

Access to Information

ATIPP Act: Part I – III

POLICY & PROCEDURES MANUAL

2008



Justice

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY

Coordinating Office

PREFACE

The Policy and Procedures Manual is designed to assist Newfoundland and Labrador public bodies in managing requests made pursuant to the *Access to Information and Protection of Privacy Act* ("the Act").

Readers will sometimes see references to ATIPP, ATIPP application, ATIPP file, etc. This acronym represents the Access to Information and Protection of Privacy Act. The following conventions have been used throughout the Manual:

- Terms and phrases that are defined in the Act are identified in bold
- A double line box indicates that a section or clause of the Act is reproduced
- A dotted line box provides an example or instruction
- When referring to the legislation, the following terms are used:

1., 2., 3., etc. section (1), (2), (3), etc. sub-section
(a), (b), (c), etc. paragraph (i), (ii),
(iii), etc. clause

We wish to acknowledge the governments of Manitoba, Alberta and British Columbia and the offices that coordinate administration of their respective access and privacy legislation. Their procedure manuals were an invaluable guide in developing this Policy and Procedures Manual for Newfoundland and Labrador public bodies.

This manual will be updated periodically. Please check the website regularly for updated versions.

ATIPP Office
Department of Justice
Updated March 2008

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION

| | Page No. |
|--|----------|
| 1.1 Background | 1-2 |
| 1.1.1 Principles of Access and Privacy Legislation | 1-2 |
| 1.1.2 Routine Disclosure | 1-2 |
| 1.1.3 Newfoundland and Labrador's <i>Access to Information and Protection of Privacy Act</i> | 1-3 |
| 1.2 Purposes | 1-4 |
| 1.3 Public Bodies | 1-5 |
| 1.3.1 House of Assembly and Courts Not Under the <i>Act</i> | 1-6 |
| 1.4 Records | 1-7 |
| 1.4.1 Definition of Record | 1-7 |
| 1.4.2 Custody or Control of a Record | 1-7 |
| 1.4.3 Records that Do Not Fall Under the <i>Act</i> | 1-8 |
| 1.5 Procedures Not Affected by the <i>Act</i> | 1-11 |
| 1.6 Conflict With Other Acts | 1-13 |

CHAPTER 2: ADMINISTRATION OF THE *ACT*

| | |
|--|------|
| 2.1 Introduction | 2-2 |
| 2.2 Head of the Public Body | 2-3 |
| 2.3 Access and Privacy Coordinator | 2-4 |
| 2.4 Minister Responsible for this <i>Act</i> | 2-6 |
| 2.5 Exercising Rights on Behalf of Another | 2-7 |
| 2.6 Giving Notice Under the <i>Act</i> | 2-9 |
| 2.7 Protection From Liability and Offences | 2-10 |

CHAPTER 3: ACCESS REQUEST MANAGEMENT

| | |
|---|------|
| 3.1 Introduction | 3-2 |
| 3.2 Right of Access | 3-3 |
| 3.3 Duty to Assist | 3-4 |
| 3.4 Applications | 3-5 |
| 3.5 Oral Requests | 3-6 |
| 3.6 Receiving a Request | 3-7 |
| 3.7 Acknowledging Receipt of Request | 3-9 |
| 3.8 Transferring a Request to Another Public Body | 3-10 |
| 3.9 Searching for the Records | 3-11 |
| 3.10 Preliminary Assessment of the Request | 3-12 |
| 3.11 Review of the Records | 3-13 |
| 3.12 Internal Consultations | 3-15 |
| 3.13 Severing | 3-16 |
| 3.14 Responding to a Request | 3-18 |
| 3.15 Refusal to Confirm or Deny the Existence of a Record | 3-21 |
| 3.16 Giving Access | 3-22 |
| 3.17 Explaining a Record | 3-23 |
| 3.18 Access to Electronic Records | 3-24 |
| 3.19 Creating a Record in the Form Requested | 3-25 |
| 3.20 Time Limit for Responding and Extending the Time Limit | 3-26 |
| 3.20.1 Time Limit for Responding | 3-26 |

Table of Contents

| | | |
|------|--|------|
| | 3.20.2 Extending the Time Limit | 3-26 |
| | 3.20.3 Suspension of Time Limit Where Fee Estimate Given | 3-27 |
| | 3.20.4 Delay in Response a Deemed Refusal | 3-27 |
| 3.21 | Repetitive or Incomprehensible Requests | 3-28 |
| 3.22 | Fees | 3-29 |
| | 3.22.1 Fee Estimates | 3-29 |
| | 3.22.2 Fee Waiver | 3-31 |
| 3.23 | Third Party Notice | 3-32 |

CHAPTER 4: EXCEPTIONS TO DISCLOSURE

| | | |
|-----|--|------|
| 4.1 | Introduction | 4-2 |
| | 4.1.1 Exceptions Apply to Information in a Record - Severing | 4-2 |
| | 4.1.2 Interpretation of Exception Provisions | 4-3 |
| | 4.1.3 Limits to an Exception | 4-4 |
| | 4.1.4 Exceptions Protecting "Third Parties" | 4-4 |
| | 4.1.5 Mandatory and Discretionary Exceptions to Disclosure | 4-5 |
| | 4.1.6 Exercising a Discretion | 4-6 |
| | 4.1.7 Reasonable Expectation of Harm | 4-7 |
| 4.2 | Exceptions | 4-9 |
| | 4.2.1 Cabinet Confidences | 4-9 |
| | 4.2.2 Local Public Body Confidences | 4-10 |
| | 4.2.3 Policy Advice or Recommendations | 4-11 |
| | 4.2.4 Legal Advice | 4-13 |
| | 4.2.5 Disclosure Harmful to Law Enforcement | 4-14 |
| | 4.2.6 Disclosure Harmful to Intergovernmental Relations or Negotiations | 4-17 |
| | 4.2.7 Disclosure Harmful to the Financial or Economic Interests of a Public Body | 4-20 |
| | 4.2.8 Disclosure Harmful to Conservation | 4-22 |
| | 4.2.9 Disclosure Harmful to Individual or Public Safety | 4-23 |
| | 4.2.10 Disclosure Harmful to the Business Interests of a Third Party..... | 4-24 |
| | 4.2.11 Disclosure of Personal Information | 4-28 |
| | 4.2.12 Public Interest Override..... | 4-28 |
| | 4.2.13 House of Assembly Service and Statutory Office Records..... | 4-29 |

CHAPTER 5: PRIVACY

Please see the "Privacy Policy and Procedures Manual"

CHAPTER 6: POWERS AND DUTIES OF THE COMMISSIONER

| | | |
|-----|--|-----|
| 6.1 | Introduction | 6-2 |
| 6.2 | The Information and Privacy Commissioner | 6-3 |
| 6.3 | General Powers and Duties of the Commissioner | 6-5 |
| 6.4 | Powers of the Commissioner When Conducting an Investigation | 6-7 |
| | 6.4.1 Powers of a Commissioner under the <i>Public Inquiries Act</i> | 6-7 |

Table of Contents

| | | |
|---|---|-------|
| | 6.4.2 Power to Require Production of Records | 6-7 |
| | 6.4.3 Right to Enter Offices of Public Bodies, Examine Records, etc. | 6-8 |
| | 6.4.4 Duty to Produce Records, etc. | 6-8 |
| 6.5 | Protection of Information Provided to the Commissioner | 6-10 |
| 6.5.1 | Investigation in Private | 6-10 |
| 6.5.2 | Statements Not Admissible in Evidence, etc. | 6-10 |
| 6.5.3 | Restrictions on Disclosure of Information by the Commissioner | 6-10 |
| | | |
| CHAPTER 7: REVIEWS, COMPLAINTS AND APPEALS | | |
| 7.1 | Introduction | 7-2 |
| 7.2 | Reviews and Complaints [sections 43 to 59] | 7-3 |
| 7.2.1 | Who May Request a Review or Make a Complaint | 7-3 |
| 7.2.2 | How and When a Request for Review May Be Made | 7-4 |
| 7.2.3 | Review by the Commissioner | 7-4 |
| 7.2.4 | Commissioner’s Report About a Review | 7-5 |
| 7.2.5 | Response of the Head of the Public Body to the Commissioner’s Report..... | 7-5 |
| 7.3 | Appeals to Court [sections 60 to 63] | 7-7 |
| 7.3.1 | Who May Appeal to the Court and What Decisions May Be Appealed | 7-7 |
| 7.3.2 | When an Appeal is Commenced | 7-7 |
| 7.3.3 | The Hearing of the Appeal | 7-8 |
| 7.3.4 | Powers of the Court on Appeal | 7-9 |
| | | |
| CHAPTER 8: REPORTING | | |
| 8.1 | Introduction | 8-2 |
| 8.2 | Notify ATIPP Office of Access Requests | 8-3 |
| 8.3 | ATIPP Summary Report | 8-4 |
| 8.3.1 | Instructions for Completing the ATIPP Summary Report | 8-4 |
| 8.3.2 | Federal Access to Information Requests | 8-9 |
| 8.4 | Reviews, Complaints and Appeals | 8-10 |
| | | |
| APPENDICES: | | |
| | APPENDIX 1 | Tab 1 |
| Form 1 | Application for Access | |
| Form 2A | Acknowledgment of Request | |
| Form 2B | Notice of Application Fee | |
| Form 3 | Notice of Transfer of Request to Another Public Body | |
| Form 4A | Response to Applicant - Full Disclosure | |
| Form 4B | Response to Applicant - Partial Disclosure | |
| Form 4C | Response to Applicant - Access Refused | |
| Form 5 | Notice of Extension of Time Limit | |
| Form 6A | Estimate of Costs Letter | |

Table of Contents

| | |
|---------|---|
| Form 6B | Estimate of Costs |
| Form 7A | Notice to Third Party |
| Form 7B | Notice to Applicant of Third Party Notice |
| Form 8 | ATIPP Summary Report |

| | |
|--|-------|
| APPENDIX 2 | Tab 2 |
| Handling the Request: Checklist of the steps to follow in managing an access request | |

| | |
|--|-------|
| APPENDIX 3 | Tab 3 |
| Glossary of terms used in access and privacy legislation | |

| | |
|------------------|-------|
| APPENDIX 4 | Tab 4 |
| Fee Schedule | |

CHAPTER 1

INTRODUCTION

- 1.1 Background
 - 1.1.1 Principles of Access and Privacy Legislation
 - 1.1.2 Routine Disclosure
 - 1.1.3 Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*
- 1.2 Purposes
- 1.3 Public Bodies
 - 1.3.1 House of Assembly and Courts Not Under the *Act*
- 1.4 Records
 - 1.4.1 Definition of Record
 - 1.4.2 Custody or Control of a Record
 - 1.4.3 Records that Do Not Fall Under the *Act*
- 1.5 Procedures Not Affected by the *Act*
- 1.6 Conflict With Other Acts

1.1 Background

1.1.1 *Principles of Access and Privacy Legislation*

Access and privacy legislation is based on two fundamental rights of people in contemporary democratic society:

- the right to access information held by governments and other public bodies, including information about oneself, subject only to certain specified exceptions
- the right to privacy for personal information collected, stored, used and disclosed by public bodies

The access right is based on the principles of the accountability of governments and other public institutions to citizens and the desirability of having better informed members of society. The exceptions to access derive from recognition that certain types of decision-making and transactions must be conducted in confidence. The practice of severing, which involves removing information that falls within an exception to disclosure from a copy of the document to be released, provides a means of disclosing as much information as possible while maintaining necessary confidentiality.

The right to privacy for personal information is based on privacy protection measures which are also referred to as fair information practices. The Act's privacy provisions control the manner in which a public body may collect, use and disclose personal information of individuals. They also control the manner in which personal information is retained, disposed of, kept accurate and kept secure. An individual has a right of access to his/her own personal information, subject to limited and specific exceptions set out in the Act. Additionally, an individual has a right to request corrections to personal information about themselves that is held by a public body.

1.1.2 Routine Disclosure

Many requests are for records containing information which may be handled outside the scope of the Act. This is called "routine disclosure" of information. Examples include information that is already publicly available or may be purchased. For records that may be routinely disclosed, there is no need for the applicant to make a formal ATIPP request (see section 1.5 of this chapter).

1.1.3 *Newfoundland and Labrador's Access to Information and Protection of Privacy Act*

Newfoundland and Labrador enacted freedom of information legislation in 1981, the third jurisdiction of Canada to do so. The *Freedom of Information Act* provided for access to records held by the Government of Newfoundland and Labrador and specified Crown agencies, with the Office of the Parliamentary Commissioner (Ombudsman) and the Supreme Court Trial Division serving as the review and final decision-making mechanisms. However, the Office of the Parliamentary Commissioner was discontinued in 1991 which resulted in the Trial Division being the only avenue of recourse for complaints. The *Freedom of Information Act* did not contain protection of privacy provisions and the right to access information did not extend to local public bodies and many Crown agencies and corporations in the province.

In line with the Government of Newfoundland and Labrador's commitment towards more open, transparent and accountable public policy, in December 2000, the Minister of Justice announced the creation of the Freedom of Information Review Committee. This committee was tasked with reviewing the existing *Freedom of Information Act* and making recommendations to modernize the legislation and to create consistency with other Canadian jurisdictions. In July, 2001, after an extensive review and consultation process, the Committee submitted its report, *Striking the Balance* (copies of which may be obtained from The Queen's Printer or through the ATIPP web site at <http://www.gov.nl.ca/just/civil/atipp>), recommending that the current act be repealed and a new legislative regime enacted.

In response, Bill 49, implementing the Committee's report, was presented to the House of Assembly during the fall of 2001 and the *Access to Information and Protection of Privacy Act* received Royal Assent on March 14, 2002. The ATIPP Act (excluding Part IV, the Privacy provisions) was proclaimed in January 2005. The Privacy provisions were proclaimed in January 2008.

1.2 Purposes

The purposes of the *Act* are set out in section 3, which provides:

3 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to ~~(b)~~ records; giving individuals a right of access to, and a right to request correction of, personal information about themselves;
- (c) specifying limited exceptions to the right of ~~(d)~~ access; preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
- (e) providing for an independent review of decisions made by public bodies under this Act.

(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.

Public Bodies

The *Act* applies to public bodies within the Province of Newfoundland and Labrador. “Public body” is defined in paragraph 2(p), which provides:

- 2 (p) “public body” means
- (i) a department created under the *Executive Council Act*, or a branch of the executive government of the province
 - (ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,
 - (iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,
 - (iv) a local public body, and
 - (v) the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*, and includes a body designated for this purpose in the regulations made under section 73, but does not include,
 - (vi) the constituency office of a member of the House of Assembly wherever located
 - (vii) the Trial Division, the Court of Appeal or the Provincial Court, or
 - (viii) a body listed in the Schedule;

Local public body is defined in paragraph 2(k) of the Act and means an educational body, a health care body and a local government body, each of which is defined in section 2.

- 2 (d) “educational body” means
- (i) Memorial University of Newfoundland,
 - (ii) College of the North Atlantic,
 - (iii) Centre for Nursing Studies, Health Care Corporation of St. John’s,
 - (iv) Western Regional School of Nursing, Western Health Care Corporation,
 - (v) a school board, school district constituted or established under the *Schools Act, 1997*, including the conseil scolaire francophone, and
 - (vi) a body designated as an educational body in the regulations made under section 73;

2 (g) “health care body” means

- (i) a hospital board or authority as defined in the *Hospitals Act*,
- (ii) a health and community services board established under the *Health and Community Services Act*,
- (iii) the Cancer Treatment and Research Foundation,
- (iv) the Mental Health Review Board,
- (v) the Newfoundland and Labrador Centre for Health Information, and
- (vi) a body designated as a health care body in the regulations made under section 73;

2 (j) “local government body” means

- (i) the City of Corner Brook,
- (ii) the City of Mount Pearl,
- (iii) the City of St. John’s,
- (iv) a municipality as defined in the *Municipalities Act, 1999*, and
- (v) a body designated as a local government body in the regulations made under section 73;

1.3.1 *Bodies that do not Fall Under the Act*

The definition of “public body” in section 2 of the Act does not include the following offices or bodies:

- the constituency office of a member of the House of Assembly wherever located
- the Trial Division, the Court of Appeal or the Provincial Court, or
- a body listed in the Schedule

1.4 Records

Section 5 states that the *Act* applies to all records in the custody of or under the control of a public body, except those described in paragraphs 5(1)(a) to 5(1)(k).

1.4.1 Definition of Record

Record is given a broad definition: “a record of information in any form ...” The definition also includes examples of records but these examples are not exhaustive.

2 (q) “record” means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

A record for the purposes of the Act includes a copy of a record, a draft and other working materials, information recorded or stored by electronic means and any other “record of information in any form” in the custody or under the control of a public body.

The Act applies to all correspondence, reports and other documents and recorded information received by the public body from an outside organization or individual, as well as to those generated by any staff of the public body in the course of their duties.

The Act applies to records created or obtained before the Act came into effect, as well as to records created or obtained after the Act came into effect.

1.4.2 Custody or Control of a Record

For a record to fall under the Act, a public body need only have either “custody” or “control” of the record. In determining whether a public body has “custody” or “control,” it is necessary to consider all aspects of the creation, maintenance and use of the record.

In most cases, the term “custody” for the purposes of the Act means having physical possession of a record. Only in rare cases could it be successfully argued that a public body does not have “custody” of a record in its possession. For example, if the records sought were produced by a contractor carrying out work for a public body but the

records did not relate directly to the work/services being provided, it may be argued that the public body does not have custody or control, as defined by the Act. However, other records produced by the contractor in carrying out the work or service may be deemed to be under the custody and/or control of the public body.

The term “control” usually means the power or authority to make decisions respecting the use or disclosure of a record. Ordinarily, records that are stored on behalf of a public body by another party in an off-site records centre are under the control of the public body.

A public body having custody of any records forming part of a cabinet submission or any records which may reveal the “substance of deliberations” of cabinet should be advised that control of these records lies with Cabinet Secretariat and, therefore, the Access and Privacy Coordinator for Cabinet Secretariat should be consulted when these are responsive records in an access request. The public body must obtain sign-off from Cabinet Secretariat before the head of the public body responds to an access request.

1.4.3 Records that do not Fall Under the Act

The Act does not apply to a limited number of records specified in paragraphs 5(1)(a) to 5(1)(k), even if these records are in the custody or under the control of a public body.

- **5(1)(a) Court Records**

The *Act* does not apply to:

- < information in a court record
- < a record of a judge, master, magistrate or justice of the peace
- < a judicial administration record, or
- < a record relating to support services provided to a judge or judicial officer of a court.

2 (h) “judicial administration record” means a record containing information relating to a judge, master or justice of the peace, including information respecting

- (i) the scheduling of judges, hearings and
- (ii) the content of judicial training programs,
- (iii) statistics of judicial activity prepared by or for a judge,
- (iv) a judicial directive, and
- (v) a record of the judicial council continued under the *Provincial Court Act, 1991*;

A “**judicial administration record**” is one type of court record excluded from the *Act* by paragraph 5(1)(a).

The courts are excluded from the scope of the *Act*; similarly, the records of the courts are excluded from the *Act*.

- **5(1)(b) Notes, etc. of persons acting in a judicial or quasi-judicial capacity**

The *Act* does not apply to “a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity.”

A person is acting in a quasi-judicial capacity if that person is carrying out a function that is partly administrative and partly judicial, and is required to investigate facts or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions as a basis for official actions, and to exercise discretion of a judicial nature. A person acting in a quasi-judicial capacity is generally under a duty to act in accordance with the rules of natural justice.

- **5(1)(c) a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;**

The *Act* does not apply to any personal or constituency record that is in the possession or control of a member of the House of Assembly.

- **5(1)(c.1) records of a registered political party or caucus as defined in the House of Assembly Accountability, Integrity and Administration Act;**

As defined in the *House of Assembly Accountability, Integrity and Administration Act*, a “**registered political party**” means an organization formed for the purpose of contesting an election of members to the House of Assembly and which is registered in the register of political parties under section 278 of the *Elections Act*, 1991. A “**caucus**” is defined as “a group of 2 or more members who belong to the same registered political party.”

- **5(1)(d) Personal or constituency record of a minister**

The *Act* does not apply to “a personal or constituency record of a minister.” However, the records of a minister relating to his or her functions as a government minister do fall under the *Act*.

- *5(1)(e) Repealed*
- *5(1)(f) Repealed*

¹ *Dictionary of Canadian Law and Black’s Law Dictionary, 6th edition.*

- **5(1)(g) *Question to be used on an examination or test***

The *Act* does not apply to “a record of a question that is to be used on an examination or test.” This exclusion applies to questions to be used now or in the future on an examination or test. The exclusion applies, but is not limited, to questions to be used on examinations or tests given by educational institutions. For example, questions on a driver’s licence test and on a government job competition test would also be excluded from the *Act* if the questions are currently being used or will be used in the future.

- **5(1)(h) *Teaching materials or research information***

The *Act* does not apply to “teaching materials or research information of an employee of a post-secondary institution.” The phrase “educational body” is defined in the *Act* to mean Memorial University of Newfoundland; College of the North Atlantic; Centre for Nursing Studies, Health Care Corporation of St. John’s; Western Regional School of Nursing, Western Health Care Corporation; a school board, school district constituted or established under the *Schools Act, 1997*, including the conseil scolaire francophone; and a body designated as an educational body in the regulations made under section 73.”

- **5(1)(i) and (j) *Archival records obtained from a person other than a public body***

The *Act* does not apply to material placed in the custody of the Provincial Archives of Newfoundland and Labrador or the archives of a public body by or for a person, agency or organization other than a public body.

- **5(1)(k) *Records relating to an ongoing prosecution***

The *Act* does not apply to “a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.” Once all proceedings have been completed, records are subject to the *Act*. A prosecution is completed once the trial is finished, a decision has been made and all appeal periods have expired.

Procedures Not Affected by the *Act*

The *Act* will not replace existing procedures for providing the public with access to records or information. The underlying principles of the legislation encourage routine disclosure wherever possible.

5 (2) This Act

- (a) is in addition to existing procedures for access to records or information normally available to the public, including a requirement to pay fees;
- (b) does not prohibit the transfer, storage or destruction of a record in accordance with an Act of the province or Canada or a by-law or resolution of a local public body;
- (c) does not limit the information otherwise available by law to a party in a legal proceeding; and
- (d) does not affect the power of a court or tribunal to compel a witness to testify or to compel the production of a document.

• **5(2)(a) *Records normally available to the public***

Public bodies have always provided public access to certain information and records in their custody. The *Act* does not replace existing procedures for gaining access to information or records which are normally available to the public, nor does it affect any fees that may be charged for such access.

Not all requests for information or records need to be made under the *Act*. See Routine Disclosure earlier in this chapter in 1.1.2. The *Act* should not be applied to preclude or reduce access to information which is available by custom or practice. However, public bodies should review their routine channels for releasing information to ensure that personal information, Cabinet confidences and information that may be harmful to the business interests of a third party is protected.

• **5(2)(b) *Transfer, storage or destruction of records***

The *Act* does not prohibit the transfer, storage or destruction of records by a public body, provided it is done in accordance with:

- < a statute or regulation of Newfoundland and Labrador <
- a statute or regulation of Canada, or < a by-law or
- resolution of a local public body

For Newfoundland and Labrador government departments, agencies and commissions, transfer, storage and destruction of records is governed by the Archives Act.

It is an offence under paragraph 72(d) of the Act to wilfully destroy a record or erase information in a record that is subject to the Act with the intent to evade a request for access to records. A person found guilty of such an offence by a court is liable to a fine of up to \$5,000 or to imprisonment for a term not exceeding 6 months, or to both.

• ***5(2)(c) Information available to parties to legal proceedings***

The *Act* does not limit the information and records otherwise available by law to a party to legal proceedings.

“Legal proceedings” include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.² Civil court actions, a prosecution in a criminal court and proceedings before a quasi-judicial tribunal such as the Labour Relations Board are examples of “legal proceedings.”

Where a public body is required by the rules of court or the rules of a quasi-judicial tribunal to produce records, the exceptions to access in the Act and the provisions restricting disclosure of personal information do not apply.

• ***5(2)(d) Powers of a court or tribunal***

The Act does not affect the power of a court or tribunal to compel a witness to testify or to compel production of documents.

Where a public body is required to produce documents by a subpoena, search warrant or other order of production, the exceptions to access in the Act and the provisions restricting disclosure of personal information do not apply.

² *Black's Law Dictionary, 6th edition*

Conflict With Other Acts

Subsection 6(1) of the *Act* establishes a general rule of priority. Where there is a conflict between this *Act* and another *Act* or regulation, this *Act* will prevail. Notwithstanding this general rule, however, public bodies have the ability to incorporate particular provisions of other Acts and regulations into the ATIPP regulations, thereby allowing those provisions to prevail over the ATIPP Act [subsection 6(2)]. This applies in situations where another Act or regulation prohibits or restricts access to information or provides a right of access to information.

It is important to note, however, that subsection 6(3) establishes a two year transition period. During this period, the general rule of priority [subsection 6(1)] will not be in force and any provision of another Act or regulation which prohibits or restricts access to information or provides a right of access to information, will prevail [subsection 6(4)].

After this two year transition period, subsection 6(4) will be repealed and subsections 6(1) and (2) will come into force. At this point, provisions of other Acts and regulations will only prevail if those provisions have been incorporated into the ATIPP regulations as per subsection 6(2) and paragraph 73(q). It is important, therefore, that during this two year transition period public bodies review their legislation in order to identify potential conflicts with the ATIPP Act. If and when such conflicts are identified, the public body may recommend to the Department of Justice that the pertinent provisions be designated in the ATIPP regulations.

Although the *Act* establishes a two year transition period, all recommendations from public bodies are subject to Cabinet approval and sufficient time must be allotted for this process. For example, a public body may choose to submit their recommendations after one year in order to allow sufficient time for the preparation of a Cabinet submission and subsequent response prior to the expiry of the transition period.

CHAPTER 2 ADMINISTRATION OF THE ACT

2.1 Introduction

2.2 Head of the Public Body

2.3 Access and Privacy Coordinator

2.4 Minister Responsible for this *Act*

2.5 Exercising Rights on Behalf of Another

2.6 Giving Notice Under the *Act*

2.7 Protection From Liability and Offences

2.1 Introduction

The *Act* establishes a uniform set of administrative requirements which must be undertaken by all public bodies in Newfoundland and Labrador.

This Chapter outlines the roles and responsibilities of the heads and officials who administer the Act within these public bodies.

Head of the Public Body

The *Act* gives the head of the public body the responsibility for all decisions and actions of the public body under the Act.

- 2(f) “head”, in relation to a public body, means
- (i) in the case of a department, the minister who presides over it,
 - (ii) in the case of a corporation, its chief executive officer,
 - (iii) in the case of an unincorporated body, the minister appointed under the *Executive Council Act* to administer the Act under which the body is established, or the minister who is otherwise responsible for the body, or
 - (iv) in another case, the person or group of persons designated under section 66 or in the regulations as the head of the public body;

66. A local public body shall, by by-law, resolution or other instrument, designate a person or group of persons as the head of the local public body for the purpose of this Act.

Under section 67, the “head of a public body may delegate to a person on the staff of the public body a duty or power of the head under this Act.” A formal delegation by a minister as head of a department to his or her deputy minister is not necessary, as the deputy has authority to act on behalf of the minister.¹

¹The *Interpretation Act* of Newfoundland and Labrador, subsection 21(4).

Access and Privacy Coordinator

Each public body is required, under section 67 of the Act, to designate a person on the staff of the public body who is responsible for receiving applications for access to records and for the day-to-day administration of the *Act*. This person will be referred to as the **Access and Privacy Coordinator** and will be responsible for management of access requests under Part II of the *Act* and is the focal point of access to information and protection of privacy within the public body.

9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

While the responsibilities of Access and Privacy Coordinators will vary somewhat, depending on the degree of centralization of the access to information and protection of privacy functions within the organizations, the following is a general list of duties.

Access Request Management Duties:

- assist applicants and potential applicants in various ways, including explaining the Act, helping them to narrow their requests, directing them to other sources of information, bearing in mind at all times the statutory duty to assist an applicant (section 9).
- assign requests to program areas
- monitor and track the processing of requests
- ensure time limits and notification requirements are met
- contact third parties if third party notification is required
- estimate, calculate and collect fees
- review preliminary access recommendations from program areas
- consult with legal counsel, as required
- develop responses to access requests

- coordinate the public body's dealings, with input and guidance from the public body's senior executive and solicitor (e.g., for a government department this would be the Deputy Minister and Department of Justice solicitor), with the Commissioner's Office during complaint investigations
-
- prepare statistical reports for the public body and the ATIPP Office in the Department of Justice

Training Administration

- identify training needs of the staff of the public body
- liaise with the ATIPP Office, Department of Justice

Minister Responsible for this *Act*

The Minister responsible for this Act is the member of Cabinet appointed under the Executive Council Act. The Minister of Justice through the Access and Privacy Office of the Department of Justice has responsibility for central administration and coordination of the legislation.

The Minister responsible for this Act is required under section 70 to submit an annual report to the House of Assembly which summarizes statistically the activities of public bodies in both access and protection of privacy. The head of the public body, not the Minister responsible for this Act, is accountable for the handling of access applications and personal information by that public body.

Exercising Rights on Behalf of Another

The rights or powers which may be exercised on behalf of an individual include the right to request access to a record under Part II, to authorize indirect collection of personal information under paragraph 33(1)(a), to consent to the use of personal information under paragraph 38(1)(b) and to consent to disclosure of personal information under paragraph 39(1)(b).

65. A right or power of an individual given in this Act may be exercised
- (a) by a person with written authorization from the individual to act on the individual's behalf;
 - (b) by a court appointed guardian of a mentally disabled person, where the exercise of the right or power relates to the powers and duties of the guardian;
 - (c) by an attorney acting under a power of attorney, where the exercise of the right or power relates to the powers and duties conferred by the power of attorney;
 - (d) by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy; or
 - (e) where the individual is deceased, by the individual's personal representative, where the exercise of the right or power relates to the administration of the individual's estate.

It is important to ensure that a person claiming authority to act on behalf of another is legally entitled to do so, particularly where personal information or privacy is involved. Where there are any questions or doubts about the existence, or the extent, of such authority, legal counsel should be contacted.

- *Paragraph 65(a) - Written authorization from the individual* An authorization under paragraph 65(a) must be in writing and signed, and should be dated. The authorization should clearly set out the extent of the authority being granted.
- *Paragraph 65(b) - Court appointed guardian* A court appointed guardian of a mentally disabled person can exercise a right or power under the *Act* only if it relates to the powers and duties of the guardian.

- *Paragraph 65(c) - Attorney under a power of attorney* Where an individual gives authority to exercise rights on his or her behalf in a power of attorney, the power of attorney document will set the limits on that authority. The attorney can exercise a right or power under the *Act* only if it relates to the powers and duties conferred by the power of attorney document.
- *Paragraph 65(d) - Parent or guardian of a minor* A parent or legal guardian of a minor (an individual under 19 years of age²) does not automatically have authority to exercise rights or powers on behalf of his or her minor child or ward under the *Act*. The head of the public body concerned must be satisfied that the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy. This leaves discretion in the hands of the public body to ensure the minor's privacy rights are protected in appropriate circumstances.
- *Paragraph 65(e) - Personal representative of a deceased individual* The personal representative referred to in paragraph 65(e) is the executor named in the will of the deceased individual or, where there is no will, the administrator appointed by a court to administer the estate of the deceased individual.

²The *Age of Majority Act* of Newfoundland and Labrador, section 2.

Giving Notice Under the *Act*

A variety of notices and documents are required to be given under the *Act*. For example, a fee estimate under subsection 68(2); notice of extension of time for responding to an access request under subsection 16(2); notice of transfer of request under subsection 17(2); notice of the decision of the head of a public body (or of the head's delegate) respecting access under subsection 12(1); notices to third parties respecting access under section 28; etc.

Notices given to a person under the *Act* should be given:

- by sending it to that person by prepaid mail to the person's last known address
- by personal service
- by electronic transmission (email) or telephone transmission (fax), or
- by another means authorized by the person receiving the notice

Except where an appeal to court is involved, the choice of how to give notice or send a document under the *Act* is usually determined by the public body and will depend on the circumstances. Normally, notices or documents will be sent by mail, email or fax. A public body should assess the circumstances and choose the most effective and economical means of giving notice or providing a document.

Protection from Liability and Offences

Under Section 71 of the *Act*, a public body and the officials involved in the administration of the *Act* are protected from liability for damages for disclosing or withholding information where the public body has acted in good faith or failing to give a required notice where the public body took reasonable care in giving notice.

71. An action does not lie against the government of the province, a public body, the head of a public body, an elected official or appointed official of a local public body or a person acting for or under the direction of the head of a public body for damages resulting from

- (a) the disclosure of or a failure to disclose, in good faith, a record or part of a record or information under this *Act* or a consequence of that disclosure or failure to disclose; or
- (b) the failure to give notice required by this *Act* where reasonable care is taken to ensure that notices are given.

“Liabilities for damages” means civil liability to pay compensation or make reparation to someone who has suffered harm or loss.

“Good faith” means honest belief and absence of malice.

“Reasonable care” in this context means taking steps that are suitable in the circumstances.

72. A person who wilfully

(a) discloses personal information contrary to Part IV;

(b) makes a false statement to, or misleads or attempts to mislead the commissioner or another person performing duties or exercising powers under this Act;

(c) obstructs the commissioner or another person performing duties or exercising powers under this Act; or

(d) destroys a record or erases information in a record that is subject to this Act with the intent to evade a request for access to records, is guilty of an offence and liable, on summary conviction, to a fine of not more than \$5,000 or to imprisonment for a term not exceeding 6 months, or to both.

“Wilfully” means intentionally or deliberately.

CHAPTER 3

ACCESS REQUEST MANAGEMENT

- 3.1 Introduction
- 3.2 Right of Access
- 3.3 Duty to Assist
- 3.4 Applications
- 3.5 Oral Requests
- 3.6 Receiving a Request
- 3.7 Acknowledging Receipt of Request
- 3.8 Transferring a Request to Another Public Body
- 3.9 Searching for the Records
- 3.10 Preliminary Assessment of the Request
- 3.11 Review of the Records
- 3.12 Internal Consultations
- 3.13 Severing
- 3.14 Responding to a Request
- 3.15 Refusal to Confirm or Deny the Existence of a Record
- 3.16 Giving Access
- 3.17 Explaining a Record
- 3.18 Access to Electronic Records
- 3.19 Creating a Record in the Form Requested
- 3.20 Time Limit for Responding and Extending the Time Limit
 - 3.20.1 Time Limit for Responding
 - 3.20.2 Extending the Time Limit
 - 3.20.3 Suspension of Time Limit Where Fee Estimate is Given
 - 3.20.4 Delay in Response a Deemed Refusal
- 3.21 Repetitive or Incomprehensible Requests
- 3.22 Fees
 - 3.22.1 Fee Estimates
 - 3.22.2 Fee Waiver
- 3.23 Third Party Notice

Introduction

This chapter outlines the requirements for providing access to records in response to an "*Access Request*", an application under Part II of the Act. Forms and information provided in the appendices should be used to manage access requests.

Appendix 1

- Form 1 Access Request Form
- Form 2A Acknowledgment of Request
- Form 2B Notice of Application Fee
- Form 3 Notice of Transfer of Request to Another Public Body
- Form 4A Response to Applicant - Full Disclosure
- Form 4B Response to Applicant - Partial Disclosure
- Form 4C Response to Applicant - Access Refused
- Form 5 Notice of Extension of Time Limit
- Form 6A Estimate of Costs Letter
- Form 6B Estimate of Costs
- Form 7A Notice of Third Party
- Form 7B Notice to Applicant of Third Party Notice
- Form 8 ATIPP Summary Report

Appendix 2

Checklist of the steps to follow in managing an access request

Appendix 3

Glossary of terms used in access and privacy legislation

The assignment of responsibility for the various functions in the access request management process will depend on a number of factors including the size of the public body, the number of requests that it receives, the degree of centralization in the organization and the management style of the Access and Privacy Coordinator. Throughout the process, remember that personal information about the applicant or a third party should be shared within the public body only on a "need to know" basis.

Appendix 4

Fee Schedule

Right of Access

The *Act* establishes a right of access to a record, or part of a record, in the custody or under the control of a public body. However, certain types of information are excluded and this right of access does not extend to:

- those limited types of records excluded from the Act under paragraphs 5(1)(a) to 5(1)(k) (see section 1.4.3 in chapter 1)
- records excluded by the provisions of another Act (see section 1.6 in chapter 1)
- information in a record which falls within an exception to disclosure in sections 18 to 30 of the *Act* (see chapter 4)

7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of a fee required under section 68.

The right of access is subject to the payment of fees as required by the *Schedule of Fees* (Appendix 5) set by the Minister of Justice.

This right of access under the *Act* is not restricted by residency or citizenship and applies to businesses and other organizations, as well as to individuals.

Duty to Assist

The *Act* requires that public bodies try to respond quickly, accurately and fully to applicants and to help them to as reasonable an extent as possible.

9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.

Both the applicant and the public body will benefit from a cooperative, respectful relationship.

Applications

To apply for access to a record under the Act, a person must complete an application in the prescribed form as per subsection 8(2). The applicant must provide enough detail to enable an experienced employee of the public body to identify the record (see Form 1 in Appendix 1).

The applicant must submit the application form to the public body that the applicant believes has custody or control of the record being requested [subsection 8(1)]. Where practicable, the application should be submitted to the Access and Privacy Coordinator at the office of the public body. Should an applicant send an application to another office of the public body, including a Minister's office, it should be accepted, date stamped and forwarded immediately to the Access and Privacy Coordinator. If possible, it should be faxed to the Coordinator right away and the original sent by mail.

Application Forms should also be available in public body offices and from the Access and Privacy Coordinator. The Coordinator should maintain a sufficient supply in the appropriate offices. The front line staff should know where the forms are located and the name and address of the Access and Privacy Coordinator, which should be provided to the public along with the application form.

If a person sends an access request in a format other than the application form, the Access and Privacy Coordinator should immediately fax or mail an application form to the person or instruct them how to obtain an application form electronically. The Coordinator should process the request so long as all the information required to locate the records being sought is provided and the appropriate fee is attached. This would be in keeping with the duty to assist in section 9 of the Act.

If the public body considers that verification of the applicant's identity or that of a third party is necessary in order to respond to the application, the public body may at any time request that the applicant provide suitable identification.

Oral Requests

Subsection 8(3) of the *Act* allows an applicant to make an oral request for access to a record if he or she has a limited ability to read or write English or has a disability or condition that impairs his or her ability to make a written request. In this situation, the Access and Privacy Coordinator or a staff member who is familiar with the process should fill out the form as directed by the individual, have the individual sign it if possible, date stamp it and send it immediately to the Access and Privacy Coordinator.

Please bear in mind, however, that the standard procedure is to have the applicant submit a request on the appropriate form. Only those individuals meeting the criteria specifically stated in subsection 8(3) are permitted to make an oral request.

Receiving a Request

On the day an access request is received, the Access and Privacy Coordinator, or whichever employee first receives the application, must date stamp the application. The Access and Privacy Coordinator should then record the application in the ATIPP Database (if using) or an access request tracking log.

Access and Privacy Coordinators must advise the ATIPP Office of each request as soon as it is received. Departments using the electronic ATIPP database should enter the details of the request at the earliest possible time. **The Access and Privacy Coordinators of all other public bodies must fax a copy of the request to the ATIPP Office at 709 729-5466 as soon as the request is received.**

On the same day, or as soon after as possible, the Coordinator should review the request to determine

- whether the application is understandable and complete,
- whether it has been sent to the appropriate public body,
- whether a formal application under the Act is, in fact, necessary in order for the applicant to obtain the information, and
- whether notification to a third party may be required

< *If the request is unclear, provides insufficient information, or is overly broad*, the Access and Privacy Coordinator should contact the applicant as quickly as possible (preferably by telephone, fax or e-mail) to clarify his or her information needs. Vague or overly general applications are generally the result of a lack of understanding of the functions of the public body, its records or how to best articulate the request. If, despite the Access and Privacy Coordinator's best efforts to clarify the request with the applicant, there is still some confusion, subsection 16(1) of the Act enables the head of the public body to extend the time for responding to a request for up to an additional 30 days if the applicant does not give enough details to enable the public body to identify a requested record.

< *If the request should have been sent to another public body*, the Coordinator should transfer the application as soon as possible, but no later than 7 days after receipt, to that other public body (see section 3.8 of this chapter - "Transferring a Request to Another Public Body").

< *If the information is available through routine channels*, the Coordinator should notify the applicant immediately and advise him or her of the normal process. In most cases, the public body will simply provide the information or direct the applicant to the appropriate office where the information may be obtained. The Coordinator should ensure that the applicant understands

what is required or who to contact for further information and should then confirm that the applicant wishes to withdraw the ATIPP application.

Acknowledging Receipt of Request

When an ATIPP request is received by a public body and the Access and Privacy Coordinator has determined that the records sought are under the custody and control of the public body, the Coordinator must send a letter to the applicant acknowledging receipt of the access request (see Form 2A in Appendix 1). The acknowledgement of receipt letter outlines the conditions under which the 30 day time limit may be extended and the policy regarding fee estimates.

Transferring a Request to Another Public Body

Under authority of subsection 17(1) of the *Act*, within seven calendar days after a public body receives a request for access to a record, the head may transfer it to another public body if:

- the record was produced by or for the other public body, or
- the record is in the custody or under the control of the other public body.

Before transferring an application, the Coordinator should make sure that the second public body has the requested record and agrees to the transfer.

Under paragraph 17(2)(a), if an application is transferred to another public body, the head of the public body that transfers the application must notify the applicant of the transfer in writing as soon as possible (see Form 3 in Appendix 1).

Searching for the Records

To respond to ATIPP applications in an efficient and timely manner, the public body must be able to locate and retrieve the requested records quickly. The requested records may be in one of these locations: in the office of the public body (in a central filing system or a staff member's office); in the Newfoundland and Labrador Government Records Centre; or at the Provincial Archives of Newfoundland and Labrador or the archives of another public body.

After the requested records have been located, the next step usually is to make photocopies of the requested records and to prepare a list of them. At least two copies of the records will be required: a clean copy for the ATIPP file and one on which to identify information which is excluded from the Act or excepted from disclosure under sections 5, 14 or 18 to 31. The original records should then be returned to their filing locations and the photocopies should be used as the working copies.

For requests involving large volumes of material, substantial photocopying may be required. For this reason, it is important that Access and Privacy Coordinators work with the applicants to narrow or clarify the scope of the request and, subsequently, the amount of materials to be searched and copied.

Each page of the records should be numbered consecutively and a list of all records prepared (see section 3.11 of this chapter for further information on preparing a list of records). The Access and Privacy Coordinator will develop a system best suited to his/her needs and the needs of their public body. Should the Commissioner be required to undertake an investigation, then careful and thorough documentation at this stage will be especially helpful to the Access and Privacy Coordinator.

3.10 Preliminary Assessment of the Request

After the nature and extent of the application have been considered (including any necessary discussion with the applicant) and the records have been located and reviewed, the Coordinator should make a preliminary assessment. The following issues need to be addressed before proceeding:

- Does it appear that all relevant records have been located and do they appear to satisfy the application?
- Can the records, in whole or in part, be released immediately without line-by-line review?
- Do the records contain third party business information that may require third party notification under section 28 (see section 3.23 of this chapter for further information)?
- Is a time extension under subsection 16(1) necessary because the application is vague, because there is a large volume of records to be searched and a response within 30 days would unreasonably interfere with operations, or because third party notification is required (see section 3.20 of this chapter for further information)?
- Does it appear likely that search and preparation will require more than two hours and the preparation of an Estimate of Costs? If so, see section 3.22.1 of this chapter.

3.11 Review of the Records

Once the preliminary assessment has been completed and any issues resolved, the Access and Privacy Coordinator should review the information in the requested records line-by-line. A line-by-line review is essential to comply with the important principle of severability set out in subsection 7(2) of the *Act*, which grants an applicant a right of access to the remainder of a record after any information excepted from disclosure under sections 18 to 30 has been severed. (See section 3.13 of this chapter for further information on severing.) A careful review of the information contained in a record is required in order to determine whether or not an exception to disclosure applies. It is usually not possible to make this determination merely on the basis of the title, type, classification or format of a record.

More than one exception to disclosure may apply to information in a record. For example, information in a briefing note forming part of a cabinet submission may be withheld under sections 18(1) (cabinet confidences), 20(1)(a) (policy advice or recommendations), and 24(1)(a) (trade secrets). The reviewer should note all relevant exceptions.

On a file copy of the record, the reviewer should mark the information in the record that he or she feels is excepted from disclosure. The section, subsection and paragraph of the exception to disclosure, and whether the exception is mandatory or discretionary, should be noted in the margin on this file copy.

It is recommended that the reviewer prepare an **Access Request Review Summary** incorporating the following elements:

| Request # | | Name of Reviewing Officer: | | | | |
|-----------|--------------|----------------------------|-------------|------------|----------|--------------------|
| Doc # | No. of Pages | Date | Description | Exceptions | Comments | Third Party Notice |

Thorough documentation at this stage will be beneficial for several reasons:

- in discussion with legal counsel
- in the final decision-making stage
- in explaining decisions to the Information and Privacy Commissioner if a complaint is made

- in preparing affidavit evidence for court in the event of an appeal respecting access

3.12 Internal Consultations

An examination of the request and a thorough review of the records will often require internal consultations.

When a public body receives a request that deals with records originating in another public body or deals with matters in which another public body has a direct interest, it should consult with that public body. This will ensure that all relevant factors are taken into consideration when deciding whether or not to disclose records.

Sometimes the nature of the request may require that senior management and/or communications management in the public body need to be consulted. Communications management should be consulted on all requests from media and some public bodies may choose to include communications consultation on every request it receives.

If the records being sought may contain cabinet confidences, then the public body must consult Cabinet Secretariat before releasing any records or information. The public body must obtain sign-off from Cabinet Secretariat before the head of the public body responds to an access request.

(See 4.2.1 of this Manual for further information.)

If the records being sought may contain information that may relate to intergovernmental relations or negotiations, then the public body must consult IGA before releasing any records or information. (See 4.2.6 in this Manual for further information.)

If the public body requires legal advice or interpretation, then they should consult with their solicitor.

The Access and Privacy Coordinator of the public body should incorporate these consultations into their ongoing review of the records.

3.13 Severing

Where part of the information in a requested record falls within an exception to disclosure, but other information in the record does not, the head is required to give the applicant access to as much of the record as can reasonably be provided without releasing the information which is excepted from disclosure. The information which is excepted from disclosure is “severed” from the remainder of the record and withheld from the applicant.

Note: Severing should be done on copies only; the original record should not be altered or defaced.

Generally, the smallest unit of information to be disclosed after severing is a sentence. But even where only a sentence remains, some information, such as a name, might be removed and the remainder released.

The requirement to “sever” a **record** is a requirement to release all information in a **record** which can reasonably be disclosed. If, after severing information from disclosure, the remaining information is meaningless, disclosure of the remaining information would not be appropriate. The Federal Court has held that information is not reasonably severable if it produces nothing more than “disconnected snippets of releasable information.”¹ While from time to time releasable information may be so intertwined with excepted information that it is impossible to carry out the severing process and retain any intelligible information, this is likely to be rare.

Time spent severing documents can be included when calculating fees.

¹Information Commissioner of Canada v. Solicitor General of Canada, [1988] 3 F. C. 551

How to Sever

- Using removable tape, black marker, or redaction software redact the information which is excepted from disclosure on a photocopy of the record.
- Write the numbers of the sections, subsections and paragraphs of the applicable exception(s) on top of the tape or in the right margin beside the severance. Remember: Use all exceptions that apply.
- When one or more entire pages have been exempted from disclosure, indicate the number of pages severed and the number of the section, subsection and paragraph of the applicable exception(s) to disclosure on the first page. i.e Pages 1-16 (sec 18, 20) no need to include 16 blank pages.
- A photocopy of this redacted version is the one which will be provided to the applicant in the final response to the request for access, either to examine on site or, if requested by the applicant and subject to any applicable fees, for the applicant to take away. If a copy of the record is provided to the applicant, an exact copy of the redacted version should also be kept in the ATIPP master file for future reference.

3.14 Responding to a Request

The Access and Privacy Coordinator, as the official delegated by the head of the public body to respond to a request, is the point of contact for the applicant in all correspondence, which may include notices under the Act, e-mails clarifying request, etc. However, it is strongly recommended that the Deputy Minister or equivalent, or his/her designate at the executive level, in the public body provide the final written response, in which the applicant is granted or denied access, as per section 12. Forms 4A, 4B or 4C should be used when preparing this response.

12. (1) In a response under section 11, the head of a public body shall inform the applicant
- (a) whether access to the record or part of the record is granted or refused;
 - (b) if access to the record or part of the record is granted, where, when and how access will be given; and
 - (c) if access to the record or part of the record is refused,
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
 - (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
 - (iii) that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.

• *When full disclosure is provided:*

Access is provided if the record falls within the scope of the Act, if none of the information in the record falls under any mandatory exception to disclosure, and if none of the information in the record falls under a discretionary exception, or it does fall under a discretionary exception but the head of the public body has decided that it may be released.

The response (use Form 4A) must inform the applicant where, when and how access will be given. See "Giving Access" in 3.16 of this Chapter.

- *When access is denied:*

Access is denied to all or part of a record if the record falls outside the scope of the Act (section 5); if the information sought is publicly available or is going to be published within 45 days (section 14); if some or all of the information in the record falls within a mandatory exception to disclosure, or if some or all of the information in the record falls within a discretionary exception to disclosure and the head has decided to deny access (sections 18-30).

For a discussion of records falling outside the scope of the Act, see section 1.4.3 in Chapter 1.

The response (Form 4B if partial access is given or Form 4C if request is fully denied) must provide the reasons for the refusal and the specific provisions of the Act on which the refusal is based. Where refusal is based on an exception to disclosure, the number of the section, subsection and paragraph of the Act must be provided. The response must also provide the title and business telephone number of an officer or employee (normally the Access and Privacy Coordinator) who can answer the applicant's questions about the refusal.

Finally, the response must also tell the applicant that he or she has the right to appeal the refusal to the Trial Division, in accordance with section 60 or ask for a review of the refusal by the Information and Privacy Commissioner, in accordance with section 43. In addition, the response must inform the applicant of the applicable time limits for filing appeals and complaints (within 30 days for appeals to the Trial Division and within 60 days for complaints to the Information and Privacy Commissioner). Note, however, that the Commissioner may allow a period longer than 60 days [paragraph 45(1)(c)].

- *When the record does not exist or cannot be located:*

A requested record may never have existed, may have been destroyed in accordance with the Archives Act or other authority, or may have been lost.

The written response must inform the applicant that access is refused as the record does not exist or cannot be located and should explain briefly the steps taken to locate the record or, in the case of a record lawfully destroyed the disposal date and the authority for doing so. The response must also provide the title and business telephone number of an officer or employee (normally the Access and Privacy Coordinator) who can answer the applicant's questions about the refusal. Finally, the response must also tell the applicant that he or she has the right to appeal the refusal to the Trial Division, in accordance with section 60 or ask for a review of the refusal by the Information and Privacy Commissioner, in accordance with section 43. In addition, the response must inform the applicant of the applicable time limits for filing appeals and

complaints (within 30 days for appeals to the Trial Division and within 60 days for complaints to the Information and Privacy Commissioner). Note, however, that the Commissioner may allow a period longer than 60 days [paragraph 45(1)(c)].

3.15 Refusal to Confirm or Deny the Existence of a Record

In certain circumstances, the mere knowledge that a record exists may cause harm. Under subsection 12(2), where the head of the public body decides to refuse access, he or she also may refuse to confirm or deny the existence of a record which:

- contains information described in section 22 (disclosure harmful to law enforcement);
- contains personal information about a third party if disclosure of the existence of the information would reveal information which is prohibited under section 30; or
- contains information that could threaten the health and safety of an individual.

3.16 Giving Access

An applicant may request to examine a record or to receive a copy of it.

- *When examination of a record is requested:*

The applicant has the right to examine the record [paragraph 15(b)], unless information in it falls within an exception to access and the record must be severed to avoid disclosure of the excepted information. Where a record must be severed, the applicant is entitled to examine a copy of the severed version but is not entitled to examine the original record.

If the applicant is permitted to examine the record, the Access and Privacy Coordinator must, in the response to the applicant, inform the applicant where and when the record may be viewed. The Access and Privacy Coordinator should provide the name of an employee (normally the Access and Privacy Coordinator) whom the applicant should contact to make specific arrangements to view the records.

- *When a copy of a record is requested:*

If the record can reasonably be reproduced, a copy of the record must be provided to the applicant [paragraph 15(a)]. The applicant will be required to pay the applicable copying fee, unless the head of the public body waives all or part of the fee (see section 3.22.2 of this chapter). An exact copy of the record as provided to the applicant should be made for the file.

3.17 Explaining a Record

The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it. This is in keeping with section 9 (Duty to Assist an Applicant) and the underlying philosophy of ATIPP.

Time spent preparing or giving the applicant an explanation of a record is not an activity for which the applicant can be charged a fee.

3.18 Access to Electronic Records

As more and more information is maintained in electronic form, applicants will increasingly ask for access to electronic records. The definition of “record” in section 2 and access to electronic records as per subsection 10(1) make it clear that records in electronic form are subject to ATIPP in the same way as paper records.

10(1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where

- (a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and
- (b) producing it would not interfere unreasonably with the operations of the public body.

The duty to produce a record in electronic form for an applicant must be met if the requirements in both paragraphs 10(1)(a) and 10(1)(b) apply. It is important to note that under paragraph 10(1)(b), the interference with operations must be “unreasonable.” At the same time, the intent of the provision is not to put the computers of a public body purely at the service of an applicant who could make considerable demands upon them.

A fee can be charged for internal or external computer programming and data processing costs (see the Fee Schedule, Appendix 5).

Note: Care must be taken with electronic information to ensure that the most current and reliable version is produced for the applicant.

3.19 Creating a Record in the Form Requested

Subsection 10(2) is a discretionary provision, which enables the public body to comply with an access request by creating a record in the form requested if the head of the public body is of the opinion that to do so would be simpler or less costly than to produce the records as they exist. The public body, however, is not obligated to create a record in a form requested by an applicant if the public body does not normally produce such records.

10(2) Where a record exists, but not in the form requested by the applicant, the head of the public body may create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

3.20 Time Limit for Responding and Extending the Time Limit

P.20.1 *Time Limit for Responding*

Public bodies must make every reasonable effort to respond to a request for access in writing within 30 days after receiving it [subsection 11(1)], unless the time limit is extended under section 16 or the request has been transferred to another public body under section 17 (see section 3.8 of this chapter).

The 30 day time limit is based on calendar days, not working days. The 30 days start to run on the day after the date that the application is received by any employee of the public body.

For example, if a request is received by a public body on June 1, Day One of the 30-day time limit is June 2. For this reason, it is essential that the Access and Privacy Coordinator have a backup person to assume ATIPP responsibilities when the Coordinator is on leave or away from the office. If the 30 day period ends on a Saturday, Sunday or statutory holiday, the time for responding is extended to the next day that is not a Saturday, Sunday or statutory holiday.²

Note: Public bodies should try to respond to requests as quickly as possible rather than leaving them until close to the time limit. Section 9 of the Act requires that the head of a public body make every reasonable effort to respond to an applicant without delay.

If the request is incomplete and further information is required from the applicant, the Access and Privacy Coordinator should seek this information immediately. The official date of receipt cannot be changed. Nevertheless, the need to obtain more information may be grounds for extending the time limit under paragraph 16(1)(a), as discussed below (see section 3.6 of this chapter for additional information).

3.20.2 *Extending the Time Limit*

If the time for responding is extended under subsection 16(1), the Access and Privacy Coordinator must send a written notice to the applicant under subsection 16(2) setting out the reason for the extension [which must be one of the three grounds set out in subsection 16(1)], indicating when a response may be expected, and explaining that the applicant may make a complaint to the Information and Privacy Commissioner about the extension (see Form 5 in Appendix 1).

²*The Interpretation Act* of Newfoundland and Labrador, section 22(j).

16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where

- (a) the applicant does not give sufficient details to enable the public body to identify the number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body; or
- (c) notice is given to a third party under section 28.

3.20.3 Suspension of Time Limit Where Fee Estimate is Given

Where a written estimate of fees is given to an applicant by the head of a public body under section 68 (see Forms 6A and 6B in Appendix 1), the time within which the head is required to respond under subsection 11(1) is suspended until the applicant notifies the head that he or she wishes to proceed with the application [subsection 68(4)]. Subsection 3.21.1 of this chapter provides detail on fee estimates. If the applicant does not notify the public body within 30 days from the date the estimate is given (ie. received by the applicant) that he or she wishes to proceed, the public body may consider the application to have been abandoned [subsection 68(3)].

3.20.4 *Delay in Response a Deemed Refusal*

Where there is a deemed refusal under subsection 11(2), an applicant may ask the Commissioner to review the refusal, as per section 43.

11(2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.

3.21 Repetitive or Incomprehensible Requests

The grounds for refusing an access application under section 13 are narrow. Section 13 does not permit the head of a public body to refuse an application for access simply because the application will involve a large number of records or is otherwise a nuisance. A decision to refuse access on the basis of section 13 may result in a review by the Information and Privacy Commissioner.

13. The head of a public body may refuse to disclose a record or part of a record where the request is repetitive or incomprehensible or is for information already provided to the applicant.

3.22 Fees

Under subsection 68(1), the head of a public body may require a person who makes an application for access under the Act to pay some of the costs incurred by the public body in responding to the application.

The **Schedule of Fees** as set by the Minister of Justice provides as follows:

- *Application Fee* Each request for access pursuant to the *Act* must be accompanied by a \$5 application fee. The application fee must be paid before access to a record is given.
- *Search and Preparation Fees* The *Schedule of Fees* provides for a fee of \$15 per hour for locating, retrieving, providing and manually producing a record in excess of **two free hours**, rounded down to the nearest hour. Severing can be included in estimating fees.
- *Computer Programming and Data Processing Fees* The actual cost of producing a record from information in electronic form shall be charged to the applicant.
- *Copying Fees* Where the record is stored or recorded in printed form and can be copied or printed using conventional equipment, the cost will be \$0.25 per page for providing a copy or print of the record.
- *Delivery Fees* The *Schedule* provides that for shipping a record, the actual costs of the shipping method chosen by the applicant shall be charged.
- *Application for Personal Information* A person requesting access to their own personal information pays **only** the application fee.

3.22.1 Fee Estimates

If an applicant will be required to pay fees over and above the application fee and those fees are expected to exceed \$50, the head of the public body **is required** to give the applicant a fee estimate before providing the services [subsection 68(2)].

As soon as it appears likely that such fees will be charged, the public body is required to prepare an Estimate of Costs (Form 6B) and send it, with a covering letter (Form 6A), to the applicant.

In the event that the fees are less than \$50, an Estimate of Costs is not necessary and the public body must immediately proceed with the request. **The fee, however, must be paid in full prior to releasing the records to the applicant. The Access and Privacy Coordinator should send the applicant a letter of acknowledgment (Form 2A) outlining the requirement for payment of fees when no Estimate of Costs is to be applied.**

As stated on Form 6A, an applicant has up to 30 days from the date the estimate is given to advise the public body if the estimate is accepted or to modify the request in order to change the fee [subsection 68(3)]. If the applicant wishes the public body to proceed with the original request, he or she must send a signed copy of the Estimate of Costs form together with a cheque or money order in the amount of 50 percent of the fees. Upon receipt of the applicant's deposit, the public body will immediately proceed to complete the response. When the response is complete, the public body will assess fees and send the applicant a bill for the balance owing. When full payment is received, the public body will provide the response.

When an Estimate of Costs is given to an applicant, the time within which the head is required to respond to the access application, under subsection 11(1) of the Act, is *suspended* until the applicant notifies the head that he or she wishes to proceed with the application [subsection 68(4)] and provides a deposit representing 50 percent of the fees payable (refer to section 3.20.3 of this chapter).

If the applicant does not notify the public body within 30 days from the date the estimate is given that he or she wishes to proceed with or modify the application, the public body may consider the application to have been abandoned [subsection 68(3)].

Refunds

Fees charged for search and preparation, copying and delivery must not exceed the actual costs of the service [subsection 68(6)]. The public body shall pay refunds to the applicant in the following situations:

- when the actual cost of search and preparation, computer programming or data processing is less than the estimate, the difference should be refunded; and
- when access to *every* record requested by an applicant is refused, the amount of estimated fees paid by the applicant shall be refunded.

Final Invoice

The applicant's full payment of a balance owing must be received by the public body prior to releasing the requested records or information. The Access and Privacy Coordinator should send the final invoice (use Form 6B as a guide when developing the final invoice) to the applicant as soon as the request is complete.

3.22.2 Fee Waiver

Subsection 68(5) of the *Act* gives the head of a public body the discretion to waive the payment of all or part of a fee in accordance with the regulations. The grounds upon which the head may waive all or part of a fee are set out below:

In accordance with section 4 of the Regulations, if the applicant requests that fees be waived, the head of a public body may waive all or part of the fees payable, if the head is satisfied that:

- payment would impose an unreasonable financial hardship on the applicant, or
- the request for access relates to the applicant's own personal information and waiving the fee would be reasonable and fair in the circumstances. **(Please note that in accordance with the Schedule of Fees, an applicant seeking access to his/her own personal information is subject only to the \$5 application fee and, therefore, this is the only fee that would be waived.)**

If the head decides to waive all or part of the fees, then the applicant must be notified in writing about the decision. The written notification may be provided to the applicant at the time access is granted to the records being sought, or before it is granted.

If fees are waived, the amount and reason for the waiver must be entered in the red FEE folder in TRIM.

3.23 Third Party Notice

Public bodies hold information about individuals, corporations, groups and non-profit organizations which, if disclosed to others, may result in harm to these third parties.

The third party notice provisions in sections 27 and 28 of the Act are intended to protect the **business interests** of third parties who would be affected by disclosure of a record to an applicant under Part II of the *Act*.

A “third party” is a person, group of persons or an organization other than the applicant or a public body.

Notice to Third Party

When the head of a public body contemplates giving access to a record requested by an applicant and the record contains information which might be excepted from disclosure under section 27, the head must give written notice to the third party. If more than one third party may be affected by the disclosure of information in the record, the head must give notice to each affected third party.

If the head of a public body intends to refuse to give the applicant access to the record, the head is not required to give notice to the third party but may opt to do so.

The process in section 28 does not prevent informal consultations with third parties who may be affected by the disclosure of a record. Indeed, such consultations are advisable when a public body is trying to determine whether the exceptions to disclosure in section 27 apply.

When and How Notice Must Be Given

The public body must give notice to a third party under section 28 within the original 30-day period for responding to the application for access, or within the extended time period if the public body has notified the applicant of an extension. The manner in which notice is to be given is addressed in section 28 of the *Act* (see section 2.6 in Chapter 2).

Content of Notice to Third Party and Applicant

The content of the notice to a third party is governed by section 28 of the Act (see Form 7A in Appendix 1). The notice must state that a request has been made for access to a record containing information which, if disclosed, might affect the business interests of the third party. It should include a copy of or a description of the contents of the record and advise the third party that he or she may consent to the disclosure or make representations within 20 days after notice is given to the public body explaining why the information should not be disclosed. In order to enable the third party to make

informed representations, the notice should provide sufficient information, including an explanation of the grounds on which records may be withheld under the Act.

When notice is given to a third party under section 28, the applicant must also be given written notice indicating that the requested record may contain information which may affect the interests of a third party and that the third party is being given an opportunity to make representations about disclosure (See Form 7B in Appendix 1).

28 (1) Where the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 27, the head shall give the third party a written notice under subsection (3).

(2) Where the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 27, the head may give the third party a written notice under subsection (3).

(3) The notice shall

(a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests of the third party;

(b) describe the contents of the record; and

(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.

(4) When notice is given under subsection (1), the head of the public body shall also give the applicant a notice stating that

(a) the record requested by the applicant contains information the disclosure of which may affect the interests of a third party;

(b) the third party is being given an opportunity to make representations concerning disclosure; and

(c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

Response from Third Party

The third party has **20 days** after notice is given to consent to the disclosure or to make representations to the public body explaining why the information should not be disclosed. Representations must be in writing. If the third party consents to disclosure

of the record, the public body releases the information unless another exception applies to it.

If a third party makes representations as to why the records should not be disclosed, the public body considers the representations in reaching a decision on access. If there is any doubt that the third party has understood the significance of the notice or the criteria that apply in decisions regarding access, the public body should contact the third party by telephone to discuss the matter.

If a third party does not respond to the notice within 20 days of being given notice, the public body must make a decision based on the information available. The public body should contact the third party a few days before the 20 days are up to remind them that the notice period is expiring.

Decision by Head of Public Body

The head of the public body has **30 days** after the third party notice was given to reach a decision on whether or not to give access to the record to the applicant. However, a decision cannot be made until the third party responds, or on the 21st day after notice is given, whichever comes first.

Decision to Give Access

If, after considering the representations of the third party, the head decides to give access to the record or part of the record to the applicant, the third party has an **additional 20 days from the date notice** of this decision is given [subsection 29(3)] to ask for a review by the Information and Privacy Commissioner, as per section 43 of the Act. **The records in question must NOT be disclosed to the applicant during this period.**

If the third party does not request a review by the Information and Privacy Commissioner within this 20 day period, the applicant will be given access to the record [subsection 29(3)].

If the third party asks for a review by the Information and Privacy Commissioner within the 20 day time period, the head of the public body cannot give access to any record that is the subject of the review until it is dealt with by the Information and Privacy Commissioner.

Decision to Refuse Access

If the head decides not to give access to the record, the applicant has the right to appeal the refusal to the Trial Division, in accordance with section 60 or ask for a review of the refusal by the Information and Privacy Commissioner, in accordance with section 43.

CHAPTER 4 EXCEPTIONS TO DISCLOSURE

4.1 Introduction

- 4.1.1 Exceptions Apply to Information in a Record - Severing
- 4.1.2 Interpretation of Exception Provisions
- 4.1.3 Limits to an Exception
- 4.1.4 Exceptions Protecting "Third Parties"
- 4.1.5 Mandatory and Discretionary Exceptions to Disclosure
- 4.1.6 Exercising a Discretion
- 4.1.7 Reasonable Expectation of Harm

4.2 Exceptions

- 4.2.1 Cabinet Confidences
- 4.2.2 Local Public Body Confidence
- 4.2.3 Policy Advice or Recommendations
- 4.2.4 Legal Advice
- 4.2.5 Disclosure Harmful to Law Enforcement
- 4.2.6 Disclosure Harmful to Intergovernmental Relations or Negotiations
- 4.2.7 Disclosure Harmful to the Financial or Economic Interests of a Public Body
- 4.2.8 Disclosure Harmful to Conservation
- 4.2.9 Disclosure Harmful to Individual or Public Safety
- 4.2.10 Disclosure Harmful to the Business Interests of a Third Party
- 4.2.11 Disclosure of Personal Information
- 4.2.12 Public Interest Override
- 4.2.13 House of Assembly Service and Statutory Office Records

Introduction

An applicant under Part II of the Act has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant. However, the right of access does not extend to information in a record which falls within an ‘exception to disclosure’ [subsection 7(2)]. As well, there is no right to the excluded records listed in subsection 5(1) of the Act. See section 1.4 in Chapter 1 for a discussion of excluded records.

Information in a record may fall within more than one exception to disclosure. Access and Privacy Coordinators reviewing records should consider that while one exception may not apply, another might. See 3.11 in chapter 3 and 4.1.1 in chapter 4 of this Manual for further information.

The exceptions to disclosure are in sections 18 to 30 of the Act. Each of these sections deals with a separate category of excepted or protected information. Generally, there are three mandatory exceptions to disclosure and eight discretionary exceptions to disclosure.

In this *Introduction*, general principles respecting the exceptions to disclosure are discussed. Then, each of the eleven exception categories in sections 18 to 30 is analyzed separately. The chapter ends with a discussion of section 31 which requires mandatory *disclosure* of certain information.

The discussion of the exceptions to disclosure in this chapter is intended to be used in conjunction with the *Act*. The provisions of the *Act* should be referred to at all times.

4.1.1 *Exceptions Apply to Information in a Record Severing*

The right of access to a **record** under the *Act* is not absolute.

7(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.

If information in a record falls within an ‘exception to disclosure’ in sections 18 to 30 of the Act, an applicant is not entitled to access that information. More than one exception may apply to the same information. See 3.13 in chapter 3 of this Manual for a discussion on severing.

The exceptions to disclosure in sections 18 to 30 of the *Act* authorize or require the head of a public body to refuse to disclose "information." The term information, rather than the term record, is used in the exception sections to indicate that the exceptions apply to the information in a record and not necessarily to the whole record.

In general, access to a record cannot be refused because of its type, title or form. Rather, the information in the record must be carefully examined to determine if an exception to disclosure applies.

Subsection 7(2) of the *Act* requires that, where an exception applies to a portion of the information in a record, only that portion is severed and the applicant is entitled to access the remainder of the record unless another exception to disclosure applies. The object of severing is to release as much information in a record as possible, without disclosing the information protected by an exception.

4.1.2 Interpretation of Exception Provisions

A refusal to disclose information in a record to an applicant under Part II of the *Act* must be based on one or more of the exceptions to disclosure set out in sections 18 to 30, unless the record does not fall under the *Act* (section 5).

For example, it is not appropriate to refuse access simply because disclosure of the record may cause embarrassment to the public body – embarrassment is not an exception to disclosure under the *Act*.

In considering whether an exception to disclosure applies to information in a requested record, the following principles should be kept in mind:

- Paragraphs 3(1)(a) and 3(1)(c) state that the purpose of the *Act* is to provide a right of access to records, subject to the "limited and specific" exceptions set out in the *Act*.
- Generally, the public body bears the burden of proving that an exception to disclosure is justified if there is a complaint to the Information and Privacy Commissioner or an appeal to court (section 64).

4.1.3 *Limits to an Exception*

In determining whether an exception to disclosure applies, it is extremely important to read all the subsections and paragraphs in the section relating to that exception. Frequently, an exception to disclosure is followed by specific limits which have the effect of significantly cutting down or limiting the scope of that exception.

An example of an exception to disclosure which contains a specific limit is section 20, the exception for advice to a public body. Subsection 20(1) sets out the exception to disclosure, while subsection 20(2) sets out numerous records and types of information which are not included in the exception. The records and information described in subsection 20(2) must be disclosed unless an exception in another section of the Act applies.

The following exception sections contain provisions limiting their application:

- Section 18 - Cabinet Confidences [subsection 18(2)]
- Section 19 - Local Public Body Confidences [subsection 19(2)]
- Section 20 - Policy Advice or Recommendations [subsections 20(2) & (3)]
- Section 22 - Law Enforcement [subsection 22(3)]
- Section 23 - Intergovernmental Relations or Negotiations [subsection 23(3)]
- Section 24 - Economic and Financial Interests of a Public Body [subsection 24(2)]
- Section 27 - Business Interests of Third Parties [subsection 27(3)]
- Section 30 - Disclosure of Personal Information [subsection 30(2)]

4.1.4 *Exceptions Protecting Third Parties*

Certain exceptions to disclosure protect information which has been provided by, which is about, or could affect, a "third party."

"Third party" is defined in section 2 of the Act to mean a person, group of persons or an organization other than the applicant or a public body. The word "person" means a natural person (an individual) and includes "a corporation and the heirs, executors, administrators or other legal representatives of a person." An "organization" is "an organized body, especially a business, ... charity, etc." For example, a trade union is an "organization."

Examples of exception provisions that apply to "third party" information include:

- Section 26 - Individual or Public Safety
- Section 27 - Business Interests of Third Parties
- Section 30 - Disclosure of Personal Information

Information in a record must be carefully reviewed to ensure that privacy and other third party rights are protected under the Act. Even where an applicant has applied for access to a record containing personal information about himself or herself, that record may also contain information provided by, about or affecting one or more third parties, including the personal information of another individual.

Section 28 of the *Act* provides that the head of a public body shall, where practicable, notify a third party in writing if the head is considering giving access to a record that may contain information which is excepted from disclosure under section 27 (Business Interests of Third Parties). See 3.23 in chapter 3 of this Manual where third party notification is discussed in detail.

4.1.5 *Mandatory and Discretionary Exceptions to Disclosure*

There are two types of exceptions to disclosure in the *Act*: mandatory exceptions and discretionary exceptions.

A mandatory exception to disclosure contains the following words:

"The head of a public body *shall* refuse to disclose information..."

If facts exist or may exist which bring the information, or part of the information, contained in a record within a mandatory exception, the head is required to refuse to disclose the information. There is no discretion to disclose information under Part 2 of the Act if a mandatory exception applies.

The three mandatory exceptions to disclosure are:

- Section 18 - Cabinet Confidences
- Section 27 - Business Interests of Third Parties
- Section 30 - Disclosure of Personal Information

A discretionary exception to disclosure contains the following words:

"The head of a public body *may* refuse to disclose information...."

A discretionary exception to the right of access permits the head of a public body to disclose information in a record, even though the information falls within the exception.

In determining whether to apply a discretionary exception, the head of a public body should follow a two stage process:

- The head must first determine whether or not some or all of the information in the requested record falls within the discretionary exception provision, and
- The head must then determine whether or not to disclose the information, even though the exception could be relied upon as a basis for refusing access. In other words, if a discretionary exception applies, the head must still consider whether it is appropriate to disclose the information in the circumstances (unless an exception in another section of the *Act* applies). A decision whether or not to disclose information falling within a discretionary exception to disclosure is an exercise of discretion.

4.1.6 *Exercising Discretion*

The discretionary exceptions to disclosure recognize that, on occasion, the head of a public body may decide, after considering all relevant factors, that it is appropriate to disclose the requested information even though an exception could be relied upon as a basis for refusing access.

The following is a summary of some of the general principles which apply to the exercise of discretion:

... the discretion must be exercised by the authority to which it is committed, which must act on its own and not under the dictation of any other body, and ... it must be willing to exercise its discretion in each individual case which comes before it. The authority must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation which gives it power to act, and must not act arbitrarily or capriciously.¹

The exercise of discretion is not simply a formality where the head of the public body considers the issues before routinely saying no. The head must consider whether or not to exercise the discretion to disclose information with respect to each request, taking into consideration the information requested and the particular circumstances of the case. The head must not replace the exercise of discretion with a blanket policy that information will not be released, simply because it can be withheld under one of the discretionary exceptions. A public body may develop guidelines on exercising discretion but may not

¹*Administrative Law* by Evans, Janisch, Mullan and Risk (1980), at page 623.

treat them as binding rules. In exercising his or her discretion, the head must "have regard to all relevant considerations" and to the spirit and purposes of the Act.

The Information and Privacy Commissioner when investigating a complaint about a refusal of access, and the court when hearing an appeal about a refusal of access, cannot override a head's decision where the head has properly exercised his or her discretion.

4.1.7 Reasonable Expectation of Harm

Many of the exceptions to disclosure in the *Act* contain a "reasonable expectation of harm" test. These exceptions are concerned with the consequences that would result to the public body or another party if the information were disclosed.

A "reasonable expectation of harm" test is indicated by wording such as:

- "could reasonably be expected to harm"
- "could reasonably be expected to interfere with"
- "could reasonably be expected to result in (a specified harm)," etc.

Examples of exceptions which contain a 'reasonable expectation of harm' test include section 27 (Business Interests of a Third Party) and section 22 (Disclosure Harmful to Law Enforcement).

When considering whether such an exception applies, the head of the public body must determine whether disclosure of the requested information "could reasonably be expected" to cause the harm described in the exception provision. Whether or not disclosure "could reasonably be expected" to result in a specified harm or injury is a question of fact which must be determined in the circumstances of each application for access, and in the context of the information contained in the record requested.

There must be a clear and direct link between the disclosure of the information and the harm that is alleged and the expectation of harm must be reasonable.

Reasonableness is judged by an objective standard. A "reasonable expectation" is one which is not fanciful, imaginary or contrived but rather one which is based on reason. However, the requirement that an expectation be reasonable does not require that it be a certainty. It is not necessary to prove that disclosure of the requested record will actually result in the alleged harm. The fact that disclosure of a similar record in the past did not result in the alleged harm is a relevant consideration but is not determinative of the issue. Evidence of reasonable expectation of harm is not required to be detailed and convincing; there need only be evidence of a reasonable expectation of probable harm, which of necessity involves some speculation.

In short, the “reasonable expectation of harm” test requires that the facts establish a likelihood that the specified harm will result from the disclosure of the record or part of the record.

4.2 Exceptions

4.2.1 *Cabinet Confidences [subsection 18(1)]*

Summary

Subsection 18(1) is intended to prevent the harm to government that is presumed to occur if the substance of deliberations is revealed before or too soon after the issues were considered or revealed prior to being ready for public review. Premature disclosure of Cabinet deliberations inhibits the ability of Cabinet members to debate issues openly and freely, thereby reducing the effectiveness of Cabinet's decision making role.

Subsection 18(1) provides a mandatory exception to the general right of access established by section 7 of the Act. Subsection 18(1) applies to all records in the custody or under the control of public bodies as defined in the Act. The exception does not apply to records that have been in existence for 20 or more years, or to records of a decision made by Cabinet or one of its committees on an appeal under an *Act* [subsection 18(2)].

Policy

Public bodies must consult with Cabinet Secretariat in regards to information that may be exempted from disclosure under subsection 18(1). The public body must obtain sign-off from Cabinet Secretariat before the head of the public body responds to an access request.

Procedure

Determine the age of the record. If the record has been in existence for 20 or more years, this exception does not apply, and the record must be released unless another exception, without a time limit, applies.

- Preliminary Examination Notify the Access and Privacy Coordinator, Cabinet Secretariat, that a request has been received for which the release of records may reveal Cabinet confidences pursuant to section 18(1). **Note: All decisions related to applying section 18 to any record must be made in consultation with Cabinet Secretariat.**
- Line by Line Review Identify information that may be severed under other exceptions. Undertake formal consultation with Cabinet Secretariat.

- Severance The public body should forward any records that may be related to section 18(1) to Cabinet Secretariat for review and confirmation of section 18 information. Cabinet Secretariat will highlight those sections of the records relevant to section 18 and return the highlighted version to the public body for formal sign-off by the head.

4.2.2 *Local Public Body Confidences [subsection 19(1)]*

Subsection 19(1) is intended to prevent the harm to local public bodies that is presumed to occur if the substance of deliberations is revealed before or too soon after the issues were considered or revealed prior to being ready for public review. Matters considered in camera, usually related to land, legal issues, legislation and human resources, are deemed to present potential harm to the local public body.

Subsection 19(1) gives the head of a local public body the discretion to refuse to disclose information that would reveal a draft legal instrument (e.g., resolution, by-law), a draft of a private bill or the substance of deliberations of an in camera meeting of its governing body.

Subsection 19(1) operates in conjunction with other Acts or Regulations made under paragraph 73(k) of the Access to Information and Protection of Privacy Act to provide limited protection for the substance of deliberations of meetings of a local public body's elected officials, or its governing body or a committee of its governing body. Paragraph 19(1)(c) may be used only to withhold information from an in camera meeting where another Act or a Regulation under this Act authorizes the holding of that meeting in the absence of the public. This interpretation of paragraph 19(1)(c) is consistent with government's stated intention in drafting the in camera provisions of the Act.

Paragraph 19(1)(c) and any Regulation created under paragraph 73(k) governs only what recorded information may be withheld under the local public bodies confidences exception. They do not in any way limit what may be discussed in camera or affect local public bodies' right to regulate procedures for their meetings.

Subsection 19(1) does not apply to records that would reveal a subject matter that has been considered in a meeting open to the public, or to records that have been in existence for 15 years or more. [Subsection 19(2)]

Procedure

Determine the age of the record. If the requested record has been in existence for 15 or more years, this exception does not apply [paragraph 19(2)(b)] and the record must be released unless another exception applies.

- Preliminary Examination
- Line by Line Review Determine whether the draft or the subject matter of the deliberations which would be revealed has been considered in a meeting open to the public. If so, this exception does not apply and the **record** must be released, unless another exception applies [paragraph 19(2)(a)].
- Exercise of Discretion
- Severance

4.2.3 Policy Advice or Recommendations [subsection 20(1)]

Summary

Subsection 20(1) gives the head discretion to refuse to disclose advice or recommendations prepared by or for a minister or a public body, or draft legislation or regulations.

Subsection 20(1) does not apply to records which have been in existence for 15 or more years [subsection 20(3)]. Also, the head cannot refuse to disclose information under this exception that falls within the list provided in paragraphs 20(2)(a) to (m).

If a public body determines a record is included in subsection 20(2), the record cannot be excepted from disclosure under subsection 20(1). However, the public body reviews the record to determine if another exception applies.

Although section 20 does not require the head of the public body to consider potential harm in making a decision whether to withhold records, potential harm can be a factor in considering the use of section 20.

Section 20 is intended to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were

subject to excessive scrutiny, while allowing information to be released which would not cause real harm.

Policy

Section 20 may be applied by public bodies in circumstances where the withholding of a record will protect the open and frank discussion of policy issues within the public service. In exercising discretion under section 20, public bodies are encouraged to consider the release of advice and recommendations which have been approved and announced, or implemented.

Background methodology, data, analyses, questions, and factual information of all reports, studies or information in the scope of section 20(2) must not be withheld under section 20(1).

Advice and recommendations developed by or for a public body or a minister, and related to but prepared separately from any of the reports mentioned in section 20(2), would be covered by section 20(1). This includes advice or recommendations in briefing, decision or discussion notes, or any subsequent reports.

A public body may not apply section 20(1) to a record if 15 years have passed since the date the record was created.

Procedure

Determine the age of the record. If the record has been in existence for 15 or more years, then section 20 does not apply.

- Preliminary Examination Identify types of information included in 20(2) and which, therefore, cannot be withheld under 20(1).
- Line by line review
- Exercise of discretion
- Severance

Public bodies must consult with Cabinet Secretariat in regards to information that may be exempted from disclosure under subsection 20

4.2.4 *Legal Advice (section 21)*

Summary

The primary purpose of this exception is to put a public body on a level playing field with other persons when seeking legal advice. Section 21 gives the head of a public body the discretion to refuse to disclose legal advice and communications that are subject to solicitor client privilege or that would disclose legal opinions provided to a public body by a law officer of the Crown.

The purpose of the exception is to facilitate full and frank consideration and discussion of the circumstances on which legal advice is sought, so that the advice may be informed and effectual, and to facilitate the preparation of a case for trial.

Under solicitor client privilege, a legal advisor must refuse to disclose communications between the legal advisor and the client, unless the client consents to the disclosure. The privilege belongs to the client and can only be waived by the client.

Generally, the decision on whether it is required by law or otherwise in the public interest to waive privilege will be determined in the course of routine consultations between the client public body and the Department of Justice or designated legal advisor.

Section 21 protects information flowing in both directions between the legal advisor and the client. This means that solicitor client privilege applies to client-generated documents, as well as legal opinions. The document may be as formal as a communication between lawyer and client or as simple as notes on file made to assist the lawyer in litigation.

Section 21 is not limited to the protection of legal advice and communications between a legal advisor and a minister or public body. The client can be a third party which is not a public body under the Act, but whose privileged documents are in the custody or control of a public body, and where the client has not waived the privilege.

Policy

Decisions on whether to waive privilege should be determined through consultations between the client public body and the Department of Justice or the public body's designated legal advisors.

Public bodies shall undertake a review, and shall determine whether section 21 applies to a particular record. A request made under a concurrent process should not be a factor in the public body making a decision with respect to access to that record.

Procedure

1. Preliminary Examination

2. Consult with Departmental Solicitor or Designated Legal Advisor

Government public bodies must consult their designated legal counsel before disclosing a record that falls under the section 21 exception.

The legal advisors will determine if the information is privileged and whether the disclosure could injure the public body's legal proceedings or positions. The client considers the legal advisors' determination in deciding whether to assert or waive the privilege.

4. Exercise of Discretion

The head of the public body may waive any privilege arising to a document when exercising discretion.

4.2.5 Disclosure Harmful to Law Enforcement

Summary *[subsection 22(1) and (2)]*

Section 22 is a discretionary exception to the public's right of access to information the disclosure of which could reasonably be expected to harm law enforcement. Section 22 lists the types of harms to law enforcement.

Under section 22, a head of a public body must not refuse to disclose routine inspection reports or statistical prosecution information. A head must not refuse to disclose a report on the effectiveness of a law enforcement program, unless disclosure of the report would interfere with or harm any of the matters listed in subsections 22(1) and (2), or if any other exception applies. As well, a head must not refuse to disclose statistical information on decisions to approve or not approve prosecutions.

If a record contains information the disclosure of which would be harmful to law enforcement, subsection 12(2) permits the head to refuse to confirm or deny its existence. A refusal to confirm or deny the existence of a record is a significant limit to the right of access.

Law enforcement is not limited to the investigative activities of police forces; paragraph 22(1)(a) provides an exception for a wide variety of investigations and proceedings by public bodies. It is also important to look to the definition of law enforcement in paragraph 2(i). In addition to policing, this definition includes any investigation, inspection or proceeding that could lead to a penalty or sanction.

The degree of harm to law enforcement will depend, in part, on the sensitivity of the law enforcement information. For example, life-and-death information relating to the identity of confidential sources of law enforcement information may be withheld even if there is a possibility, as opposed to a probability, of harm to law enforcement.

Policy

Public bodies may refuse to disclose information which would harm a law enforcement matter.

Although it is not necessary to demonstrate that actual harm will result, or that actual harm resulted from a similar disclosure in the past, public bodies should consider past experiences as a factor in determining whether harm to a law enforcement matter has occurred.

Public bodies shall provide explicit assurances of confidentiality to confidential sources of law enforcement information, wherever possible.

Public bodies may refuse to disclose law enforcement information provided by an anonymous source if there is no way to determine whether disclosure of the information would result in the identification of that anonymous source.

Public bodies must not refuse to disclose under section 22 routine inspection reports or statistical prosecution information.

Public bodies must not refuse to disclose under section 22 a report on the effectiveness of a law enforcement program, unless disclosure of the report would interfere with or harm any of the matters as listed in the section.

Subsection 12(2) permits public bodies to refuse to confirm or deny the existence of a record if the record contains information the disclosure of which would be harmful to law enforcement.

Public bodies shall interpret the definition of "law enforcement" to include investigations that lead or could lead to the imposition of a penalty or sanction either by the public body itself, or by another public organization.

If a public body has started an investigation, records that are relevant to the investigation are excepted from disclosure regardless of when the record was created.

Procedure

- 1 Preliminary Examination
- 2 Line by Line Review
- 3 Program Effectiveness Assessment Determine whether the information is an assessment of the effectiveness of a law enforcement program. If so, the information must be released unless one of the specified harms to law enforcement could reasonably be expected to result from its disclosure, or if another exception applies.
- 4 Routine Inspection Report or Prosecution Statistics Determine whether the information is a routine inspection report, or statistical information on prosecution decisions. If so, the information must be released unless another exception applies.
- 5 Exercise of Discretion
- 6 Severance
- 7 Refuse to Confirm or Deny the Existence of the Record There are situations in which the disclosure of the mere existence of a record could result in harm to law enforcement. For example, disclosure of investigation records or criminal intelligence might reveal information to the applicant that would harm an investigation or intelligence-gathering activity.

If a record contains information the disclosure of which could reasonably be expected to harm law enforcement, subsection 12(2) permits the head to refuse to confirm or deny its existence. Where the head refuses to confirm or deny the existence of a record, the public body notifies the applicant of the refusal under subsection 12(1) of the Act.

A refusal to confirm or deny the existence of a record is a significant limit to the right of access. If an applicant asks the Information and Privacy Commissioner to review a refusal to confirm or deny the existence of a record, the public body will be required to provide detailed and convincing reasons why subsection 12(2) was claimed.

4.2.6 *Disclosure Harmful to Intergovernmental Relations or Negotiations [subsection 23(1)]*

Summary

Subsection 23(1) gives the head discretion to refuse to disclose information which, if disclosed, could reasonably be expected to harm the normal process of intergovernmental relations or the supply of intergovernmental information.

This section protects from release the following categories of intergovernmental information:

- Information the disclosure of which could reasonably be expected to harm the conduct of relations between the government of Newfoundland and Labrador and the following external governmental entities or their agencies: < the government of Canada, < another provincial government, < the council of a municipality, < a government of a foreign state, or < an international organization of states.
- Information received in confidence from any of the above mentioned governments, councils or organizations, or their agencies.

If the head intends to exercise discretion to disclose information in spite of the applicability of this exception, consent of the Department of Justice or Lieutenant Governor in Council must be obtained [subsection 23(2)].

Section 23 cannot be applied to records which have been in existence for 15 or more years, unless the information in the records is law enforcement information [subsection 23(3)].

Policy

Section 23 is discretionary giving the head of the public body the responsibility for exercising that discretion in deciding whether to release records. However, the head of the public body shall refuse to disclose information that is excepted under subsection 23(1) if the head has not received agreement to disclose from either the Department of Justice, in the case of law enforcement records, or the Lieutenant Governor in Council, for any other type of information.

Intergovernmental Affairs Secretariat should be consulted, as soon as practicable, when the subject matter of the request fits, or may fit, within section 23.

Public bodies may apply paragraph 23(1)(a) regardless of the identity of the applicant. The applicant may be one of the governments listed in clauses 23(1)(a)(i) through (iv), yet the information may be withheld if disclosure could reasonably be expected to harm relations between the government of Newfoundland and Labrador and the government that has requested the information or another government.

Public bodies are not required to demonstrate a reasonable expectation of harm under paragraph 23(1)(b) when withholding information received in confidence.

Public bodies should consult with the Department of Municipal and Provincial Affairs with regard to records of a local government body.

Procedure

Determine the age of the record. Section 23 cannot be applied to records which have been in existence for 15 or more years unless the information is law enforcement information. Other exceptions may apply.

- Preliminary Examination
- Consult with Intergovernmental Affairs Secretariat
- Line by Line Review

If necessary, consult with the appropriate Access and Privacy Coordinator (e.g. Intergovernmental Affairs Secretariat, Justice) to determine whether the record contains information that may be excepted in any of the following categories:

< Harm to the conduct of relations Determine whether a reasonable person would expect that releasing the record would result in harm to the conduct of relations between the government of Newfoundland and Labrador and any of the governments, councils, or organizations listed in clauses 23(1)(a)(i) through (iv), or their agencies [paragraph 23(1)(a)]. In making this determination, appropriate internal consultations should be made.

< Information received in confidence Determine whether a reasonable person would expect that release of the requested record would reveal information received in confidence from any of the governments, councils, or organizations listed in clauses 23(1)(a)(i) through (iv), or their agencies [paragraph 23(1)(b)].

- Section 23 consultations with other ministries, agencies or governments

Consultations with the other government(s) involved assist in determining whether or not the exception applies, and ensure that the head is aware of all relevant factors in exercising discretion whether to release all or part of the record.

The Access and Privacy Coordinator for the public body consults with the Access and Privacy Coordinator for Intergovernmental Affairs. **The Access and Privacy Coordinator for Intergovernmental Affairs should be consulted on records with section 23 considerations. Likewise, consultations should occur with the Access and Privacy Coordinator for the Department of Justice for section 23 records containing law enforcement information. It is recommended that the Access and Privacy Coordinator for Municipal and Provincial Affairs be advised of all cases where the consideration of the use of section 23 involves local government bodies.** Consultations with other governments are carried out through appropriate channels.

- (i) the government of Canada or the government of a province

In most cases requiring consultation with the federal government or another provincial government, the Access and Privacy Coordinator for the public body contacts his or her counterpart in the other government.

- (ii) the council of a local government body

Where relations with a local government body may be affected the **public body** may consult with the Access and Privacy counterpart for that local government body.

In cases of doubt regarding the relevance of a document or the appropriate protocol for contact, consult with the Access and Privacy Coordinator for Intergovernmental Affairs.

- (iii) the government of a foreign state

When consultation is required with a foreign government, Intergovernmental Affairs coordinates the consultation unless another established channel for direct liaison exists. If a **public body** with the consent of Intergovernmental Affairs then undertakes direct liaison, keep Intergovernmental Affairs informed of the communications. In cases of doubt on the appropriate protocol for contact, consult with the Access and Privacy Coordinator for Intergovernmental Affairs at an

early stage of the line-by-line review if international relations or any significant intergovernmental issues are involved.

- Exercise of Discretion
- Severance
- Consent of Lieutenant Governor in Council or Attorney General for section 23

If the head decides to exercise discretion to disclose non-law enforcement information to which section 23 applies, consent of the Lieutenant Governor in Council (Cabinet) must be obtained prior to disclosure. The Access and Privacy Coordinator for the public body coordinates/obtains Cabinet consent. This includes drafting any necessary Cabinet submissions.

For law enforcement information to which section 23 applies, the head must obtain the consent of the Attorney General. For law enforcement information, the Access and Privacy Coordinator for the public body contacts the Access and Privacy Coordinator for the Department of Justice to obtain the consent of the Attorney General.

Notify any other government(s) involved of the final decision on whether or not to release information to which section 23 applies.

4.2.7 Disclosure Harmful to the Financial or Economic Interests of a Public Body [subsection 24(1)]

Summary

Subsection 24(1) gives the head the discretion to refuse to disclose information the disclosure of which could harm the financial or economic interests of a public body or the government of Newfoundland and Labrador.

This section also protects from release information which could harm the ability of the government of Newfoundland and Labrador to manage the economy.

Section 24 does not apply to the results of product or environmental testing carried out by or for the public body, unless the testing was done on a fee for service basis or for the purpose of developing methods of testing [subsection 24(2)].

Public bodies hold significant amounts of financial and economic information critical to their financial management and the management of the provincial economy. Section 24

ensures that, where harm would result from disclosure, **public bodies** may withhold certain portions of this information.

Policy

Public bodies may refuse to disclose information the disclosure of which could harm the financial or economic interests of a public body or the government of Newfoundland and Labrador or the ability of the government to manage the economy. In determining whether it is reasonable to expect any harm, the head of the public body needs to consider all aspects of the mandate and activities of the public body, and not limit that consideration only to the records requested.

A trade secret must be:

- owned by the public body or the government of Newfoundland and Labrador, or

- the public body or the government must be capable of proving a claim of legal right in the information (such as under a license agreement)

A public body shall consider the financial or economic interests of other public bodies when reviewing records in their custody or control. Consultation between public bodies in these situations is essential to determine harm under section 24.

The fact that information belongs to one of the categories listed in paragraphs 24(1)(a) to (e) is not sufficient in itself to establish that it meets the harms test set out in subsection 24(1). Although there is a presumption that the disclosure of information in these categories would harm the financial or economic interests of a public body, the head of the public body must have detailed and convincing evidence of harm in order to apply the exception.

Public bodies must not refuse to disclose under subsection 24(1) the results of product or environmental testing carried out by or for that public body, unless the testing was done for a fee or as a service to someone other than the **public body**, or for the purpose of developing methods of testing.

Procedure

- Preliminary Examination
- Line by line review Verify whether any information in the record which might result in harm to the financial or economic interests of a public body of the government of Newfoundland and Labrador, or to the ability of the government to manage the economy, falls into one of the categories set out in paragraphs 24(1)(a) through (e), or is similar in type.

Determine if information in the record is the result of product or environmental testing and, therefore, may not be withheld under section 24, unless performed for a fee as a service or for developing methods of testing.

- Exercise of Discretion
- Severance

4.2.8 *Disclosure Harmful to Conservation (section 25)*

Summary

Section 25 gives the head discretion to refuse to disclose information which, if disclosed, could result in damage to or interfere with the conservation of fossil sites, natural sites, valuable anthropological or heritage sites, or endangered, threatened, vulnerable or rare living resources.

Policy

Public bodies shall exercise prudence when considering disclosure of records to which section 25 may apply, bearing in mind the potential for damage to, or interference with, the conservation of fossil sites, natural sites, valuable anthropological or heritage sites, or endangered, threatened, vulnerable or rare living resources.

Public bodies shall consult with the Department of Tourism, Culture and Recreation before disclosing information concerning sites that have an anthropological or heritage value.

If a public body identifies information that has conservation of endangered, threatened or rare living resources value, it shall consult with the Department of Environment and Conservation to determine if other circumstances are relevant in making its decision.

Procedure

- Preliminary Examination
- Line by Line Review
- Exercise of Discretion A relevant factor in exercising discretion under section 25 is safeguarding the

public body's ability to preserve or protect from harm any of the sites, species or resources listed in paragraphs 25(a)(b) or (c). In many cases, the exact whereabouts or attributes of a site, species or resource this section seeks to protect are not common knowledge. That fact alone may be the main safeguard the public body must preserve.

Before exercising discretion to release information under this section, public bodies shall consult with the Department of Tourism, Culture and Recreation and/or the Department of Environment and Conservation, depending on the types of records involved, to determine if other circumstances are relevant to its decision.

- Severance Care must be taken that information considered for release, when combined with other available information, would not result in any of the harms contemplated in section 25.

4.2.9 *Disclosure Harmful to Individual or Public Safety (section 26)*

Summary

Subsection 26(1) gives the head discretion to refuse to disclose information, including an individual's own personal information, where the disclosure could threaten another person's safety, mental or physical health, or interfere with public safety.

Subsection 26(2) also gives the head discretion to refuse to disclose an individual's personal information if disclosing the information to that individual would result in *immediate and grave harm* to the individual's safety, or mental or physical health. You will note that this subsection requires a higher degree of harm.

Policy

Public bodies shall apply subsection 26(1) only where there are reasonable grounds for the head to believe that a threat to anyone's safety or mental or physical health, or an interference with public safety could result from a disclosure.

Public bodies shall act prudently in applying subsection 26(1) and shall regard the safeguarding of public health and safety as a priority in exercising discretion.

Public bodies shall apply subsection 26(2) only where there are reasonable grounds for the head to believe that an applicant's own personal safety or mental or physical health would be compromised if the requested information were to be disclosed.

The standard of proof to be applied by the head of the public body is a balance of probabilities that the potential violence or harm will result. The head of the public body is not required to prove beyond doubt that the harm will result.

Procedure

- Preliminary examination
- Line by line review
- Exercise of Discretion
- Severance

4.2.10 *Disclosure Harmful to the Business Interests of a Third Party [subsection 27(1)]*

Summary

Subsection 27(1) is a mandatory exception to the public's right of access to information. It protects information which, if disclosed, would harm a third party's business interests.

Paragraphs 27(1)(a) to (c) provide a three-part test; that is, the information in question must meet **ALL** parts of the following test before a public body may apply the exception:

- The information would reveal third party trade secrets, or, the commercial, financial, labour relations, scientific or technical information of or about a third party, and
- The information was supplied in confidence, and
- Disclosure of the information could result in one or more specified harms.

Many of the third parties contemplated for protection by subsection 27(1) will be commercial interests which have supplied information about private sector enterprises to government. **However, the exception is not limited to information supplied by commercial third parties - it applies equally to information supplied by any individual or organization that meets each part of the three-part test.**

Section 27 addresses information about the business interests of a third party where that information is held by a public body. Section 27 protects the information from disclosure where all three parts of the test are met, whether the third party whose business interests may be affected supplied the information or some other party supplied it.

Subsection 27(2) creates a mandatory exception to the public's right of access where the information in question was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax. This applies both to personal and business information.

Subsection 27(2) operates as a mandatory exception independently of subsection 27(1).

The head cannot refuse to disclose information under subsection 27(1) or (2) where the third party consents to the disclosure under subsection 27(3).

Because this exception concerns the information of third parties, public bodies may apply it only in conjunction with the third party notice provisions in sections 28 and 29.

Policy

Public bodies must apply the section 27(1) exception when all three parts of the test in paragraphs 27(1)(a) to (c) are met.

Whenever collecting information, public bodies should have policies and procedures in place to protect the confidentiality of information if there is an expectation that information supplied by the third party will be in confidence.

Information generated by public bodies from which third party confidential information can be inferred shall be subject to the same policies as information directly supplied in confidence by the third party.

Public bodies must apply the subsection 27(2) exception to any information related to taxation as noted in the section, in order to protect third party information supplied to the public body for taxation purposes. Public bodies must not apply this exception if the third party consents to the release of the information, or if the record has been in existence for 50 years and is in the Provincial Archives of Newfoundland and Labrador or the archives of a public body.

Procedure

Determine the age of the record. If the record has been in existence for 50 or more years and is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body, then this exception does not apply.

- Preliminary Examination Business information may exist in an aggregate form relating to several third parties. In such cases, information may be withheld under section 27 if it can be linked to a particular third party and meet the three part test. In determining

whether aggregate business information may harm a particular third party consider:

< the number of firms that comprise the industry, and < the market share distribution among the firms

- Third Party Notice If the initial review indicates that part or all of the requested information may fall under this exception and the head intends to refuse access, the head may give notice to the third party, but is not required to do so. However, where the head intends to give access, the head must give the third party a notice pursuant to section 28. (See 3.23 in Chapter 3.)

The notice to the third party should not identify the applicant, unless the applicant has given express consent to make this disclosure.

- Line by Line Review To meet the three part test of subsection 27(1):

< the third party must have ownership or claim of legal right to the information and the information must be of the type described in 27(1) (e.g., information about the third party's finances, proprietary processes or approaches, labour negotiations, scientific or technical information, etc.),

< the information must have been supplied implicitly or explicitly in confidence, and

< there are objective grounds for believing that one of the types of information listed in paragraph 27(1)(a) will potentially or actually cause harm following disclosure.

Under paragraph 27(1)(c), some of the factors which may influence the head's decision include:

< the representations of the third party,

< the nature of the information and the type of harm its release might cause, and

< the monetary or other value of the harm, if it can be determined to meet the definition of significant "harm."

A public body must be able to present detailed and convincing evidence of the facts that led to the expectation that harm would occur if the information were

disclosed. There must be a link between the disclosure of specific information and the harm which is expected from release.

It is not necessary to demonstrate that actual harm will result, or that actual harm resulted from a similar disclosure in the past, although such past experience could be part of the factual considerations upon which the expectation of harm is based.

Under clause 27(1)(c)(ii), the head should consider all relevant facts, circumstances and third party representations to determine whether it is in the public interest that the supply of similar information continue and whether disclosure would discourage third parties from voluntarily supplying information to public bodies in the future. It is unlikely that similar information would no longer be supplied where there is a financial or other incentive to continue supplying that information (e.g., the public body purchases the information), where it is legally required, or where it is supplied under a contract where no breach of contract is expected or reasonably foreseeable.

- Consideration of Third Party Consent or Representations The third party has 20 days after notice is given to consent to the release of the record or to make written representations against disclosure of the record in whole or in part. If the third party consents to the release of information, that information cannot be withheld under this exception. If the public body receives consent to the release of the information from the third party, check to see if another exception applies. If not, recommend to the head that the information be released. (See 3.23 in Chapter 3.)

If the third party makes written representations that part or all of the requested record should not be released, consider those representations when determining whether or not the three-part harms test is met. In addition, consider and document all other facts and circumstances.

The third party's representations may or may not affect the finding of fact as to whether part or all of the requested record must be withheld under this exception.

- Notice to applicant and third party following the head's decision
- Severance

4.2.11 *Disclosure of Personal Information (section 30)*

Summary

Section 30 is a mandatory exception which limits the disclosure of an individual's personal information to a third party.

Subsection 30(1) provides a mandatory exception to the general right of access established by section 7 of the Act. Subsection 30(1) applies to all records in the custody or under the control of public bodies as defined in the Act. The exception does not apply to records described in subsection 30(2).

Section 30 requires the head to refuse disclosure of personal information. This protection applies only to natural persons or individuals. Section 30 is considered when an applicant makes a request for someone else's personal information. Of course, a party may consent to the disclosure of their own personal information.

Policy

A public body shall not release personal information as defined in paragraph 2(o) unless the information falls within one of the exceptions contained within subsection 30(2).

If a record contains personal information of a third party, subsection 12(2) permits the head to refuse to confirm or deny its existence. A refusal to confirm or deny the existence of a record is a significant limit to the right of access. (See section 3.15 of chapter 3 and the Procedure below for further information.)

Procedure

- Preliminary Examination
- Line by Line Review Determine if information falls within the definition of personal information contained in paragraph 2(o). This information shall not be released unless it falls within one of the exceptions contained in subsection 30(2).
- Consideration of third party consent If third party consents to disclosure then the information should not be withheld, unless another exception to disclosure applies.
- Severance

- Refusal to confirm or deny the existence of the record There are situations in which the disclosure of the mere existence of a record could unreasonably invade a third party's personal privacy. For example, disclosure that a public body has a file on a third party's psychiatric treatment would in itself reveal sensitive personal information about the third party.

In such circumstances, subsection 12(2) permits the head to refuse to confirm or deny the existence of the record. Where the head refuses to confirm or deny the existence of a record, the public body notifies the applicant of the refusal under subsection 12(1) of the Act.

A refusal to confirm or deny the existence of a record is a significant limit to the right of access. If an applicant asks the Information and Privacy Commissioner to review a refusal to confirm or deny the existence of a record, the public body will be required to provide detailed and convincing reasons why subsection 12(2) was claimed.

4.2.12 *Public Interest Override (section 31)*

Section 31 is a general override provision that obligates the head of a public body to disclose information of a risk of significant harm, where disclosure is clearly in the public interest. Even if information falls within an exception to disclosure, section 31 requires the release of the information.

Whether or not a request for access is made, the head of a public body must disclose, without delay, information to the public, to the applicant or to the individuals affected:

- which reveals a risk of significant harm to the environment or to the health and safety of the public or a group of people, and
- the disclosure of which is clearly in the public interest

Before disclosing information under this section, the head of a public body must, if practicable, notify any third party to whom the information relates.

It is important to note that the decision to disclose information pursuant to section 31 rests with the head of the public body. When employees of public bodies become aware of information that may be subject to section 31, they should immediately inform the head. There is no obligation on an employee (other than the head) under the Act to disclose the information to the public, the affected group or an applicant.

The head of the public body must approve any release of information under section 31. This approval must not be delegated below the Deputy Minister or equivalent level. The head of a public body must disclose information falling under subsection 31(1) even if there has been no formal access request under the Act.

The head of a public body must ensure that there is no delay that adversely affects the public interest. Notification (before the disclosure of information) to any third party to whom the information relates is “practicable” if it does not result in delay that adversely affects the public interest.

The head of the public body is not required to wait for any prescribed period of time, or for input after notifying the third party, before disclosing information under section 31. The head of the public body must ensure that the information is released in a manner designed to reach the intended audience, i.e., the public, the affected group or the applicant.

Procedure

- The head of the public body determines that there is a risk of significant harm.
- If practicable, notify any third party to whom the information relates, in writing, before the disclosure of the information. Notice to an affected third party under section 31 is less formal than notice given under section 27, due to the urgency of the circumstances that would normally exist when the public interest override is invoked. In many cases, a public body may initially give notice to the individual by telephone rather than writing.

4.2.13 *Disclosure of House of Assembly service and statutory office records*

Section 30.1 The Speaker of the House of Assembly or the officer responsible for a statutory office shall refuse to disclose to an applicant information:

- (a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;
- (b) that is advice or a recommendation given to the speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission established under the House of Assembly Accountability, Integrity and Administration Act that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; and
- (c) in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records connected with the investigatory functions of the statutory office.

CHAPTER 6 POWERS AND DUTIES OF THE COMMISSIONER

6.1 Introduction

6.2 The Information and Privacy Commissioner

6.3 General Powers and Duties of the Commissioner Under the Act

6.4 Powers of the Commissioner When Conducting an Investigation

6.4.1 Powers of a Commissioner Under the Public Inquiries Act

6.4.2 Power to Require Production of Records

6.4.3 Right to Enter Offices of Public Bodies, Examine Records, etc.

6.4.4 Duty to Produce Records, etc.

6.5 Protection of Information Provided to the Commissioner

6.5.1 Investigation in Private

6.5.2 Statements Not Admissible in Evidence, etc.

6.5.3 Restrictions on Disclosure of Information by the Commissioner

Introduction

One of the purposes of the *Access to Information and Protection of Privacy Act* is to provide for an independent review of the decisions of public bodies respecting access to information and protection of personal information under the Act [paragraph 3(1)(e)].

Part V of the Act assigns this independent review function to Newfoundland and Labrador's Information and Privacy Commissioner. The Commissioner is responsible for:

- monitoring compliance with the Act by public bodies
- promoting public awareness of the Act
- investigating and dealing with complaints respecting access to information and correction of personal information under the Act

Newfoundland and Labrador's Information and Privacy Commissioner cannot order a public body to comply with the Act. However, the powers of the Information and Privacy Commissioner to monitor compliance with the Act, to mediate and make recommendations respecting complaints and to make his or her findings and recommendations public, have a significant persuasive effect on the actions of public bodies.

This Chapter discusses the general powers and duties of the Information and Privacy Commissioner under the *Act*, which are found in Part V (sections 43 to 59).

The Information and Privacy Commissioner

Newfoundland and Labrador's Information and Privacy Commissioner (the Commissioner) is an officer of the House of Assembly who is appointed under the *Access to Information and Protection of Privacy Act*. As an officer of the House of Assembly, the Commissioner is independent of the Government of Newfoundland and Labrador.

The Commissioner is appointed by the Lieutenant-Governor in Council on a resolution of the House of Assembly for a term of two years. A person may be reappointed as Commissioner for further terms of two years.

The Commissioner may be removed or suspended from office only by the Lieutenant Governor in Council on a resolution of the House of Assembly carried by a majority vote of the members of the House of Assembly. If the House of Assembly is not in session, the Lieutenant Governor in Council may suspend the Commissioner for incapacity, neglect of duty or misconduct, but the suspension does not continue beyond the end of the next session of the House of Assembly. The House of Assembly must determine if the suspension is to continue or if the Commissioner should be removed from office. In other words, the Commissioner cannot be removed from office by the Government acting on its own.

Persons employed under the Commissioner are members of the public service of Newfoundland and Labrador. The Commissioner may delegate to any person on his or her staff a duty or power under the Act.

The Commissioner, and any person acting for or under the direction of the Commissioner, is protected from legal proceedings for "anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty or power under" the Act. This means that, as long as the Commissioner and his or her staff act honestly and with the intention of complying with the Act, no legal proceedings can be brought against them.

The Commissioner's general duties respecting confidentiality of information are set out in the *Access to Information and Protection of Privacy Act (as amended)*. The Commissioner's duty to treat information obtained in the course of exercising powers and carrying out duties under the *Act* are set out in section 56 of the *Act* and are discussed later in this Chapter.

Under the *Act*, the Commissioner must make an annual report to the House of Assembly through the Speaker on:

- the exercise and performance of his or her duties and functions under this Act
 - the Commissioner's recommendations and whether public bodies have complied with the recommendations
 - the administration of this Act by public bodies and the minister responsible for this Act, and
-
- other matters about access to information and protection of privacy that the Commissioner considers appropriate

General Powers and Duties of the Commissioner

Paragraph 3(1)(e) of the *Act* provides that one of the purposes of the *Act* is to provide for an "independent review of the decisions of public bodies" respecting access to information and protection of personal information under the *Act*. This purpose is carried out through the office of the Commissioner.

The Commissioner has a continuing responsibility to ensure that public bodies are complying with the requirements of the *Act*.

The Commissioner cannot make orders that bind a public body. However, the broad powers of the Commissioner to monitor, investigate and make recommendations, and to make his or her findings and recommendations public, have a significant impact on the actions of public bodies.

In general terms, the responsibilities of the Commissioner under the *Act* fall into three categories:

- monitoring compliance with the *Act* by public bodies
- promoting public awareness of the *Act*, and
- investigating and dealing with complaints respecting access to information and correction of personal information under the *Act*

As well, section 59 requires the Commissioner to submit an annual report to the House of Assembly.

51. In addition to the Commissioner's powers and duties respecting reviews, the Commissioner may

- (a) make recommendations to ensure compliance with this Act and the regulations;
- (b) inform the public about this Act;
- (c) receive comments from the public about the administration of this Act;
- (d) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;
- (e) comment on the implications for protection of privacy of
 - (i) using or disclosing personal information for record linkage, or
 - (ii) using information technology in the collection, storage, use or transfer of personal information;
- (f) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants; and
- (g) make recommendations to the head of a public body or the minister responsible for this Act about the administration of this Act.

Powers of the Commissioner When Conducting an Investigation

6.4.1 Powers of a Commissioner under the Public Inquiries Act

In carrying out an investigation under section 43 of the *Act* or an investigation of a complaint under Part V of the *Act*, the Commissioner has all the powers and protections of a commissioner under the *Public Inquiries Act* [subsection 52(1) of the *Access to Information and Protection of Privacy Act*]. These powers include:

3. (1) The commissioner or commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence that is vested in a court of law in civil cases; and a false statement made by the witness on oath or affirmation shall be an offence punishable in the same manner as perjury.

(2) A witness shall not be excused from answering a question upon the ground that the answer to the question may tend to criminate the witness, or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of a person, and where but for this Act or the Canada Evidence Act the witness would have been excused from answering the question and although the witness is because of this Act or the Canada Evidence Act compelled to answer the answer so given shall not be used or receivable in evidence against the witness in a criminal proceeding taking place later, other than a prosecution for perjury in the giving of the evidence.

Public Inquiries Act

6.4.2 Power to Require Production of Records

The Commissioner:

- may require any record in the custody or under the control of a public body that the Commissioner considers relevant to an investigation to be produced to the Commissioner [subsection 52(2) of the Act], and
- may examine any information in a record, including personal information

[subsection 52(2)]

A public body is required to produce any record or a copy of a record that is relevant to the investigation being carried out by the Commissioner within 14 days [subsection 52(3)].

If it is not practicable to make a copy of the requested record, the head of the public body may require the Commissioner to examine the original record at its site [subsection 52(4)].

6.4.3 *Right to Enter Offices of Public Bodies, Examine Records, etc.*

Despite any other statute or regulation or any privilege of the law of evidence, in exercising powers and performing duties under the *Act*, the Commissioner has the right:

- to enter any office of a public body and examine and make copies of any record in the custody of the public body [paragraph 53(a)], and
- to speak in private with any officer or employee of a public body [paragraph 53(b)]

An example of a privilege of the law of evidence is solicitor-client privilege.

6.4.4 *Duty to Produce Records, etc.*

The duty of a public body and its officers and employees to produce a record or a copy of a record requested by the Commissioner under the *Act* applies despite any other statute or regulation or any privilege of the law of evidence [subsection 52(3)].

Indeed, it can be an offence under the *Act* not to provide records to the Commissioner. Any person who wilfully:

- makes a false statement to the Commissioner or another person performing duties or exercising powers under the *Act* [paragraph 72(b)], or
- misleads or attempts to mislead the Commissioner or another person in performing duties or exercising powers under the *Act* [paragraph 72(b)], or
- obstructs the Commissioner or another person in performing duties or exercising powers under the *Act* [paragraph 72(c)], or

- destroys a record or erases information in a record that is subject to the *Act* with the intent to evade a request for access to records [paragraph 72(d)]

is guilty of an offence under the *Act*. If found guilty by a court, that person is liable to a fine of up to \$5,000 or to imprisonment not exceeding 6 months, or to both (section 72) .

Protection of Information Provided to the Commissioner

6.5.1 *Investigation in Private*

The Commissioner may carry out an investigation under the *Act* in private [subsection 47(2)].

6.5.2 *Statements Not Admissible in Evidence, etc.*

A statement made or an answer given by a person during an investigation by the **Commissioner** under the *Act*, and a report or recommendation of the Commissioner, cannot be introduced or admitted as evidence in a court or in any other proceeding, except:

- in a prosecution in the criminal courts for perjury in respect of sworn testimony [paragraph 54(1)(a)], or
- in a prosecution for an offence under the *Act* [paragraph 54(1)(b)], or
- in an appeal to the Newfoundland and Labrador Supreme Court Trial Division under the *Act*, when the Commissioner is a party to the appeal [paragraph 54(1)(c)]

The Commissioner, and anyone acting for or under the direction of the Commissioner, cannot be required to give evidence, in a court or in any other proceeding, about information that comes to their knowledge when performing duties or exercising powers under the *Act* [subsection 54(2)].

Anything said, any information supplied and any record produced by a person during an investigation by the Commissioner under the *Act* is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court (section 55).

6.5.3 *Restrictions on Disclosure of Information by the Commissioner*

Section 56 of the *Act* places restrictions on disclosure by the Commissioner, and by the Commissioner's staff, of information they obtain in performing duties or exercising powers under the *Act*.

In particular, the Commissioner may disclose, or authorize anyone acting for or under his or her direction to disclose, only:

- information that is necessary to perform a duty or to exercise a power of the Commissioner under the Act [paragraph 56(2)(a)]
- information that is necessary to establish the grounds for findings and recommendations contained in a report under the Act [paragraph 56(2)(b)]
- information in the course of a prosecution or an appeal referred to in subsection 54(1) [subsection 56(5)]

In addition, the Information and Privacy Commissioner may disclose to the Newfoundland and Labrador Minister of Justice and Attorney General information relating to the commission of an offence under the Act or under any other statute or regulation of Newfoundland and Labrador or Canada if the Commissioner considers there is reason to believe an offence has been committed [subsection 56(4)].

In conducting an investigation and in performing any other duty or exercising any power under the Act, the Commissioner, and anyone acting for or under the direction of the Commissioner, must take "every reasonable precaution" to avoid disclosing, and must not disclose:

- any information the head of a public body is authorized or required to refuse to disclose in response to a request for access to information under Part II or III of the *Act* [paragraph 56(3)(a)], and
- whether information exists, if the head of a public body is authorized under subsection 12(2) of the *Act* to refuse to confirm or deny that the information exists in response to a request for access to information under Part II of the *Act* [paragraph 56(3)(b)]

CHAPTER 7

REVIEWS, COMPLAINTS AND APPEALS

7.1 Introduction

7.2 Reviews and Complaints [sections 43 to 59]

7.2.1 Who May Request a Review or Make a Complaint

7.2.2 How and When a Request for Review May Be Made

7.2.3 Review by the Commissioner

7.2.4 Commissioner's Report About a Review

7.2.5 Response of the Head of the Public Body to the Commissioner's Report

7.3 Appeals to Court [sections 60 to 63]

7.3.1 Who May Appeal to the Court and What Decisions May Be Appealed

7.3.2 When an Appeal is Commenced

7.3.3 The Hearing of the Appeal

7.3.4 Powers of the Court on Appeal

Introduction A fundamental right under the *Act* is the right to ask

Commissioner to review a decision of a public body respecting:

- requests for access to records under Part II of the Act, or
- correction of personal information. This review

process is set out in Part V of the Act. The Act also

provides that:

- a person who has been refused access to a record or part of a record under Part II, or
- a third party who has been notified under section 28 of a decision by the head of a public body to give access to a record containing information about the third party under Part II

may appeal the decision directly to the Newfoundland and Labrador's Supreme Court Trial Division, without first requesting a review by the Commissioner.

Reviews and Complaints [sections 43 to 59]

The right to an independent review of the decisions and actions of public bodies under the Act is fundamental to guaranteeing access to information and protection of personal information. The right to request a review by Newfoundland and Labrador's Commissioner under Part V of the Act (sections 43 to 59) about the decisions of public bodies relating to access to records and about the correction of personal information helps ensure that the purposes of the *Act*, as set out in section 3, are achieved. In addition, the right to make a complaint about specific actions under the *Act* help ensure a fair and equitable process.

7.2.1 Who May Request a Review or Make a Complaint

Reviews about access to records or correction of personal information

- A person who has made a request to a public body for access to a record or correction of personal information may ask the Commissioner to review a decision, act or failure to act of the head of the public body that relates to the request [subsection 43(1)]
- A third party who is given notice under section 28 of a decision by the head of a public body to give access to a record containing information affecting the third party's business interests may ask the Commissioner to review such a decision [subsection 43(2)]

Complaints

In addition to conducting reviews, section 44 allows the Commissioner to investigate and attempt to resolve complaints on behalf of applicants who feel that:

- an extension of time for responding to a request is not in accordance with section 16, or
- a fee required under the *Act* is inappropriate.

Exercising rights on behalf of another

Where a person has a right to request a review or to make a complaint under the *Act*, the request or complaint may be made by another person who is authorized under section 65 to act on behalf of that person.

7.2.2 *How and When a Request for Review May Be Made*

When requests for review must be made

A request for review under section 43 by a person respecting his or her request for access to a record must be delivered to the Commissioner within 60 days after the person is notified of the decision respecting access by the head of the public body [paragraph 45(1)(a)]. It is important to note, however, that the Commissioner maintains the discretion to extend this period [paragraph 45(1)(c)].

If the head of a public body fails to respond to a request for access to a record under Part II of the Act within the required time, the failure is treated as a decision to refuse access and the 60 day time limit referred to in paragraph 45(1)(a) does not apply [subsection 45(2)].

A request for review by a third party respecting a decision of the head of a public body to give access to a record affecting the third party's business interests under section 28 of the Act must be made to the Commissioner within 20 days after notice of the head's decision is given [paragraph 45(1)(b)].

7.2.3 *Review by the Commissioner*

Commissioner must notify others of a request for review

The Commissioner shall provide a copy of a request for review to the head of the public body concerned and in the case of a request for review from a third party, to the applicant concerned [subsection 45(3)].

Informal resolution of a request for review or complaint

When reviewing a decision or investigating a complaint, the Commissioner may, within 30 days of the request, take any steps that he or she considers appropriate in order to reach an informal resolution (section 46). Such a resolution must be to the satisfaction of the parties and be in a manner consistent with the purposes of the *Act*. The purposes of the *Act* are set out in section 3 of the *Act* and Chapter 1 of this manual.

Representations to the Commissioner

During an investigation, the Commissioner is required to give the person requesting a review, a third party and any other person the Commissioner considers appropriate an opportunity to make representations [subsection 47(1)].

These representations may be made to the Commissioner through legal counsel or through an agent [subsection 47(4)]. In addition, the Commissioner has the discretion to decide whether representations are to be made orally or in writing [subsection 47(3)].

The Commissioner may conduct a review in private and a person who makes representations during such a review is not entitled to be present during an investigation nor to comment on representations made to the Commissioner by another person [subsection 47(2)].

Time limit for investigation

The Commissioner must complete a review and make a report within 90 days after receiving the request for review (section 48). The following section provides details on the report of the Commissioner.

7.2.4 Commissioner's Report About a Review

On completing a review, the Commissioner is required to prepare a report containing his or her findings on the review and, where appropriate, his or her recommendations and the reasons for those recommendations [paragraph 49(1)(a)].

The Commissioner is required to give a copy of the report to the person who requested the review, the head of the public body concerned and a third party who was notified under section 47.

In the event that the Commissioner does not make a recommendation to alter the decision, act or failure to act, the report must include a notice to the person who requested the review of their right to appeal the decision to the Supreme Court Trial Division under section 60 and of the time limit for such an appeal [subsection 49(2)].

7.2.5 Response of the Head of the Public Body to the Commissioner's Report

If the Commissioner's report contains recommendations, the head of the public body concerned is required to send the Commissioner and any other person who was sent a copy of the report a written response. This response must be given within 15 days after receiving the report and must indicate the head's decision to follow the recommendation or another decision that the head considers appropriate [subsection 50(1)].

If the head of the public body decides not to follow the recommendation of the Commissioner, the head must, in writing, inform all persons who were sent a copy of

the report of the right to appeal the decision to the Supreme Court Trial Division under section 60 and of the time limit for such an appeal [subsection 50(2)].

Where the head of the public body does not give written notice within 15 days, the head of the public body is considered to have refused to follow the recommendation of the Commissioner [subsection 50(3)].

Appeals to Court

7.3.1 Who May Appeal to the Court and What Decisions May Be Appealed

The following persons may appeal a decision of the head of a public body under the Act to the Newfoundland and Labrador Supreme Court Trial Division:

- a person who applied for access to a record under Part II
- a person who is a third party notified under section 28
- a person who requested correction of their personal information under section 35

The Commissioner may appeal a decision to refuse access to a record, or part of a record, to give access to third party information in a record, or to refuse to correct personal information to the Supreme Court Trial Division, provided the Commissioner has obtained the consent of the applicant or third party involved [subsection 61(1)].

Where an applicant or third party has appealed to the court, the Commissioner has the right to intervene as a party to that appeal [subsection 61(2)].

There is no appeal to court respecting a complaint about the collection, use or disclosure of personal information by a public body under the *Act*.

7.3.2 When an Appeal is Commenced

If a person has the right to appeal a decision under the *Act* to the Supreme Court Trial Division, the appeal may be made by filing an application with the court:

- within 30 days after receiving a public body's response to the Commissioner's report [subsection 60(1)]
- within 30 days after the person is notified of the decision, or the date of the act or failure to act, by the head of a public body [subsection 60(2)]

The application must name the head of the public body involved in the complaint as the respondent to the appeal [subsection 60(3)]. For example, if the complaint involved the Newfoundland and Labrador Department of Justice, the "Minister of Justice and Attorney General," and not the Government of Newfoundland and Labrador, would be named as the respondent.

The head of a public body who has refused access to a record or part of it must, on receipt of a notice of appeal by an applicant, give written notice of the appeal to a third party who:

- was notified of the request for access under section 28, or
- would have been notified under section 28 if the head had intended to give access to the record or part of the record [subsection 60(4)]

A copy of the notice of appeal shall be served by the appellant on the minister responsible for this Act (the Minister of Justice). As well, the minister responsible for this Act may become a party to an appeal by filing a notice to that effect with the Registrar of the Supreme Court [subsections 60(5) and (6)].

The record for the appeal shall be prepared by the head of the public body named as the respondent in the appeal [subsection 60(7)].

The practice and procedure under the *Rules of the Supreme Court, 1986* relating to appeals apply to an appeal made under the *Act* unless they are inconsistent with the *Act* [subsection 60(8)].

7.3.3 *The Hearing of the Appeal*

The Newfoundland and Labrador Supreme Court Trial Division is required to consider an appeal under the *Act* as a new matter [subsection 62(1)]. This means that the court will hear evidence, which is not restricted to the evidence which was produced before the Information and Privacy Commissioner. The court may hear evidence by affidavit [subsection 62(1)].

The Supreme Court has considerable power to compel the production of documents and may order the production of a record in the custody or under the control of a public body for examination by the court [subsection 62(2)].

In general, if an appeal relates to a decision by the head of a public body to refuse to give an applicant access to all or part of a record, it is up to the head to prove that the applicant has no right of access to the record or part of the record. In other words, the head has the "burden of proving" that the refusal of access is justified [subsection 64(1)]. There is, however, an exception to this general rule, in subsection 64(2):

64 (2) On a review of or appeal from a decision to give an applicant access to a record or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.

On an appeal under the *Act*, the court is required to take every reasonable precaution:

- to avoid disclosure of any information the head of a public body is authorized or required to refuse to disclose under Part II of the Act [paragraph 62(3)(a)], and
- to avoid disclosure as to whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2) of the *Act* [paragraph 62(3)(b)].

7.3.4 *Powers of the Court On Appeal*

On hearing an appeal under the *Act*, the court may:

- dismiss the appeal where it is determined that the public body was required or authorized to withhold the information [paragraph 63(1)(a)], or
- order the head to give the applicant access to all or part of the record where it is determined that the public body was not required or authorized to withhold the information [paragraph 63(1)(b)], and
- make any other order that the court considers appropriate where it is determined that the public body was not required or authorized to withhold the information [paragraph 63(1)(b)].

If the court finds that a record or part of a record falls within an exception to disclosure under Part II, the court cannot order the head to give the applicant access to that record or part of it, regardless of whether the exception requires or merely authorizes the head to refuse access [subsection 63(2)]. For example, where the record falls within a discretionary exception to access and the head has properly exercised his or her discretion to refuse access, the court cannot order disclosure of the record. In other words, the court cannot order a public body to exercise their discretion.

CHAPTER 8

REPORTING

8.1 Introduction

8.2 Notify ATIPP Office of Access Requests

8.3 ATIPP Summary Report

8.3.1 Instructions for Completing the ATIPP Summary Report

8.3.2 Federal Access to Information Requests

8.4 Reviews, Complaints and Appeals

Introduction

The ATIPP Office requires from all public bodies information about the administration of access requests. This includes the number and nature of requests, applicant type, exceptions applied, response time, and final outcome. In addition to requiring the information to prepare the Minister's Annual Report to the House of Assembly (required under section 70 of the Act), this knowledge is required to monitor activity under the Act and to ensure consistent application by public bodies.

Departments of government will be using TRIM, an electronic database specifically designed for ATIPP and, accordingly, the statistical information required by the ATIPP Office will be supplied electronically. Users should refer to the ATIPP TRIM Manual.

All public bodies excluding Departments must fill out an ATIPP Summary Report (Form 8) on completion of each access request. This report must be faxed to the ATIPP Office at 709-729-5466.

Notify ATIPP Office of Access Requests

To maintain a central **record** of the topics of ATIPP access requests received under Part II of the *Act* by all **public bodies**, Access and Privacy Coordinators must advise the ATIPP Office of each request as soon as it is received. Departments using TRIM must enter the details of the request at the earliest possible time.

The Access and Privacy Coordinators of all other public bodies must fax a copy of the request to the ATIPP Office at 709-729-5466 as soon as the request is received.

ATIPP Summary Report

The ATIPP Summary Report (“the Report”) is used to collect statistical information about activity under the *Act*, for administrative purposes of the Newfoundland and Labrador government. The Report is also used to provide information for the Annual Report of the Minister of Justice (the Minister responsible for this Act), as required in section 70 of the *Act*.

The Access and Privacy Coordinator of each public body excluding Departments is responsible for ensuring that the Report is prepared accurately and in a timely manner for each access request. The report should be faxed or e-mailed to the ATIPP Office as soon as the response is sent to the applicant and the file is closed.

8.3.1 *Instructions for Completing the ATIPP Summary Report*

Only requests for information or records that are made pursuant to the Act should be recorded on an ATIPP Summary Report.

If an application is transferred to another public body, this should be indicated in the Final Outcome section of the Report. For statistical purposes, it will be cross-referenced with the report filed by the public body which received the transferred request to ensure the request is not counted twice.

Requests for records that do not fall under the Act, such as records of officers of the House of Assembly or of Court proceedings, should not be included. This issue is discussed in more detail in Chapter 1 under the heading, “Records That Do Not Fall Under ATIPP.”

Section 1 Type of Applicant

Indicate the type of applicant.

Academic/
Researcher Professional archivists, historians, members of a
university/college and others requiring public body records for research purposes

Business Private sector organization

Individual A person making a request on their own behalf, or on behalf of
another person

| | |
|-------------------|---|
| Interest Group | Those representing community groups or special interest organizations/associations |
| Legal Firm | Legal representatives or agents seeking access on behalf of clients |
| Media | Television, radio, print or internet media organizations or their representatives |
| Other Public Body | Other federal, provincial, local and international government bodies (also includes a public body within the definition of this <i>Act</i> and located in the province) |
| Political Party | Any political organization, including elected officials |

Section 2 Type of Request

Indicate the type of request.

General Access Requests for general information/records

Personal Information Access Requests from an individual or a representative of that individual seeking records containing information about themselves

Correction of Personal Information Requests from an individual or a representative of that individual requesting correction of records containing information about themselves

Section 3 Final Outcome

Record the final outcome, or access decision, taken with respect to the request.

Abandoned Applicant has failed to provide appropriate fees to support a request, and the request is closed

Access Denied Records are withheld from release

Full Disclosure All requested records are supplied to the applicant with no severing of information

Partial Disclosure Some of the records requested are being released while other information is being withheld in accordance with the exceptions listed in the Act

Publicly Available The information/records being sought have already been published or are available for purchase by the public

Will be publicly available within 45 days The information/records being sought will be published or

released to the public within 45 days after the applicant's request is received (if not published within 45 days, application is reactivated)

Records Do Not Exist No records within the scope of the request have been found

Refused to Confirm or Deny Existence of a Record Request has been denied pursuant to section 12(2)

Repetitive or

Incomprehensible The information/records being sought have been denied or have been provided to the applicant on one or more previous occasions; or the information/records being sought cannot be identified because the applicant's request is unclear and repeated attempts to clarify request with applicant have been unsuccessful

Transferred Request is transferred to another public body which has custody and/or control of the records sought

Withdrawn The applicant has chosen not to pursue the request and has notified the public body

Section 4

Exceptions

Record each exception to disclosure applied in the access request by noting the sections and subsections of the *Act*.

A record or part of a record may be withheld under several exceptions. Be sure to indicate all that apply.

For example, the information being sought is the advice given to the Minister of Justice by a senior official in the Department. That advice, containing a possible course of action, potentially may be protected under 20(1) – Policy Advice or Recommendations; 21 – Legal Advice; and 24(1) – Disclosure Harmful to the Financial or Economic Interests of a Public Body.

Section 5

Response Time

First, indicate whether the access request was responded to within 30 calendar days, within the extension period of 30-60 days, or after more than 60 days. Then, record whether or not the deadline was met.

For example, if the 30 day time limit was extended for an additional 30 days and the response was provided to the applicant on Day 60, then the response time was within 30-60 days and the deadline was met.

Response time means the total length of time that a public body takes to fully respond to a request. This includes locating the requested records, making the decision about access, doing any severing that may be required, and providing the final response to the applicant.

Section 6

Extensions

If the 30 day time limit was extended, indicate the provision used and the number of days extension.

Section 7 Third

Party Notice

If third party notification was required because some or all of the information being sought in the access request involved a third party (or parties), indicate whether the third party consented to release, did not consent or did not respond.

Third party Consent Third party consents in writing to release of the records, as described by the public body

Third Party Does Not Consent Third party objects to release of the record and makes written representations to the public body

Third Party Partially Consents Third party consents to release of part of the record and makes written representations to the public body

Third Party does not respond Third party does not respond to the notification within 20 days after it is given

***Section 8 Fees
Collected***

You **must** record all fees collected from the applicant in the **Red "FEES" folder of TRIM.**

Indicate the total number of search hours, after the first two hours, it took to complete the request, rounded down to the nearest hour, and also record any copying fees.

***Section 9
Fee Waivers***

If fees were waived, indicate the amount waived.

Record the total number of hours, after the first two hours, it took to complete the request, even if fees were waived, rounded down to the nearest hour.

***Section 10
Notes***

If you wish to provide any additional information on the access request, use this section.

The ATIPP Summary Report should then be signed and dated, with contact details provided, and faxed to the Access and Privacy Office, Department of Justice, at fax # 709-729-5466. Alternatively, complete the Report electronically (obtained from the ATIPP Office) and submit via e-mail to brendahowell@gov.nl.ca.

8.3.2 *Federal Access to Information Requests*

Under its *Access to Information Act*, the federal government sometimes receives access requests which require them to seek consent from a public body of Newfoundland and Labrador. If a department or other public body receives such a request for consent from the federal government, the ATIPP Office must be advised. Departments using the electronic database will use the database for this purpose. All other public bodies should complete the cover page and Part B of the ATIPP Summary Report, which requires you to provide the following details on this type of request:

S nature/subject of request
S name of individual and federal public body making request
(this information is provided on the cover page under “Applicant” and
“Organization”)
S date received S date response
is due S date reply sent S any
notes to be added

Reviews, Complaints and Appeals

If your public body receives notification from the Information and Privacy Commissioner that their Office has received a complaint and/or is undertaking a review of an access request handled by your public body, the ATIPP Office must be advised.

Similarly, if your public body receives notice of an Appeal to the Supreme Court of a decision made by your public body, the ATIPP Office must be advised. Such an appeal may be initiated by the applicant, the Information and Privacy Commissioner or a third party.

APPENDIX 1

Forms,
Letters,
and
Notices



Application for Access

Form 1

Personal information on this form is collected under Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* and will be used to respond to your request. **See reverse for instructions.**

| | |
|--|--------------|
| 1. To Which Public Body Are You Making Your Request? | |
| 2. Applicant <i>(please print)</i> | |
| Surname: | First Name: |
| Organization <i>(where applicable)</i> : | |
| Address: Postal Code: | |
| Daytime Telephone #: | Facsimile #: |
| E-Mail: | |
| 3. What Information Are You Requesting? <i>Please check one T</i> | |

My own personal information (For another person's personal information, attach proof of authority)

General information

I wish to obtain access to the following information/records *(please be specific)*:

If you need more space, attach a separate piece of paper.

Applicant's Signature:

Date: YYYY-MM-DD

For Public Body Use Only

Date Received:

File #:

Instructions

Please

- Make only one request on each application form
- Describe the records or information you are seeking in as much detail as possible
- Enclose a cheque or money order for the \$5.00 application fee payable to the public body to which the request is submitted (or, if a government department, payable to the Newfoundland Exchequer)
- Send or deliver this form and the fee to the Access and Privacy Coordinator of the public body most likely to have the records you are seeking
- Keep a copy for your records
- Please note that under authority of section 68 of the *Access to Information and Protection of Privacy Act* (the *Act*) you may be asked to pay certain additional costs as prescribed by the Minister responsible for the *Act*, before gaining access to records. If the estimated costs of a request for general information are more than \$50, you will be sent an Estimate of Costs and a request to pay a 50% deposit.
- Please note that if the public body does not respond within 30 days of receipt of this application, you may appeal to the Supreme Court Trial Division or ask for a review by the Information and Privacy Commissioner, under authority of section 43 of the *Act*. In addition, if the public body extends this 30-day time period under subsection 16(1) of the *Act*, you may make a complaint to the Information and Privacy Commissioner in accordance with section 44 of the *Act*.
- The *Act* may be viewed in its entirety at <http://www.assembly.nl.ca/legislation/sr/statutes/a01-1.htm>
- Further information about making a request for access is available on the ATIPP web site which may be found at <http://www.justice.gov.nl.ca/just/CIVIL/atipp/default.htm>.

Personal information collected on this form is protected by the *Access to Information and Protection of Privacy Act* and will be used only to respond to this request. Inquiries about the use and protection of this personal information should be directed to the Access and Privacy Coordinator of the public body to whom the application is sent.

(Public Body Letterhead)

[Date] [Applicant's Name and Address] Dear [Applicant's Name]: Re: Your request for access to information under Part II of the *Access to Information and Protection*

of Privacy Act
[Our File #:] This is to confirm that, on [date], [name of public body] received your request for access to the following records/information: [describe the records and/or information requested]. The *Access to Information and Protection of Privacy Act* (the *Act*) requires that we make every

reasonable effort to respond to your request in writing within 30 days after receiving it, unless: we extend the 30 day time period under section 16 of the *Act*; or the time for responding is suspended under

subsection 68(4) of the *Act*, pending your response to a fee estimate; or notice is given to an affected third party under section 28 of the *Act*. In accordance with the Schedule of Fees set by the Minister, and under authority of the *Act*, you may be required to pay a fee for processing your request. If the fee is estimated to be more than \$50, you will be

sent an estimate of costs and asked to pay a deposit equal to 50 percent of the total payable before your request will be processed further. If you have any further questions, please feel free to contact the undersigned by telephone at (telephone number] or by e-mail at [e-mail address].

Sincerely,

[Name] Access and Privacy
Coordinator

(Public Body Letterhead)

[Date]

[Applicant's Name and Address]

Dear [Applicant's Name]:

Re: Your request for access to information under Part II of the *Access to Information and Protection of Privacy Act*
[Our File #:]

This is to confirm that, on [date], [name of public body] received your request for access to the following records/information:

[describe the records and/or information requested]

Your request was not accompanied by the \$5 application fee, which is required under the *Access to Information and Protection of Privacy Act's* Schedule of Fees as set by the Minister of Justice. Please forward this amount, by cheque or money order payable to [the Newfoundland Exchequer or name of agency or local public body], to the undersigned as soon as possible. Your request will be processed once this fee has been received.

If you have any further questions, please feel free to contact the undersigned by telephone at [telephone number] or by email at [email address].

Sincerely,

[Name] Access and Privacy
Coordinator

[Public Body Letterhead] [Date] [Applicant's Name and Address] Dear
[Applicant's Name]: Re: Your request for access to information under Part II of the *Access to
Information and Protection of Privacy Act*

[Our File #:] On [date], [name of public body] received your request for access to the
following records: [describe the records requested]. Please be advised, however, that the
above noted records

Option 1

were produced by or for [name of other public body].

Option 2

are in the custody or under the control of [name of other public body].

Your request, therefore, was transferred to [name of other public body] on [date], under authority of
section 17 of the *Access to Information and Protection of Privacy Act* (the *Act*). This public body is
required to make every reasonable effort to respond to your request within 30 days
after receiving it, unless: they extend the 30 day time period under section 16 of the *Act*; or the time for
responding is suspended under subsection 68(4) of the *Act*, pending your response to

a fee estimate provided by [name of other public body]; or [name of other public body] is required to
give notice to an affected third party under section 28 of the *Act*. If you have any further questions,
please feel free to contact [name of Access and Privacy Coordinator

for the other public body] at [telephone number] or you may contact the undersigned at [telephone
number]. Sincerely, [Name]

Access and Privacy Coordinator

cc. [Access and Privacy Coordinator of other public body]

[Public Body Letterhead] [Date]

[Applicant's Name and Address]

Dear [Applicant's Name]:

Re: Your request for access to information under Part II of the *Access to Information and Protection of Privacy Act*
[Our File #:]

On [date], [name of public body] received your request for access to the following records:

[describe the records requested].

I am pleased to inform you that your request for access to these records has been granted.

Option 1: Payment of Fees Required

Please be advised, however, that before access can be provided, payment of fees associated with processing this request is required. Enclosed is an invoice for the amount of [\$]. Please forward a cheque or money order for the amount indicated on the estimate, payable to [the Newfoundland Exchequer or name of agency or local public body], to the undersigned at the address noted [above/below].

Option 2: Balance of Fees Required

Please be advised, however, that before access can be provided, the fees set out in the Estimate of Costs, forwarded to you on [date], must be paid in full. Please forward a cheque or money order for the amount indicated on the estimate, payable to the Newfoundland Exchequer [or name of agency or local public body], to the undersigned at the address noted [above/below].

Option 3: Copy requested and records can be reproduced

In accordance with your request for a copy of the records, the appropriate copies have been enclosed.

Option 4: Applicant has requested to examine the records

In accordance with your request to examine the records, please contact the undersigned at [telephone number] in order to make the appropriate arrangements.

Option 5: Applicant has requested copy of records which cannot be reproduced

Although you have requested a copy of the records, please be advised that they cannot reasonably be reproduced because [explain why]. In accordance with subsection 15(b) of the *Access to Information and Protection of Privacy Act*, you will be permitted to examine the records. Please contact the undersigned at [telephone number] in order to make the appropriate arrangements.

If you have any further questions, please feel free to contact me at [telephone number].

Sincerely, [Name] Access and
Privacy Coordinator

[Public Body Letterhead] [Date] [Applicant's Name and Address] Dear

[Applicant's Name]: Re: Your request for access to information under Part II of the *Access to Information and Protection*

of Privacy Act

[Our File #:] On [date], [name of public body] received your request for access to the following records:

[describe the records requested]. I am pleased to inform you that your request for access to these records has been granted in part. In particular, access is granted to the following records:

[Specify records to which access is being granted.] Access to the remaining records, and/or information contained within the records, has been refused in accordance with the following exceptions to disclosure, as specified in the *Access to Information and Protection of Privacy Act* (the *Act*): [Identify the specific exception provisions relied upon, quote the wording of the exception provisions or attach copies of them, and explain why they apply.] As required by subsection 7(2) of the *Act*, we have severed information that is excepted from disclosure and have provided you with as much information as possible.

Option 1: Payment of Fees Required

Please be advised, however, that before access can be provided, payment of fees associated with processing this request is required. Enclosed is an invoice for the amount of [\$]. Please forward a cheque or money order for the amount indicated on the estimate, payable to [the Newfoundland Exchequer or name of agency or local public body], to the undersigned at the address noted [above/below].

Option 2: Balance of Fees Required

Please be advised that before access can be provided, the fees set out in the Estimate of Costs, forwarded to you on [date], must be paid in full. Please forward a cheque or money order for the amount indicated on the estimate, payable to the Newfoundland Exchequer [or name of agency or local public body], to the undersigned at the above noted address.

Option 3: Copy requested and records can be reproduced

In accordance with your request for a copy of the records, the appropriate copies have been enclosed.

Option 4: Applicant has requested to examine the records

In response to your request to examine the records, please be advised that the records contain information which is excepted from disclosure under the *Act* and which must be severed, and your right of access under subsection 7(2) of the *Act* does not extend to information which is excepted from disclosure. Accordingly, please contact the undersigned at [telephone number] in order to make arrangements for you to examine those records, and/or information contained within those records, which is not subject to an exception under the *Act*.

Option 5: Applicant has requested copy of records which cannot be reproduced

Although you have requested a copy of the records, please be advised that they cannot reasonably be reproduced because [explain why]. In accordance with subsection 15(b) of the *Act*, you will be permitted to examine those records, and/or information within those records, which is not subject to an exception under the *Act*. Please contact the undersigned at [telephone number] in order to make the appropriate arrangements.

Section 43 of the *Act* provides that you may ask the Information and Privacy Commissioner to review this partial refusal of access or you may appeal the refusal to the Supreme Court Trial Division. A request to the Information and Privacy Commissioner shall be made in writing within 60 days of the date of this letter or within a longer period that may be allowed by the Commissioner.

The address and contact information of the Information and Privacy Commissioner is as follows:

In the event that you choose to appeal to the Supreme Court, you must do so within 30 days of the date of this letter. Section 60 of the *Act* sets out the process to be followed when filing such an appeal.

If you have any further questions, please feel free to contact the undersigned at [telephone number].

Sincerely,

[Name] Access and Privacy
Coordinator

[Public Body Letterhead] [Date] [Applicant's Name and Address] Dear

[Applicant's Name]: Re: Your request for access to information under Part II of the *Access to Information and Protection*

of Privacy Act
[Our File #:]

On [date], [name of public body] received your request for access to the following records:

[describe the records requested].

Please be advised that access to these records has been refused in accordance with the following exceptions to disclosure, as specified in the *Access to Information and Protection of Privacy Act* (the *Act*):

[Identify the specific exception provisions relied upon, quote the wording of the exception provisions or attach copies of them, and explain why they apply.]

Section 43 of the *Act* provides that you may ask the Information and Privacy Commissioner to review this refusal of access or you may appeal the refusal to the Supreme Court Trial Division. A request to the Commissioner shall be made in writing within 60 days of the date of this letter or within a longer period that may be allowed by the Information and Privacy Commissioner.

The address and contact information of the Information and Privacy Commissioner is as follows:

In the event that you choose to appeal to the Supreme Court, you must do so within 30 days of the date of this letter. Section 60 of the *Act* sets out the process to be followed when filing such an appeal. If you have any further questions, please feel free to contact the undersigned at [telephone number].

Sincerely, [Name] Access and
Privacy Coordinator

[Public Body Letterhead]

[Date]

[Applicant's Name and Address]

Dear [Applicant's Name]:

Re: Your request for access to information under Part II of the *Access to Information and Protection of Privacy Act*
[Our File #:]

On [date], [name of public body] received your request for access to the following records:

[describe the records requested].

Please be advised that the 30 day time limit for responding to your request has been extended for an additional [#] days and we expect to respond to your request by [date].

Option 1: To clarify request - paragraph 16(1)(a)

The reason for this extension of time is to allow us to obtain additional information from you in order to properly identify the records you are requesting. This extension is in accordance with paragraph 16(1)(a) of the *Access to Information and Protection of Privacy Act*, which provides:

16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where
(a) the applicant does not give sufficient details to enable the public body to identify the requested record;

Please contact the undersigned at [telephone number] as soon as possible so that we may clarify which records you are requesting.

Option 2: Large number of records requested or to be searched - paragraph 16(1)(b)

This extension of time is necessary because [you have requested a large number of records/a large number of records must be searched in order to respond to you request] and responding within the 30 day time period would interfere unreasonably with the operations of our organization. This extension is in accordance with paragraph 16(1)(b) of the *Access to Information and Protection of Privacy Act*, which provides:

16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where
(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body;

Option 3: Notice to Third Party Under Section 28 - paragraph 16(1)(c)

This extension of time is necessary because a preliminary review of the records you have requested indicates that we must notify [a third party/third parties] before access to the records is granted. This

16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where

(c) notice is given to a third party under section 28.

Paragraph 44(a) of the *Access to Information and Protection of Privacy Act* provides that you may make a complaint to the Information and Privacy Commissioner about this decision to extend the time limit for responding to your request.

The address and contact information of the Information and Privacy Commissioner is as follows:

If you have any further questions, please feel free to contact the undersigned at [telephone number].

Sincerely,

[Name] Access and Privacy
Coordinator

[Public Body Letterhead]

[Date]

[Applicant's Name and Address]

Dear [Applicant's Name]:

Re: Your request for access to information under Part II of the *Access to Information and Protection of Privacy Act*
[Our File #:]

On [date], [name of public body] received your request for access to the following records:

[describe the records requested].

Under authority of section 68 of the *Access to Information and Protection of Privacy Act* (the *Act*), you are required to pay a fee for processing your request. The details of this fee are included on the attached Estimate of Costs form.

Please review this estimate, choose one of the three options available and return the form to the undersigned within 30 days. Please ensure that you have signed and dated the form. If you are prepared to pay the fee, please include a cheque or money order for 50% of the fee, payable to [the Newfoundland Exchequer or name of agency or local public body]. If we do not receive a response within 30 days from the date of this letter, your request for access will be considered abandoned, under authority of subsection 68(3) of the *Act*.

Please be advised that section 44 of the *Act* provides that you may file a complaint with the Information and Privacy Commissioner if you feel that the fee is inappropriate.

The address and contact information of the Information and Privacy Commissioner is as follows:

I have also attached a copy of the fee waiver policy for your information.

If you have any further questions, please feel free to contact the undersigned at [telephone number].

Sincerely,

[Name] Access and Privacy
Coordinator Enclosures (2)

Form 6B - Estimate of Costs [print on public body letterhead]

Estimate of Costs

In accordance with subsection 68(2), you are being advised by this estimate that a fee is payable for responding to your application for access to records. The estimate is as follows, based on charges authorized by the Fee Schedule set by the Minister responsible for this Act:

| | | | | |
|---------------------------------------|-------|--------|---------------------------------|-----------|
| FILE #: | | | | |
| Search and preparation fee: | | | | |
| Time in excess of two hours | _____ | hours | × \$15 | \$ |
| Estimated cost (at \$15 per hour) | | | | |
| Photocopies: | | | | |
| Number of copies (at \$0.25 per copy) | _____ | copies | × \$0.25 | \$ |
| | | | | |
| | | | Total of estimated costs | \$ |

Please note: A refund will be issued if access to every record requested is refused, or if the actual cost is less than this estimate. Any balance owing will be payable before access is given.

Public Body

Address

Coordinator Date

Please choose one of the following three options (T). Once you have signed and dated the form, please return it to the individual and address noted above. All cheques are to be made payable to the [Newfoundland Exchequer or name of other public body]. Applicants have up to 30 days from the date of the estimate to indicate if it is accepted, not accepted or to modify the request in order to reduce the fees. If this form is not returned within this time period, the application will be considered abandoned. We shall notify you when the records are ready.

9 I am prepared to pay the fee estimate quoted above and ask that you proceed with my request. I have enclosed a payment of 50% of the estimate and agree to pay the balance prior to the records being released to me.

9 I am not prepared to pay the fee estimate quoted above and I ask that you discontinue my request.

9 I am not prepared to pay the fee estimate quoted above and I wish to modify my request in accordance with a revised Application for Access (please attach revised Application).

| |
|--|
| Applicant's Signature _____ Date _____ |
|--|

[Public Body Letterhead] [Date] [Third Party's Name and Address] Dear

[Third Party's Name]: Re: Request for access to information under Part II of the *Access to Information and Protection of Privacy Act*

[Our File #:]

[Name of public body] has received a request under Part II of the *Access to Information and Protection of Privacy Act* (the *Act*) for access to records. On reviewing these records, it appears that they may contain information which, if disclosed, might affect your business interests as described in section 27 of the *Act* (copy attached).

Option 1:

Enclosed is a copy of [the record requested/the part of the record requested] which contains the information in question.

Option 2:

The following is a description of the requested records and the information in question:

[Describe requested records and the information which might affect the third party's interests.]

If you wish to consent to the disclosure of this information, please provide the undersigned with your consent in writing as soon as possible and no later than 20 days from the date of this letter.

If you wish to make representations as to why the requested information should not be disclosed, please provide the undersigned with your representations in writing as soon as possible and no later than 20 days from the date of this letter. Your representations as to why the information should not be disclosed should be based on the provisions of section 27 of the *Act*.

Subsections 28(3) and 28(4) of the *Act* require that we give written notice of our decision respecting access, including reasons for the decision, to you and to the applicant. Our decision must be made within 30 days after the date of this letter, whether or not we have received a response from you, unless we extend the time period under paragraph 16(1)(c) of the *Act*.

If you have further questions, please feel free to contact the undersigned at [telephone number].

Sincerely,

[Name] Access and Privacy
Coordinator

Enclosure (s)

Form 7B - Notice to Applicant of Third Party Notice - Subsection 28(4)

[Public Body Letterhead] [Date] [Applicant's Name and Address] Dear

[Applicant's Name]: Re: Your request for access to information under Part II of the *Access to Information and Protection*

of Privacy Act
[Our File #:]

On [date], [Name of public body] received your request for access to the following records:

[Describe the records requested.]

The records you have requested may contain information which, if disclosed, might affect the business interests of a third party as described in section 27 of the *Access to Information and Protection of Privacy Act* (the *Act*).

As required by section 28 of the *Act*, we have given written notice to the third party that a request for access to these records has been made. This notice gives the third party an opportunity to consent to the disclosure of the information or to make representations to us explaining why the information should not be disclosed. The notice to the third party was dated and sent on [date], and requires a response within 20 days.

A copy of sections 27 and 28 have been enclosed for your information.

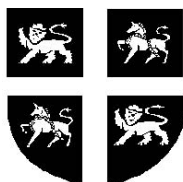
Our decision respecting your request for access must be made within 30 days after the date the notice was given to the third party, unless we extend the 30 day time limit under paragraph 16(1)(c). Section 29 of the *Act* requires that we give written notice of our decision respecting your request for access to you and to the third party.

If you have any further questions, please feel free to contact the undersigned at [telephone number].

Sincerely,

[Name] Access and Privacy
Coordinator

Enclosure



Department of Justice Office of the Access to Information and
GOVERNMENT OF NEWFOUNDLAND
AND LABRADOR

ATIPP Summary Report
 Form 8

File #:
 Organization:

General Access Personal Info FAI

| 1. ATIPP REQUESTS | |
|--------------------------------------|-------|
| EXCEPTIONS | |
| Mandatory: | s. 18 |
| | s. 27 |
| | s. 30 |
| Discretionary | s. 20 |
| | s. 21 |
| | s. 22 |
| | s. 23 |
| | s. 24 |
| | s. 25 |
| FINAL OUTCOME | |
| Abandoned | |
| Access Denied | |
| Full disclosure | |
| Partial disclosure | |
| Public Domain | |
| Available in 45 days | |
| Non-existent records | |
| No confirmation or denial of records | |
| Repeat / Incomplete | |
| Withdrawn | |
| Transferred | |
| RESPONSE TIME | |
| Within 30 days | |
| Within 30 - 60 days | |
| More than 60 days | |

| | | |
|--|-------------|--|
| <p>EXTENSIONS Insufficient detail Large number of records 3rd Party Notice 3RD PARTY NOTICE Consent to release Did not consent to release Partially consented Did not respond</p> <p>TIME SPENT</p> <table border="1"> <tr> <td>Total Hours</td> <td></td> </tr> </table> | Total Hours | |
| Total Hours | | |

| 2. FAI REQUESTS | |
|----------------------------|--|
| OUTCOME | |
| Response Time | |
| Volume of records | |
| Concur with release | |
| Do not concur with release | |
| Reason for Non-Concurrence | |

| |
|---|
| <p>FEE WAIVERS</p> <p>Subsection Financial hardship 4 (1)(a) Personal Info 4(1)(b)</p> |
|---|

| FEES | | Amount |
|-------------------|---------------------------|--------|
| Application Fee | | \$ |
| Search / Prep fee | #hrs ____ x \$15.00 | \$ |
| Copying Fee | | \$ |
| Total | | \$ |

APPENDIX 2

Handling the Request

HANDLING THE REQUEST

| | ✓ | Manual Ref | ATIPP Tips |
|----|--|---------------------------|---|
| 1 | Send form to applicant if application is not in the required format (Form 1) | 1.1.2 1.4.3 1.5 3.4 | Do records sought fall under the <i>Act</i> ? Provide information/records through routine disclosure, if possible. |
| 2 | Send notice to applicant if application fee does not accompany request (Form 2B) | 2.6 3.2 3.22 | |
| 3 | Date stamp the request | 3.3 3.6 | Call or email applicant, if request needs to be clarified. Always be helpful and keep applicant informed. Do not probe motives. |
| 4 | Calculate the due date (30 calendar days after receipt) | 3.20.4 | Failure to respond within 30 days may be deemed a refusal of access. |
| 5 | Enter details in the TRIM database, if using, or other monitoring/tracking system | 3.1 3.6 | Remember: Information about applicant is shared only on a "need to know" basis. |
| 6 | If not using TRIM, fax copy of application to ATIPP Office | 8.2 | |
| 7 | Transfer request to other public body, if required Send applicant notice of transfer (Form 3) | 2.6 3.8 | Confirm other public body has records and obtain their permission to transfer request. Requests must be transferred within 7 days. |
| 8 | Send applicant letter acknowledging request (Form 4) | 3.7 | This form advises applicant that no estimate of costs will be sent if fees are expected to be less than \$50. |
| 9 | <i>Initiate search for the records</i> | | |
| | Identify and assemble records | 3.9 3.10 | Ensure all potential program areas are asked to search for records. Search paper, electronic and other records in any form. Keep accurate documentation of search. Make 2 copies of each record and number all documents. |
| 10 | Update database/tracking system | | |

| | | | | |
|----|---|--|---------------------------------|--|
| 11 | <i>Assess materials</i> | | | |
| | Extension required? Send notice to applicant (Form 6) | | 2.6 3.20 | |
| | Third party notice required? Send notice to third party and to applicant (Forms 7A, 7B) | | 2.6 3.23 | |
| 12 | Update database/tracking system | | | |
| 13 | <i>Fees estimate</i> | | | |
| | Assess number of hours and photocopies required to complete request | | 2.6 3.22 | Consult with senior management on fees estimate. Round estimate of hours down to nearest hour. Aim for accurate estimate. Use Form 6B. |
| | Send written fees estimate to applicant (Form 6A, 6B) | | 3.22 | Fees estimate not required if fees will be less than \$50 |
| | Receive applicant's consent to pay costs and deposit , resume processing request; or, negotiate amended request to reduce costs; or, close file if applicant withdraws application | | 3.22 | Processing of request stops until deposit is received. Consider fee waiver and/or narrowing request. |
| 14 | Update database/tracking system | | | |
| 15 | Make two copies of the records; one for file and one working copy | | 3.9 | |
| 16 | Line-by-line review of materials. Prepare list of records. | | 3.11 | Consult with program areas for context and sensitivity. |
| 17 | Send to departmental/agency solicitor for legal opinion , if required | | 4.2.4 4.2.8 4.2.6 3.12 | Lawyer/departmental solicitor must be consulted if records may be withheld under s.21 Dept. of Tourism, Culture & Recreation and/or Dept. of Environment & Conservation must be consulted if records may be withheld under s.25 Dept. of Justice, Intergovernmental Affairs and/or Municipal and Provincial Affairs must be consulted if records may be withheld under s.23 Advise senior management and communications of significant issues. |

| | | | | |
|----|---|--|----------------------------|---|
| 18 | Sever any information which is not to be disclosed. Indicate the subsections used to protect information. If more than one exception applies, note each one. | | 3.11 3.13 3.16 4.1.1 | |
| 19 | Prepare draft response (Forms 4A, 4B or 4C) | | 3.14 | |
| 20 | Send draft to head (or designate) for approval | | 3.12 3.14 | Discuss any sensitive issues with head/senior management. |
| 21 | Send draft to Access and Privacy Coordinator, Cabinet Secretariat for approval (if any of the materials may contain cabinet confidences) | | 1.4.2 3.12 | |
| 22 | Send final bill to applicant | | 2.6 3.22 | |
| 23 | Send response to applicant if outstanding fees are paid. Send refund, if applicable | | 3.14 3.16 3.17 | |
| 24 | Close file | | | |
| 25 | Update database/tracking system | | | |
| 26 | Send Summary Report to ATIPP Office, Dept. of Justice (if not using TRIM database) | | 8.3 | Ensure all correspondence and documentation is on file. |

APPENDIX 3

Glossary

These definitions are provided to Access and Privacy Coordinators and employees of public bodies for the purpose of managing requests under the *Act*. They are not official definitions and are intended only to guide employees in the application and administration of the *Act*.

Entries with an * are defined in the *Act*.

| | |
|---------------------------------------|--|
| access | Either the opportunity to examine an original record or the provision of a copy. |
| Access and Privacy Coordinator | A person on the staff of a public body designated by the head to receive and process requests made under the <i>Act</i> , coordinate responses to requests for approval by the head of the public body; educate staff of the public body about the applicable provisions of the <i>Act</i> , track requests made under the <i>Act</i> and the outcome of the request, and prepare statistical reports on requests for the head of the public body. |
| advice | Expression of opinion on policy related matters. Includes proposals, recommendations, analysis, policy options and draft legislation or regulations. |
| annotate | To add an explanatory, descriptive or critical note to a record. |
| applicant* | Any person who makes a request under the <i>Act</i> for access to a record or correction of a personal record. |
| ATIPP | The official abbreviation for “Access to Information and Protection of Privacy.” |
| burden of proof | The obligation to bring forth sufficient evidence or proof to convince the Information and Privacy Commissioner or Trial Division of the truth of a fact. |
| Cabinet | The common name for the Executive Council. It consists of a committee of Ministers that acts collectively with the Premier to decide matters of government policy. |
| commercial information | Relates to the buying, selling or exchange of merchandise or services. Includes third party associations, history, references, and insurance policies, as well as pricing structure, market research, business plans, and customer records. <i>See also financial information.</i> |

| | |
|----------------------------|---|
| complaint | A formal expression of dissatisfaction submitted by an applicant or other person to the Information and Privacy Commissioner. A complaint may be based on one or both of the following grounds specified in the <i>Act</i> : • A public body’s extension of time for responding to a request is not in accordance with section 16; or • A fee required under the <i>Act</i> is inappropriate <i>See also review</i> . |
| confidential source | For the purposes of the <i>Act</i> ’s exception for law enforcement information, “confidential source” means an informant who provided law enforcement information to a public body and who was either promised confidentiality or who had an expectation of confidentiality based on the circumstances in which the information was provided. A “confidential source” is to be distinguished from a person who provided information “in confidence,” which is relevant for the application of other exceptions. <i>See also “in confidence.”</i> |
| control | For the purposes of determining whether the <i>Act</i> applies to a record that is “under the control” of a public body, “control” means the authority to manage the record, including restricting, regulating and administering its use, disclosure and disposition. |
| custody | For the purposes of determining whether the <i>Act</i> applies to a record that is “in the custody” of a public body, “custody” means physical possession. |
| disclosure | The act of making known or revealing. Disclosure can also mean providing access to records or personal information. |
| discretion | The power to make a decision that cannot be determined to be right or wrong in an objective sense. Discretion amounts to the power of the decision-maker to choose a particular course of action for good reasons and in good faith, after considering the relevant facts and circumstances; the applicable law, including the <i>Act</i> ; and the proper application of the law to the relevant facts and circumstances. |

| | |
|---------------------------------|---|
| discretionary exception | Within the context of Part III of the <i>Act</i> , an exception to disclosure that permits a public body to choose whether or not to withhold all or part of a record. Discretionary exceptions begin with the phrase “The head of a public body <i>may</i> refuse to disclose.” <i>See also</i> “ mandatory exception. ” |
| educational body* | A local public body that is: • Memorial University of Newfoundland • College of the North Atlantic • Centre for Nursing Studies, Health Care Corporation of St. John’s • Western Regional School of Nursing, Western Health Care Corporation • A school board, school district constituted or established under the <i>Schools Act, 1997</i> , including the conseil scolaire francophone, and • A body designated as an educational body in the regulations made under section 73 <i>See also</i> “ local public body. ” |
| employee* | Includes, in relation to a public body, a person retained under a contract to perform services for the public body. |
| exceptions to disclosure | Provisions of the <i>Act</i> which either require or permit a public body to withhold all or part of a record or personal information in the custody or under the control of a public body. The <i>Act</i> establishes limited and specific exceptions to the right of access where disclosure would reveal certain categories of information or would result in harm to the Government of Newfoundland and Labrador, the public body or a third party. These exceptions, which are either mandatory or discretionary, are set out in sections 18 to 30 of the <i>Act</i> . |
| explicitly in confidence | <i>See in confidence.</i> |

| | |
|------------------------------|---|
| extension | In the context of the access request process under the <i>Act</i> , the lengthening of the 30 day time limit for responding to the request. An extension can only be claimed if: • the applicant does not provide enough details to enable the record to be identified; • a large number of records are requested or must be searched and responding within 30 days would unreasonably interfere with the operations of the public body; • notice is given to a third party under section 28. |
| fees | The charges that an applicant pays to a public body for services related to the processing of an access request. The ATIPP Schedule of Fees sets out the services for which fees may be charged and the charges for providing these services. Fees may not exceed the actual cost of providing the service. |
| financial information | Information regarding the monetary resources of a third party, including an individual, such as financial capabilities, assets and liabilities, past or present. Financial information is not limited to information relating to financial transactions in which the third party is involved. |
| good faith | An intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. Black's Law Dictionary 693 (6th ed. 1990) |
| guardian | In relation to a minor, a person who has care and custody of the minor or is involved in his or her daily care. In relation to a dependent adult, guardian means the person who has been appointed as the guardian of the individual. |

| | |
|--------------------|---|
| harm | Damage or detriment. Within the context of the <i>Act's</i> exceptions to disclosure, "harm" is the term used to refer to the injury to a particular public or private interest that could occur as the result of the disclosure of certain types of information in records in the custody or under the control of a public body. The harm must be specific to the context of the request. The general test for harm under the <i>Act</i> is whether there is a reasonable expectation of harm flowing from disclosure of the specific information at issue. |
| harm's test | A test or set of criteria used to determine whether disclosure of records or information would cause damage or detriment to a particular interest. To meet the standard of proof required to decide that disclosure could reasonably be expected to cause harm, and therefore that a particular exception in the <i>Act</i> applies: • there must be a reasonable expectation of probable harm (not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue); • the harm must constitute damage or detriment, not mere interference or inconvenience; and • there must be a causal connection between disclosure and the anticipated harm. |
| head* | In relation to a public body, means: • in the case of a department, the minister who presides over it • in the case of a corporation, its chief executive officer • in the case of an unincorporated body, the minister appointed under the <i>Executive Council Act</i> to administer the Act under which the body is established, or the minister who is otherwise responsible for the body, or • in another case, the person or group of persons designated under section 66 or in the regulations as the head of the public body. |

| | |
|---------------------------------|---|
| health care body* | A local public body that is: • a hospital board or authority as defined in the <i>Hospitals Act</i> , • a health and community services board established under the <i>Health and Community Services Act</i> , • the Cancer Treatment and Research Foundation, • the Mental Health Review Board, • the Newfoundland and Labrador Centre for Health Information, and • a body designated as a health care body in the regulations made under section 73. |
| implicitly in confidence | A phrase applied to information that is furnished on the understanding of both parties that it be kept secret. There may be no actual statement of confidentiality, written agreement or other physical evidence of the understanding that the information will be kept confidential. Some of the relevant facts and circumstances that may show an understanding of confidentiality are how the information was provided, for what purpose, and how it was managed, secured or distributed by or within the public body. |
| in camera | In the absence of the public at large. A meeting of a local public body that is open to the public or to which the public at large is invited, even if no members of the public attend, is <i>not</i> a meeting held <i>in camera</i> . |
| in confidence | A term applied to information that is furnished with the intent that it be kept secret. In the context of the <i>Act</i> , the concept is applied to information or records supplied to a public body by third parties (including individuals and other levels of government) or by confidential sources of enforcement information. Whether information has been supplied explicitly or implicitly in confidence is a factor in considering exceptions to disclosure under subsections 22(1)(d), 23(1)(b), and 27(1)(b). The information must have been supplied in the expectation that the public body would not disclose it. The intention that the confidence will be maintained may be explicitly stated within the record in question or may be implied by the circumstances under which the information was submitted and received. Where confidentiality is implied, there must be objective grounds to support the assumption of confidentiality. <i>See also implicitly in confidence.</i> |

| | |
|---|---|
| informal resolution | The process of facilitating discussion between parties with the goal of negotiating a mutually accepted resolution of the dispute. |
| Information and Privacy Commissioner | The Information and Privacy Commissioner appointed under the <i>Access to Information and Protection of Privacy Act</i> . The Information and Privacy Commissioner is an Officer of the House of Assembly and is independent of government. The Information and Privacy Commissioner has been designated as the independent review mechanism for the <i>Act</i> . |
| investigation | A systematic process of examination, inquiry and observation. The <i>Act's</i> definition of "law enforcement" includes policing and any investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed. Within this context, an investigation may be carried out by or on behalf of a public body or by a police service. The term "investigation" also refers to the procedures used by the Information and Privacy Commissioner to ensure compliance with the <i>Act</i> . After conducting an investigation, the Office of the Information and Privacy Commissioner may issue an Investigation Report. |
| judicial administration record* | A record containing information relating to a judge, master or justice of the peace, including information respecting: • the scheduling of judges, hearings and trials • the content of judicial training programs • statistics of judicial activity prepared by or for a |

| | |
|---|--|
| local government body* | A local government body means: • the City of Corner Brook • the City of Mount Pearl • the City of St. John's • a municipality as defined in the <i>Municipalities Act, 1999</i> , and • a body designated as a local government body in the regulations made under section 73 |
| local public body* | A local public body means: • an educational body • a health care body, and • a local government body. |
| mandatory exception | Within the context of Part III of the <i>Act</i> , an exception to disclosure that requires a public body to withhold all or part of a record. Mandatory exceptions begin with the phrase "The head of a public body <i>shall</i> refuse to disclose." The mandatory exceptions are: sections 18(1), 27(1), 27(2), and 30(1). <i>See also discretionary exception.</i> |
| Minister responsible for this Act* | The member of the Executive Council charged by the Lieutenant Governor in Council with the administration of the <i>Act</i> . The Minister responsible for the <i>Act</i> is the Minister of Justice. |
| notice | An official communication required to be delivered to a member of the public, an affected third party, or an applicant in particular circumstances under the <i>Act</i> . |
| offence | Means an offence under an enactment of Newfoundland and Labrador or Canada, including an offence under the <i>Act</i> . |
| penalty or sanction | Includes a fine, imprisonment, and revocation of a licence, an order to cease an activity, expulsion or job loss. For the purposes of the <i>Act's</i> exception for law enforcement, the penalty or sanction must be in relation to an offence under an enactment. |
| person | Within the context of the <i>Act</i> , a "person" means a "legal person" which includes an individual, a corporation or any other entity. |

| | |
|--|---|
| <p>personal information*</p> | <p>Recorded information about an identifiable individual, including but not limited to: • the individual's name, address, telephone number • the individual's race, national or ethnic origin, colour, or religious or political beliefs, or associations • the individual's age, sex, marital or family status • an identifying number, symbol or other particular assigned to the individual • the individual's fingerprints, blood type or inheritable characteristics • information about the individual's health and health care history, including information about a physical or mental disability • information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given • anyone else's opinion about the individual • the individual's personal views or opinions</p> |
| <p>policing</p> | <p>activities of police services. activities carried out under the authority of a statute regarding the maintenance of public order, detection and prevention of crime or enforcement of law.</p> |
| <p>privacy impact statement</p> | <p>A process that assists public bodies in reviewing the impact that a new program, administrative process or practice, information system or legislation may have on individual privacy.</p> |
| <p>proceeding</p> | <p>An action or submission to any court, judge or other body having authority, by law or by consent, to make decisions concerning a person's rights. This includes administrative proceedings before agencies, boards and tribunals that lead or could lead to a penalty or sanction being imposed, including a penalty or sanction imposed by another body to which the results of the proceeding may be referred.</p> |

| | |
|---------------------------------------|---|
| public body* | For the purposes of the administration of the <i>Act</i> , “public body” means: • a department created under the <i>Executive Council Act</i> , or a branch of the executive government of the province • a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown • a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister • a local public body. |
| public interest | For the purposes of the <i>Act’s</i> mandatory provision for disclosure in the public interest and disclosure of personal information for research or statistical purposes, information “clearly in the public interest” refers to information of compelling public interest, not just of interest or of curiosity to the public, a group of people, a person or the applicant. |
| reasonable | Fair, proper, just, moderate, suitable under the circumstances. There are a variety of situations under the <i>Act</i> where reasonableness comes into play in a decision or course of action on the part of a public body, in particular: • fulfilling the duty to assist applicants and to respond to requests without delay • deciding whether or not disclosure of information that may be subject to certain exceptions could reasonably be expected to cause harm, and • making certain determinations with respect to the collection, use, disclosure, and protection of personal information. |
| reasonable expectation of harm | In the context of certain exceptions in the <i>Act</i> , the phrase “reasonable expectation of harm” means that there is a clear cause-and-effect relationship between the disclosure and the harm; the disclosure will cause harm and not simply interference or inconvenience; and the likelihood of harm is genuine and conceivable. |
| record* | A record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium. |

| | |
|---|---|
| records retention and disposition schedule | A legal authority that describes the records under the control of a public body, specifies how long and where they must be kept as they progress through the phases of their life cycle, the format in which the records must be stored, and what their final disposition will be (destruction or archival preservation) at the end of their life cycle. |
| request | An application under the <i>Act</i> for access to records or personal information in the custody or under the control of a public body. |
| review* | In the context of the <i>Act's</i> provisions for independent reviews of decisions made by public bodies, "review" refers to the examination by the Information and Privacy Commissioner of a decision, act or failure to act by the head of a public body in the course of processing a request for access to records or information under the <i>Act</i> . |
| routine disclosure | A process whereby access to a record is granted without a request under the <i>Act</i> , usually in response to a routine inquiry or request. |
| scientific information | Information exhibiting the principles or methods of science. <i>See also technical information.</i> |
| severing | The physical removal, by masking or other means, of any information that is excepted from disclosure in order that the remainder may be disclosed. |
| statistical survey | Refers to general views or considerations of subjects using numerical data, such as a study of growth rates in various forested areas of Newfoundland and Labrador. |
| technical information | Information relating to a particular subject, craft or technique, such as system design specifications and plans for an engineering project. <i>See also scientific information.</i> |
| third party* | Any person, group of persons or organization other than the person making a request (the applicant) or a public body. The term refers to a person, group of persons or organization whose information is in the custody or under the control of a public body and whose interests are affected by the public body's decision, as described in the <i>Act's</i> exceptions for third party business information. |

| | |
|--------------------------|---|
| time limit | The time allowed for a response to be made or an action to be taken. All time limits under the <i>Act</i> are based upon calendar days, not working days. The time limit begins on the day after the request is received in a duly authorized office and any initial fee is paid. The 20-day time limit for a third party response begins on the day after the third party notice is given; and an applicant has 60 days from the day after being notified of a decision to request a review of that decision by the Information and Privacy Commissioner. If a time limit expires on a Saturday, Sunday or other holiday, the time limit is extended until the next working day. |
| trade secret | Information, including a formula, pattern, compilation, program, device, product, method, or process: <ul style="list-style-type: none"> • that is used, or may be used, in business or for any commercial purpose • that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use • that is the subject of reasonable efforts to prevent it from becoming generally known, and • the disclosure of which would result in significant harm or undue financial loss or gain. |
| transfer | The act by which one public body formally passes to another public body responsibility for processing a request for access to records or correction of personal information under the <i>Act</i> , usually because the receiving public body has a greater interest in the records. Another public body may have a greater interest in a record if the record was produced by or for the other public body; the other public body was the first to obtain the record; or the record is in the custody or under the control of the other public body. |
| transitory record | A record that has only immediate or short-term usefulness and will not be needed again in the future. Transitory records contain information that is not required to meet legal or financial obligations or to sustain administrative or operational functions, and has no archival value. |

APPENDIX 4

Fee Schedule

**Establishment of Fees for the *Access to Information and
Protection of Privacy Act***

Pursuant to Section 21 of the *Executive Council Act*, Section 68 of the *Access to Information and Protection of Privacy Act* and all other powers enabling him in this regard, the Minister of Justice has been pleased to establish the fees set out below, effective from the 3rd day of June, 2004.

Dated at St. John's in the Province of Newfoundland and Labrador, on the 3rd day of June, 2004.

The Honourable Thomas Marshall, Q.C.
Minister of Justice and Attorney General

FEES

1. (1) An applicant who makes a request for access to a record pursuant to the *Access to Information and Protection of Privacy Act* must pay to the public body:

- (a) an application fee in the amount of \$5.00;
- (b) for locating, retrieving, providing and manually producing a record, \$15.00 for each hour of person time after the first two hours, rounded down to the nearest hour;
- (c) for producing a record from information in electronic form, the actual cost of producing the record;
- (d) for shipping a record, the actual costs of shipping using the method chosen by the applicant;
- (e) where the record is stored or recorded in printed form and can be copied or printed using conventional equipment, 25 cents a page for providing a copy or print of the record; and
- (f) where the record is stored or recorded in a manner other than that referred to in paragraph (e) or cannot be reproduced or printed on conventional equipment, the actual cost of reproduction for providing a copy of the record.

(2) A person who requests access to their own personal information only pays the application fee set out in paragraph 1(1)(a).

2. The application fee in paragraph 1(1)(a) shall be paid before access to a record is given.

3. (1) If a head gives a person an estimate of an amount payable under the Act, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

(3) The outstanding balance shall be paid before access to a record is given.