

**Presentation by the Information Commissioner of Canada**

**Independent Statutory Review Committee**  
*Access to Information*  
*and Protection of Privacy Act*

**Newfoundland and Labrador**

**Monday, August 18, 2014**

**Check against delivery**

Good morning Mr. Chair and panel members.

Thank you for the opportunity to present my perspective on freedom of information issues to the Independent Statutory Review Committee. I am accompanied this morning by my colleague Jacqueline Strandberg. Jacqueline has diligently prepared some comparative research material which we have presented to the Committee this morning to assist in your review.

To start I should state that I have reviewed Commissioner Ring's recommendations and I support them fully. Hence my remarks will be brief and focus on three key issues: the exceptions regime and the Commissioner's ability to review decisions on disclosure, proactive disclosure and the duty to document. This will allow more time for detailed questions of interest to the Committee.

At the onset, I congratulate the government of Newfoundland and Labrador to have given the Committee the broad mandate to conduct this independent review of the *Access to Information and Privacy Act* (ATIPPA)<sup>1</sup> and for moving forward with its Open Government Initiative.

The Supreme Court of Canada has recently recognised again the important role of access to information legislation: "Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.

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<sup>1</sup> S.N.L. 2002, c A-1.1.

However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information.”<sup>2</sup>

Hence in reviewing any freedom of information legislation, the key issue is: does the legislation achieve the right balance between the confidentiality required to conduct the business of government while ensuring citizens have access to information under the control of the government so they can hold their governments to account. In 2014, this balancing exercise must be conducted in the context of open government initiatives which are developing not only in Newfoundland and Labrador, but across Canada and many other countries.

My review of the current ATIPPA leads me to conclude that it does not achieve this balance. Let me explain.

### **Exceptions and the Commissioner’s ability to review decisions on disclosure**

In section 3 the ATIPPA recognizes the right of the public to access government records, subject to limited exceptions to this right of access. Model access to information laws endorse this principle and generally provide that limitations to the right of access should be constructed as

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<sup>2</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 1-2.

discretionary, injury based exemptions. These exemptions should also be of general application and be time limited.<sup>3</sup>

It is important to understand that discretionary exemptions do not result in all information being disclosed at all times. Discretionary exemptions are considered the progressive standard because they require decision makers to make an informed, fair, and reasonable decision about disclosure.

Injury based exemptions are favoured because they take into account that the level of sensitivity attached to information changes with circumstances, time and perspectives.

An additional tool used to balance exemptions with the right of access is a public interest override. Public interest overrides are favoured because decision-makers must ask themselves whether the general public interest in disclosure outweighs the specific interest the exemption is

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<sup>3</sup> See Article 19, *A Model Freedom of Information Law* (London: Article 19, 2006) at Part IV: Exceptions, online: Article 19 <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf> [Article 19 Model Law]; Organization of American States, *Model Inter-American Law on Access to Public Information and its Implementation Guidelines* (Washington: Organization of American States, Secretariat of Legal Affairs, 2012) at art. 40, online: Organization of American States [http://www.oas.org/en/sla/dil/docs/Access\\_Model\\_Law\\_Book\\_English.pdf](http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf) [OAS Model Law]; Open Society Foundations, *The Tshwane Principles on National Security and the Right to Information* (New York: Open Society Foundations, 2013) at principle 1(c) and principle 3, online: Open Society Foundations <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf> [Tshwane Principles]; and the Open Government Guide, *Open Government Guide: Right to Information* (New York: Open Government Guide, 2013) at recommendation 4, online: Open Government Guide <http://www.opengovguide.com/commitments/adopt-a-law-which-recognises-the-right-to-information-in-line-with-international-standards/> [Open Government Guide].

intended to protect. If the answer is yes, the information must be disclosed. Recent model laws,<sup>4</sup> and some provinces include a public interest override.<sup>5</sup>

Section 3 of the ATIPPA also provides for an independent review of disclosure decisions made by public bodies. Independent oversight is also consistent with international norms.<sup>6</sup>

The changes brought forward by Bill 29 have expanded the scope of key exceptions to disclosure under the Act such as the exceptions for Cabinet confidences, policy advice and recommendations and business interests of a third party. In conjunction, it has in some circumstances, curtailed the ability of the Commissioner to review disclosure decisions.

In addition, exclusions under the Act do not allow for consideration of any of the factors that must be taken into account under discretionary exemptions and, in most instances, decisions on the application of exclusions are not independently reviewable by the Commissioner.

The ATIPPA, in its current form, excludes from its application a broad range of records: all records listed at section 5 and records listed in subsection 7(4) – records created solely for the purpose of briefing a member of the Executive Council with respect to assuming responsibility for a department, secretariat or agency or a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the House of Assembly.

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<sup>4</sup> OAS Model Law at arts. 43 and 44 and Tshwane Principles at principle 3(b)(ii).

<sup>5</sup> *Freedom of Information and Protection of Privacy Act* (British Columbia), R.S.B.C. 1996, c. 165 at s. 25 and *Freedom of Information and Protection of Privacy Act* (Ontario), R.S.O. 1990, c. F.31 at s. 23 [ON FIPPA].

<sup>6</sup> See OAS Model Law at p. 51 of Implementation Guidelines.

The issue of whether the Commissioner is able to review disclosure decisions made pursuant to the application of section 5 is currently before the appeal court.<sup>7</sup> Further, section 43 prevents the Commissioner from reviewing decisions made under section 18 that a record is an official cabinet record or reviewing decisions made under section 21 that information needs to be protected by reason of solicitor client privilege.

Although I did not review all of the various provisions of the acts or regulations that have been designated to prevail over the ATIPPA, I did review the *Energy Corporation Act*<sup>8</sup> provisions that govern access to information held by Nalcor and its subsidiaries, given the importance of this corporation's activities. Section 5.4 of the *Energy Corporation Act* essentially precludes the Commissioner from reviewing decisions on disclosure by the CEO of Nalcor, if the latter certifies that the information qualifies for non-disclosure and the CEO's certification is confirmed by the board of directors of the corporation.

In my view, the expansion of the exceptions regime, the exclusions and the curtailment of the Commissioner's ability to review decisions on disclosure has tipped the balance in the ATIPPA excessively in favour of non-disclosure of government information to the detriment of Newfoundlanders and Labradorians' ability to hold their government to account.

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<sup>7</sup> *Ring v. Memorial University of Newfoundland*, 2014 CanLII 12849 (NL SCTD).

<sup>8</sup> S.N.L. 2007, c. E-11.01.

It is also inconsistent with the principles of the Government's open government initiative, which are transparency, accountability, participation and collaboration.<sup>9</sup>

### **Proactive disclosure**

Section 69 of the ATIPPA provides for the creation and publication of a directory of information to assist people in identifying and locating records held by public bodies. Commissioner Ring has pointed out in his brief that the directory has not been established yet and he recommends that it be commenced and maintained.

I support this recommendation but I would also recommend that the Government amend the Act to include provisions for publication schemes. Publication schemes are mandatory requirements within access laws to disclose on a routine basis certain classes of information, such as policies and procedures, minutes of meetings, annual reports and financial information. Usually, this information must be made available to the public via an institution's website and is updated on an ongoing basis. Comparable jurisdictions, as well as model laws use publication schemes.<sup>10</sup>

The benefits of implementing a comprehensive publication scheme are numerous. Publication schemes can promote a pro-disclosure culture; transform the access framework from a reactive to a proactive system; limit government costs because it results in decreases in access requests and

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<sup>9</sup> Government of Newfoundland and Labrador, Office of Public Engagement, *Open Government Initiative Framework* (St. John's: Office of Public Engagement, 2014) at p. 1, online: Open Government, <http://www.open.gov.nl.ca/pdf/OpenGovernmentInitiativeFramework.pdf>.

<sup>10</sup> The following access laws all include publication schemes: ON FIPPA at s. 33; *An Act respecting access to documents held by public bodies and the Protection of personal information* (Quebec), CQLR c A-2.1 at division III: Distribution of Documents or Information, *Federal Transparency and Access to Governmental Public Information Act* (Mexico) 2002 at art. 7; *Freedom of Information Act 2000* (the United Kingdom) ch. 36 at s. 19; and the *Freedom of Information Act* (United States), 5 U.S.C. § 552 at s. (a). The following model laws also all include publication schemes: Open Government Guide; OAS Model Law at art. 8; and Article 19 Model Law at s. 17.

reduces delays for the public looking for information. Embedding publication schemes in the ATIPPA would also be consistent with the government's open government initiative.

### **Duty to Document**

The ATIPPA currently does not include a provision that requires the documentation of decisions, including information and processes that form the rationale for that decision. The access to information regime relies on recorded information. Without an explicit duty to document in the Act it is possible that not all information related to the decision-making process is being recorded. This risk is compounded by the advent of new technologies used in government institutions such as instant messaging.<sup>11</sup> A legal duty to document the decision-making process protects information rights but also leads to better governance and ensures that the historical legacy of government decisions is preserved.

Thank you and I will be pleased to answer your questions.

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<sup>11</sup> Office of the Information Commissioner of Canada, *Instant messaging putting access to information at risk* (Special Report) (Ottawa: Office of the Information Commissioner of Canada, 2013), online: Information Commissioner <http://www.oic-ci.gc.ca/eng/pin-to-pin-nip-a-nip.aspx>.