Special Report SR-2023-001 to the House of Assembly

Reduced Government Consultation with the Office of the Information and Privacy Commissioner under *ATIPPA, 2015* section 112

November 14, 2023

Introduction

Section 106 of the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*) provides the Commissioner with the authority to make a special report to the House of Assembly, through the Speaker, regarding:

- the resources of the Office of the Information and Privacy Commissioner (OIPC);
- another matter affecting the operation of this *Act*; or
- a matter within the scope of the powers and duties of the commissioner under this *Act*.

The purpose of this Special Report is to advise Members of the House of Assembly that the government has changed the way that it consults OIPC pursuant to section 112(1) of *ATIPPA, 2015*, thus changing the extent to which the Commissioner is able to discharge his obligations under sections 112(2) and (3). Members should be aware that bills introduced have not had the same level of consultation as had previously been the norm. Moreover, Members should be aware that it is this Office's view that the nature of the government's change in consultation practices:

1) does not adequately meet the obligations of Ministers under section 112(1);
2) prevents the Commissioner from meeting his obligations under section 112(2); and
3) inhibits the Commissioner's ability to exercise his authorities under section 112(3).

Through this Special Report, OIPC finds that the nature of consultation under section 112 has been fundamentally diminished and therefore the Commissioner recommends that Members undertake their own careful and in-depth analysis, to the best of their ability, of the access and privacy implications of bills. Members are also encouraged to contact OIPC to ask questions or seek our views on access or privacy matters on bills that come before them.

Background

Section 112 of *ATIPPA, 2015* reads as follows:

> *112. (1) A minister shall consult with the commissioner on a proposed Bill that could have implications for access to information or protection of privacy, as soon as possible before, and not later than, the date on which notice to introduce the Bill in the House of Assembly is given.*

> *(2) The commissioner shall advise the minister as to whether the proposed Bill has implications for access to information or protection of privacy.*
>
> *(3) The commissioner may comment publicly on a draft Bill any time after that draft Bill has been made public.*

This provision of *ATIPPA, 2015* was included in the draft bill prepared by the 2014 Statutory Review Committee of *ATIPPA* in response to the absence of consultation of the Commissioner on the infamous Bill 29 amendments. The Commissioner told the review committee:

> Unfortunately, the OIPC was precluded from any participation in that review except for its initial submission and this is in spite of numerous attempts by our office to become involved, to be engaged because it's our view that we have a unique perspective and experience.

The Committee noted that "It is more effective to comment before legislation is adopted than after provisions are enacted into law." (Report of the 2014 Statutory Review Committee, p. 234).

From the time that *ATIPPA, 2015* came into force until March of this year, the practice of government departments was to provide OIPC with draft bills about a week prior to their introduction in the House. In some instances, OIPC would be consulted earlier and more often if the department in question felt that this was necessary. In some other instances, the consultation would be late – for a variety of reasons. However, in all cases, draft bills were provided for the purposes of consultation before their circulation at second reading[1] and we would respond in writing. MHAs have thus been able to proceed with their debate under the understanding that this consultation has taken place, whether or not the department has accepted any recommendations that we have offered or responded to our concerns. Members would also have been aware that the Commissioner had authority under section 112(3) to

[1] It should be noted that section 112 states that the minister shall consult with the Commissioner "as soon as possible before, and not later than, the date on which notice is given". The practice for many years has been to consult prior to the public distribution of the bill at second reading. It has been very common for notice, and even first reading, to be given on bills with no consultation. It is often the case that legislative drafting is often still ongoing until very shortly before a bill's distribution in the House for second reading. While OIPC has often advocated for consultation to be as early as possible, we have never taken issue with this apparent divergence in practice from the wording of the section.

speak out publicly if there were major outstanding concerns. They could thus conclude that anything critical had been addressed if such commentary did not take place.

The clear purpose of this section of the *Act* was for this Office to undertake a review that could inform the statute, either during its development or while being debated in the legislature, or both. In the years since *ATIPPA, 2015* came into force, until very recently, we provided our feedback on draft bills to departmental officials and our Annual Reports each year provide summaries of our comments on these bills. This provision of feedback on draft bills has occurred with only two exceptions, in the fall 2022 and spring 2023 sittings of this legislature (Bills 20[2] and 22[3] respectively).

It is relevant to observe that the process provided for by section 112 of *ATIPPA, 2015*, though a considerable improvement over the process provided for by the statute which it replaced, is a substantially less robust process for input by the Information and Privacy Commissioner than found in a number of other Canadian jurisdictions. In those jurisdictions, bills are considered carefully by standing legislative committees which invite written and oral submissions from various expert witnesses, including Information and Privacy Commissioners when there are matters relevant to access and privacy. In this jurisdiction, the committee stage of the legislative process generally, with the exception of budget legislation, involves the legislature resolving itself into the Committee of the Whole and proceeding with a clause-by-clause debate and voting without an opportunity for submissions from anyone other than Members. A review of recent legislative sessions reveals that bills generally are debated and voted at second reading and committee stage on the same day or, less often, the next day. Because the norm is that bills are often only in the public domain for a matter of hours before they are voted on at committee stage, the window of opportunity for meaningful intervention

[2] Our Office was not provided with a draft of Bill 20 (*Provincial Health Authority Act*) but we saw significant privacy issues once it was introduced. Therefore there was a need to comment publicly on this Bill. The Minister acknowledged that not providing our Office with the draft legislation for review had been a "critical oversight".

[3] Our Office was thoroughly and properly consulted during the development of Bill 22 (*Management of Information (Amendment) Act*). Even so, we felt compelled to speak publicly because the subject matter (duty to document) is of such exceptional importance to a core component of our mandate, namely access to information.

during the legislative process is quite limited. For this reason, the process under 112(1) and (2) for consultation prior to a bill's introduction is a critical one.

Change in Government Consultation

In March 2023, the Commissioner received a letter from the Minister of Justice and Public Safety indicating that drafts would no longer be provided to OIPC for review. This letter is attached as Annex A. Our response to the Minister's letter is attached as Annex B.

In short, the Minister indicated that draft bills would no longer be provided to the Commissioner but instead that consultation could take the form of anything ranging from a phone call to an email to sharing segments of a bill. The rationale that he cited was concern that sharing of draft bills would be a breach of cabinet confidence.

To summarize our reply, we noted that the modern approach to statutory interpretation recognized by the Supreme Court of Canada is that a statute must be read in its entirety and each clause must be understood within the whole scheme of the *Act*. It is not possible for us to understand the operation of a certain specific clause identified by a department unless we can understand how it interacts with the *Act* as a whole. Moreover, it has been our experience that we occasionally identify matters with implications for access and privacy that departments do not. It is not the case that the sharing of draft bills with OIPC is a breach of cabinet confidence but rather a legitimate *abrogation* of cabinet confidence which is provided for by section 112. While sharing a whole draft bill does bring the Commissioner into Cabinet's confidence, sharing part of a bill or the policy intent of a bill does so as well. The abrogation is clear: the Commissioner is bound by section 112(3) to maintain the confidence until such time as the bill is publicly circulated. Please see the attached letters for more detailed analysis on both sides of this matter.

Since March 2023, we have been consulted on a number of bills under the government's new approach to consultation under section 112. In the spring sitting, we were consulted on Bill 31 (*Patient Safety Act*) and Bill 33 (*Hydro Corporation Act*). In the fall sitting so far we have been consulted on Bill 50 (*Change of Name Act*), Bill 43 (*Schools Act, 1997 (Amdt) No. 2*), Bill

54 (*Towns and Local Service Districts Act*) and one bill on which notice has not yet been given. In these cases, we were in almost all instances asked for a meeting on very short notice and given a brief presentation or a description of the intent of the Bill. There were some examples where consultation was in the form of a simple email. In some instances there were fragments of statutory language shared, while in other instances the Bill was merely described.

Most of these Bills have not seemed, once introduced, to have significant adverse effects from an access or privacy perspective and hence we have not spoken out about them per our authority under section 112(3). However, Bill 54, on which we were minimally consulted, and Bill 56, on which we were not consulted, do have significant implications and illustrate the deficiencies in the government's changed approach.

Bill 54 – *Towns and Local Service Districts Act*

Bill 54, which received second reading on November 1, 2023, is a repeal-and-replace Bill of the *Municipalities Act, 1999*. As the hundreds of municipalities in this province are public bodies subject to *ATIPPA, 2015*, there are significant implications of this legislation for access and privacy. The *Municipalities Act, 1999* has been under review for many years. Our records indicate then-Minister Eddie Joyce first announcing a review of the *Act* in 2017. Previous attempts to review the *Act*, and discussions with our Office about it, extend back into the time of the previous administration.

There are two areas that have been of concern to OIPC over the years related to the *Municipalities Act, 1999*. The first relates to *ATIPPA, 2015* section 28(1)(c) which is a discretionary exception related to information that would reveal the substance of deliberations of a meeting where an *Act* authorizes the holding of a meeting in the absence of the public. This is connected to the *Municipalities Act, 1999* because section 213 of that *Act* provides that a private or privileged meeting may be declared to address any subject matter, without restriction. For many years we have felt that this was overbroad as it allowed municipalities the opportunity to, at any time and about anything, drop a cloak of secrecy over a matter.

The second area of concern is privacy related and relates to the by-law making powers of municipalities. This is very technical, but potentially quite seriously impactful on the privacy rights of residents of the province. Section 61 of *ATIPPA, 2015* limits the authority for public bodies (including municipalities) to collect personal information to the following three circumstances: where it is expressly authorized by or under an *Act*; if it is collected for the purposes of law enforcement; or if it relates directly to and is necessary for an operating program or activity of the public body. Municipalities are only able to pass by-laws, enforce laws, or operate programs that their statute allows them to do. The *Municipalities Act, 1999* established a quite narrow scope of activities that municipalities could create programs for and enact by-laws about. The new Bill broadens this substantially, which we understand and respect is desirable to many in the municipal sector. The perhaps unintended consequence is that the privacy guardrails in *ATIPPA, 2015* only work for the municipal sector at present because of the narrow scope of municipal activities in the present *Act*. Given our limited time to conduct analysis and research, we are concerned that municipalities may now be able to enact programs and create by-laws involving the collection of personal information far beyond that which they can currently do, with no apparent limitations, given how the provisions in *ATIPPA, 2015* and the new Bill interact[4].

Not only is there a concern that this new Bill essentially creates an opening for unfettered collection of personal information through new by-laws and programs, but due to capacity issues experienced by many municipalities, there is a very real question as to whether municipalities are prepared to handle the legal and ethical obligations that arise with the collection, use, storage and disclosure of this information. Moreover, to the extent that by-law making authority has been substantially expanded, so too is the ability of municipal enforcement officers to engage in public surveillance. This is not a theoretical concern. Municipalities are not required to engage with this Office when they wish to implement novel or other significant collections of personal information. However, we are aware that towns in

[4] Many of the discretionary by-laws Towns can adopt as set out in section 8 of Bill 54 are broad in nature and pursuant to section 6 of the Bill the powers of the Town are to purposely be given a broad interpretation: "*6. Recognizing that a town is a responsible and accountable level of government, the powers of a town under this or any other Act shall be interpreted broadly in order to provide broad authority to the town council to enable it to govern the affairs of the town as it considers appropriate and to enhance the town council's ability to respond to issues in the town*."

this province have implemented or attempted to implement significant new electronic surveillance programs, and we have recently been informed that one municipality intends to use artificial intelligence (AI) in one of its programs, although we are not aware of the details. Surveillance and AI tools are now available, off the shelf, sometimes at quite low costs, and we can expect that they are or will be marketed to municipalities. These are issues that did not exist to the same extent several years ago but they are now upon us and they will create quite significant risks to privacy in the short to medium term, among municipalities as well as throughout society.

We understand that there is always a balance to be struck between privacy and the public interest in efficient and effective public services; however, it must also be borne in mind that in addition to *ATIPPA, 2015*, privacy is a Charter right. Without clearer guardrails in either *ATIPPA, 2015* or this Bill, Bill 54 risks shifting the balance in the municipal sector in such a way as to create risks of harm to the privacy of Newfoundlanders and Labradorians that may be both substantial and difficult to predict, given the rapid advancement of technology.

We have not had a detailed discussion about legislative reform of the municipal sector with the Department of Municipal and Provincial Affairs or its predecessors for a number of years. We first learned of Bill 54 through an email received after 4:30 on Friday, October 28 when a meeting was requested for Monday, October 30. It was at this meeting that we were advised Bill 54 was a repeal-and-replace of the *Municipalities Act, 1999*. We were shown a six-slide deck that focused on the lists of topics about which a municipality could convene a privileged meeting, and a similar list for local service districts. The limitation of the ability of municipalities to convene privileged meetings to a specific list of topics is an improvement over the unfettered ability at present; however we can hardly provide analysis on whether everything on that list should be there, or whether there are things on the list that should not be, off the top of our heads, viewing a slide deck over a virtual briefing. Although we asked about it, there was no discussion of the by-law making authority of municipalities.

We expressed to Departmental officials that this form of consultation was not, in our view, sufficient to discharge its responsibilities under section 112(1) and inhibited the Commissioner from meeting his obligations under section 112(2). The Deputy Minister

responded that she was "asked to share this information with us". It is very clear that sharing a small amount of information about a bill immediately prior to its introduction does not amount to meaningful consultation by any measure, let alone the standard that we feel sufficient to meet section 112(1).

We did indicate that we would be happy to provide what feedback we could on the limited information with which we were provided if the Department would share the presentation deck with us. Officials advised that they would check to see if this was allowed. We did not hear back. Bill 54 was introduced on November 1, 2023.

This commentary about Bill 54 is simply meant to identify that there are access and privacy implications in the Bill as it currently stands and to illustrate the implications of inadequate or absent consultation. We appreciate that it is desirable to enumerate the matters about which a town can hold a privileged meeting, but wish to take the time to research, assess, and provide our comments to the Department. We understand and appreciate the policy direction inherent in the Bill to create a broad, enabling statute for municipalities, and these comments are not an objection to that concept. It may indeed be possible for a statute to be developed which accomplishes that purpose while also providing appropriate privacy guardrails, however Bill 54 does not do that as it presently stands. We have simply not yet had a conversation with the Department about these issues.

I make the following findings as it relates to Bill 54.

- Bill 54 has implications for access to information and protection of privacy.
- Our Office was provided, visually but not in writing, with a small and limited amount of information on an access implication of Bill 54.
- Our Office was not provided with any information on the privacy implications of Bill 54.
- Our Office was not consulted on Bill 54 within the meaning of section 112.

Bill 56 – *Access to Information and Protection of Privacy Act, 2015 (Amdt.) No. 2*

Bill 56, which was debated at second reading and committee stage on October 30, involves the addition of section 6 and paragraph 7(1)(b) of the *Interpersonal Violence Disclosure*

Protocol Act to Schedule A of *ATIPPA, 2015*. While it is a very short Bill, with only one section, it carries very significant access and privacy implications. **We were not consulted at all on this Bill**.

It may be an oversight that we were not consulted on Bill 56 because we *have* been consulted on the *Interpersonal Violence Disclosure Protocol Act* and on the general direction of the protocol itself. This *Act*, and the protocol for which it provides, is known as Clare's Law following the development of similar legislation in the United Kingdom. It is relevant to discuss this subject matter because not only can it explain how the oversight likely occurred, but also why it is important.

OIPC does not inherently agree with or disagree with Clare's Law. With rare exceptions, unless the policy position is directly about access or privacy, we do not take positions on the policy positions of government but rather how they are to be implemented. We understand the intended benefit to the public of the approach and, as we always do, are seeking to understand if any diminishments of access or privacy rights that might be involved are proportional to the public benefit and if they have been mitigated to the greatest extent possible.

The *Interpersonal Violence Disclosure Protocol Act* was introduced and received Royal Assent in the fall 2019 sitting of the 49th General Assembly. The *Act* provides for the development of a protocol, to be enacted in regulations, that would provide a process by which individuals could get information about the history of an intimate partner if they consider that there is some risk of violence.

This Office was consulted on the draft Bill by the Department of Justice and Public Safety in April 2019 prior to the tenure of the current Commissioner. Our Office's commentary asked a range of questions about the draft Bill, and noted that there did not "appear to be sufficient data gathered to demonstrate whether such laws/protocols achieve the intended goal of protecting a person at risk from interpersonal violence". Moreover, the email noted that the details of what information would be disclosed, on what basis, and to whom would be specified in the yet-to-be developed protocol and expressed that "it is difficult to conduct a

meaningful analysis on the overall privacy impacts…". The Department responded to this email, addressing many of the questions, and also indicated that "the Department views the Office of the Information and Privacy Commissioner as a stakeholder in the development of the protocol and the Department looks forward to the potential for future consultations once the protocol is being developed".

Bill 6 of the 49th General Assembly was introduced on November 5, 2019. The *Act* itself was only a first step in bringing the protocol into development. Then-Minister of Justice and Public Safety, Andrew Parsons, indicated that the development of the protocol would take "in the realm of 12 months".

Minister Parsons noted that the Information and Privacy Commissioner had been consulted, but he did not indicate what the nature of feedback had been. Hansard shows that the debate on the Bill raised the privacy issues, including a reference to the Charter (by the Opposition) and the methodology that would be used to assess the risk profile (by the Third Party) but little could be said about either topic without detail in the protocol. The votes at second reading and at committee stage occurred on that same afternoon.

OIPC was next consulted on this topic on March 9, 2023 when we met with officials from the Department of Justice and Public Safety. We were provided with a presentation deck that outlined the general direction the Newfoundland and Labrador protocol was going to take. At that juncture, the protocol had not been developed and the presentation described the "model". Certain points of the protocol are necessary to discuss because they indicate how significant the access and privacy issues are.

Under the model, an individual who considers that they are at risk of interpersonal violence (or a designated support person, with their consent) can make an application to obtain information about a current or former partner. The analysis will be conducted by the police using local and national sources available to them and generate a risk score. According to the now-released protocol, this will not include just convictions, arrests or charges but also may include "non-violent convictions related to interpersonal violence" as well as "concerning behavior towards previous partners" and "police warnings", among other things. When a score

is determined – either insufficient evidence, low, medium or high risk – it is provided, along with relevant contextual information, to the applicant who is required to keep this information confidential.

Some of the privacy and access implications can be easily inferred.

- The protocol involves the collection, use and disclosure of the personal information of one person, and its disclosure to another person. This alone is contentious from a privacy perspective; however, the public purpose of this privacy invasion may be justified given the purpose of the initiative to enhance safety.
- Complicating matters further is that the disclosure does not just involve the disclosure of factual information, but its analysis and evaluation so that the future behavior of a person may be predicted, and again, provided to another person.
- A further, even more complicating factor is that the person about whom the personal information relates cannot themselves have access to that information. If a person who an individual "considers" may pose a risk to them seeks information from the government or police about whether or not an application has been made, and what the outcome was, and learns that such an application has been made, this may exacerbate the risk of violence. Therefore, the only safe response that the government or police could make to an access request for this information is that they neither confirm nor deny whether any application has been made.
- The implications of all this are that anyone who has had any interaction with the police that could potentially be connected to interpersonal violence could potentially be subject to some form of risk scoring by the police but no one would ever be able to know what that score is or if anyone has sought it.

OIPC discussed all these points with departmental officials during our March 2023 meeting. We expressed that careful examination of the protocol itself, once it was developed, would help us understand it and we indicated that we would appreciate an opportunity to review it once a draft was ready. We discussed the access implications above and indicated that *ATIPPA, 2015* likely contained sufficient privacy protections under sections 5(1)(j-m), section

31 or section 37. We anticipated that the government or public body could respond to such a request refusing to confirm or deny the existence of the information as provided for in section 17(2)(c). Finally, we asked if the Department's constitutional lawyers had been consulted about whether there are any Charter implications and, when told that they had not, we recommended that this be done.

We have heard nothing more about Clare's Law since that meeting. When, on October 30, 2023, we learned of Bill 56, which would amend *ATIPPA, 2015*, we were surprised. We have never had discussions with the Department about amending *ATIPPA, 2015* for this purpose. Bill 56 would amend *ATIPPA, 2015* to *exclude* the provisions of Clare's Law that might involve disclosure of information about an application from the *Act* altogether. An exclusion is different from an exception. In the case of an exception – such as those noted above under sections 31 and 37 - the information is protected from disclosure, but there is OIPC oversight and appeal provisions. By adding these sections to Schedule A through Bill 56, our independent oversight is removed. It is not, on its face, clear that removing the Commissioner is required. As noted above, the existing protections under *ATIPPA, 2015* are broad and appear sufficient. In our analysis, it seems that the only effect of this measure is to remove OIPC oversight.

The unorthodox approach of Clare's Law – whereby the right of a person to obtain information about themselves is removed and granted to another person – suggests that independent oversight is extremely important, particularly in the context of limited national and global experience with such laws. Perhaps the Department has reasons why this approach was taken that may be compelling, but these have never been shared with OIPC.

Considering all of this, it is very concerning that when Bill 56 was debated in the House of Assembly on October 30, the Minister of Justice and Public Safety that, during consultations, the Commissioner had agreed with the approach to protect records collected under this process. Later, when MHA Helen Conway Ottenheimer asked directly if the Commissioner had seen the Bill and provided feedback, and if that feedback could be tabled, the Minister reiterated that the Commissioner had been consulted and agreed with the approach and committed to providing written comments if he could.

This was inaccurate. It is not the case that the Commissioner was aware of, let alone agreed with, this approach during the March 2023 meeting, or subsequently. If the Minister is referring to the consultation that took place with this Office four and a half years ago, our review of our written submission, and the Department's response to it, does not indicate any reference to this approach.

The debate on this Bill was brief and concluded that afternoon. The Minister advised that this was the "last hurdle" before implementation of Clare's Law and that the protocol would come into effect "very, very soon". As it happened, the *Interpersonal Violence Disclosure Protocol Act* was proclaimed, the finalized protocol was released, and applications for disclosures commenced on November 2, 2023.

We appreciate that internal communications issues within the Department may have confused things. Certainly, the debate in the House seemed to muddle Clare's Law itself, Bill 56, and the protocol. The Minister may well have been advised that OIPC had been consulted but was unclear about precisely what we were consulted on.

The point that this case illustrates is that, were the approach to consultation of OIPC the same as it had been from the time *ATIPPA, 2015* came into force until March 2023, then this confusion would have been avoided. The Office of Legislative Counsel would have sent the draft Bill 56 to OIPC before it was introduced at second reading and we could have let the Department know our concerns. If they were under the misapprehension that we were aware of, and agreed with, this approach to exclusion of Clare's Law from *ATIPPA, 2015* we could have corrected that. The Minister would not have erroneously claimed that we had been consulted, and furthermore that we were supportive of the Bill, when asked about it in the House.

I make the following findings as it relates to Bill 56.

- Bill 56 has implications for access to information and protection of privacy.
- Bill 56 removes our Office's oversight authority over subject matter that directly impacts access and privacy.
- Contrary to section 112, our Office was not consulted on Bill 56 at all.

Conclusion and Recommendation

It is important to understand why the section 112 consultation process exists. It is so that the Commissioner can identify privacy or access to information concerns in draft bills and engage in dialogue with officials about those concerns by providing our comments. Once a bill has been made public, the legislative process is so quick that if we have not been consulted adequately (or at all) prior to debate in the House, we may simply not have time to analyze the bill and provide any comments on important aspects in order to inform the legislative process. In some cases, we may not even know that such a bill is before the House until it is being debated or it has been passed.

The Federal Court of Appeal, in *Apotex Inc. v. Canada (Attorney General)* 2000 CanLII 17135 (FCA), 2000, said:

> *An undertaking to consult prior to the enactment of delegated legislation cannot be discharged without affording the individual to whom it was given a reasonable opportunity to attempt to influence its content… In order to honour such an undertaking the process of consultation should generally include the disclosure of the text of the proposed regulations, together with an explanatory statement, and sufficient time for this material to be studied and a response prepared.*
>
> *…*
>
> *It goes without saying that, as a general rule, consultation will generally be more effective if it occurs well before administrative action is finalized than if it occurs after the die is cast for all practical purposes*.

It is clear that the consultation that was intended by the government's change in approach, and what has actually happened, has fallen well short of this standard, making sections 112(1) and 112(2) inoperable.

Generally speaking, Members are briefed – usually a day or two – prior to the introduction of bills, and opposition Members and offices have very limited time to research or consult on their own prior to debate at second reading. Members therefore rely on asking Ministers about the consultations that have taken place with key stakeholders. This is very commonly the focus of initial questioning of debate during committee stage.

Members should therefore be aware that consultation with this Office is now fundamentally diminished from how it has been for the past eight years.

The Commissioner's mandate under *ATIPPA, 2015* explicitly provides in section 95(2)(e) that he may comment on the implications for access to information or for protection of privacy of proposed legislative schemes, programs or practices of public bodies. We therefore feel it is necessary to advise the Legislature of this significant change in practice and its repercussions on the protection of privacy and access to information.

The Commissioner therefore recommends that Members undertake their own careful and in-depth analysis, to the best of their ability, of the access and privacy implications of bills. Members are also encouraged to contact OIPC to ask questions or seek our views on access or privacy matters of bills that come before them.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of November, 2023.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

Annex A

March 13, 2023 Correspondence from the
Minister of Justice and Public Safety
to the Information and Privacy Commissioner

Government of Newfoundland and Labrador
Department of Justice and Public Safety
Office of the Minister and Attorney General

March 13, 2023

Michael Harvey
Information and Privacy Commissioner
Office of the Information and Privacy Commissioner
P.O. Box 13004, Station "A"
St. John's, NL A1B 3V8

Dear Mr. Harvey:

RE: Section 112 of the *Access to Information and Protection of Privacy Act, 2015*

I write with respect to the interpretation of section 112 of the *Access to Information and Protection of Privacy Act, 2015*. Section 112 states:

> **112.** (1) A minister shall consult with the commissioner on a proposed Bill that could have implications for access to information or protection of privacy, as soon as possible before, and not later than, the date on which notice to introduce the Bill in the House of Assembly is given.
>
> (2) The commissioner shall advise the minister as to whether the proposed Bill has implications for access to information or protection of privacy.
>
> (3) The commissioner may comment publicly on a draft Bill any time after that draft Bill has been made public.

As you are aware, it has been the practice of government departments to provide the Information and Privacy Commissioner (the "Commissioner') with complete copies of draft bills. In reviewing this practice, the Department of Justice and Public Safety engaged the Hon. Clyde K. Wells, K.C., in his capacity as former premier of the province and chairperson of the 2014 ATIPPA Statutory Review Committee, to consider whether the provision of draft bills are mandatory under s. 112. In his analysis (attached), Mr. Wells concludes that s. 112 should not be interpreted in such a manner as to require the submission of proposed bills.

As a result of our review, including the opinion of Mr. Wells which clarifies s. 112, please be advised that government departments will no longer be submitting legislative drafts to the Commissioner. However, where a Minister is of the view that a particular provision in draft legislation "could have implications for access to information or protection of privacy", that

Minister may continue to provide the Commissioner with the wording as part of the consultation required under s. 112.

Regards,

JOHN HOGAN, KC
Minister of Justice and Public Safety
Attorney General

P.O. Box 8700, St. John's, NL, Canada A1B 4J6 709 729 2869 709 729 0469 www.gov.nl.ca

JAN 27 2023

January 23, 2023

Ms. Denise Woodrow,
Assistant Deputy Minister, Legal services
Department of Justice and Public Safety
P.O. Box 8700
St. John's, NL, A1B 4J6

Dear Ms. Woodrow:

Re: Request for my views respecting
Cabinet disclosure of draft bills

Your letter of January 12, 2023 requests my "views as to whether section 112 of the *Access to Information and Protection of Privacy Act, 2015* ("the Act") should be interpreted as requiring the provision of a draft bill to the Information and Privacy Commissioner". While I continue a relationship with Cox and Palmer, as a strategic adviser, I no longer practice law. Therefore, the views expressed are, consistent with your request, offered only on the basis of their being informed by my background as a former premier of the province and a former chairperson of a statutory review committee (2014) for the Act. I should disclose that my views are also informed by the fact that my undergraduate degree was in political science. The views expressed are not the views of Cox and Palmer, and my providing them is not a service for which there will be a billing.

Your departmental legal advisers will, no doubt, have advised you that the action a minister is required to take is that specified in subsection (1) of section 112. The factual circumstance in which any minister is required to take that action is also specified in subsection (1). That subsection reads:

> 112. (1) A minister shall consult with the commissioner on a proposed Bill that could have implications for access to information or protection of privacy, as soon as possible before, and not later than, the date on which notice to introduce the Bill in the House of Assembly is given

Essentially, the action mandated is that "any" minister, not just the minister responsible for the Act, must, in the course of proposing any Bill to the House of Assembly, consult with the

Clyde K. Wells, ONL, K.C.
Cell 709 725 2617 *Email* ckw@wellsnet.ca
Suite 1100 Scotia Centre 235 Water Street St. John's NL A1C 1B6

commissioner", if that Bill "could have implications for access to information or the protection of privacy". Clearly a minister has to first decide whether or not any of the provisions of the proposed Bill could have implications for access to information or protection of privacy. That does not mean the minister has to be satisfied that those provisions have, or if enacted would have, such implications. A minister concluding that one or more provisions of a proposed Bill could, possibly, have the identified implication, becomes the triggering circumstance that requires that minister to consult with the commissioner. However, if the minister does not so conclude, there is no requirement whatsoever for the minister to consult the commissioner.

In the event a minister does conclude that a Bill could have such an implication, nothing in subsection (1), or for that matter the whole of section 112, gives any direction as to the manner in which the minister is to consult. The only direction in subsection (1) is as to the point in time by which the minister must have consulted. That point is and "not later than, the date on which notice to introduce the Bill in the House of Assembly is given". It is, however, to occur "as soon as possible before that time".

Obviously, the minister would have to advise the commissioner of the precise wording of the provisions of the Bill that the minister concluded could have implications for access to information or protection of privacy. The minister would also have to provide the commissioner with information, as to the general nature of the proposed Bill, sufficient to ensure that the commissioner had appropriate context within which to determine the advice required to be given. Based on my experience, in both the capacities to which you have referred, there would be no necessity whatsoever for the minister to disclose any provisions of the Bill if those provisions had no bearing on the concerns that caused the minister to seek the commissioner's advice. In fact, doing so, without special Cabinet authorization, would put them in breach of the minister's oath as a member of Cabinet.

Theoretically, consultation could be by any one of:

- an in-person meeting with the commissioner to inform the commissioner of the provisions of the proposed Bill that caused the minister to conclude there could possibly be such implications, provide a description of the general nature of the Bill, and request the commissioner's advice as to whether those provisions, in fact, have such an implication;
- a letter or email to the commissioner, setting out the provisions of the proposed Bill that caused the minister to conclude there could possibly be such an implication, describing the general nature of the Bill, and seeking the commissioner's advice as to whether those provisions, in fact, have such an implication; or
- by submitting the then current draft of the proposed Bill to the commissioner and asking the commissioner's advice as to whether the concerning provisions, in fact, have such and implication.

Any one of those alternative forms of consultation would include all the mechanics necessary to consult. The first two of those three alternatives are straightforward and either one of them

should produce the required result without complications. At first glance, the third alternative, submitting to the commissioner, the then current draft of the proposed Bill, whether the concerning provisions constituted 1%, 5%, 25%, 50% or more of the total Bill, may appear to be the practical approach. However, it is the only one of those alternatives that would involve complications making its use impossible, without a special Cabinet authorization in each instance.

As is the case with Cabinet proceedings generally, the manner in which a minister, or the Cabinet as a whole, consults outside the Cabinet, is a matter exclusively for the Cabinet to decide. The political conventions and the common law governing operations of Cabinet have a long history and are quite rigid. It should also be noted that the Act defines the word "minister" as meaning "a member of the executive council appointed under the *Executive Council Act*", and the word "Cabinet" as meaning "the executive council appointed under the *Executive Council Act*". For convenience, I will simply use the term "Cabinet". Clearly, a consultation by a minister, such as that mandated by section 112, can only be considered an activity that involves Cabinet, and would be subject to such Cabinet strictures and limitations as may be imposed either by convention or by law.

One such stricture or limitation is the political convention respecting Cabinet secrecy. Political Science academics and courts agree that the Cabinet secrecy convention is of critical importance to the successful operation of the parliamentary system of responsible government. In its report, the 2014 committee which, as you are aware, I chaired, responded (at pages 85-90) to a suggestion by a presenter that "the Committee include in its report a thorough review of the tradition of Cabinet secrecy", and provided the suggested review. It is not necessary to restate a summary of that review here. It may, however, be helpful to appreciation of its nature and importance, and to understanding why it is not to be dislodged by inference, for me to restate a few brief excerpts from views adopted by that report. The committee quoted from *Cabinet Government,* by Sir Ivor Jennings, the acknowledged expert on Cabinet government, the following:

> ... The rule is, primarily, one of practice. Its theoretical basis is that a Cabinet decision is advice to the Queen [King] whose consent is necessary to its publication. ...

The report also quoted from *The Constitution of Canada* by W.P.M. Kennedy, one of Canada's earliest constitutional historians, the following:

> In provincial government the executives are modelled on the British type and follow the lines of cabinet administration. The functions of the provincial cabinets, the theories and conventions governing them, and the relationship between the executives and the lieutenant governors are so similar to those in the federal sphere that they do not call for separate treatment.

From Professor MacGregor Dawson, of the university of Toronto, the committee quoted the essence of the convention and described its critical importance:

> ... no information on what is proposed or discussed or decided in the meetings of the Cabinet can be released, even in confidence, until the moment arrives for the

> announcement or implementation of a decision. The deliberations of Cabinet, in short, are held in the strictest secrecy. ...

and,

> Unless secrecy exists and is maintained in its most rigid form, the Cabinet system will never work satisfactorily, will tend, rather, to prove a source of weakness and distraction. ...

Legislatures have, over recent decades, softened the stringency of the Cabinet secrecy convention. The modern view tends to recognize that after a time the need for Cabinet secrecy in respect of most Cabinet advice, documents, discussions and decisions no longer exists. In some jurisdictions, legislation specifically provides for ending confidentiality protection for those Cabinet secrets after a specified number of years. In the case of both, Canada federally and Newfoundland and Labrador, the period is twenty years. However, the need for Cabinet secrecy in relation to advice, documents, discussions and decisions, respecting current and more recent matters before Cabinets, has been summarized in a major paper[1] on the subject, by Professor Yan Campagnolo. His comments explaining his purpose in writing, and the current state of the Cabinet secrecy convention, include the following[2]:

> The objective of this article was to show that Cabinet secrecy is essential to the proper functioning of the Westminster system of responsible government. ...
>
> ... While in office Ministers do not disclose, without appropriate authorization, Cabinet secrets to outsiders, and access to the documents containing such information is firmly controlled by the Secretary to the Cabinet as custodian of Cabinet documents. ...
>
> ...Keeping the secrecy of Cabinet proceedings is not an optional matter for current Ministers: it is a duty enforced by the Prime Minister. It is a matter of political survival. ...
>
> ... the reason behind the Cabinet secrecy conventions is the proper functioning of the Westminster system of government (good government). The reasoning is as follows: to maintain the confidence of the House of Commons, Ministers must be united and speak with a single voice, a result that can only be achieved if they have a confidential forum in which they can discuss candidly and reach a consensus on proposed policy and action. ...
>
> The secrecy convention aims to protect the collective decision-making process and the personal views expressed by Ministers while deliberating on government policy and action. It applies whatever the substance of the subject matter examined by the Cabinet may be as it is a non- substantive form of secrecy. A distinction must be made between two periods in the decision-making process: before and after a decision has been made public. The first period requires a higher degree of secrecy to protect the

[1] The Political Legitimacy of Cabinet Secrecy, by Yan Campagnolo, Assistant Professor, Common Law Section, University of Ottawa, (2017) RITUM 51; CanLIICocs3560.

[2] *Ibid.*, at pp.104-06

> efficiency of the decision-making process from undue pressure and criticism. This justifies the provisional protection of background information, or noncore secrets, about the policy or action under consideration in the deliberative stage. But a lower degree of secrecy is required in the second period. After a decision is made public, it is no longer necessary to protect the noncore secrets supporting the decision. From that moment onward, only ministerial views, or core secrets, must remain confidential to protect ministerial solidarity and the candour of ministerial discussions.

About twenty years ago, the Supreme Court of Canada wrote[3] that:

> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, recognized another important reason for protecting Cabinet documents, namely to avoid "create[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making. (emphasis added)

The views you have asked me to express cannot be provided on the basis of consideration only of the explicit provisions of section 112. The application of those provisions bears on the functioning of Cabinet government in the province, and they have to be construed in that context. The provisions of draft Bills presented to Cabinet for consideration usually go through a series of amendments, deletions, additions, or other adjustments, right up until, in the words of MacGregor Dawson, "the moment arrives for the announcement or implementation of a decision". Until that point in time, the strictures and limitations of the Cabinet secrecy convention are rigidly applied to the proposals, including the content of the draft as it may, from time to time during the Cabinet process, be adjusted. The Legislature can, by an enactment, alter the application of those limitations and strictures. The question here is, does section 112 do so.

The short answer in my view is that it does not. Subsection (1) is the only subsection that provides any direct guidance at all, as to what the minister is required to do. No legal analysis is necessary to support a conclusion that nothing, in any of the three subsections, specifies that a draft of the Bill, in whatever state of development or adjustment it may be from time to time, must be submitted to the commissioner. I do not offer it as a reasoned legal opinion, but I would add that I see nothing in that subsection (1) that would warrant inferring that Cabinet ministers are required to submit to the commissioner, a draft of every proposed Bill. In fact, the foregoing discussion of the Cabinet secrecy convention would lead one to conclude that such an inference would be so offensive to principles underlying the proper functioning of Cabinet in our system of responsible government, as to be a threat to the system itself.

The other two subsections read as follows:

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[3] *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para.18.

(2) The commissioner shall advise the minister as to whether the proposed Bill has implications for access to information or protection of privacy
(3) The commissioner may comment publicly on a draft Bill any time after that draft Bill has been made public

Subsection (2) imposes an obligation only on the commissioner. It is to advise the minister as to whether the proposed Bill, in fact, has the described implications. The reference to "proposed Bill", in subsection (2), can only be to that portion of it, about which the minister has sought the commissioner's advice. Without special Cabinet approval, the minister could not disclose those portions of the Bill having no bearing on the described implications. Not only would there be no necessity for it, but doing so could potentially disclose highly confidential policy issues. If the reference to "a proposed Bill that could have implications for access and protection of privacy", in subsection (1) does not give rise to an inference that the whole of all Bills, or even the whole of a Bill in question, has to be submitted to the commissioner, then nothing in subsection (2) could give rise to such an inference.

Subsection (3) would seem to have no possible bearing on the issue at all. It is confined to permitting the commissioner to "comment publicly on a draft Bill any time after that draft Bill has been made public". In my view, that is not only consistent with the Cabinet secrecy convention, but is supportive of its application here. That subsection does seem to contemplate that the commissioner would be aware of the existence of a draft Bill and, no doubt, aware of any of provisions having implications for access to information and protection of privacy. That awareness would, of course, be the case in any one of the three possible modes of consultation described above. However, it would not require the submission to the commissioner of a draft Bill, one or two of the provisions of which could have such implications, and dozens or even hundreds of provisions that would disclose Cabinet's most closely protected policy proposals respecting any one of numerous other areas of governmental responsibilities. As well, one could well imagine that Cabinet might, on occasion, specifically authorize submitting all the provisions of a draft Bill to the commissioner, or to others, in order to obtain advice. The provision in subsection (3) would be necessary in any such circumstance, and cannot, therefore, be a basis for inferring that all ministers must submit draft Bills to the commissioner.

While it is open to the minister, or the Cabinet, to consult the commissioner on any proposed Bill, subject, of course, to the limitations and strictures of the Cabinet secrecy convention, the subsection (1) requirement to consult with the commissioner arises only if the proposed Bill could have implications for access to information or protection of privacy. Thus, it does not seem an at all rational conclusion to suggest that subsection (1) should be interpreted as requiring the submission to the commissioner of all draft Bills. Nor, in my view, would it be an at all rational conclusion to suggest that subsection (1) should be interpreted to require that the minister concerned submit, in addition to all the provisions the minister concluded could have such implications, all of the remaining provisions, even though they had no bearing on

access to information or protection of privacy matters but could include matters, the disclosure of which could be severely harmful to development or implementation of a government policy.

In summary, I am of the view that, both the suggestion that section 112 be interpreted as requiring that all proposed Bills be submitted to the commissioner, and the suggestion that it be interpreted as requiring that all other provisions, as well as the provisions causing the minister to conclude a proposed Bill could have implications for access to information and protection of privacy be submitted to the commissioner, would cause ministers to be in breach of their oaths of office and the Cabinet secrecy convention. I am also of the view that both suggestions are quite inconsistent with:

- The emphasis placed by the 2014 committee review of the Act on the importance of Cabinet confidentiality, historically and currently;
- The recommendation of that 2014 committee that the Act contain a provision that would result in absolute protection from disclosure for, amongst other things, draft legislation;
- The prohibition, in subsection (2) of section 27 of the Act, against release of a Cabinet record, defined to include draft legislation, to an applicant making a request for access to information as a person generally entitled to access pursuant to section 11 of the Act.

Indeed, I would go further and suggest that, if doubt remains, protection of Cabinet secrecy is of such importance to proper government of the province that steps should be taken to amend the legislation to remove any doubt arising from the less than precise drafting recommended by the 2014 committee, for which, I have primary responsibility.

Yours very truly,

Clyde K. Wells

Annex B

May 3, 2023 Correspondence from the
Information and Privacy Commissioner to the
Minister of Justice and Public Safety

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

May 3, 2023

VIA EMAIL

Hon. John Hogan
Minister
Department of Justice and Public Safety
East Block, Confederation Building

By email: JillMarch@gov.nl.ca

Dear Minister Hogan,

Subject: Section 112 of the *Access to Information and Protection of Privacy Act, 2015*

Thank you for your correspondence dated March 13, 2023 regarding the Department's new interpretation of section 112 of the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*). I am writing at this time to ask that you reconsider this decision. I respectfully disagree with the analysis of section 112 that has informed the Department's decision and am concerned that future consultations which proceed on that basis may not satisfy the statutory requirements of this provision. I further disagree that the previous consultations government departments have done on a regular basis for almost eight years is, as is referenced in the Department's letter, a violation of the cabinet confidence convention. Given *ATIPPA, 2015* provides me with explicit authority to comment publicly on a Bill once it has been made public, I am alarmed that the limited manner of consultation prescribed in the Department's letter will limit or even completely prevent me from informing debate on the Bill while it is being considered by the legislature, contrary to the clear intent of this section.

I have the greatest respect for former Premier Wells for his well-known intellect and many accomplishments, including his work as Chair of the 2014 *ATIPPA* Statutory Review Committee. The well-thumbed report of that review has sat on my desk since my first day as Commissioner and was never far from hand during my previous roles. One of the great things about the review process that he chaired was that it provided an opportunity for people of differing views to, publicly and on the record, put their arguments before a Committee of three individuals, having considerable and varied expertise. The outcome of their work has been recognized as one of the best access and privacy statutes in Canada. In this instance, however, Mr. Wells has developed and provided his opinion without the advantage of hearing from numerous invested parties, the input of other committee members, and years removed from considering the matters involved in the *ATIPPA* review.

P. O. Box 13004, Station "A", St. John's, NL A1B 3V8
Telephone: (709) 729-6309 • Facsimile: (709) 729-6500
E-mail: commissioner@oipc.nl.ca • www.oipc.nl.ca

In asking the Department to reconsider its decision, and thereby continue on with the well-established prior practices of the past, we offer the following perspective on section 112 for consideration.

I will begin by considering the purpose of section 112. Upon receipt of your letter, I reviewed the report of the 2014 Statutory Review Committee to examine what it said about the intent of section 112. This topic emerged during the statutory review in response to concerns expressed that the Commissioner of the day did not speak out with concerns about Bill 29 while it was considered by the House. The report concludes, prior to making the recommendation that would inform section 112, that "It is more effective to comment before legislation is adopted than after provisions are enacted into law" (page 234). In my view the new approach the Department proposes to take will hamper or otherwise stop me from effectively providing meaningful advice in two respects: first, in providing advice to the Minister responsible for the Bill in question and in the second instance, used more sparingly but nevertheless clearly intended, in providing advice to Members of the House of Assembly and the public. I will examine the two stages of the consultation contemplated by section 112 in turn.

The first opportunity for consultation provided for by section 112 is by a department on behalf of a minister, in confidence, at some point during development of the Bill. Mr. Wells suggests that consultation could be any one of: an in-person meeting; a letter or an email; or submitting a draft of the Bill. He suggests that any one of these would include all the mechanics necessary to consult. He says that, if the Minister concludes that there could be implications for access to information or privacy, then they would have to advise of the precise wording of the provisions of the Bill, as well as the general nature of the Bill, sufficient to ensure that the commissioner had appropriate context. First, I note that section 112 does not say that a minister shall consult with the commissioner on "a part or parts" of a Bill that could have implications for access to information or protection of privacy. While Mr. Wells correctly notes that the provision does not explicitly state that the entire Bill must be provided to the commissioner, neither does it say that "a part" or "parts" of the Bill must be provided, which is one of the interpretations he arrives at. My view is that to be consulted on a Bill means being consulted on the entire Bill, and that this is necessary in order for the consultation to be meaningful, and thereby attain the purpose and intent of section 112.

It is a well-established principle of statutory interpretation that an *Act* must be read in its entirety and its scheme must be understood. As I am sure you are aware, the Supreme Court of Canada in *Rizzo and Rizzo Shoes* endorsed Driedger on Statutes at paragraph 21, where he states "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Furthermore, *Archean Resources*, from our own Court of Appeal, had this to say:

> [22] ...s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, *based on the language of the whole enactment* and the court's general knowledge of the state of the pre-existing law and any information as to the

> broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. *The surrounding text*, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise…
> [emphasis added]

In other words, both the Supreme Court of Canada and the Newfoundland and Labrador Court of Appeal are telling us that you can't discern the true meaning of a statutory provision unless you consider it in the entire context of the Act itself. In using the word "shall", section 112(2) places an obligation on me to advise the Minister as to whether the proposed Bill – again, the Bill itself - has implications for access to information or protection of privacy. I cannot meet that obligation unless I can review the Bill in accordance with the modern principles of statutory interpretation, i.e. unless I can consider it in whole.

Mr. Wells also focuses on what would trigger consultation by a minister – whether or not they had come to the conclusion that there may be implications for access to information or protection of privacy. In our experience in the years since these provisions have come into force, departments have done a good job at understanding whether a Bill might meet this threshold. Generally speaking, we are consulted in situations where there is some change to the collection, use, storage or disclosure of information by a public body – if the information is personal information, then there may be a privacy implication and even if it is not, there may be access implications. What departments are less attuned to, and the value that we have brought, is identifying *how* these implications may arise. It also happens, at times, that in a Bill with several inter-related provisions potentially impacting access or privacy, government officials assume that our interest would be in one set of provisions and they are surprised when we point out the privacy or access implications of another provision they hadn't realized was also relevant to privacy or access. Further, the language of the provision itself shows that this is the very type of experience and expertise sought from the Commissioner on such matters. While under section 112(1) the Minister is required to ("shall") consult with the Commissioner, it is noteworthy that the Minister must do so where a bill "could have" implications for access to information or protection of privacy. In section 112(2) it is the Commissioner who then advises the Minister whether the proposed bill does indeed have ("has") such implications for access to information or protection of privacy. The language therefore contemplates a scenario where the Minister is unaware of such implications but the Commissioner then provides this assessment for the Minister's consideration. For the Commissioner to be able to point out such implications, by necessity, requires the entirety of the proposed Bill, even parts the Minister believes may not have any such implications.

Bill 20 from the fall 2022 sitting of the House of Assembly, which received Royal Assent as the *Provincial Health Authority Act*, is an excellent and recent example. In that instance, in what we were later told was an oversight, we were not consulted on the Bill or the precise wordings of any sections. We were advised, in phone conversations and emails, about the general nature of the Bill. Among other items, we were not advised that the Bill would authorize the new Provincial Health Authority to proceed with activities related to the "social determinants of health" and a "learning health system". It did not occur to the Department

that these references might be interpreted to provide authority for new collections of information for these purposes, without them being defined. It may be understandable that this implication would not have occurred to the Department; this is precisely the kind of value that the OIPC brings to statutory development. As it unfolded, the government accepted the point and the Bill was amended to remove references to these terms. Had we been consulted as per the standard section 112 practice, we could have raised these matters and others in a confidential manner without it emerging in the House. However, if the Department's *new* policy had been used, where only parts or a part of a Bill are provided for us to review, such serious concerns and considerations as those noted above may not come to light, with a mere possibility that they might be identified at second reading.

In my review, the basis for the change in your approach is premised on Mr. Wells' assertion that sharing entire drafts of Bills could involve a violation of cabinet confidences. As with all constitutional conventions, we take the convention of cabinet secrecy very seriously. My recent report on the access request to the Department of Finance for the Rothschild Report is a recent indication of how seriously we appreciate the importance of cabinet secrecy to our Westminster system of government (A-2022-014). This convention, however, should not be applied in an overbroad way. In my long career in government I have both conducted consultations, and been consulted, by governments at federal and provincial levels, on draft legislation and regulations. It has always been understood that the greatest care must be taken with consultations on such drafts; however, this consultation does regularly occur when it is necessary – and not just with statutory officers such as myself. Consider the recent example of Bill 22: I am aware that government consulted the House of Assembly Service on the draft Bill and it was on the basis of this consultation that amendments to the *House of Assembly Accountability, Integrity and Administration Act* were developed. According to the analysis in your letter, sharing of the Bill would have also been a violation of cabinet confidences. Would such consultation also be prohibited? Cabinet itself can of course decide whether to reveal information about its deliberation, and – as I argue is the case here – such a procedure can be provided for by the law.

Mr. Wells has expressed concern that there may be many aspects of a Bill which have nothing to do with privacy or access. He is correct. While the examples that I cite in this letter are Bills which have very much to do, throughout, with access and privacy, we regularly deal with proposed Bills that may (or ultimately, may not, as is sometimes the case) have implications for access or privacy in only some specific way. In retrospect, we could look at those examples and conclude that our commentary was limited and perhaps I did not need to review the entire Bill. However, this is a conclusion that can only be identified in retrospect. The risk of my exposure to cabinet deliberations is, in my view, outweighed by the risk that matters related to access or privacy will be missed.

The statute not only requires my exposure to cabinet confidences but also includes protections. I am constrained by the restrictions placed on me as I am drawn into that confidence for this legally authorized purpose. To understand this point we must understand the scheme of *ATIPPA, 2015*. Consider that the *Act* provides me with broad authority to speak publicly. Along with other authorities in various other subsections of section 95, section 95(d) authorizes me to "comment on the implications for access to information or for protection of privacy of proposed legislative schemes, programs or practices of public bodies". Section 112(3), in authorizing me to "comment publicly on a draft Bill any time after that draft Bill has been made public" might therefore, if read in isolation from 112(1) and (2), be understood to be redundant, thus violating modern principles of legislative drafting and statutory

interpretation. The logical alternative is to interpret 112(3) not as an authority to speak publicly – 95(d) provides me with that, so I don't need it again from 112(3) - but a *limitation* of that authority in this particular circumstance. It is a *prohibition* about speaking publicly about a draft Bill prior to the point at which it has been made public. The only logical interpretation of section 112(3) is that it anticipates that I have been provided with the Bill during the process outlined in 112(1) and 112(2) and that its purpose is therefore to legally bind me to the confidence with which it has been shared. In sum, the section, read as a whole, must be interpreted to describe: how I am to be brought into the government's confidences; the purpose for doing so; the point at which I am released from that confidence; and what I am authorized to do then. In this way, *ATIPPA, 2015* clearly and logically addresses the cabinet confidence issue.

As an aside, but a relevant one, it should be noted that it was a very clear intent of *ATIPPA, 2015* that I have the ability to compel and review cabinet documents in the context of an access investigation. The 2014 Statutory Review addressed this matter exhaustively. My ability to compel documents is established in section 97(3) which establishes that I "may require any record in the custody or under the control of a public body". No explicit reference is made to documents subject to cabinet confidences, yet the provincial government has never failed to produce such documents when compelled. The principle that legislation can abrogate the convention is well established. A focus on cabinet confidences now as it applies to section 112 seems, therefore, selective.

The new approach reflected in your letter would also change how I exercise the second, rarely used, procedure provided for in section 112: my provision of advice to MHAs and the public as provided for by sections 95(d) and 112(3). To date, my practice and that of my predecessors has been to utilize section 112(3) very sparingly. Outside of our annual reports, within which we provide summaries of consultations, I have only spoken publicly about two Bills – Bills 20 and 22 in this legislative session. Both times I did so because the issues were very important to my mandate: respectively, the creation of the largest custodian under the *Personal Health Information Act* and legislation that purports to create a duty for public bodies to adequately document their decisions – documents that would then become subject to *ATIPPA, 2015*. In both of these instances, Members of the House of Assembly very much appreciated learning about my concerns about these Bills. This is undeniably the purpose of the inclusion of section 112(3) in the *Act*. It is important to note that I am a statutory officer of the House and Members have a right to, pursuant to my legal authorities, expect to rely on me as a resource at that stage.

In these two cases, through quick action, I was able to provide assessment of the Bills during the second reading debate. If, however, the Department were to implement the change in practice that the Department suggested, this would become almost impossible. Consider Bill 22: the media and MHAs were briefed on this Bill under embargo before we were able to obtain a copy; we did not obtain it until the debate actually proceeded. Indeed, it was only through the media and MHAs that we discovered that Bill 22 would receive its second reading on the day in question. We were only able to provide quick analysis of the Bill because officials had provided it to us in fall 2022 per the standard practice and we were left to simply confirm that nothing had changed. Under your new approach, we would not see the Bill in its entirety for the first time until Members were on their feet in the House.

It may be observed that the committee stage of the legislative process would provide an opportunity for this feedback to be provided. Indeed, in other jurisdictions at federal and

provincial levels, my counterparts appear before standing legislative committees to provide their feedback on legislation as part of the normal course of their duties. In this Province however, without standing legislative committees, the second reading and committee stage usually happen very quickly. In this session of the House, at the time of writing, 22 statutes have received Royal Assent. With only four exceptions (Bills 3, 5, 12 and 20) each of them was voted upon at second reading and committee stage on the very same day. In the exceptions, the committee vote occurred one day after the vote at second reading. It is clear that, in the normal course of events, your intended change in approach would not allow sufficient time for proper analysis of a Bill in order to inform debate at any legislative stage.

It is a logical consequence that if government departments limit section 112 consultation with my Office before Bills are made public, then I will be obligated to speak publicly about them more often after they are made public, even if limited in this fashion. Clearly the legislature foresaw that there may be situations in which my public commentary would be appropriate. Bill 22 is such an example: my Office and the government had a difference of views about the statute; we could not resolve them between ourselves; and I was left with the choice to either remain silent or provide my analysis to Members and the public. This has caused political controversy, but that is a natural and normal part of an inherently political process. However, in many instances – Bill 20 is a likely example – such political controversy is not necessary and could easily have been avoided. A final concern is that the approach that you plan to take may, in practice, prevent me from being able to discharge my responsibilities, particularly the non-discretionary one in section 112(2), altogether. My view is that the previous process, in place without controversy for almost eight years, was working very well and there is no need to change it at this time.

While I hope that you will reconsider your approach, I strongly recommend that if you remain inclined to proceed with this course of action, then it would be appropriate to consult the Speaker, the House Leaders of the Official Opposition and the Third Party and independent MHAs. I am an officer of the legislative branch of the government and this course of action would change the way in which I provide service to the House. I think that their views, which certainly should be informed by Mr. Wells analysis but also my analysis here, would be valuable. I think that they have a right to know that there has been a fundamental change in the nature of my consultation on Bills that they are being asked to consider.

I look forward to your response on this matter and am available to discuss the topic further.

Yours truly,

Michael Harvey
Information and Privacy Commissioner