of the legislation.

Over the past three decades, all jurisdictions in Canada have passed legislation relating to the public's right to access information and to their right to have their personal privacy protected.

These legislative initiatives represent an evolution from a time when governments in general consistently demonstrated stubborn resistance to providing open access to records. This concept has changed. Today, access to information is a clearly understood right which the public has demanded and which governments have supported through legislation and action. No doubt there are still instances when unnecessary delays and unsubstantiated refusals to release information are encountered by the public, which is why it is important that the OIPC exists as an independent body to review decisions made by public bodies about access to information requests.

The *ATIPPA*, like legislation in other Canadian jurisdictions, established the Information and Privacy Commissioner (the "Commissioner") as an Officer of the House of Assembly, with a mandate to provide an independent and impartial review of decisions and practices of public bodies concerning access to information and privacy issues. The Commissioner is appointed under section 85 of the *ATIPPA* and reports to the House of Assembly through the Speaker. The Commissioner is independent of the government in order to ensure impartiality.

The Office of the Information and Privacy Commissioner (the "OIPC") has been given wide investigative powers, including those provided under the *Public Inquiries Act*, and has broad access to records in the custody or control of public bodies in relation to matters which the Commissioner is empowered to review. The government amended the *ATIPPA* through Bill 29 to remove the Commissioner's authority to review a refusal of access to information based on a claim of solicitor and client privilege (section 21) and a claim that a record is an official cabinet record (section 18(2)(a)). The Commissioner therefore has neither the right to conduct a review into such a refusal nor to demand that such records be produced in the course of a review. The applicant, however, retains the right to ask the Supreme Court Trial Division to review a decision to refuse access on the basis of either of those two provisions, or the applicant may ask the Commissioner to initiate such an appeal.

Aside from those provisions, if the Commissioner considers it relevant to an investigation, he may require any record, including personal information, which is in the custody or control of a public body to be produced for his examination. This authority provides the citizens of the Province with the confidence that their rights are being respected and that the decisions of public bodies are held to a high standard of openness and accountability. While most citizens are prepared to accept that there may be instances of delays by public bodies, and that there may also be mistakes and misunderstandings, they also expect that such problems will be rectified with the help of this Office when they occur.

The Personal Health Information Act *(PHIA)*

Health Information a Private Matter

On April 1, 2011 the *Personal Health Information Act (PHIA)* was proclaimed into force. Newfoundland and Labrador's *PHIA* is a law which establishes rules regarding how your personal health information is to be handled. *PHIA* governs information held by custodians of your personal health information, whether in the public sector or the private sector. Most personal health information is considered to be in the control or custody of a custodian and is therefore covered by *PHIA*.

Major Custodians

- Eastern Health, Central Health, Labrador Grenfell Health, and Western Health, Newfoundland and Labrador Centre for Health Information.
- Regulated health professionals in private practice, such as doctors, dentists, pharmacists, physiotherapists, chiropractors, and registered massage therapists.
- Faculty of Medicine and the Schools of Nursing, Pharmacy, and Human Kinetics and Recreation at Memorial University.

The purposes of *PHIA* are accomplished by:

1. establishing rules for the collection, use and disclosure of personal health information to protect the confidentiality of the information as well as to protect individual privacy;
2. giving the public a right of access to personal health information about themselves;
3. giving the public a right to require correction or amendment of that information;
4. establishing measures to ensure accountability by custodians and to safeguard the security and integrity of personal health information;
5. providing for independent review of decisions and resolution of complaints respecting personal health information; and
6. establishing measures to promote compliance with *PHIA* by custodians.

PHIA recognizes that you expect your health information to remain confidential and that it should only be collected, used or disclosed for purposes related to your care and treatment. However, *PHIA* also acknowledges that personal health information is sometimes needed to manage the health care system, for health research and for other similar purposes. Furthermore, law enforcement officials, health officials and others may also have a legitimate need to access personal health information, under limited and specific circumstances.

If you wish to access your personal health information, or if you have an inquiry about how your personal health information is being collected, used or disclosed, you may contact your health care provider. For more information about *PHIA*, visit the *PHIA* web page of the Department of Health and Community Services at www.health.gov.nl.ca/health/*PHIA*.

The Commissioner's Office investigates privacy breach complaints and other complaints about how personal health information has been improperly collected, used, disclosed or otherwise mishandled by a custodian. The Commissioner also investigates complaints on the basis that a custodian has refused to provide a copy of an individual's personal health information to the individual, or refused to correct an error in an individual's personal health record.

If you believe on reasonable grounds that a custodian has contravened or is about to contravene a provision of the *PHIA* in relation to your own personal health information or that of another individual, you may file a complaint with the Commissioner.

If you wish to file a complaint with the Commissioner, we ask that you use the forms which are available from our Office or our website at www.oipc.nl.ca/forms.htm.

Complaints may be mailed, dropped off, or sent by fax or email. Those sent by email must contain a scanned copy of a signed and dated complaint form, otherwise they will not be accepted.

Upon receipt of a complaint, the Commissioner will attempt to resolve the matter informally. If this is not successful, a formal review may be conducted. There is no cost to file a complaint with the OIPC.

***PHIA** balances your right to privacy with the legitimate needs of persons and organizations providing health care services to **collect**, **use** and **disclose** such information.*

Accessing Information

ATIPPA

It should not be a difficult process for individuals to exercise their right of access to records in the custody or control of a government department or other public body covered by the *ATIPPA*. Many people are seeking records containing information which may be handled without a formal request under the access legislation. This is referred to as routine disclosure and I am pleased to report that more and more information requests are being dealt with in this timely and efficient manner. Where the records are not of a routine nature, the public has a legislated right of access under the *ATIPPA*. The process is outlined below.

How to Make an Access to Information Request?

STEP 1

Determine which public body has custody or control of the record.

STEP 2

Contact the public body, preferably the ATIPP Coordinator, to see if the record exists and whether it can be obtained without going through the process of a formal request. A list of ATIPP Coordinators and their contact information can be found at the ATIPP Office Website.

STEP 3

To formally apply for access to a record under the *Act*, a person must complete an application in the prescribed form, providing enough detail to enable the identification of the record. Application forms are available from the public body or from the ATIPP Office Website.

STEP 4

Enclose a cheque or money order for the $5.00 application fee payable to the public body to which the request is submitted (or, if a government department, payable to the Newfoundland Exchequer).

STEP 5

Within 30 days, the public body is required to either provide access, transfer the request, extend the response time up to a further 30 days or deny access. Additional fees will likely also be imposed for providing a copy of the records.

STEP 6

If access to the record is provided, then the process is completed. If access is denied or delayed unreasonably, or if you think the fee charged is inappropriate, or if you have experienced other problems with the access to information process, you (the applicant) may request a review by the Commissioner, or you may appeal directly to the Supreme Court Trial Division.

How to File a Request for Review or Investigation of Complaint?

STEP 1

Submit a Request for Review or Investigation of Complaint Form to our Office.

STEP 2

Upon receipt of a complaint or formal request for review, the Commissioner will review the circumstances and attempt to resolve the matter informally.

STEP 3

If informal resolution is unsuccessful, the Commissioner may prepare a Report and, where necessary, will make recommendations to the public body. A copy of the Report is provided to the applicant and to any third party notified during the course of our investigation, and the Report is also posted on our website.

STEP 4

Within 15 days after the Report is received, the public body must decide whether or not to follow the recommendations, and the public body must inform the applicant and the Commissioner of this decision.

STEP 5

Within 30 days after receiving the decision of the public body, the applicant or the Commissioner may appeal the decision to the Supreme Court Trial Division.

PHIA

PHIA also grants individuals a right of access to information, but under *PHIA* this is only a right of access to the individual applicant's own personal health information. Under specific circumstances as outlined in section 7, typically where the individual is not able to exercise their own rights, the right to request access to this information (as well as other rights under *PHIA*) can be exercised by a representative of the individual. The provisions which allow a custodian to refuse access to the requested information are limited, and the situations in which these provisions would apply occur relatively infrequently. Unless one of those provisions apply, any individual who requests access to their own personal health information should expect to get it, although as with *ATIPPA*, a reasonable fee may apply. Just as with the *ATIPPA*, any individual who is refused access to their own personal health information may file a complaint with the Commissioner.

How to Make an Access Request?

STEP 1

An individual who wishes to access his or her own personal health information should make a request directly to the custodian that the individual believes has custody or control of the information.

STEP 2

The request should be in writing unless the individual has limited ability to read or write English, or has a disability or condition that makes it difficult to do so in writing.

STEP 3

The request should contain sufficient details to permit the custodian to identify and locate the record.

STEP 4

A custodian must respond to a request without delay, and in any event, within 60 days of receiving the request. That deadline can be extended for a maximum of an additional 30 days under specific circumstances outlined in *PHIA*. Nothing in *PHIA* prevents a custodian from granting a request for access informally without the need for a written request.

How to File a Request for Investigation of Complaint?

STEP 1

If you have submitted a request to a custodian for access to your personal health information and you are not satisfied with the response, you may ask the Commissioner to review the matter by filing a complaint.

STEP 2

If you wish to file a complaint with the Commissioner, we ask that you use the forms which are available from our Office or our website at www.oipc.nl.ca/forms.htm.

Withholding Information

ATIPPA

While the *ATIPPA* provides the public with access to government records, such access is not absolute. The *Act* also contains provisions which allow public bodies to withhold certain records from disclosure. The decision to withhold records by governments and their agencies frequently results in disagreements and disputes between applicants and the respective public body. Although applicants are empowered to appeal directly to the Supreme Court Trial Division, the most common route for applicants in such cases is to the OIPC.

Complaints Range From

- being denied the requested records;
- being told there are no responsive records;
- being requested to pay too much for the requested records;
- being told by the public body that an extension of more than 30 days is necessary;
- not being assisted in an open, accurate and complete manner by the public body; and
- other problems related to the *ATIPPA* process.

The Commissioner does not have the power to order that a complaint be settled in a particular way. He and his staff rely on negotiation to resolve most disputes, with his impartial and independent status being a strong incentive for public bodies to abide by the legislation and provide applicants with the full measure of their rights under the *Act*. As mentioned, there are specific but limited exceptions to disclosure under the *ATIPPA*. These are outlined below.

Mandatory Exceptions

- *Cabinet confidences* - the head of a public body shall refuse to disclose to an applicant a Cabinet record including: (a) an official Cabinet record; (b) a discontinued Cabinet record; and (c) a supporting Cabinet record.
- *Personal information* - recorded information about an identifiable individual, including name, address or telephone number, race, colour, religious or political beliefs, age, or marital status.
- *Harmful to business interests of a third party* - includes commercial, financial, labour relations, scientific or technical information and trade secrets.
- *House of Assembly service and statutory office records* - protects parliamentary privilege, advice and recommendations to the House of Assembly, and records connected with the investigatory functions of a statutory office.

Discretionary Exceptions

- *Local public body confidences* - includes a draft of a resolution, by-law, private bill or other legal instrument, provided they were not considered in a public meeting.
- *Policy advice or recommendations* - includes advice or recommendations developed by or for a public body or minister.
- *Legal advice* - includes information that is subject to solicitor-client privilege and legal opinions by a law officer of the Crown.
- *Harmful to law enforcement* - includes investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed.
- *Harmful to intergovernmental relations* - includes federal, local, and foreign governments or organizations.
- *Harmful to financial or economic interests of a public body* - includes trade secrets, or information belonging to a public body that may have monetary value, and administrative plans/negotiations not yet implemented.
- *Harmful to individual or public safety* - includes information that could harm the mental or physical well-being of an individual.
- *Confidential evaluations* – protects from disclosure evaluative or opinion material, provided explicitly or implicitly in confidence, which was compiled for specific purposes outlined in the exception.
- *Information from a workplace investigation* – limits the amount of information available to applicants regarding a workplace investigation, but specifies that certain information about the investigation must be made available to specific parties as defined in the exception.
- *Disclosure harmful to conservation* – allows information about conservation to be withheld if disclosure could reasonably be expected to damage or interfere with conservation as outlined in the exception.
- *Disclosure harmful to labour relations interests of public body as employer* – allows certain labour relations information to be withheld in the circumstances outlined in the exception.

Unsupported refusals to release information and delays in responding to requests for access are particularly frustrating to applicants as well as to this Office. It is of significant comfort to acknowledge that there is a sustained effort under way by government through the ATIPP Office to train public bodies in their obligations under the *ATIPPA*, especially as it relates to the timeframes for notification and action. The government's *ATIPPA* Policy and Procedures Manual is an integral part of the ongoing training program. This Office has and will continue to work with government in this effort.

Since the *ATIPPA* first became law, public bodies have often expressed resentment that they sometimes receive requests for information that they would call frivolous or vexatious. It is important to recognize that requests for records which may seem petty to some, may be a serious issue for certain citizens whose right to make a request is protected by the *ATIPPA*. Since this Office was established in 2005, there have been very few cases involving access requests which could have been considered frivolous or vexatious. That being said, those few we have seen were indeed problematic for the public bodies involved, and there was no remedy under the law as it existed prior to Bill 29 to refuse such requests. Since the Bill 29 amendments, the *ATIPPA* provides an opportunity for public bodies to disregard a request if the circumstances set out in section 43.1(1) apply:

> *43.1 (1) The head of a public body may disregard one or more requests under subsection 8(1) or 35(1) where:*
>
> *(a) because of their repetitive or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to the abuse of the right to make those requests;*
> *(b) one or more of the requests is frivolous or vexatious; or*
> *(c) one or more of the requests is made in bad faith or is trivial.*
>
> *(2) Where the head of a public body so requests, the commissioner may authorize the head of a public body to disregard a request where, notwithstanding paragraph (1)(a), that the request is not systematic or repetitive if, in the opinion of the commissioner, the request is excessively broad.*

As set out above, section 43.1(2) provides for an additional circumstance where an applicant's request may be disregarded, but only with the authorization of the Commissioner. When the Bill 29 amendments became law, we were concerned at first that we might see many public bodies attempt to disregard requests on the basis of one of the provisions in section 43.1. On the contrary, we have only seen a couple of inquiries of this nature. It could be that public bodies are aware that there is substantial case law on the meaning of these provisions in similar legislation in other Canadian jurisdictions, and that there is a high threshold to make a case that an applicant's request may be disregarded. Furthermore, knowing that our Office is here to review any applicant's claim that their request has been unjustly disregarded would no doubt serve as a deterrent to any such move by a public body which was not well founded.

The bottom line is that it is inevitable that the public's recourse to access laws will likely grow. Whether they are policy, financial, economic, political or personal, issues are becoming more and more complex and the public is becoming more questioning. The right to demand access to such information, even if it seems trivial or unimportant to all but the requester, is still paramount in that process.

PHIA

PHIA contains very limited provisions allowing a custodian to refuse access to a record of an applicant's personal health information. As with *ATIPPA*, the basis for a decision to refuse access to a record may be either mandatory or discretionary, as described in section 58 of *PHIA*.

Mandatory Exceptions

The mandatory exceptions occur under the following circumstances, where:

- another *Act*, an *Act* of Canada or a court order prohibits disclosure to the individual of the record or the information contained in the record in the circumstances;
- granting access would reveal personal health information about an individual who has not consented to disclosure; or
- the information was created or compiled for the purpose of:
  - a committee referred to in subsection 8.1(2) of the *Evidence Act*;
  - review by a standards or quality assurance committee established to study or evaluate health care practice; or
  - a body with statutory responsibility for the discipline of health care professionals or for the quality or standards of professional services provided by health care professionals.

Discretionary Exceptions

The discretionary exceptions to the right of access under *PHIA* are set out in section 58, subsections 2 and 3. One example is section 58(2)(d)(i) which says that a custodian may refuse access to a record of personal health information where "granting access could reasonably be expected to result in a serious risk of harm to the mental or physical health or safety of the individual who is the subject of the information or another individual."

The Role of the Commissioner

In accordance with the provisions of the *ATIPPA*, when a person makes a request for access to a record and is not satisfied with the resulting action or lack thereof by the public body, he or she may ask the Commissioner to review the decision, act or failure to act relating to the request. The Commissioner and this Office therefore have the key role of being charged by law with protecting and upholding access to information and protection of privacy rights under the *ATIPPA*.

This responsibility is specific and clear, and this Office takes it seriously. However, there are often questions concerning how we see our role, and how we do our job. It has been mentioned earlier that the Office is independent and impartial. There are occasions when the Commissioner has sided with applicants and other occasions when the Commissioner supports the positions taken by public bodies. In every case, having conducted our research carefully and properly, all conflicting issues are appropriately balanced, the law and common sense are applied and considered, and the requirements of the legislation are always met. Applicants, public bodies and third parties must understand that this Office has varied responsibilities, often requiring us to decide between many conflicting claims and statutory interpretations.

As noted, this Office does not have enforcement or order power. We do not see this as a weakness, rather it is a strength. Order power may be seen as a big stick which could promote an adversarial relationship between this Office and public bodies. We promote and utilize negotiation, persuasion and mediation of disputes and have experienced success with this approach. Good working relationships with government bodies are an important factor and have been the key to this Office's success to date.

The key tenet of our role is to keep the lines of communication with applicants, public bodies and affected third parties ***open***, ***positive***, *and* ***productive***.

Success can be measured by the number of satisfied parties involved in the process, by fewer complaints, and by more and more information being released by public bodies without having to engage the appeal provisions of the *ATIPPA*. We are equally committed to ensuring that information that should not be released is indeed protected.

This Office is committed to working cooperatively with all parties. While we respect opposing points of view in all our investigations, we pursue our investigation of the facts vigorously.

We are always available to discuss requests for review and related exceptions to the fullest extent at all levels without compromising or hindering our ability to investigate thoroughly. We emphasize discussion, negotiation and cooperation. Where appropriate, we are clear in stating which action we feel is necessary to remedy disagreements. In that regard, we will continue to make every effort to be consistent in our settlement negotiations, in our recommendations and in our overall approach.

In accordance with the provisions of the *PHIA*, the Commissioner has broad authority to oversee this important law. The Commissioner may exercise his powers and duties under *PHIA* by:

1. reviewing a complaint regarding a custodian's refusal of a request for access to or correction of personal health information;
2. reviewing a complaint regarding a custodian's contravention or potential contravention of the *Act* or regulations with respect to personal health information;
3. making recommendations to ensure compliance with the *Act*;
4. informing the public about the *Act*;
5. receiving comments from the public about matters concerning the confidentiality of personal health information or access to that information;
6. commenting on the implications for access to or confidentiality of personal health information of proposed legislative schemes or programs or practices of custodians;
7. commenting on the implications for the confidentiality of personal health information of using or disclosing personal health information for record linkage, or using information technology in the collection, storage, use or transfer of personal health information; and
8. consulting with any person with experience or expertise in any matter related to the purposes of this *Act*.

ATIPPA Review 2014-2015

The results of the Legislative Review and the subsequent legislation *ATIPPA, 2015* will be reported on, in detail, in our Annual Report for the period of April 1, 2015 - March 31, 2016. It should be recognized that the OIPC had undertaken a significant amount of work in preparation for and during the year long review process. The following paragraphs outline the timelines and a summary of the process followed by the Review Committee from April 2014 to March 2015, when the two volume report, including draft legislation, was presented to Government by the Committee.

Under the *ATIPPA* legislation, a review of the *Act* is scheduled to take place every five years; however, the Government decided to move forward with this review two years earlier than scheduled.

The Committee Members held their first committee meeting and initial press conference on April 11, 2014 and separate introductory meetings with officials of the Office of Public Engagement (OPE) and the OIPC. In May 2014, Committee Members reviewed comments from the general public and stakeholders in response to a call for public input.

Public hearings were held on June 24, 25 and 26, 2014 at the Ramada hotel in St. John's. The Review Committee received presentations from OIPC's Ed Ring, Information and Privacy Commissioner, and Sean Murray, Director of Special Projects. Prior to the initial day of public hearings, Chair Clyde Wells stated...

> *"Commissioner Ed Ring and his staff are the province's **leading authorities** on **access** and **privacy**...Hearing their presentation first can provide a reference point for the committee and other presenters."*

Due to the in-depth nature of the OIPC presentation on June 24th and the questions from the Committee Members, the OIPC was asked to return on June 26, 2014 to finish their presentation.

Following the OIPC presentation, Chair Wells stated that Commissioner Ring "...prepared and submitted to us what we consider to be a very thorough presentation covering most of the aspects at least perhaps all of the aspects that would be of concern to this committee and we appreciate very much the effort that you have made in causing this to be prepared and the effort you have made in being present and presenting it and your continued interest in what the committee is doing and we thank you very much for it."

Public hearings were also held on July 22, 23 and 24 and on August 18, 19, 20 and 21 at the Ramada hotel in St. John's. The Review Committee's final presentation was received from OIPC Commissioner Ed Ring and Sean Murray, Director of Special Projects, on August 21st. In total, 36 individuals or groups presented at the public hearings. These hearings were webcast, and it is understood that hundreds of people from across the country and beyond were watching at any given time.

In addition to being the first and last presenter at the public hearings, the OIPC provided a five-part written submission (95 pages) in mid-June which encompassed months of review and consultation by all OIPC staff and expressed concisely the concerns that the OIPC felt, not only internally, but also heard from the public and public bodies alike. The OIPC made a number of supplementary submissions dealing with matters raised by the Review Committee in relation to OIPC presentations, as well as addressing some matters raised by public bodies at the hearings and through written submissions.

In September 2014, a Summary Report on Responses to the *ATIPPA* Coordinator Questionnaire was posted on the Committee's website. In October 2014, transcripts of the Public Hearings were posted on the Committee's website.

On March 2, 2015, the *ATIPPA* Review Committee presented its final report to Government. The final report was comprised of two volumes – an Executive Summary and the Full Report. In total, the report contained 90 recommendations and a draft bill which government agreed to implement.

In its report and draft legislation, the Committee recommended that the Commissioner's jurisidiction and authority be fully restored in order to be able to review records related to claims of solicitor and client privilege (section 21) and a claim that a record is an official cabinet record (section 18(2)(a)). Additionally, significant clarification was provided to situations where a public body asserts, by citing section 5, that certain records responsive to an access to information request are outside the scope of *ATIPPA*.

Within weeks of the release of the Report, the Minister Responsible for the administration of *ATIPPA, 2015*, initiated a number of early actions that would come into force immediately. These actions affected public bodies that came under direct control of Government. All other public bodies would wait until the legislation is proclaimed into force before these actions would take effect. On March 17, 2015, a new fee schedule was introduced, which saw the elimination of the application fee. Also, on that date, public bodies (associated with Government) were required to report all privacy breaches to the OIPC.

During March 2015, the OIPC commenced work on identifying and preparing a number of guidance documents that would assist public body coordinators to make a smooth transition to the new *ATIPPA, 2015*. The guidance documents prepared and issued before proclamation date are listed below.

- Requesting a Time Extension
- Guidelines for Public Interest Overide
- Privacy Impact Assessments
- Indirect Collection of Personal Information
- Apply to the Commissioner for Approval to Disregard an Access to Information Request
- Cost Estimates

ATIPPA, 2015 - Report Recommendation Summary

- Scrapped the old *Act*, wrote entirely new one.
- Recasted the purpose section "facilitate democracy".
- Commissioner is now an "advocate for access to information and protection of privacy".

Centre for Law and Democracy called it...

"A strong law by international standards and head and shoulders above other Canadian jurisdictions."

ATIPPA, 2015 - Access Impacts

- Introduce a public interest override.
- Duty to document (pending further legislative amendments); lead agency is OCIO. Committee work is ongoing and the OIPC will review and comment on drafts.
- OIPC to develop a template for publication scheme to facilitate open government and proactive disclosure.
- Access coordinators given greater independence.
- Fees reduced, application fee eliminated and Commissioner given final say if there is a fee complaint.
- All time extensions require approval by the Commissioner.
- Public bodies wishing to disregard a request must seek prior approval of the Commissioner.

- Commissioner must complete the complaint process; including informal resolution and report issued within 65 working days (annual reporting requirement beginning in Annual Report 2015-2016). The Commissioner, in extreme cases, may apply to a judge to issue an extension to that period.
- Hybrid Ombudsman/order making powers (flexability of Ombudsman model with ability to enforce recommendations as a court order).
- Public Body, within 10 days of receiving an OIPC Report, may seek a declaration from the courts not to follow recommendation(s); onus shift from the applicant to the public body.
- OIPC can file an order with the courts to compel public bodies to comply.

ATIPPA, 2015 - Privacy Impacts

- Mandatory breach notification to OIPC (early action, March 17, 2015 with public bodies controlled by Government).
- Public bodies must complete a Privacy Impact Assessment (PIA) for new or altered programs.
- Commissioner shall review PIA's for all common or integrated programs.
- Commissioner can initiate own motion privacy breach investigations.
- Commissioner's Report recommendations can be converted into an order of the court to stop collecting, using or disclosing personal information or destroying personal information collected in contravention of the *ATIPPA, 2015*.

ATIPPA, 2015 - Program Impacts

- Government must consult with Commissioner in advance of any legislation which could impact access or privacy.
- Audit public bodies compliance with the *Act*.
- Broad public and public body education mandate for the Commissioner.

Outreach and Statistics

Education and Awareness

The reporting period from April 1, 2014 - March 31, 2015 has once again presented the Office with many opportunities to engage with the public and professional organizations along with opportunities for staff to attend workshops and conferences in order to remain current with emerging trends and developments in Access, Privacy and Health Information. A number of meetings and consultations were held with public bodies under *ATIPPA,* as well as with a number of large and small custodians under *PHIA*. Additionally, meetings were held between OIPC officials and officials from some governing bodies and associations representing many of the major custodian groups under *PHIA*. A significant number of briefings and presentations were delivered to schools throughout the Province.

Data Privacy Day

Data Privacy Day (DPD) is recognized by privacy professionals, corporations, government officials, academics and students around the world. It aims to highlight the impact that technology is having on our privacy rights and underline the importance of valuing and protecting personal information.

The 7th International DPD was celebrated on January 28th with an aim to raise awareness and generate discussion about data privacy and access rights and responsibilities. In Newfoundland and Labrador, the OIPC put together materials offering “On the Go” and “Social and Digital Life” privacy tips, and conducted an educational campaign distributing promotional materials to all public body ATIPP Coordinators. We also provided online content and tips in concert with Stay Safe Online.org and the federal Office of the Privacy Commissioner.

Privacy Awareness Week

Privacy Awareness Week (PAW) is an event to highlight and promote awareness about privacy rights and responsibilities in the community. This year’s PAW took place from May 4 to May 10, 2014.

The OIPC focused awareness efforts through social media and the OIPC Twitter account (www.twitter.com/OIPCNL), posting tips, info, and links to privacy issues, information and advancements.

This information was meant to make people more aware of the various concerns associated with these specific privacy areas, as well as to open a dialogue about these issues and offer tips and advice on how to better secure your personal information.

Right to Know (RTK) Week 2014

For the ninth year, the OIPC joined with other information and privacy commissioner and ombud offices from across the country in celebrating national Right to Know (RTK) Week from September 22 to 28, 2014, and international Right to Know Day on September 28, 2014.

Right to Know seeks to raise awareness of every individual's right to access government information, while promoting freedom of information as essential to both democracy and good governance. The OIPC highlighted RTK through online and media informational campaigns, as well as posts on RTK facts and principles sent out through the PSN and to ATIPP Coordinators.

The OIPC also partnered with the OPE, Memorial and College of the North Atlantic to sponsor the Right to Know (RTK) Week 2014 Essay Competition. Secondary and post-secondary students in Newfoundland and Labrador were asked to write an essay addressing the topic, "What does 'Open Government' mean to you?" The competition was launched during RTK Week 2014 and ran through the end of the calendar year. A number of entries were received and a panel of judges representing the four sponsoring organizations will review the submissions and select first, second and third place winners, awarding cash prizes in the next reporting period.

Twitter

The OIPC has been using Twitter, as part of our broader communications practices, since 2012. The OIPC has continued to grow our followers since then, using the social media site to communicate clearly and quickly to the public who are interested in access to information and protection of privacy issues.

The OIPC's Twitter account is www.twitter.com/OIPCNL. Through it, the OIPC links to news releases, reports, speeches, presentations and other publicly available OIPC material; relevant information produced and published elsewhere; interesting facts, quotes, videos or observations related to access and privacy; as well as topical questions related to access and privacy meant to provoke discussion.

Consultation/Advice

This Office continues to receive numerous inquiries and requests for advice and consultation. In response, our staff routinely provides guidance to individuals, organizations, public bodies and custodians.

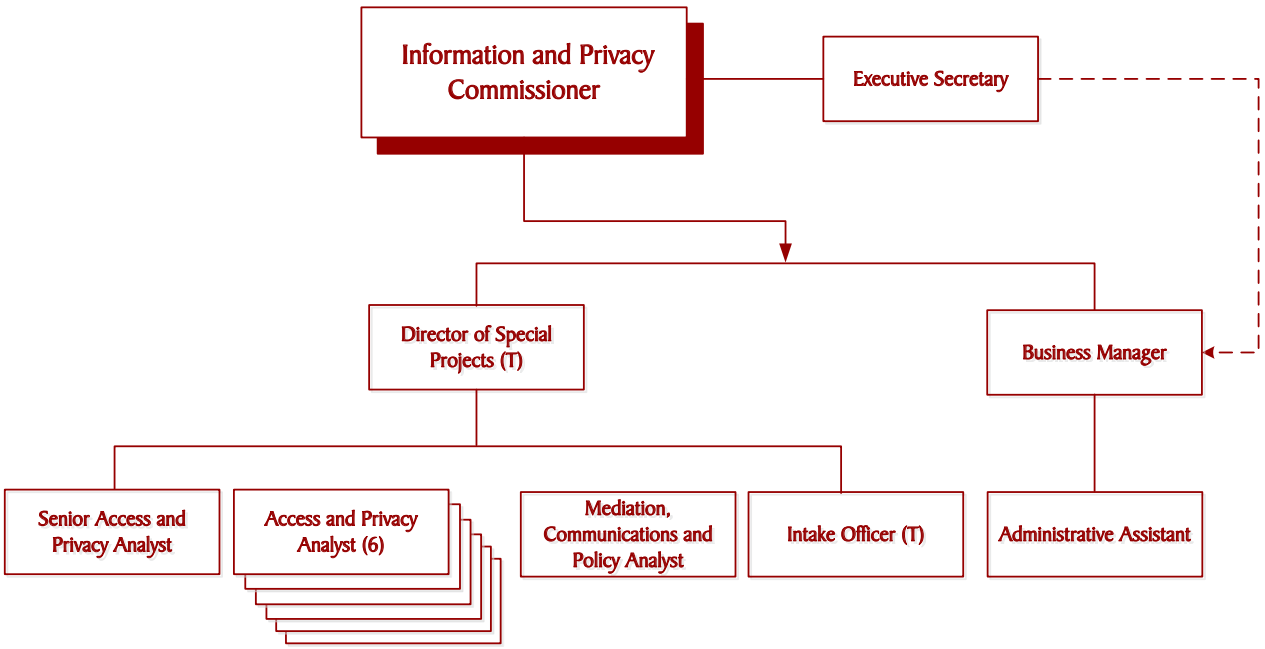
We consider this to be an important aspect of our overall mandate and we encourage individuals and organizations to continue seeking our input on access, privacy, and personal health information matters. There may be times when we are unable to advise on a specific situation if it appears that the matter could subsequently be brought to the OIPC for investigation or review, however, if that is the case, we can still offer information about the applicable legislation and the complaint or review processes.

OIPC Website

Our website, www.oipc.nl.ca, continues to be a useful tool for members of the public, public bodies and custodians. There are a number of valuable resources there, with updates and additions planned in the coming year.

Staffing

The Office has a total of 14 staff including: the Commissioner; Director of Special Projects (Temporary); Senior Access and Privacy Analyst; six Access and Privacy Analysts; Mediation, Communications and Policy Analyst; Intake Officer (Temporary); Business Manager; Executive Secretary, and an Administrative Assistant.



While all staff members work diligently to meet the challenges of increased workload demands, our work volume is quite high and will continue to be high for the foreseeable future. This situation is in part due to the fulfillment of our role to educate the public, and the demands of numerous consultations and inquiries.

Individuals and organizations are now more familiar with this Office and with the *ATIPPA* and *PHIA* and, as a result, are exercising their rights under the legislation more often. We are encouraged by this. I should also note that our Office has been challenged to cope with the demands placed on it due to the significant workload resulting from privacy breach investigations.

2014-2015 Statistics

Statistical breakdown for this reporting period can be found on our website www.oipc.nl.ca. Highlights are provided below.

Requests

Of the **789** Requests received by Public Bodies **54** were submitted to OIPC for review.

ATIPPA

Of the **86** active Requests for Review, **23** were resolved through informal resolution and **11** resulted in a Commissioner's Report. The remainder was either resolved by other means or carried over to the 2015-2016 fiscal year. Of the **11** complaints received under section 44, relating either to the fees being charged or to extensions of time by public bodies, **10** were investigated and concluded by this Office and the remaining file was carried over to the 2015-2016 year.

Of the **34** active privacy investigations, **22** were closed and **11** were carried over to the 2015-2016 year. Closed privacy investigations include those which may have been resolved through Informal Resolution or No Jurisdiction/Declined to Investigate.

190

NUMBER OF ***ATIPPA*** AND ***PHIA***
ACTIVE FILES RECEIVED IN **2014-15**

PHIA

This Office received **4** access/correction complaints and **5** privacy complaints under section **66** of *PHIA*. In addition, there were **2** access/correction complaints and **48** privacy complaints carried over from the previous year for a total of **59** active access/correction and privacy complaints for the 2014-2015 fiscal year.

Of the **6** access/correction complaints, **5** were closed, and **1** was carried over to the 2015-2016 fiscal year. Of the **53** privacy complaints received, **49** were closed and **4** were carried over to the 2015-2016 fiscal year.

990

NUMBER OF ***ATIPPA*** AND ***PHIA***
INQUIRIES RECEIVED IN **2014-15**

Privacy

ATIPPA

The OIPC will respond to all formal privacy breach complaints and will conduct an investigation when appropriate. It should be noted that the OIPC reserves the right to initiate an investigation into privacy breach matters when it appears to be in the public interest to do so, without a formal complaint from a complainant. The Office may also conduct a privacy investigation at the request of the head of a public body or his or her representative.

It should be emphasized that it is access issues, rather than privacy issues, which have constituted the bulk of our work in the past year. A lot of credit for the fact that privacy issues have not been as numerous as might have been expected, goes to the ATIPP Office and to the Office of the Chief Information Officer, for being proactive on privacy, responding quickly to gaps in policies and procedures when they are identified, and for cooperating fully with our Office. Privacy is all about prevention, and sometimes the preventive work goes unrecognized. I want to take this opportunity to recognize the good work that is being done here in Newfoundland and Labrador.

Part IV of the ATIPPA was proclaimed on January 16, 2008. Part IV contains provisions governing the collection, use and disclosure of personal information by public bodies in Newfoundland and Labrador. These are the rules that public bodies must follow in order to protect the privacy of all citizens.

In contrast to the access to information provisions of the *ATIPPA*, there is no requirement to issue a report resulting from a complaint about a breach of the privacy provisions. If a privacy complaint is not resolved informally, the Commissioner must decide whether to publish a report or to allow the file to be concluded through a letter of findings and recommendations from the investigating OIPC Analyst to the public body and complainant. To this end, the OIPC has developed some guidelines to help the Commissioner in this decision. No individual factor is to be determinative, as these considerations are advisory in nature only. Ultimately, the decision of how to conclude a privacy breach complaint is one which requires the consideration of all relevant factors at the discretion of the Commissioner, including some which may be relevant only to the particular case under consideration.

Factors to be Considered Include:

1 **Educative value for the public:** are there issues in the Privacy Complaint which are of broad public interest and should be discussed in a published Report in order to help educate the public about the applicable privacy considerations?

2 **Educative value for Public Bodies:** are there issues in the complaint which, if addressed in a Report, would be of value or of interest to other public bodies as they incorporate privacy considerations into their policies and procedures?

3 **Precedent:** are there issues in the Privacy Complaint which would give rise to the consideration of significant legal issues from a privacy standpoint such that there would be value in highlighting them in a Report?

4 **Recommendations:** are there one or more recommendations to the Public Body as a result of the Privacy Complaint?

5 **Significance:** is the Privacy Complaint a trivial matter or one where the allegation of a privacy breach is minor in nature, or one involving unique circumstances that would affect only a small number of people?

6 **Complainant Agreement:** has the Complainant agreed that:

- upon investigation, his or her complaint is unfounded and therefore accepts that no formal report or other action by the OIPC is required or expected; or
- upon investigation, the Public Body has agreed to take steps acceptable to the Complainant to resolve the complaint so that no formal report or other action by the OIPC is required or expected?

PHIA

PHIA is part of a new generation of privacy laws which are being developed in jurisdictions across Canada. Now, all of the personal health information held by private sector custodians, from dentists to pharmacists, to doctors in private practice, to ambulance services, and many more, is governed by *PHIA*. The other major effect of *PHIA* is that all of the personal health information held by public sector custodians (including Eastern Health, Western Health, Labrador Grenfell Health, and Central Health) falls under *PHIA* rather than *ATIPPA*.

In the time leading up to the proclamation of *PHIA*, this Office was involved in extensive discussions and committee work with the Department of Health and Community Services and many other stakeholders to ensure that all of the ingredients were in place to help custodians comply with *PHIA*. That work has continued since the proclamation of *PHIA*. We continue to be available to meet with the professional colleges, boards and associations representing the many registered health professionals in the Province in order to educate these organizations about the law which now applies to their members. Each time we issue a Report under *PHIA*, we send a copy by email to all of these boards and associations. We have had the opportunity to address issues of mutual concern cooperatively with organizations such as the Pharmacy Board and College of Physicians, and we continue to provide presentations about *PHIA* and the role of the OIPC at the request of boards and associations at Annual General Meetings and professional development sessions.

__PHIA__ was proclaimed into law on __April 1, 2011__. This was an important step in the evolution of personal health information privacy law within our Province.

Since *PHIA* proclamation, we have developed an excellent rapport with some of the largest custodians of personal health information, namely the four Regional Health Authorities, listed above. *PHIA* requires that they notify the Commissioner's Office in the event of a "material" or serious breach as defined in the *PHIA* regulations. Our experience has been that while these custodians have been notifying us of material breaches, they have also been informing us of less serious breaches on occasion, and also engaging our expertise to discuss policy development, breach response, and to consult with us on the decision of whether and how to notify individuals who have been affected by a breach. We believe this process is working well so far, and we look forward to continued cooperation with these custodians.

We are also engaged with the Regional Health Authorities in other ways. In addition to our regular interactions relating to breach notification, we also look for their cooperation in the event of a complaint which requires investigation. Usually in such cases, there has been a breach or alleged breach of *PHIA*, and an individual has filed a complaint with the OIPC asking that we investigate. Our experience to date is that the Regional Health Authorities have been cooperative and helpful during our investigations, and are fully engaged in trying to improve their policies and procedures in order to prevent future breaches and to meet the expectations set out by *PHIA*.

An important part of this cooperation has been seen in the successful prosecution of two offences under *PHIA* in which one employee of Western Health and another employee of Eastern Health were found, as a result of separate investigations, to have committed these breaches. The Western Health employee was fined $5000 in September 2014 while the Eastern Health employee received a $1000 fine in October 2014. Both individuals also lost their jobs. These were the first charges laid under either *ATIPPA* or *PHIA* and they are two of only a handful of prosecutions of this nature which have ever occurred in Canada. The investigations were carried out by the OIPC, the Commissioner laid the charge, and the Attorney General successfully prosecuted the cases through Crown Attorney Vikas Khaladkar. The Commissioner would like to thank officials of Western Health and Eastern Health for their full cooperation in these investigations.

Access Investigation Summaries

As indicated in our previous Annual Report, the majority of Requests for Review received at this Office continue to be resolved through informal resolution. Of the Requests completed within the period of this Annual Report, 31 were resolved through the informal resolution process. In these cases, we write the applicant and the public body, as well as any applicable third party, confirming that a resolution has been achieved and advising all parties that the file is closed or will be closed within a specified time period. Where informal resolution is successful, no Commissioner's Report is issued.

In the event that our attempt at an informal resolution is not successful, the file will be referred to a formal investigation. The results of this investigation, including a detailed description of our findings, are then set out in a Commissioner's Report. The Report will either contain recommendations to the public body to release records and/or to act in a manner consistent with the provisions of the *Act,* or will support the position and actions of the public body. All Commissioner's Reports are public and are available on our website at www.oipc.nl.ca.

The following are summaries of selected investigation files.

Report A-2014-009 – Newfoundland and Labrador English School District (formerly Nova Central School District)

The Duty to Assist – How far must a public body go to determine authorship of records?
The Commissioner's Authority to Report Evidence of an Offence – When should it be exercised?

The Applicant, a former employee, made an access request to Nova Central School District ("NCSD") for records containing references to himself. NCSD provided him with responsive records, and withheld some information claiming the exceptions to access in sections 20 (policy advice and recommendations), 21 (legal advice) and 30 (personal information). The Applicant requested that this Office review the severing of some records, the withholding of others and of other decisions made by NCSD. In particular, the Applicant was anxious to determine the identity of the writer of a page of handwritten notes, as he regarded the contents to be defamatory.

During the course of informal resolution NCSD made inquiries of a number of current staff, and concluded that the handwriting did not belong to any of them. There was some speculation that it might be the handwriting of a particular former staff person, now retired.

However, NCSD had no authority to require that retired former employees respond to questions such as this. The Commissioner determined that NCSD had gone as far as it could go to determine the authorship of the handwritten document, and therefore the search conducted was reasonable and complete. In addition, the Commissioner found that certain documents were properly withheld from the Applicant in accordance with section 21 (legal advice).

The Applicant also took the position that the Commissioner should invoke the provisions of subsection 56(4) of the *ATIPPA*, which provides that the Commissioner may disclose to the Attorney General information relating to the commission of an offence under this or another *Act*. The Commissioner held that subsection 56(4) is an extraordinary remedy, and if he were to exercise the discretion to disclose information to the Attorney General under that provision it would only be in the clearest, most conclusive and most exceptional of cases, in which evidence that an offence had been committed was placed before him. The Commissioner found that there was no evidence before him to support the Applicant's request.

Report A-2014-012 - Eastern Health

This report focuses on the issue of custody or control by examining when a public body has custody or control of a record for the purposes of the ATIPPA.

The Applicant requested from Eastern Health the financial statements of a Third Party, which is a transition house, for the years 2000-2011. Initially, Eastern Health was not prepared to release the records, having refused access based on section 27 of the *ATIPPA* (the third party business interests exception). However, after the Applicant made a Request for Review to this Office, Eastern Health reconsidered its claim of section 27 and decided to release the records it had for the years 2007 and 2008. Eastern Health acknowledged that it had records for the year 2005, however, since the Department of Health and Community Services was responsible for providing funding to the Third Party for that timeframe, it was Eastern Health's opinion that the records for the year 2005 were not in their custody or control for the purposes of the *ATIPPA*. The Applicant made a second request to Eastern Health for the financial records of the Third Party for the year ending March 31, 2013 which Eastern Health responded to by saying that it did not have the records for the year ending March 31, 2013. The Applicant questioned the complete lack of records for the years 2006 and 2009-2011, as well as the completeness of the records received for the years 2007 and 2008.

A record will only be subject to the *ATIPPA* if it is in the custody or under the control of a public body, it need not be both. Determining that a record is in the custody of or under the control of a public body does not necessarily mean that an applicant will be given access to it as a record could still be withheld under a mandatory or discretionary exception. The Commissioner reviewed other Commissioners' decisions as well as court decisions in other jurisdiction and concluded that the terms "custody" and "control", while not defined in the *ATIPPA*, have been given a broad and liberal interpretation in keeping with the intent of access to information legislation.

A non-exhaustive list of factors has been developed in other jurisdictions in assessing custody and control and it has been concluded that while physical possession of a record is the best evidence of custody, there must be something more than mere possession. Similarly, the Supreme Court of Canada reinforced the fact that there must be something more than physical control over a document to determine the issue of control and outlined a two-part test in *Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25*.

The Commissioner applied the list factors in assessing custody and control as well as the two-part test from the Supreme Court of Canada to the records in question and determined that Eastern Health had custody or control of the 2005, 2006, 2009-2011 records and records for the year ending March 31, 2013.

In relation to the 2005 records, the Commissioner relied on the fact that in addition to physical possession of the records, Eastern Health was responsible for the care, protection, and disposal of its copy of the 2005 records. In addition, it was the Commissioner's opinion that the records did relate to Eastern Health's mandate and function and that Eastern Health did have the right to deal with the records. The Commissioner concluded that any limitations placed on Eastern Health were in relation to Eastern Health's control of the records rather than its custody and therefore Eastern Health did have custody of the 2005 records for the purposes of the *ATIPPA*.

In relation to the 2007 and 2008 records, the Commissioner was satisfied that Eastern Health had conducted a reasonable search and that Eastern Health did not have any further records for the years 2007 and 2008 in its possession.

In relation to the 2006, 2009-2011 records and records for the year ending March 31, 2013, the Commissioner consulted the Provincial Transition Houses Operational Standards for the years 2006 and 2010 which outlined, among other things, the financial reporting requirements between transition houses and the public body responsible for funding. Eastern Health was responsible for providing funding to the Third Party from 2006 onward and in fact Eastern Health did request the financial statements of the Third Party thereby demonstrating that it felt it had a right to a copy of the records. The Commissioner concluded that Eastern Health should have been able to obtain the necessary records to discharge its duty to account for public funds and determined that Eastern Health had control over the records for the years 2006, 2009-2011 and for the year ending March 31, 2013 for the purposes of the *ATIPPA*.

The Commissioner recommended that Eastern Health review the 2005 records in accordance with the *ATIPPA* to determine if any exceptions to disclosure apply and once the review was completed to disclose the 2005 records to the Applicant. The Commissioner further recommended that Eastern Health obtain a copy of the financial statements of the Third Party for the years 2006-2011 and year ending March 31, 2013, review the records in accordance with the *ATIPPA* to determine if any exceptions to disclosure apply and then disclose the records to the Applicant.

Report A-2014-014 - Memorial University

This report examined section 22.1 (confidential evaluations) which was a new section added with the Bill 29 amendments and which had not been considered by the Office previously.

The Applicant applied to Memorial University ("Memorial") for access to records relating to his application for a senior position with a particular faculty at Memorial, including all reports and feedback regarding his application. Memorial released the responsive records to the Applicant in part with portions severed in accordance with section 20(1) (policy advice or recommendations), section 22.1 (confidential evaluations) and section 30 (disclosure harmful to personal privacy) of the *ATIPPA*. The Applicant was not satisfied and requested that this Office review the exceptions to disclosure claimed by Memorial.

Memorial claimed section 20(1) (policy advice or recommendations) as an exception to disclosure in three instances. The Applicant quoted from previous reports from this Office emphasizing that factual material cannot be withheld under section 20(1). The Commissioner concluded that the information severed fit within section 20(1) since

the content of the records dealt with employees' suggestions and recommendations in relation to the overall search for candidates for the senior position. The Commissioner also concluded that Memorial applied section 30 of the *ATIPPA* appropriately.

Although section 22.1 (confidential evaluations) had not been considered previously by this Office, other jurisdictions have similar provisions under their access to information and protection of privacy legislation which assisted in the analysis of this section. The Alberta OIPC had established a three-part test in relation to its confidential evaluations section which is similar to section 22.1 of the *ATIPPA*. The first part of the test is determining whether the information is personal information that is evaluative or opinion material. The second part of the test is that the personal information must have been compiled for a specific purpose and a number of possibilities are listed, however, subsection (a)-(e) of section 22.1 outline all the potential purposes under the *ATIPPA*. The last part of the test is that the personal information must have been provided explicitly or implicitly in confidence.

Part one of the test states that the personal information must be evaluative or opinion material, however, section 22.1 of the *ATIPPA* does not specify whose personal information must be included in the records for that section to apply. Based on interpretations of similar sections in other jurisdictions, the Commissioner concluded that the personal information is generally an applicant's personal information but also may include a third party's personal information. The Commissioner reviewed the records where Memorial claimed section 22.1 and determined that while the records contained the Applicant's personal information (opinions about the Applicant), the records also contained the personal information of the individual who supplied feedback. The Commissioner reviewed the meaning of evaluative or opinion material and determined that the records where Memorial claimed section 22.1 did contain personal information that was evaluative or opinion material, therefore part one of the test was met.

Part two of the test states that the personal information must have been compiled for a specific purpose and section 22.1 of the *ATIPPA* lists various purposes in subsection (a)-(e). In this situation the personal information was compiled for determining the suitability, eligibility or qualifications for employment (section 22.1(a)), therefore part two of the test was met.

Part three of the test requires that the personal information be provided explicitly or implicitly in confidence. The feedback sheet provided to individuals for their comments regarding candidates for the senior position advised that their submissions would be held in

confidence. Memorial also advised that feedback provided in this type of situation has always been treated as confidential and that faculty would have had an expectation of confidentiality, however, the feedback form did state that anonymity under the *ATIPPA* could not be guaranteed. The Commissioner concluded that based on the feedback sheet and Memorial's comments regarding expectations of confidentiality in an evaluative process that the personal information was provided in confidence and part three of the test was satisfied.

As section 22.1 of the *ATIPPA* is a discretionary exception to disclosure, Memorial provided a detailed submission regarding its exercise of discretion in relation to section 22.1. There are a number of relevant factors that a public body must weigh when considering whether or not to exercise its discretion and overall Memorial was of the view that more factors weighed in favor of withholding the information than releasing the information. The Commissioner concluded that Memorial had considered the objects and purposes of the *ATIPPA* in deciding whether to exercise its discretion in relation to the section 22.1 redactions and that Memorial did try and release as much information as possible.

The Commissioner found that Memorial had properly applied the exceptions to disclosure claimed under the *ATIPPA* and that Memorial had applied its discretion appropriately.

Report AH-2014-001- Eastern Health *(PHIA)*

Correction of Personal Information – When is it required?

The Complainant requested correction of personal health information in a clinical report about him written by an Eastern Health specialist. Specifically, there were statements attributed to him in the report, about his experience with pain relief medications, and especially about his use of marijuana for pain relief. The specialist had written that the Complainant had made those statements during a medical appointment. The Complainant claimed that he had never made such statements, and that in fact they were not true. Eastern Health refused to grant the request for correction, and the Complainant therefore filed a complaint with this Office. As this was the first occasion on which the Commissioner had been called upon to address the provisions of *PHIA* dealing with the correction of personal health information, the Commissioner wrote a fairly lengthy Report, in which he adopted the framework of analysis used by the Alberta Commissioner, in dealing with substantially similar legislative provisions.

Applying that analysis, the Commissioner found that the disputed portions of the clinical report consisted of "professional observation" within the meaning of section 62 of *PHIA*. Sections 62 and 63 of *PHIA* provide that a custodian of health information must, when presented with a request for correction, do one of two things. Either it may grant the request for correction (in which case the correct information must be placed in the record, without, however, wiping out the incorrect information) or, if it refuses to correct the information, it must annotate the record with the correction that was requested but not made.

There was not sufficient evidence, despite the Complainant's assertions, for the Commissioner to reach a conclusion about which of the conflicting statements to accept as accurate. The Commissioner therefore concluded that the custodian was not required to correct the information. However, the custodian was required to annotate the record with the correction that had been requested but not made.

It is important to be clear that, if the information consists solely of professional opinion or observation, that information would not be subject to correction or amendment. If a patient, or anyone else, could compel a doctor to change or correct any of his or her observations, then it would undermine or even make nonsense of the diagnosis. This has consequences not only for the utility of any treatment recommended or provided by the doctor, but also for the later assessment of possible errors or omissions in treatment, by hospitals or professional regulatory bodies.

Instead, *PHIA* has created a procedure that focuses on both the integrity and the transparency of the clinical record-keeping process. It focuses on integrity by insulating health care professionals from outside interference in formulating and recording their professional observations and diagnostic opinions. It simultaneously ensures transparency, by requiring that in either case, the record will always contain both the original content and the information about the requested correction.

If a request is for the correction of independently verifiable facts, then the correction should be made. If the information falls into the category of professional opinion or observation, then the request should be refused. In either case, however, both patients and health care professionals are assured that conflicting statements can be recorded in this process, so that future users of the record are made aware of the conflict.

Privacy Investigation Summaries

Report P-2014-001 - Newfoundland and Labrador English School District

The Complainant submitted a privacy complaint alleging that Eastern School District (now Newfoundland and Labrador English School District) had inappropriately collected and disclosed her personal information and had failed to adequately protect her personal information. The Complainant also expressed concerns about how her personal information was being protected and used by Eastern School District.

The facts of this case are somewhat complex, as the matter stems from the manner in which Eastern School District handled several harassment complaints that were filed with Eastern School District by the Complainant. Prior to Eastern School District investigating the remaining two harassment complaints filed by the Complainant, it decided to hire an outside agency to "assess the professional relationships" in the Complainant's workplace, and to place the Complainant's harassment complaints on hold pending the outcome of this assessment. The Complainant agreed to participate in a "mediation" process that had been proposed by Eastern School District, but was adamant that this process not take the place of the process to be followed under Eastern School District's written policies and guidelines for dealing with harassment complaints. From the beginning, the Consultant's role was not clear and therefore the purpose of the collection of the Complainant's personal information was vague and unclear. This led, in turn, to several other problems.

The Commissioner found that it is imperative that all parties in a situation such as this one be clear on what is required and expected. Otherwise, public bodies run the risk of breaching section 33(2)(a) (the purpose for which information may be collected), because if they themselves are not clear what they are asking for they cannot adequately explain to an individual the purpose for the collection. Further, by not being clear on what information they need, they run the risk of collecting more information than is necessary, contrary to section 32(c).

With respect to section 33 (how personal information is to be collected), the Commissioner found that Eastern School District did not adequately explain the purpose of the collection to the Complainant. By not having clear terms of engagement with respect to the Consultant, there were seemingly several different purposes for the collection of the Complainant's personal information. The Complainant believed it was for the purpose of mediating issues she was having with some of her co-workers. The official purpose, according to

Eastern School District, was to review professional relationships in the school and make recommendations with respect to improving these relationships. In addition to reviewing and commenting on the issues in the workplace, the Consultant appears to have been acting (at times) in the capacity of a psychologist, and used the Complainant's personal information for the purpose of making findings about her mental state (as related to the workplace issues). It is unclear whether she was retained by Eastern School District to do this, but it is clearly not how her role was explained to the Complainant, and thus the purpose of her collection of the Complainant's personal information was not adequately explained to the Complainant.

Lack of clarity with respect to the collection of personal information also leads to issues surrounding the proper use of personal information. If it is not clear why personal information was collected, then public bodies cannot be certain that the use of personal information is in keeping with the *ATIPPA*. If a public body cannot show that the use was consistent with a stated purpose, or a purpose directly related thereto, it will be found to have not complied with sections 38 (use of personal information) and 40 (use for consistent purpose).

As well, the lack of clarity surrounding the purpose of the process and the collection of the Complainant's personal information also made it difficult to determine whether every reasonable step was taken to ensure accuracy and completeness of the Complainant's personal information (in accordance with section 34) in this case, both at the outset and as events unfolded. An opportunity to clarify this purpose may have presented itself when the Complainant first expressed her concerns about how the process was unfolding, or when the Consultant spoke with Eastern School District about potential interviewees. These opportunities were not acted upon by Eastern School District. As a result, the Commissioner could not say with any confidence that Eastern School District was in compliance with section 34.

In addition to breaching the sections mentioned above, the Commissioner found that the Eastern School District also breached section 39 of the *ATIPPA* in several specific incidents as outlined more fully in the report when it improperly disclosed the Complainant's personal information.

The Commissioner recommended that Eastern School District should ensure that it is clear in all communications to individuals about what information they will be collecting and the purpose for collecting it. Further, as independent contractors are considered employees of public bodies for the purposes of the *ATIPPA*, Eastern School District should ensure that

clear terms of engagement are drafted when outside services are engaged, so that there can be no misunderstanding as to the role of the contractor (especially when the contractor has multiple qualifications and can be put to use in different ways). These terms should state exactly what that person has been hired to do, and the precise purpose for the collection of any personal information. This includes informing the individual about the use to which the information will be put. The terms of engagement should also be shared with all parties to the process. Due to the uniqueness of each situation that can arise, a general policy may not be the best tool to clarify the engagement of independent contractors, except to the extent that a policy can set out expectations for contractors with respect to their responsibilities and obligations under *ATIPPA* with respect to the collection, use, disclosure and protection of personal information (keeping in mind that for the purpose of the *ATIPPA*, independent contractors are considered public body employees, as per section 2(e)).

With respect to section 34 (accuracy of personal information), even where an independent contractor has been hired, the public body remains responsible for making all reasonable efforts to ensure the accuracy and completeness of the personal information it collects where that information will be used to make a decision about a person. Some decisions have long lasting and far reaching consequences for the people involved. If public bodies become aware of any concerns with respect to the accuracy and completeness of information they are collecting, these concerns should be addressed appropriately.

Lastly, the Commissioner stated that public bodies must be conscious of the need to disclose only the personal information that is necessary, and that in some circumstances normal disclosure practices will need to be altered (in this case, the strained relationship between the Complainant and the Principal at her school called for more limited disclosure of information that might otherwise be the case) so that only the information necessary to fulfill employment duties is disclosed.

Court Proceedings

The following are summaries of several of the proceedings in the Supreme Court of Newfoundland and Labrador Court of Appeal and Trial Division in which this Office has been involved during the period of this Annual Report.

2012 01G 6594 – Office of the Information and Privacy Commissioner v. Department of Environment and Conservation, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding is an appeal by the Commissioner under section 60(1.1) of the *ATIPPA*, which allows the Commissioner to appeal a decision of a public body refusing to disclose a record on the basis of solicitor and client privilege under section 21.

It was necessary to proceed with this matter by way of an appeal to the Trial Division because amendments to the *ATIPPA* in Bill 29 removed the Commissioner's power to do a review of a public body's decision to deny access on the basis of the solicitor and client exception to disclosure. The only remedy now for an access to information applicant who has been refused access on the basis of a claim of solicitor and client privilege is for the applicant to appeal the decision of the public body directly to the Trial Division under section 60(1.1) or request the Commissioner to launch such an appeal.

In this case, after being denied access to the requested records on the basis of solicitor and client privilege under section 21, the Applicant requested this Office to file an appeal of the decision of the Department of Environment and Conservation to refuse access.

This Office filed a Notice of Appeal on December 21, 2012 and the hearing on this matter took place on July 17, 2014. The decision was given by Madam Justice Valerie L. Marshall on July 25, 2014, which is reported as *Information and Privacy Commissioner (Newfoundland and Labrador) v. Newfoundland and Labrador (Environment and Conservation),* 2014 CanLII 40089 (NL SCTD).

In her decision Madam Justice Marshall commented on the procedure that was followed and on the burden of proof:

> *[6] In the Ring decision, the sealed records were reviewed by the Chief Justice. Similarly, in this case, the sealed records were reviewed only by me. As indicated in the brief filed by the Respondent, the records consist of a single memo which was prepared by solicitors of the Department of Justice for the Deputy Minister of Environment and Conservation.*

[7] The Respondent agrees with the Appellant's position that section 64(1) of the Act clearly places a statutory burden on the Respondent to establish that the Appellant has no right of access to the document.

Madam Justice Marshall applied the well-established three-part test from *Canada v. Solosky*, *1*979 CanLII 9 (SCC) and determined that the record was protected by solicitor and client privilege.

Madam Justice Marshall then dealt with the issue of the public body's exercise of discretion and made the following comments:

[20] Having determined that the record is solicitor-client privileged, the Appellant's position is that the Court must then evaluate the exercise of discretion by the Respondent in refusing to disclose the record. The exercise of discretion arises from the use of the word "may" in section 21 of the Act.

. . .

[26] Based upon the above-cited excerpt from Pomerleau, and the ensuing reference to the Supreme Court of Canada decision in Dagg v. Canada (Minister of Finance), 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, I agree with the Appellant's position that the Court must "consider whether the discretion appears to have been exercised in good faith and for some reason rationally connected to the purpose for which the discretion was granted" (from Dagg, as quoted in Pomerleau at para. 4).

[27] On this point, however, I also agree with Chief Justice Orsborn's comments at paragraph 49 of Ring where he indicated that the onus of proof is on the person asserting the improper exercise of discretion. In this case, as in Ring, there is simply no evidence that the Respondent improperly exercised its discretion. The document is clearly a solicitor-client privileged document, and in the absence of the existence of a waiver of privilege, or exceptional circumstances, there is no reason to conclude that there has been an improper exercise of discretion. I find that the discretion to refuse disclosure of the record in this particular case was exercised lawfully.

Madam Justice Marshall concluded her decision by stating:

> *[40] Based on the foregoing, the appeal is dismissed. Considering the fact that the Commissioner had no way of knowing the contents of the records before determining whether court action was appropriate, there shall be no order for costs.*

2013 01G 3476 – Corporate Express Canada Inc., trading as Staples Advantage Canada v. Memorial University, OIPC as Intervenor, Dicks and Company Limited as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding was an appeal by a third party under section 60(1) of the *ATIPPA*, which allows a third party who has been notified under section 28 of the *ATIPPA* to appeal a decision of a public body to follow a Commissioner's recommendation to release information to an applicant.

This matter began with an access request to Memorial by Dicks and Company Limited ("Dicks") seeking access to records relating to a tender for the provision of office supplies to Memorial. After receiving the access request, Memorial, pursuant to section 28 of the *ATIPPA*, notified Corporate Express Canada Inc. ("Corporate Express") that an access request had been made for access to a record containing information the disclosure of which may affect the business interests of Corporate Express. Corporate Express responded to this notification by correspondence setting out the reasons why it objected to the release of the requested information. Subsequently, Memorial advised Dicks that it was denying access to the requested information on the basis of section 27 (disclosure harmful to the business interests of a third party).

Dicks filed a Request for Review with the Commissioner resulting in the release on June 4, 2013 of Report A-2013-009 in which the Commissioner recommended that Memorial release the information previously withheld under section 27. On June 17, 2013, Memorial advised the Commissioner that it accepted the Commissioner's recommendation to disclose the information.

Pursuant to section 60(1) of the *ATIPPA*, Corporate Express, as a third party, filed an appeal in relation to Memorial's decision to follow the recommendation in Report A-2013-009. Pursuant to section 61(2), the Commissioner became an Intervenor in the appeal. Dicks was granted Intervenor status by the court.

The hearing in this matter was held on June 17-18, 2014 and on September 19, 2014 Mr. Justice Raymond P. Whalen delivered his decision, which is reported as *Corporate Express Canada, Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland,* Gary Kachanoski, 2014 CanLII 55800 (NL SCTD). In his decision Mr. Justice Whalen stated the issue to be:

> *[2] The primary issue engaged is a determination of whether MUN, as a public body, should refuse to disclose certain records pertaining to its award of tender for office supplies as it would be harmful to the business interests of the Applicant.*

During his analysis of the issue, Mr. Justice Whalen commented on the purpose of the *ATIPPA*:

> *[21] This said, the over-arching purpose of the Act is set out in s. 3. It is necessary to recognize in any analysis that the purpose of the Act is to make public bodies more accountable by giving the public a right of access to records while "specifying limited exceptions to the right of access" (s. 3 (1) (c)). Any party carrying on business with a public body must be aware of this playing field. The public is to be given access to records of the public body with limited exceptions. While not restricted to the expenditures of public funds, the principle of being accountable to the public applies, in my view, with even greater focus when involving the use of the public's money.*

Mr. Justice Whalen set out the position of Corporate Express, and the burden of proof imposed on it by the *ATIPPA*:

> *[19] It is the Applicant's argument that disclosure of the Requested Information could be harmful to its business interests. The Applicant must provide "sufficiently clear, convincing and cogent evidence" to satisfy this proposition on a balance of probabilities.*

In making his finding that the requested information was not supplied in confidence within the meaning of section 27(1)(b), Mr. Justice Whalen stated:

> *[34] If one were to accept the argument that information is confidential merely because when it was supplied to the public body it was endorsed as such, then all third parties dealing with a public body could routinely frustrate the intent of the Act by adding such an endorsement to the information supplied.*

. . .

[38] It is my view that no circumstances exist that suggest the information was compiled or communicated as confidential. The information was compiled and supplied in compliance with the requirements of the tender proposal which were known to the Applicant and consistent with the Applicant's stated reporting capacity. The Applicant set out to win the contract outlining its reporting capabilities as available to the public body in several formats. [. .]. The content was information of actual items purchased. Neither the content, purpose, nor circumstance in which the information was compiled or communicated would support the argument that the information was confidential in nature.

Mr. Justice Whalen discussed whether the disclosure of the requested information would harm the competitive position of Corporate Express in accordance with the exception set out in section 27(1)(c)(i) or would result in significant loss to Corporate Express in accordance with section 27(1)(c)(iii). As part of his discussion, Mr. Justice Whalen stated:

[46] The burden of proof of probable harm is on the party resisting disclosure. To satisfy this evidentiary requirement, there must be convincing evidence that release of the Usage Reports will cause probable harm. The evidence of the Applicant is vague and speculative and insufficient in my view to establish on a balance of probabilities, that reasonable expectation of probable harm to the competitive position of the Applicant or significant financial loss would result from the release of the Usage Report, resulting therefore in damage to business interests of the Applicant.

. . .

[49] It must first be recognized that the fundamental purpose of the Act is to make public bodies accountable, that a person who makes a request for a record has a right of access and the burden is on the party claiming protection under one of the exemptions to satisfy the Court why the information should not be disclosed.

The findings of Mr. Justice Whalen included the following:

[51] When consideration is given to the evidentiary standard set out in the jurisprudence, I find the Applicant's evidence not sufficiently detailed or convincing to substantiate either that its competitive position will be harmed

> *or that the release of Requested Information will cause It significant financial loss. The Applicant's evidence falls more into the category of mere possibility and speculation. The Applicant clearly wishes to protect the turf that it has enjoyed for 30 years and it continues to enjoy the benefits of having the contract to provide office supplies to MUN.*

In dismissing the appeal and directing the Respondent, Memorial, to provide the requested information to the Second Intervenor, Dicks and Company, Mr. Justice Whalen relied on the following conclusion:

> *[52] In the context of procurement and use of public funds, the disclosure of the Usage Reports in question is in step with the fundamental purpose of the Act to hold the public body accountable and the Applicant has failed to satisfy the Court that it is protected under any of the mandatory exemptions contained within the legislation.*

Corporate Express has appealed the decision of Mr. Justice Whalen to the Court of Appeal (2014 01H No. 0085 – Supreme Court of Newfoundland and Labrador, Court of Appeal). The hearing for that appeal has been set for April 6, 2015.

2013 04G 0007 – Peter McBreairty v. College of the North Atlantic; OIPC as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding was reported on in last year's Annual Report. It involves an appeal by an access to information applicant under section 60(1) of the *ATIPPA*, which allows an applicant to appeal a decision of a public body refusing to follow the recommendations in a Commissioner's Report.

This matter began with an access request to the College of the North Atlantic ("the College"). The College denied access to some of the information requested by the Applicant and the Applicant filed a Request for Review with the Commissioner resulting in Report A-2012-011 in which the Commissioner recommended release of some of the information to which the College had denied access.

The College declined to follow the Commissioner's recommendation and pursuant to section 60(1) of the *ATIPPA*, the Applicant filed an appeal in relation to the College's decision not to follow the recommendations. The Commissioner became an Intervenor in the appeal proceeding.

The hearing for the appeal was held on May 26-27, 2014 and September 11, 2014 in the Supreme Court of Newfoundland and Labrador, Trial Division in Corner Brook. A decision from the court is pending.

2013 01H 0084 - Geophysical Services Incorporated v. Ed Martin, Supreme Court of Newfoundland and Labrador, Court of Appeal

This proceeding involves an application for leave to appeal the Trial Division decision given by Mr. Justice Robert Hall on November 6, 2013 and reported as *Geophysical Services Incorporated v. Martin*, 2013 CanLII 71082.

The matter arose as a result of an access request by Geophysical Services Incorporated (GSI) to Nalcor (a public body of which Ed Martin is president). Nalcor refused access to certain requested information and GSI appealed that refusal to the Supreme Court of Newfoundland and Labrador, Trial Division pursuant to section 43(3) and section 60(2) of the *ATIPPA*.

The *ATIPPA* appeal was heard by Mr. Justice Robert Hall who decided the appeal should be stayed on the basis that it is premature and should not be heard until a companion action has been dealt with.

On November 18, 2013, GSI filed a Notice of Application for Leave to Appeal seeking leave to appeal the decision of Mr. Justice Hall in the Court of Appeal.

This Office has applied to intervene in the proceeding in the Court of Appeal and that application is scheduled to be heard on April 21, 2015.

2014 01G 2012 – Office of the Information and Privacy Commissioner v. Eastern Regional Integrated Health Authority, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding was an appeal by the Commissioner under section 60(1.1) of the *ATIPPA*, which allows the Commissioner to appeal a decision of a public body refusing to disclose a record on the basis of solicitor and client privilege under section 21.

It was necessary to proceed with this matter by way of an appeal to the Trial Division because amendments to the *ATIPPA* in Bill 29 removed the Commissioner's power to review a public body's decision to deny access on the basis of the solicitor and client exception to disclosure. The only remedy now for an access to information applicant who has been refused access on the basis of a claim of solicitor and client privilege is for the applicant to appeal the decision of the public body directly to the Trial Division under section 60(1.1) or request the Commissioner to launch such an appeal.

In this case, after being denied access to the requested records on the basis of solicitor and client privilege under section 21, the Applicant requested this Office to file an appeal of the decision of the Eastern Health to refuse access.

This Office filed a Notice of Appeal on May 7, 2014. No date has been set for a hearing in this matter.

2014 01G 0775 – Scarlet Hann v. Department of Health and Community Services; OIPC as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding was reported on in last year's Annual Report and involves an appeal by an access to information applicant under section 60(1) of the *ATIPPA*, which allows an applicant to appeal a decision of a public body not to follow a Commissioner's recommendation to release information to the applicant.

This matter began with an access request to the Department of Health and Community Services by an applicant seeking records relating to a certain employment position within a government-funded organization, and decisions made in relation to that position. The Department denied access to all responsive records based on the exceptions set out in section 18 (cabinet confidences) and section 20 (policy advice or recommendations). The Applicant filed a Request for Review resulting in the release on January 14, 2014 of Report A-2014-001 in which the Commissioner recommended the release of the information not excepted from disclosure by section 18 or section 20.

The Department declined to follow the Commissioner's recommendation and, pursuant to section 60(1) of the *ATIPPA*, the Applicant filed an appeal in relation to the Department's decision not to follow the Commissioner's recommendation. Pursuant to section 61(2), the Commissioner became an Intervenor in the appeal.

A hearing date was set for September 15, 2014 but was rescheduled a number of times with the hearing now scheduled for September 17, 2015.

2014 01G 8068 - Susan Shiner v. Eastern Health, OIPC as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

This proceeding involves an appeal by an access to information applicant under section 60(1) of the *ATIPPA*, which allows an applicant to appeal a decision of a public body made in relation to a Commissioner's recommendation.

The matter began with an access request to Eastern Health for the annual financial statements of a third party organization for a specified number of years. Eastern Health released the financial statements for some of the specified years but claimed it did not have custody or control of the financial statements for the other years.

The Applicant filed a Request for Review resulting in Report A-2014-012 in which the Commissioner determined that while Eastern Health did not have possession of the financial statements for some of the years, it did have control over those financial statements. The Commissioner recommended that Eastern Health obtain those financial statements and release the records with any excepted information severed.

The Applicant filed a Notice of Appeal in the Supreme Court of Newfoundland and Labrador, Trial Division. The Applicant attached to the Notice of Appeal correspondence from Eastern Heath indicating that Eastern Health agreed to comply with the Commissioner's recommendation and contacted the third party organization requesting copies of the financial statements but was informed by that organization that it would not be providing Eastern Health with the requested financial statements.

The Applicant, in the Notice of Appeal, requested that Eastern Health "take stronger action and employ new measures to obtain copies of the annual financial statements".

The Commissioner has become an Intervenor in the proceeding pursuant to section 61(2) of the *ATIPPA*.

No further action has been taken in this matter since the filing of the Notice of Appeal.

2014 01G 6373 - Edward Cole v. Newfoundland and Labrador English School District, OIPC as Intervenor and 2014 01G 6374 - Edward Cole v. Newfoundland and Labrador English School District, OIPC as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division

These two proceedings arose out of two separate access requests made by Edward Cole to the Nova Central School District (which now is part of the amalgamated Newfoundland and Labrador English School District). The Applicant was not satisfied with the response of the School District to his access requests and filed Requests for Review with our Office in relation to each of the requests.

These Requests for Review resulted in two Commissioner's Reports: Report A-2014-009 and Report A-2014-010, both released on August 11, 2014. The conclusion in each Report was that the School District had responded appropriately to the access request under consideration and the Commissioner did not make a recommendation in either Report.

On September 2, 2014, the Applicant, Edward Cole, filed notices of appeal in relation to each of the matters. Pursuant to section 61(2) of the *ATIPPA*, on September 15, 2014 the Commissioner filed a Notice of Intervention on each of the appeals. The two appeals were subsequently consolidated and the hearing for the matter will be held on May 26, 2015.

2014 01H 0020 – Office of the Information and Privacy Commissioner v. Memorial University, Supreme Court of Newfoundland and Labrador, Court of Appeal

This proceeding involves an appeal of a trial decision of Madam Justice Gillian Butler which was reported on in last year's Annual Report (2012 01G 4352 – *Office of the Information and Privacy Commissioner v. Memorial University*, Supreme Court of Newfoundland and Labrador, Trial Division).

This matter has its origins in an access request to Memorial by an Applicant seeking records pertaining to an observational study of MS patients. Memorial denied access to all of the records in reliance on section 5(1)(h) which exempts from the *ATIPPA* a record containing "research information of an employee of a post-secondary educational institution".

The Applicant filed a Request for Review resulting in Report A-2012-009 in which the Commissioner recommended release of some of the information which Memorial had claimed was exempted by section 5(1)(h). Memorial declined to follow the Commissioner's recommendation and expressed the view that the Commissioner should not have sought access to the records nor completed a report because the responsive records were prima facie exempted research information and by doing so the Commissioner exceeded his jurisdiction.

Pursuant to section 61(1) of the *ATIPPA*, the Commissioner filed an appeal in the Trial Division in relation to Memorial's decision not to follow his recommendations.

In her decision given on March 24, 2014 and reported at *Ring v. Memorial University of Newfoundland*, 2014 CanLII 12849 (NL SCTD), Justice Butler set out her conclusion as follows:

> *[64] The Commissioner has no jurisdiction over section 5 records. He cannot compel their production for review to verify a claim under section 5. He cannot review them and cannot make a recommendation to a public body on their release. Based on the current wording of the ATIPPA, when a claim to section 5 records is made, the Commissioner's only recourse is to request that this court conduct a judicial review of the records and the public body's claim that the records are outside the ambit of the Act. This judicial review is distinct from the appeal provisions of Part III of the ATIPPA.*

The Notice of Appeal was filed in the Court of Appeal on April 22, 2014 and a hearing date has been set for April 13, 2015.

2015 01G 0823 - Corporate Express Canada Inc., trading as Staples Advantage Canada v. Memorial University, OIPC as Intervenor, Supreme Court of Newfoundland and Labrador, Trial Division.

This proceeding is an appeal by Corporate Express, pursuant to section 60(1) of the *ATIPPA*, of a decision of Memorial University to follow the recommendation of the Commissioner that information be released to an access to information applicant.

This matter began with an access request to Memorial for copies of all submitted bids in response to tender for the provision of office supplies to Memorial. Memorial subsequently advised Corporate Express that the requested information would be released unless Corporate Express filed a Request for Review with this Office in accordance with section 43 of the *ATIPPA*.

On August 21, 2014, Corporate Express filed a Request for Review with this Office, which resulted in this Office issuing Report A-2014-013. In that Report, the Commissioner recommended release of the requested information. Memorial accepted the recommendation of the Commissioner and advised Corporate Express that it intended to release the requested information to the access to information applicant.

On February 11, 2015, Corporate Express filed an appeal of the decision of Memorial to follow the Commissioner's recommendation to release the information. The Commissioner filed a Notice of Intervention on February 18, 2015.

The parties appeared in the Trial Division on March 4, 2015 and agreed to adjourn the matter pending the outcome of an appeal in the Court of Appeal dealing with the same issue.

Follow-Up

From time to time, the OIPC designates certain files for follow-up, particularly those which may require a longer period of time before recommendations can be implemented.

In May 2013, this Office received a privacy complaint from an employee regarding the video camera surveillance system at the St. John's City Lockup. The Department of Justice responded to this complaint by noting that one of the primary responsibilities of the Adult

Corrections Branch is to maintain safe and secure correctional facilities for inmates, staff and members of the public. They noted that the Lockup operates in an environment requiring enhanced security measures as most inmates detained there are fresh arrests and are often under the influence, have not undergone any security/classification assessment and some express suicidal ideations.

The Department also noted that signage is in place to notify people that they are being recorded. In an effort to balance privacy with security the Department has limited access to the recordings to two senior employees, and the retention period of the recordings is limited to 30 days.

In a letter dated November 27, 2013, the OIPC responded to the complaint. The position of this Office was that, given the nature of the workplace and the measures that have been taken to minimize the intrusion on the privacy of staff, the use of video camera surveillance did not contravene the *ATIPPA*, and that section 32 in particular allows for the collection of personal information that "relates directly to and is necessary for an operating program or activity of the public body".

This Office stated that there was a rational basis for these security measures, and they were directly related to and necessary for the safe operation of the Lockup in accordance with section 32 of the *ATIPPA*. However, we did recommend the Department adopt comprehensive policies and procedures (to be reviewed and updated as necessary) to direct its practices in relation to the surveillance system.

We advised the Department that these policies and procedures should be in writing and include the following:

- the rationale and purpose of the system;
- provide system guidelines that include: the location and field of vision of equipment, list of authorized personnel to operate the system, when surveillance will be in effect, and whether and when recordings will be made;
- develop policies and procedures specific to providing notice of use of surveillance, providing access, use, disclosure, security, retention and destruction of records;
- outline responsibilities of all service providers (employees and contractors) to review and comply with policy and statute in performing their duties and functions related to the operation of the video surveillance system; and
- clarify consequences of breach of contract or policy.

Unfortunately, the Department has still not implemented these policies and procedures. Upgrading of the surveillance system has been the focus of the Department since this Office's recommendations and they have only recently received the required approvals and financial support to implement this upgrade.

We are advised by the Department that the development of policies and procedures will now begin as the upgrades are now approved. It is the intention of the Department to discuss a draft of these policies with this Office before finalizing them. We look forward to assisting the Department as they try to balance privacy concerns with operational requirements and we will report on the Department's progress in this regard in a future Annual Report.

Conclusion

2014-2015 has been interesting, demanding and somewhat turbulant but also a gratifying and productive period. Our ability and developing level of expertise allowed the Office to maintain a very high standard in resolving our access and privacy files under both *ATIPPA* and *PHIA*. Additional effort was required by our staff to maintain this standard as our Office continued throughout this reporting period to be engaged with the *ATIPPA* review process. I am pleased and proud to express my thanks to the OIPC staff for their hard work, dedication and very positive attitude.

I would be remiss if I did not mention the very positive cooperative and collaborative relationships with the Office of Public Engagement, which houses the ATIPP Office and is responsible for the administration of *ATIPPA, 2015*. To Minister Steve Kent and Deputy Minister Judith Hearn and the entire Office of Public Engagement staff, a big thank you for your efforts towards the development and proclamation of *ATIPPA, 2015*, as well as the ongoing consultation and communication with the OIPC, to ensure that the best piece of Access and Privacy legislation in Canada is properly and competently administered. The citizens of the Province are the beneficiaries of your dedication and hard work.

I look forward to the next reporting period with optimism and excitement as we, at the OIPC, start the next journey in helping to operationalize *ATIPPA, 2015*. There will be challenges along the way as we interpret some of the new sections of the *Act*, requiring significant research that will allow the Office to formulate our position and render strong, consistent and logical decisions. We also look forward to actively participating in and making a significant contribution to the first mandatory legislative review of *PHIA*.

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