

**Reviewing the *Access to Information and
Protection of Privacy Act***

A Discussion Paper



Government of Newfoundland and Labrador
Department of Justice

Message from the Minister

The Government of Newfoundland and Labrador is committed to open, transparent and accountable operations that serve all Newfoundlanders and Labradorians. The *Access to Information and Protection of Privacy Act* (ATIPPA) is a key component of that commitment, giving citizens a right of access to records of a public body and regulating the collection, use and disclosure of personal information held by public bodies.

As part of this first statutory review of the ATIPPA, I am pleased to present this discussion paper to encourage discussion about the important principles of access and privacy. I encourage you to take the time to review this paper and share your thoughts, concerns, comments and experiences regarding the first five years of the ATIPPA's operation. Your feedback is essential and will shape how the ATIPPA can be used and applied for the benefit of all residents of Newfoundland and Labrador.

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About the *Access to Information and Protection of Privacy Act*

On June 16, 1981 the Government of Newfoundland and Labrador proclaimed the *Freedom of Information Act*, becoming one of the first provinces in Canada to officially adopt such legislation. The Act established a statutory regime for citizens to access information in the records of government departments and scheduled agencies, subject to limited exceptions. Citizens of the province gained an opportunity for informed participation in the democratic process and the assurance of greater accountability on the part of the province.

The *Freedom of Information Act* also provided the right to appeal decisions to the provincial Ombudsman or to the province's Supreme Court. In 1991, however, the position of Ombudsman was abolished, leaving the courts as the only venue for appeals.

On December 12, 2000, the Government of Newfoundland and Labrador established the Freedom of Information Review Committee with a broad mandate to "review and make recommendations on all aspects of the *Freedom of Information Act*." The Committee undertook a comprehensive review of relevant literature, examined freedom of information legislation from other provinces and the federal government, and conducted a series of consultations across the province and with representatives of other Canadian jurisdictions.

The Committee recommended that the *Freedom of Information Act* be repealed and replaced with new legislation to provide specific rights of access to information, protect personal privacy, ensure access to one's own personal information, and establish an independent process for reviewing decisions made by departments and agencies under the new Act.

As a result of the Committee's recommendations, the *Access to Information and Protection of Privacy Act* ("ATIPPA") received Royal Assent on March 14, 2002 and was subsequently proclaimed into force on January 17, 2005, with the exception of Part IV – Protection of Privacy. The privacy provisions of the ATIPPA were proclaimed on January 16, 2008.

Section 3 of the ATIPPA provides that the purpose of the Act is to make public bodies more accountable to the public and to protect personal privacy by:

- giving individuals a right of access to records;
- giving individuals a right of access to, and a right to request correction of, personal information about themselves;
- specifying limited exceptions to the right of access;
- preventing the unauthorized collection, use and disclosure of personal information by public bodies; and
- providing for an independent review of decisions by public bodies under the Act.

The ATIPPA applies to more than 460 public bodies across the province, from government departments and agencies to health care and educational bodies to municipalities. The Department of Justice is assigned with the responsibility for the overall administration and coordination of the ATIPPA, which involves the provision of support and leadership in the interpretation and application of the legislation. In order to facilitate this mandate, the Department has established the Office of the ATIPP Coordinator, which assists public bodies by providing education and training, developing policies and procedures, fostering common standards, and providing advice and guidance on the processes necessary to ensure the legislation is implemented and applied properly.

While the Office of the ATIPP Coordinator is responsible for the overall administration and coordination, each public body is required by the legislation to designate an Access and Privacy Coordinator, who is responsible for receiving and processing access requests, coordinating responses, educating staff and tracking requests.

Section 74 of the ATIPPA states that after the expiration of not more than five years after the coming into force of the Act, the Minister responsible for the Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operations of the Act or any part of it.

Access Experience

The ATIPPA applies to all records in the custody of or under the control of a public body. Certain information, however, is specifically excluded from the scope of the legislation, including:

- a record in a court file, a record of a judge of the Trial Division, Court of Appeal, or Provincial Court, a judicial administration record or a record relating to support services provided to the judges of those courts;
- a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;
- a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;
- records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act*;
- a personal or constituency record of a minister;
- a record of a question that is to be used on an examination or test;
- a record containing teaching materials or research information of an employee of a post-secondary educational institution;
- material placed in the custody of the Provincial Archives of Newfoundland and Labrador by or for a person, agency or organization other than a public body;
- material placed in the archives of a public body by or for a person, agency or other organization other than the public body; or

- a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

“Public body” is defined in section 2(p) of the ATIPPA and means:

- a department created under the *Executive Council Act*, 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; and
- the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*.

This definition also includes any body designated as a public body in the regulations made under section 73, but does **not** include the constituency office of a member of the House of Assembly; the Supreme Court Trial Division, the Court of Appeal or the Provincial Court; or a body listed in the Schedule as being excluded.

Any person who makes a request under section 8 of the Act 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 (section 7). Members of the public may access records by making a request to the public body they believe has custody and control of the record.

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

How many access requests are received?

Under the ATIPPA, the public can access two types of information: personal information and general information. All requests that are not considered to be personal information are treated as general access requests.

The number of access to information requests made under the ATIPPA has continued to grow over the past 3 years. During the first 15 months after proclamation of the ATIPPA (January 2005 to March 2006) public bodies received 426 requests. In 2006-07, public bodies received 376 requests. In 2007-08, that number increased to 463. In 2008-09, public bodies in Newfoundland Labrador received 471 general access requests and 56 personal information requests, for a total of 527 requests for access to information.

Who makes access requests?

The most frequent requesters of information under the ATIPPA in 2008-09 were individuals. Individuals made approximately 38% of all general access requests. Other frequent requesters for general information included the media (30%) and political parties (20%). The remainder of requests came from businesses, law firms, interest groups, and other public bodies.

96% of all requests for personal information came from individuals.

Who receives access requests?

With respect to general access requests, the Department of Health and Community Services (40), Executive Council (38), and Department of Justice (35) received the most requests in 2008-09.

The most requests for personal information in 2008-09 were received by the College of the North Atlantic (12), Memorial University (9) and the Department of Justice (6).

What is the response time for ATIPP requests?

Section 11 of the ATIPPA provides that the head of a public body shall make every reasonable effort to respond to a request for access within 30 days after receiving it, unless the time limit is extended under section 16, if notice is given to a third party under section 28 (disclosure harmful to third party business interests) or if the request has been transferred to another public body.

According to section 16, a public body may extend the time for responding for an additional 30 days where:

- the applicant does not give sufficient details to enable the public body to identify the requested record;
- a large number of records is requested or must be searched, and responding within 30 days would interfere unreasonably with the public body's operations; or
- notice is given to a third party under section 28 (disclosure harmful to third party business interests).

In 2008-09, approximately 75% of all general access requests were responded to within 30 days. Approximately 21% were responded to within 30 to 60 days. In only 4% of general access requests did public bodies fail to respond within 60 days.

With respect to personal information requests, approximately 76% of requests were responded to within 30 days. 14% were responded to within 30 to 60 days. In 10% of personal information requests public bodies took more than 60 days to respond.

What are the outcomes of access requests?

Under section 12, a public body's response to an applicant must inform the applicant whether access to the record or part of the record is granted or refused. If access is to be given, the applicant must be informed of where, when and how access is to be given. If access is refused, the applicant must be given the reasons for refusal and the provisions of ATIPPA relied upon as well as the contact information of someone in the public body who may answer any questions about the refusal. The public body must also inform the applicant of their right to appeal the decision to refuse access.

Access may be granted to all, some or none of the information requested. Denial of access must be based on the exceptions to disclosure in the ATIPPA. Some of these exceptions are mandatory, while others are discretionary. Exceptions to access are found in Part III of the Act.

Public bodies granted either full or partial disclosure in approximately 59% of general access requests in 2008-09. Access was denied in 7% of all general access requests. The remaining requests were either abandoned, transferred, withdrawn, for records that did not exist, or for records that were publicly available. On one occasion, a request was denied because it was incomprehensible or repetitive under section 13 and another occasion, a public body refused to confirm or deny the existence of records on the basis of section 12(2).

Full disclosure or partial disclosure was granted in approximately 74% of all requests for personal information. Access was denied in 8% of requests. The remaining requests were either abandoned, transferred or for records which did not exist.

How much does it cost to access information?

All Canadian jurisdictions have a fee structure that shares the cost of access between the person asking for the information and the public body responding to the request. The ATIPPA states that the head of a public body may require an applicant to pay a fee to make a request under the Act and for search, preparation, copying and delivery services in accordance with the fee schedule set by the Minister.

The ATIPPA Fee Schedule provides for an application fee of \$5. The first two hours spent locating, retrieving, providing and manually producing a record are at no charge to an applicant. For requests that require more than two hours of search and preparation time, a fee of \$15 per hour (rounded down to the nearest hour) may be charged.

Other fees that may be charged are:

- the actual cost of producing records from information in electronic form;
- the actual cost of shipping using the method chosen by the applicant;

- 25 cents per page for providing a copy or print of a record, where the record is stored or recorded in print form; and
- the actual cost of reproducing a record where the record is stored or recorded in a manner other than that referred to above or cannot be reproduced or printed on conventional equipment.

Any person who requests access to their own personal information is subject only to the \$5 application fee.

The head of a public body may waive the requirement to pay fees where payment would impose an unreasonable financial hardship on an applicant or where the request for access relates to the applicant's own personal information and waiving the fee would be reasonable and fair in the circumstances.

Exceptions to Access

The ATIPPA does not provide an absolute right of access to all records of a public body. Access to information legislation in all jurisdictions across Canada recognizes that such an absolute right could prevent or interfere with a public body's ability to meet its responsibilities and protect the privacy of third parties. In addition to records that are excluded from the scope of the Act by virtue of section 5, Part III of the ATIPPA sets out specific and limited exceptions to the general right of access to information.

Information protected by an exception in Part III may be severed from records that are responsive to an access request. Section 7(2) of the ATIPPA provides that the right of access does not extend to information exempted from disclosure under Part III, but states that where it is reasonable to sever that information from a record, an applicant has a right to access the remainder.

Part III contains both mandatory and discretionary exceptions. Mandatory exceptions, which must be applied in every case, include:

- cabinet confidences (s. 18);
- information harmful to the business interests of a third party (s. 27);
- personal information (s. 30); and
- House of Assembly service and statutory office records (s. 30.1).

Discretionary exceptions, which require a public body to consider all circumstances in order to determine whether it is appropriate to release the requested information, include:

- local public body confidences (s. 19);
- policy advice or recommendations (s. 20);
- legal advice (s. 21);
- disclosure harmful to law enforcement (s. 22);

- disclosure harmful to intergovernmental relations or negotiations (s. 23);
- disclosure harmful to the financial or economic interests of a public body (s. 24);
- disclosure harmful to conservation (s. 25); and
- disclosure harmful to individual or public safety (s. 26).

In addition to the exceptions to access set out in Part III, the head of a public may also refuse access to a record where the request is deemed to be repetitive or incomprehensible, or is for information that has already been provided to the applicant (s. 13).

Similarly, if the record is published and available to the public, or if the record is to be published or released to the public within 45 days after the request is received, the head of the public body may refuse to disclose the record (s. 14).

Protection of Privacy

The Government of Newfoundland and Labrador and other public bodies hold significant amounts of personal information about individual Newfoundlanders and Labradorians. One of the major purposes of the ATIPPA is to ensure that public bodies collect, use and disclose personal information responsibly in order to protect personal privacy.

Section 2(o) defines “personal information” for the purpose of the ATIPPA as recorded information about an identifiable individual, including:

- name, address or telephone number;
- race, national or ethnic origin, colour, or religious or political beliefs or associations;
- age, sex, sexual orientation, marital status or family status;
- an identifying number, symbol or other particular assigned to the individual;
- fingerprints, blood type or inheritable characteristics;
- information about the individual's health care status or history, including a physical or mental disability;
- information about the individual's educational, financial, criminal or employment status or history;
- the opinions of a person about the individual; and
- the individual's personal views or opinions.

Part IV of the ATIPPA regulates the collection, use and disclosure of personal information by public bodies.

The ATIPPA privacy provisions are based on standards for privacy protection developed by the Canadian Standards Association (CSA), known as the ‘Fair Information Practices’. The CSA is a not-for profit organization which develops standards to address the needs of business, industry, government and consumers.

The Fair Information Practices are:

1) Accountability

An organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the following principles.

2) Identifying Purposes

The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.

3) Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

4) Limiting Collection

The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.

5) Limiting Use, Disclosure, and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

6) Accuracy

Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.

7) Safeguards

Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

8) Openness

An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

9) Individual Access

Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

10) Challenging Compliance

An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

Complaints under ATIPPA

Part V of the ATIPPA creates an independent review mechanism for decisions made by public bodies under the Act. Persons who make requests for access to information or for correction of their own personal information may ask the Office of the Information and Privacy Commissioner (OIPC) to review a decision, act or failure to act by the head of the public body in question. The Information and Privacy Commissioner is an independent officer of the House of Assembly. The OIPC may also investigate complaints that an extension of time for responding to a request is not in accordance with section 16 or that a fee required under the Act is inappropriate.

Other general powers and duties of the OIPC include:

- making recommendations to ensure compliance with the Act and regulations;
- informing the public about the Act;
- receiving comments from the public about the administration of the Act;
- commenting on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;
- commenting on the implications for protection of privacy of using or disclosing personal information for record linkage or using information technology in the collection, storage, use or transfer of personal information;
- bringing to the attention of the public body a failure to fulfil the duty to assist applicants; and
- making recommendations to the head of the public body or the minister responsible for the Act about the administration of the Act.

After investigating a request for review or a complaint, the Commissioner shall prepare a report containing his findings and, where appropriate, recommendations along with the reasons for those recommendations. The head of the public body then has 15 days to decide whether to follow the Commissioner's recommendations or make another decision the head deems appropriate.

The ATIPPA also provides for appeals to the Supreme Court, Trial Division where a person is not satisfied with the decision of the head of a public body subsequent to a report by the Commissioner. The OIPC may also appeal the decision of the head of a public body, with the consent of the applicant or third party involved.

Your Thoughts?

The Government of Newfoundland and Labrador is committed to promoting the principles of openness, accountability and transparency throughout the public service.

Public consultations held by the Freedom of Information Review Committee helped shape the ATIPPA as it stands today. During this 5-year statutory review of the ATIPPA, the views and experiences of Newfoundlanders and Labradorians are once again important in evaluating the provisions and operation of this important piece of legislation.

In addition to any other comments you might have, your views on the following issues would be appreciated:

1. What has been your experience in using the ATIPPA to access information in the custody or control of public bodies in Newfoundland and Labrador?
2. The ATIPPA provides for limited exceptions to the right of access to information. Are there any types of information that should be made more readily available? Are there any types of information (personal information or otherwise) that you feel require greater protection?
3. While public bodies often deal with frequent, concurrent or very broad requests for information, the majority of requests for access to information are dealt with within the legislative time frames. Do you feel that public bodies should have more flexibility in response times?
4. The ATIPPA contains both mandatory and discretionary exceptions to access as set out in Part III. Do you have any specific comments or recommendations about these provisions?
5. Is the ATIPPA Fee Schedule appropriate?

6. The ATIPPA provides for protection of personal information held by public bodies in Newfoundland and Labrador. Can you recommend any additional uses or disclosures of personal information that should be permitted under the Act?
7. The Office of the Information and Privacy Commissioner is a statutory office of the House of Assembly and is independent from the Government of Newfoundland and Labrador. The OIPC handles complaints relating to the ATIPPA. Do you have any suggestions for changes to the complaints process?
8. Section 2(p) of the ATIPPA provides a definition of “public body”. Additional “public bodies” may be added by regulations made under section 73. Are there any bodies which would not appear to meet the definition of “public body” but which should be subject to the ATIPPA?
9. Are the provisions of the ATIPPA appropriate for local public bodies – such as municipalities, school boards and regional health boards?

Individuals are invited to respond to the consultation questions outlined above or to provide any other comments by sending responses to the Department of Justice by mail, email, secure fax, or via the Department of Justice website at www.justice.gov.nl.ca prior to _____. Comments and submissions may be sent to:

Department of Justice
Access to Information and Protection of Privacy Review
4th Floor, East Block, Confederation Building
P.O. Box 8700
St. John’s, NL A1B 4J6
Fax: (709) 729-5466
Email: atippoffice@gov.nl.ca

If you have any questions about the consultation process, please contact the Office of the ATIPP Coordinator, Department of Justice at (709) 729-7072.

PRIVACY NOTICE

Any identifiable personal information collected during this consultation process is provided voluntarily and will be treated as confidential.

This information is collected in accordance with the *Access to Information and Protection of Privacy Act* and will only be used for the purpose of this consultation process and for conducting a review of the *Access to Information and Protection of Privacy Act*.

Personal information may not be secure while in transit between your computer and the government server. If you choose not to provide personal information through this website, you may submit your responses to the consultation questions by secure fax, mail or in person.