

ATIPPA Review Committee Office
Suite C, 83 Thorburn Road
St. John's, NL
A1B 3M2
info@parcnl.ca

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[REDACTED] Section 30

July 27, 2014

Dear Mr. Wells, Ms. Stoddart and Mr. Letto:

Thank you for providing the opportunity to submit to the ATIPPA Review process.

As part of your review, I understand that you are interested in hearing from users of the system. Please consider the following points presented from my experience as a citizen who has requested access to information under ATIPPA:

- 1) **Equal access to information without the threat and expense of court proceeding is what the citizens of Newfoundland and Labrador (NL) should expect from your review.** Access in NL must be at least equal to the best already in place in Canada. It is not good enough for us as citizens to accept a decision that denies us access when the same information request would be honoured in so many other provinces in the country. Accepting less transparency than provided to other jurisdictions is to allow flawed legislation to negatively impact our human rights as Canadians.
- 2) **Access to information requests should never be denied based on the reason for which they are requested.** Prior to an access request escalating to an ATIPPA application, public bodies have avenues to mediate and resolve conflict. However, when that has not worked, it appears that potential exists for a public body to escalate the status of requested information to Cabinet supported information under Bill 29. The crafting of the Legislation should not lend itself to the arbitrary escalation of information to protected status. Our Commissioner's review of all requested documents would eliminate any opportunity that exists for abuse, incorrect interpretation and/or misrepresentation.
- 3) **Public bodies must be held accountable when denying access after severing has occurred.** The interpretation of ATIPPA Section 7(2) states that severing is available. In reading Section 7(2), one would expect that once a public body has had the opportunity to remove the secrets from a protected record, what is left of the record would be provided to an applicant. This is particularly so if the information left after severing can cause no harm, and continues to have

value to the applicant. In reality, a public body can continue to deny access by claiming that what was left after severing as “meaningless”. Ironically, the public body can continue to deny access in spite of formal recommendations by the Commissioner that cites page numbers where value continues to exist in a severed record for an applicant. The Commissioner’s input carries no weight even when clear logic should apply.

4) The Substance of Deliberation Test should be a minimal expectation of our citizens.

Earlier presentations quoted educated opinions about how NL has stepped well behind other jurisdictions in providing citizens their right to access of information. Experts have warned that this backward step opens opportunity for both escalated abuse and arrogance at a time when misconduct by government representatives is more frequent, and more public. In this environment, citizens cannot be expected to ‘trust’ processes that do not have checks and balances in place to protect their rights.

5) It is not good enough that citizens of NL are left to trust that Public Bodies will provide information, if they can.

In NL we do not apply a Substance of Deliberation Test to access requests and this questionable practice is further compounded by our Commissioner’s lack of authority to view documents for authenticity. This is further compounded by inconsistency in interpreting the Act. Your review has already determined that interpretation of the Act has been challenging for public servants and, in the interest of not making a mistake, it is expected that more information is being withheld than necessary. None of this instills confidence to NL citizens who are playing by the rules in requesting information through the system they have been provided. Citizens wrongfully assume that an expert is given the tools and authority to influence fair outcomes.

6) The system provided to protect our rights in NL escalates to the Courts too often.

During this review, mediation has been quoted as having informally resolved the majority of all reviews in NL. For the 25% where mediation was not successful, or was not offered, consideration of an enhanced mediation process may be helpful. Analysis of these requests would also identify the type of request where inappropriate blocking of information by Public Bodies tends to occur, if at all.

7) It is likely an accurate prediction that many applicants will give up their right to access and decide to live without accessing a record when it means going to Court.

A review of how often the current process proves to be too great a deterrent to citizens would be of interest to the public. ATIPPA provides citizens of NL the right to request information, and it promises to provide access to severed documents, but there is no real opportunity to gain access to severed records outside the Courts. It is not surprising that individual citizens, without the human and financial resources, seldom challenge government through the Trial Division under Section 60. Under such odds, labeling a document as supportive to Cabinet is effective. From the government’s perspective, such a move essentially eliminates any right to access, but from a citizen’s perspective, it eliminates government’s accountability, credibility and trust. Without an Appeal to the Trial Division, it appears that no one with any authority gets the opportunity to question if the labeling of a record as protected was ever legally correct or legitimate.

Government can very effectively eliminate public scrutiny by denying access and redirecting ordinary citizens to the Courts. As the experts have warned, there is opportunity for abuse. The citizens of NL require the checks and balances other jurisdictions have found necessary to protect the rights of citizens and the integrity of the system.

- 8) **If Legislation lends itself to being used as a tool by public bodies wanting to avoid appeals on their decisions, then legislation is facilitating an unconscionable high-handed abuse of authority and a blatant misrepresentation of the spirit of the Act.** In my experience with ATIPPA, a government department is not always interested in mediation and may prefer to inappropriately escalate a request for factual information in order to claim ATIPPA protection. It appears that such action can be entirely based on the reason for which a request was made. Although one would expect it to be unacceptable, a government department choosing to artificially escalate the privacy level of requested information has the opportunity, and perhaps the authority, under current legislation. Through this submission, I am bringing the potential use of this expensive management tactic to the attention of the ATIPPA Review Process.
- 9) **A ‘Statement of Claim’ to the Trial Division of the Supreme Court of NL is in some cases the only avenue available to determine if government acted responsibly and in good faith.** In other jurisdictions, the expert opinion of a Commissioner is valid and respected. Unfortunately, in NL public bodies are not required to accept expert interpretation and recommendations. Of great concern, is that this review has clearly identified inconsistency in interpretation, the potential for undue influence and a need for more training. Citizens of NL should not accept that our designated expert can be overruled. Doing so leaves us with the Courts as the only avenue available to citizens who feel wrong doing has occurred.
- 10) **Political embarrassment should never be an excuse to withhold information.** Summarizing my case would clearly demonstrate many of the points discussed above. Through the Commissioner’s work, the government department has already severed the record in question in my case, but government continues to refuse access, in spite of the Commissioner’s recommendations on Formal Review advising release of the record. The Commissioner advised that release would cause no harm, would be in the spirit of the Act, and would fully satisfying my access request. The Department did not agree with our expert and continues to refuse access. The Department has claimed that what was left of the record after severing ‘meaningless’ and that the record was protected by procedural guidelines, if not by legislation. Of greatest concern, the department has also depended upon their need to “avoid embarrassment of the public servants” as a legitimate reason not to release the severed record.
- 11) **Any citizen applying to ATIPPA for access needs clear, easy to read information about the role of the OIPC and the limited influence a review can yield.** The process is uncharted for most citizens and is perhaps not as helpful as one would initially perceive. In reality, we have the right to submit an access request, but ‘little, to no right’ to access a severed record without proceeding to the level of the Courts. This is not what the literature available leads one to believe prior to engaging in the process.

12) **An access to information request can turn into an expensive process for all parties and should be included in any training that may occur in the future.** The cost of escalating the initial HR Appeal process to the ATIPPA level have been substantial, some of the costs include:

- The initial application review process by ATIPPA staff and ATIPPA departmental coordinators.
- A preliminary review by the OIPC resulting in a flow of government correspondence.
- A formal review by the Privacy Commissioner resulting in the writing of an extensive report.
- Assignment of a lawyer by government (average hourly rate is \$200-\$300 an hour) to this case.
- Retaining of a lawyer by the Privacy Commissioner (average hourly rate is \$200-\$300 an hour).
- Three preliminary Court appearances (judge, court costs and lawyers present x 3)
- A two day hearing by the Supreme Court of NL scheduled for September 2014 (Judge and 2 lawyers for 2 days, plus preparation time, court room costs).

The court hearing will take place in September 2014. The two government funded solicitors, representing the different views of our government, will likely determine that the Privacy Commissioner's opinion and recommendations offered a year earlier were sound, just and informed.

Thank you for this opportunity. Should you need further clarification of the issues presented or copies of any of the information related to my case, please contact me. By nature of its simplicity, and the complexity that evolved, this case is valuable to your review process.

Respectfully,

Scarlet Hann



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