Canada: Newfoundland and Labrador

Submission to the Independent Review of Newfoundland and Labrador's Access to Information and Protection of Privacy Act

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Introduction[1]

Newfoundland and Labrador's Access to Information and Protection of Privacy Act, 2015 (ATIPPA)[2] scores 111 points out of 150 on the Right to Information Rating, an internationally recognised methodology for measuring the strength of legal frameworks for the right to access information held by public authorities (or the right to information, RTI), which has been applied to all of the national RTI laws globally.[3] This score positions ATIPPA as by far the strongest right to information legislation in Canada and the 24th best in the world when assessed against national laws.

This achievement was no accident. In 2015, the Newfoundland and Labrador government lived up to its commitment to revamp its access to information legislation, thereby respecting a fundamental human rights obligation. Among other things, it accepted many of the proposals for reform that the Centre for Law and Democracy (CLD) presented during the review[4] and the significant enhancements to the legislation have been enjoyed by many in the province since then.

The 2020 five-year review is an excellent opportunity to reflect on the benefits of those reforms. One especially important change has been the removal of the fee to make requests. While a $5 fee may seem trifling, there is a significant psychological difference between a minor fee and no fee at all. The result has been a dramatic increase in the level of public engagement with the right to information regime, which is to be celebrated. Another key change has been the expansion of the mandate and powers of the province's Information and Privacy Commissioner, the oversight body under the legislation, which is key to the success of any right to information system. The province should be proud of these reforms, and the knock-on effect they have had across the country, and ensure that they are retained in the legislation.

Yet there is still significant room for improvement. The legislation's main weakness is its exceptions, which are often drawn too broadly and lack adequate harm tests, public interest overrides and sunset clauses. These flaws represent a breach of relevant international standards and they can, on their own, significantly undermine an otherwise robust right to information system. Reforms to other areas of the legislation, such as requesting procedures

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[2] Access to Information and Promotion of Privacy Act, 2015, Chapter A-1.2, https://www.assembly.nl.ca/legislation/sr/statutes/a01-2.htm.

[3] The global RTI Rating website is available at: https://www.rti-rating.org. CLD has also rated all of the Canadian laws, at: https://www.law-democracy.org/live/rti-rating/canada/. For more information specifically on CLD's assessment of ATIPPA, see Centre for Law and Democracy, "Newfoundland and Labrador Enacts Canada's Best Access Law", 2 June 2015, http://www.law-democracy.org/live/newfoundland-and-labrador-enacts-canadas-best-access-law/.

[4] See Centre for Law and Democracy, *Submission to the Independent Review of the Newfoundland and Labrador Access to Information and Protection of Privacy Act*, July 2014, http://www.law-democracy.org/live/wp-content/uploads/2014/07/Canada.Nfld_.RTI_.Jul14.pdf.

and scope, are also needed if ATIPPA is to remain in the top 20% of global right to information laws.

This Analysis contains CLD's submissions for the 2020 review of ATIPPA. As an NGO that specialises in the right to information globally, CLD's submissions focus on improving ATIPPA so as to bring it into line with international standards. CLD has reviewed right to information legislation in over 130 jurisdictions, including the 2015 review of ATIPPA. It is CLD's hope that Newfoundland and Labrador can continue to lead the way for Canadian right to information legislation.

1. Positive Aspects

While Newfoundland and Labrador's right to information regime has several laudable aspects, its fee structure and robust Information and Privacy Commissioner are especially worthy of mention.

Free to Make Requests

That it is free to make requests is a particularly positive feature (section 25). It should not cost money to exercise the fundamental human right to information. Accordingly, a long list of countries, including Afghanistan,[5] Albania[6] and Argentina,[7] do not charge any fees simply for making or lodging requests.[8]

Making it free to lodge requests has also had clear practical benefits in Newfoundland in the form of increasing public engagement with the access regime. The removal of the $5 request fee in 2015 has led to an immediate and dramatic rise in request numbers. Between 2014 and 2015, request numbers rose by 86% (from 757 to 1,410).[9] Over a five-year period (2014 - 2019), request numbers rose by 218% (757 to 2,412).[10] These increases are likely due at least in part to the significant psychological difference between needing to pay even a small fee and no fee at all.

Increased engagement with the right to information regime is to be celebrated. The legislation exists so that as many people as possible can access information held by their government, which is public property. Governments sometimes express the fear that enabling free requests

[5] Access to Information Law, Article 9(1), available in English translation at: https://www.rti-rating.org/wp-content/uploads/2020/01/Afghan.RTI.Decree.May18.Amend.Oct19.pdf.
[6] Law No. 119/2014 on the Right to Information, Article 13(1), available in English translation at: https://www.rti-rating.org/wp-content/uploads/Albania.pdf.
[7] Ley de Accesso a la información, Article 6, https://www.rti-rating.org/wp-content/uploads/Argentina.pdf.
[8] This is reflected in Indicator 24 of the RTI Rating. The performance of countries by indicator can be found at: https://www.rti-rating.org/country-data/by-indicator/.
[9] Newfoundland and Labrador Justice and Public Safety (ATIPP Office), *2018-2019 Annual Report on the Administration of the Access to Information and Protection of Privacy Act*, 2019, pg 8, https://www.gov.nl.ca/atipp/files/publications-atippa-annual-report-2018-19.pdf.
[10] *Ibid.*

will lead to an unmanageable flood of frivolous requests.[11] To CLD's knowledge, there is little evidence that such worries have materialised in any country that has made requests free. It is true that a dramatic increase in requests can increase the workload of access coordinators at public bodies. However, the response should not be to use fees to deter individuals from seeking to exercise a human right; other options, such as increasing the resources available for processing requests, are preferable.

While it is good that requests are free, other fees in Newfoundland and Labrador's access procedure should be tweaked. Global best practice is to limit charges to the costs of reproducing and delivering information.[12] However, section 25(2) of the ATIPPA, along with section 3 of the fee rules,[13] provide that public bodies may charge CAD 25 per hour after 10 hours of searching to locate a record by local bodies and 15 hours by any other public body. Such charges essentially bill members of the public for poor government records management practices. Furthermore, international practice is to provide a certain number of pages for free, such as 20;[14] this is also missing from the ATIPPA.

Robust IPC

The ATIPPA provides for oversight in the form of an independent Information and Privacy Commissioner. Such bodies play a foundational role in better practice right to information regimes through such activities as adjudicating appeals, training public officials and promoting public awareness about the right to information. Some of the particularly positive features of the Newfoundland and Labrador Commissioner include financial independence from government (sections 90-93) and its broad mandate to initiate investigations into potential breaches of the law (section 95(1)(a)), to make recommendations to public bodies regarding access (section 47), to approve requests by public bodies to disregard requests (section 21), to vary request processing procedures (section 24) or to extend the time limits for responding to requests (section 23), and to raise public awareness about the right to information (section 95(2)(b)). The Commissioner is also protected against liability for actions done in the course of duty, unless they are done in bad faith (section 104). Importantly, an innovative approach to giving the Commissioner the power effectively to render his or her decisions binding is reflected in sections 47-51 of the ATIPPA.

[11] See, for example, Dean Beeby, "Information commissioner pleads poverty, Tory MPs say raise fees", 4 December 2014, CBC, www.cbc.ca/news/politics/information-commissioner-pleads-poverty-tory-mps-say-raise-fees1.2861052.

[12] See, for example, Croatia's Right of Access to Information Act, 011-01/13-01/27, Article 19.2: "The public authority body is entitled to request from the beneficiaries to cover the actual material expenses incurred by providing information, under Article 17 of this Law, as well as to request to cover the expenses of delivering the requested information", available in English translation at: https://www.rti-rating.org/wp-content/uploads/Croatia.pdf

[13] Establishment of Costs for the *Access to Information and Protection of Privacy Act*, 1 June 2015, https://www.gov.nl.ca/atipp/files/info-costschedule-jun1-2015.pdf.

[14] See, for example, Estonia's Public Information Act, RT I 2000, 92, 597, Article 25(2): "A person making a request for information shall pay up to 0.19 Euros per page for printouts and copies on paper starting from the twenty-first page, unless a state fee for the release of information is prescribed by law", available in English translation at: https://www.rti-rating.org/wp-content/uploads/Estonia.pdf.

There are, however, ways in which the oversight system could be further improved. CLD believes that the ATIIPPA already makes it clear that the Commissioner has the authority to access and review information in relation to which a claim of solicitor-client privilege has been made. Section 97(3) empowers the Commissioner to order the production of "any record" and section 97(6) states that public bodies shall not place any condition on the ability of the Commissioner in this regard other than those authorised by section 97(5), which includes designating a site where the Commissioner may examine a record claimed to be subject to solicitor-client privilege. Section 100(2) indicates that solicitor-client privilege is not affected by the production of a record to the Commissioner. Together, these provisions make it clear that the parliamentary intent was that the Commissioner has the right and power to inspect records claimed to be subject to privilege.

This interpretation also makes sense from a policy perspective. Having the power to review information that is claimed to be subject to solicitor-client privilege is key to the Commissioner's oversight function. Otherwise, public bodies could potentially block a broad range of information from release by claiming solicitor-client privilege, something that has happened in other jurisdictions. In this case, the only recourse left to the applicant would be to lodge a costly and lengthy court appeal. Other review bodies such as the National Security Intelligence Review Agency,[15] the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police[16] and the federal Information Commissioner[17] all have the power to review this sort of information. From a policy perspective, there is no reason why Newfoundland and Labrador's Information and Privacy Commissioner, which plays a similar oversight role, should not have this power.

However, the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v. University of Calgary*[18] has created some uncertainty over how explicit a right to information statute must be to cover information claimed to be covered by solicitor-client privilege. In *University of Calgary*, the Court determined that the Albertan commissioner could not order production of records to which solicitor-client privilege was deemed to attach, even though the enabling statute gave him or her the power to review information "notwithstanding any privilege of the law of evidence".[19]

CLD's position is that the language of the ATIPPA is clearer than that of the Albertan law considered in *University of Calgary* and, in particular, that it is sufficiently clear as to the power of the Commissioner to review information that is claimed to be subject to solicitor-client privilege. However, making this explicit in the ATIPPA would remove any doubt about this.

Finally, since the Commissioner is a key government watchdog, it is important that the law ensure that holders of this post are competent and independent from the political process. To

[15] National Security and Intelligence Review Act, S.C. 2019, c. 13, s.), section 9(2), https://laws-lois.justice.gc.ca/PDF/N-16.62.pdf.
[16] Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, sections 45.4(1)(a) and 45.4(2), https://laws-lois.justice.gc.ca/PDF/R-10.pdf.
[17] Access to Information Act, R.S.C., 1985, c. A-1, section 36(2), https://laws-lois.justice.gc.ca/PDF/A-1.pdf.
[18] [2016] 2 SCC 555, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16251/index.do.
[19] Freedom of Information and Protection of Privacy Act, Revised Statutes of Alberta 2000, Chapter F-25, 22 November 2019, section 56(3).

the end, it would be useful to require those being considered for appointment both to be free of strong political connections and to have a minimum of professional expertise or experience. Being too restrictive in this regard could unduly narrow the range of talented candidates but the law should at least set out some minimum standards for this position and rule out individuals with direct connections to political parties from being appointed.

Recommendations:

- Section 25(2) of ATIPPA and section 3 of the fee rules should be removed.
- Consideration should be given to adding language to section 25 of ATIPPA the and the fee rules so that the first 20 pages are provided to requesters for free.
- Explicit language should be added to section 97 to make it clear that the Commissioner has the power to review information that is subject to a claim of solicitor-client privilege.
- Language should be added to the ATIPPA on minimum qualifications for commissioners and rules prohibiting individuals with strong political connections from being appointed.

2. Exceptions

Exceptions represent the category where the ATIPPA does by far the least well from among the seven categories on the RTI Rating, scoring just 17 out of a possible 30 points or just 57%. Many exceptions fail to meet the three-part test mandated by international standards, as reflected in the Council of Europe's Recommendation of the Committee of Ministers to member states on access to public documents. Principle IV(1) of the Recommendation indicates that exceptions must serve legitimate interests and that disclosure "may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure".[20]

The first limb of the test is that the exception should be narrowly defined to serve a legitimate interest. A list of legitimate interests has been clearly defined by international standards to include only: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities.[21] However, the ATIPPA includes several exceptions that go beyond this list, such as information that comprises teaching materials (section 5(g)). Others seem to have been drafted with a legitimate interest in mind but are drawn so broadly that they render secret information that goes beyond that legitimate interest.

[20] Council of Europe, Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents, 21 February 2002, Principle IV, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c6fcc.
[21] *Ibid.*, Principle IV(1).

Second, information should only be able to be withheld if releasing it would result in substantial harm to a legitimate interest. Information cannot be ATIPPA simply because it relates to an interest. In a few cases, releasing information self-evidently causes harm, such as for information subject to solicitor-client privilege. Otherwise, however, the legislation should include an explicit requirement of harm before access may be refused. Many of the exceptions in the ATIPPA are not harm tested. Others either do not have or do not have sufficiently brief sunset clauses; such clauses ensure that where the passage of time has rendered information no longer sensitive, it must be disclosed.

Third, even if a legitimate interest would be harmed by disclosure, international standards require that information to be released anyway if that harm is outweighed by the public interest in accessing the information, such as its value in exposing human rights violations. The ATIPPA does have a public interest override but it does not apply to many exceptions, it is by nature too weak and its application is discretionary.

Another key problem is that the ATIPPA preserves exceptions that are contained in the many legal provisions that are listed in Schedule A. Several of these exceptions do not have harm tests, public interest overrides or sunset clauses.

Exceptions are Narrowly Defined to Protect Legitimate Interests

Section 5 creates a number of exclusions or types of information or records that are entirely excluded from the ambit of the ATIPPA. Some of these do refer to legitimate interests, such as sections 5(k)-(m), which pertain to records relating to prosecutions and investigations by the Royal Newfoundland Constabulary. Others are not legitimate, such as section 5(d), referring to records of a registered political party, and section 5(g), which exempts "a record containing teaching materials or research information of an employee of a post-secondary educational institution". Some of the material covered by these exclusions might legitimately be exempt via other exceptions, such as for commercial interests of third parties (section 39), but they are not legitimate as set out in section 5. Many of the section 5 exclusions are not harm tested.

Furthermore, the problem with the section 5 exclusion approach is that it removes these records from the ambit of the public interest override and any sunset clause, because the records in question are simply not subject to any requirement to disclose in the first place.

Several of the 'regular' exceptions set out in Division 2 of Part II of the ATIPPA do not serve legitimate interests or, to the extent that they do, unnecessarily duplicate protection afforded by other exceptions. For example, section 32 covers confidential evaluations for purposes of education, awards for outstanding service and the issuance of public contracts and other benefits. None of these are independent grounds for an exception although some of this information would be covered by sections 27-29, on policy making, section 35, on the financial interests of public bodies, and section 40, on privacy. Section 38 covers labour relations information, again not an independent ground for refusing to disclose although part of this information would again be covered by other exceptions, such as the administration of justice (section 31) or the financial and economic interests of public bodies (section 35).

Similarly, Section 41 protects House of Assembly service and statutory office records, which is again not an exception which is recognised under international law. To the extent that this includes sensitive information, it is already covered by other exceptions, such as the administration of justice (section 31). Section 41(a), protecting infringements of Assembly privileges, and section 41(b), governing any advice or recommendation given to various Assembly bodies that is not required by law to be entered into the minutes of the House of Assembly Management Committee, are particularly problematical here. Any information covered by these sections that could legitimately be withheld would be covered by the various policy making exceptions in sections 27-29.

Section 30's exception for legal advice privilege is also too broadly framed. While protecting solicitor-client privilege is key to the relationship between a lawyer and a private individual, the same analysis does not apply in the lawyer-government context. Protecting solicitor-client privilege is important in the private context because clients are usually discussing sensitive legal matters, such as contracts or criminal actions. However, government lawyers are often used to provide policy-type advice to public officials, much like other professional staff. There is no warrant for casting a general blanket of secrecy over this sort of advice, beyond the protections already offered by sections 27-29. Instead, legal advice should only be subject to protection when it is to be used in an explicitly legal way. This is essentially captured by the idea of litigation privilege, which covers advice provided by lawyers in preparation for an upcoming or potential court case.

Several subsections of section 35, which covers information that could harm financial or economic interests of public bodies, are also overbroad. Section 35(1)(b) covers information so long as that information has or is "reasonably likely to have" monetary value, a formulation that appears to apply to information of any value, which is most information. Section 35(1)(d) covers any information that if disclosed could result in "premature disclosure of a proposal or project or in significant loss or gain to a third party". Neither of these is legitimate, of themselves (i.e. unless connected to some other interest). Some part of the first might be covered by the policy making exceptions in sections 27-29 while the latter would need to incorporate some sort of qualifier to limit it to illegitimate loss or gain, failing which, it could stymie many innovations, such as the entire range of useful apps that were built with Canadian government data. Section 35(1)(g) covers information the disclosure of which could harm the "financial interests" of the province or a public body. This is too broad to be properly defined, although a reference to the commercial interests of a profit-making public body would be appropriate.

Harm Test

A significant number of the exclusions and exceptions in the ATIPPA fail to incorporate any form of harm test. For example, sections 27-29 protect cabinet records, local public body confidences and policy advice, which relate to the legitimate 'policy making' exception. However, the sections are written to protect entire classes of information – such as a discussion paper or minute – rather than specific interests, against harm. International standards suggest that the policy making exception should be understood to protect four specific sub-interests against harm: the effective formulation or development of government

policy; policies where premature disclosure would jeopardise their success; the free and frank exchange of advice or views, which is of inherent importance to the deliberative process; and the efficacy of testing or auditing procedures.[22] All of these categories would be massively overbroad if not subjected to a harm test or requirement. Despite this, the exceptions in sections 27-29 simply list types of information – advice prepared for Cabinet, for example, or draft regulations – which by definition cannot be subjected to a harm test (these can only attach to interests). As a result, they are excessively broad because they could be relied upon to refuse the disclosure of policy-related records even where this would cause no harm. Other provisions that fail to incorporate a harm test are parts of sections 5, 31, 32, 33, 35, 38 and 41.

It may be noted that some provisions in the ATIPPA contain the word 'harmful' in their title but go on to include sub-sections that do not refer. One example is section 31(1), which lists a range of law enforcement-related exceptions. Some of these exceptions are effectively harm tested, such as "deprive a person of the right to a fair trial" in section 31(1)(h). However, others are not. Section 31(1)(l), for example, covers information that could reveal "arrangements for the security of a property or a system". This appears to be designed to prevent bad faith actors from gaining knowledge to bypass security systems. Yet without a harm test, the provision could also block, for example, the release of information about how public funds expended on an extensive video surveillance system installed by the government. Similarly, section 31(1)(m) refers to the idea of revealing "technical information about weapons used or that may be used in law enforcement". Once again, keeping all of this information secret would disable important public debate about the purchase of weapons, such as the one held recently in Halifax over the purchase of an armoured vehicle for the Halifax Regional Police, which involved in-depth discussions about the capabilities of the vehicle in question. If a harm test were added so that this would apply only where the release of this information would undermine law enforcement, it would be legitimate.

While a few exceptions, such as for solicitor-client privilege or privacy, essentially inherently include a harm test. Otherwise, one should apply to every single exception. One approach that may be efficient, given how long the ATIPPA is, would be to create a new section that applied a substantial harm test to every exception.

Public Interest Override

ATIPPA's treatment of the public interest override falls short of international standards in several respects. These mandate that the override should apply to every exception. The general public interest override in section 9 does not apply to the exceptions set out in sections 27, 31, 33, 37 and 39-41 or the exclusions in section 5. Of these, only section 27 has its own public interest override,[23] leaving out many exceptions. The section 9 override additionally does not apply to exceptions which require the public body to refuse to disclose ("shall refuse"), although all of the exceptions to which it formally applies are already of the "may refuse" type.

[22] Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (2008, Paris, UNESCO), p. 105, https://unesdoc.unesco.org/ark:/48223/pf0000158450.

[23] Section 40(2)(m) also alludes to a public interest test in section 40(3), but section 40(3) makes no reference to the public interest suggesting section 40(2)(m) contains a drafting error.

The section 9 override is mandatory, in the sense that it must be applied when the conditions for it are met. In contrast, the section 27 override is discretionary in nature, contrary to international standards. Furthermore, the standard of application of the section 9 override is too weak. It applies only where it is "clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception". Given that access to information is a human right, international standards require the public interest to be weighed against the harm specifically, rather than the more general notion of the "reason for an exception".[24] Second, the requirement that there be a "clear demonstration" of why the public interest outweighs the harm unreasonably tilts the consideration in favour of secrecy whereas international standards call for a straight balancing of the two interests concerned.

Third Parties

Another weakness in the regime of exceptions in the ATIPPA is that third parties can excessively delay the granting of access to an applicant. Section 19(7) prevents public bodies from releasing information that involves a third party until the third party has "exhausted any recourse under this Act", which includes the possibility of both a complaint to the Commissioner or an appeal to the Trial Division court. Sections 42(4), 53(2) and 53(3) place time limits on when such complaints and appeals may be filed, but the time frames for the Commission to determine complaints are relatively long and these are much longer for court cases, although these must at least proceed on an "expedited basis" (section 57). As a result, records involving third party interests could stay sealed for the duration of protracted litigation, which is an unacceptable delay for the exercise of the human right of accessing information. It also creates a presumption against disclosure and in favour of protecting third parties. While privacy, one of the third party interests potentially involved, is also a human right, other third party interests are not (and are, instead, matters like commercial interests). Furthermore, international experience demonstrates that sensitive third-party information is almost never released, because decision-makers all along the spectrum tend to be very protective of secrecy interests. As a result, better practice would be to release the information once the public body has deemed that it is not covered by the exceptions but then to allow the third party to appeal and then claim compensation if that decision is eventually overturned.

Sunset Clauses

International standards require right to information laws to include sunset clauses so that exceptions protecting public interests cease to apply after a set period of time, such as 15 or 20 years. The rationale here is that the sensitivity of this information declines rapidly over time and that sunset clauses prevent information being unnecessarily withheld after its sensitivity has reached a vanishing point. Some laws provide for a special procedure to extend the period of secrecy, sometimes with the approval of the oversight body, in those highly exceptional cases where it remain sensitive beyond the sunset period.

[24] Council of Europe, Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents, note 20, Principle IV(2).

The ATIPPA does contain some sunset clauses in sections 27, 28, 29, 34, 38 and 39. However, better practice requires a sunset clause to apply to all exceptions that protect a public interest, such as the administration of justice (which is protected by section 31). Furthermore, some of the sunset clauses in the ATIPPA are too long. For example, sections 38(2) and 39(3)(b) on, respectively, labour relations information and commercial information of third parties, in both cases when this information is in the archives, have 50-year sunset clauses. Better practice would be to provide for time limits that are more akin to the 15-year period in sections 28(2)(b), 29(3) and 34(3) or the 20-year period in section 27(4)(a).

Paramountcy Clauses

Better practice is for right to information laws to include, within their regimes of exceptions, at least in a general way, all of the interests which are protected by secrecy (such as national security, privacy and so on), and then to allow other laws to elaborate on but not expand upon those exceptions. In this way, the three parts of the test for exceptions, namely clear and narrow definitions of protected interests, the harm test and the public interest override, can effectively be applied to all secrecy provisions.

ATIPPA does generally take this approach (see section 7(1)), but then exempts from this requirement all of the numerous provisions listed in Schedule (paramountcy clauses). Several of the paramountcy clauses in Schedule A do not meet international standards. For example, sections 173-174 of the Highway Traffic Act[25] prevent the disclosure of accident incident reports drafted by peace officers in all circumstances. While this may sometimes be legitimate, for example in the context of ongoing litigation and where disclosure could undermine the administration of justice, these provisions do not refer to a legitimate interest or contain a harm test, public interest override or sunset clause. Section 29(3)(a) of the Adult Protection Act,[26] to give another example, does contain a harm test but not a public interest override. As a result, Schedule A imports into the ATIPPA additional exceptions that are not in line with international standards.

Recommendations:

- The regime of exceptions in the ATIPPA should be reviewed carefully, including in light of the analysis presented above, and exceptions that do not protect legitimate interests, that are overbroad or that, to the extent that they are legitimate, are already covered by other exceptions should be removed.
- All exceptions, including the matters covered by section 5, should be subject to a substantial harm test, whether this is achieved via a single overriding provision or specific harm tests for each exception.
- A mandatory public interest override should apply to all exceptions, including those in section 5, and it should apply whenever the harm to the protected interest is outweighed by the public interest in disclosure.

[25] Highway Traffic Act, RSNL 1990, Chapter H-2, https://www.assembly.nl.ca/legislation/sr/statutes/h03.htm#173.
[26] Adult Protection Act, SNL2011, Chapter A-4.01, https://www.assembly.nl.ca/legislation/sr/statutes/a04-01.htm#29.

- The ATIPPA should be amended so that public bodies can disclose information which is not covered by the regime of exceptions, regardless of any third party claims regarding that information, while third parties should have recourse to seek compensation if it is ultimately decided that such a disclosure was erroneous and causes them harm.
- Sunset clauses should apply to all exceptions that protect public interests and should be set at 15 or 20 years, with the possibility of an extension where this is approved by the Commission.
- The ATIPPA should provide that secrecy provisions in other laws, including those set out in Schedule A, do not apply to the extent that they conflict with its provisions.

3. Scope of Public Bodies Covered

ATIPPA could also be improved by expanding the types of public bodies to which it applies. For example, although sections 2(m) and 5(1)(a)-(b) refer to information of a judicial nature, including several types of administrative information, they effectively serve to largely exclude the courts from the ambit of the law. This is in addition to section 2((x)(viii), which entirely excludes several courts. Section 5(1)(b) additionally excludes notes or communications prepared by persons acting in an undefined "judicial or quasi-judicial capacity". In addition to the courts, this might intrude into the executive branch if it is interpreted to cover administrative tribunals, which arguably undertake a quasi-judicial function.

While much of the legislative branch appears to be covered, section 2(x)(vii) excludes the constituency offices of ministers.

Coverage could also be expanded to include bodies which undertake public functions or operate with significant public funding, in line with better practice.[27] In addition, section 2(x)(ii) only covers corporations which are either owned by the Crown or in which the Crown holds a majority of the shares, excluding companies which the Crown effectively controls even if it does not possess a full majority of the shares.

Recommendations:

- The ATIPPA should be amended so as to cover all judicial bodies (courts and quasi-judicial bodies) and all of the information they hold, subject to the regime of exceptions (including to protect the administration of justice).

[27] See, for example, the Danish Access to Public Administration Documents Act, Act no. 572, 19 December 1985, Chapter 1, section 3 of which states: "[T]he minister concerned may stipulate that this Act shall apply also to specified companies, institutions, associations etc. that cannot be classified as part of the public administration, provided that the operating expenses of such entities are mainly covered by central or local government funds or to the extent that they are empowered by law or provisions laid down pursuant thereto to make decisions on behalf of central or local governments", https://www.rti-rating.org/wp-content/uploads/Denmark.pdf.

- Insert a new subsection into section 2(x), which defines public bodies, to include the judicial branch of government and private bodies that fulfil public functions or receive public funds.
- Section 2(x)(vii) should be removed.
- The ATIPPA should be amended to cover any corporation over with the Crown has effective control, as well as any private body which undertakes a public function or operates with significant public funding.

4. Other Issues

The requesting procedures in the AIPPA could be amended to make them more user friendly. It requires public bodies to transfer requests to other bodies where those bodies hold the information, rather than just refer the applicant to the other body, which is better practice, but the circumstances in which they can transfer requests are too broad. Section 14(1)(a) provides that a public body can transfer a request for information even if it holds that information, as long as that information was produced by another public body. Better practice is to require a public body to process any request for information it actually holds, following consultation with other public bodies as needed.

According to section 16, public bodies must respond to requests "without delay" and in any case within 20 business days. While this is reasonable, better practice, especially in an era of digital information, is to call for responses more quickly, ideally within ten days.

Recommendations:

- Section 14(1)(a) should be removed so that public bodies can only transfer requests where they do not hold the information which is responsive to that request.
- Consideration should be given to shortening the initial time limit for responding to requests to ten business days.
- Insert a new section that obliges public bodies to create minimum standards for the filing of records.