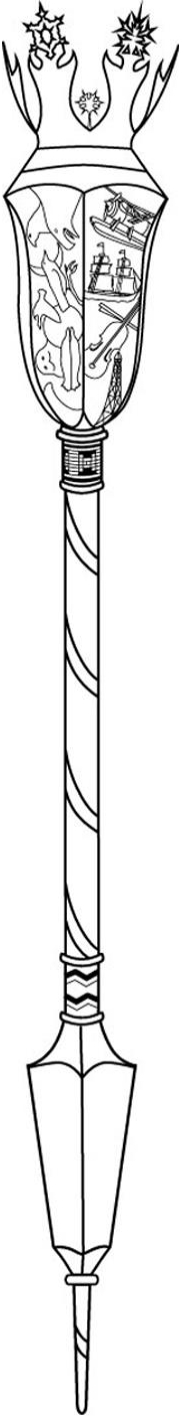


May 28, 2019



# **18<sup>th</sup> Legislative Assembly of the Northwest Territories**

## **Standing Committee on Government Operations**

Report on the Review of *Bill 29:  
An Act to Amend the Access to  
Information and Protection of  
Privacy Act*

Chairperson: Mr. Kieron Testart

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## Standing Committee on Government Operations

Assemblée législative

## Comité permanent des opérations gouvernementales

May 28, 2019

SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Government Operations is pleased to provide its *Report on the Review of Bill 29 – An Act to Amend the Access to Information and Protection of Privacy Act* and commends it to the House.

*K. J. H.*

Kieron Testart  
Chairperson

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**STANDING COMMITTEE ON  
GOVERNMENT OPERATIONS**  
**REPORT ON THE REVIEW OF *BILL 29:***  
***AN ACT TO AMEND THE ACCESS TO INFORMATION***  
***AND PROTECTION OF PRIVACY ACT***

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## **STANDING COMMITTEE ON GOVERNMENT OPERATIONS**

### **REPORT ON THE REVIEW OF *BILL 29:* *AN ACT TO AMEND THE ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT***

#### **INTRODUCTION**

The Standing Committee on Government Operations (“the Committee”) is pleased to report on its review of *Bill 29: An Act to Amend the Access to Information and Protection of Privacy (ATIPP) Act*.

*Bill 29: An Act to Amend the Access to Information and Protection of Privacy Act*, sponsored by the Department of Justice, has been referred to the Standing Committee on Government Operations for review. The bill proposes to:

- Provide for the application of the Act to municipalities that are designated in regulations;
- Clarify the types of records exempted from disclosure because they would reveal Cabinet or Financial Management Board confidences and provide for a similar exemption for municipal records;
- Allow for a compelling public interest to override particular statutory grounds providing that a record is to be exempt from disclosure;
- Revise time limits by: restating them as business days rather than calendar days; shortening some turn-around times; and adding time limits for certain actions required under the Act that did not previously have them;
- Set out a process for the Information and Privacy Commissioner (IPC) to consider requests from heads of public bodies to extend time limits for responding to requests for access;
- Address the privacy and access considerations related to human resources documents, including employee evaluation and workplace investigation documents;
- Clarify exemptions from disclosure relating to business interests;

- Permit the collection and disclosure of information for the delivery of common or integrated programs and services;
- Update the general powers of the IPC;
- Provide for a review of the Act by the Minister every seven years; and
- Make other adjustments intended to improve language and enhance clarity in the Act.

## BACKGROUND

Now in its twenty-third year, the *Access to Information and Protection of Privacy Act* came into force on December 31, 1996. The stated purposes of the Act are to make public bodies more accountable to citizens and to protect the privacy of personal information held by public bodies.<sup>1</sup> Public bodies include the Government of the Northwest Territories (GNWT) and its agencies, boards, commissions and corporations, as set out in the regulations. The Act achieves its purposes by:

- Giving individuals the right to access and the right to request the correction of personal information about themselves held by public bodies;
- Setting out limited exceptions to the right of access;
- Preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
- Providing for an independent review of decisions made under the Act by the Information and Privacy Commissioner.

Although the Act has been amended from time to time to respond to specific issues raised by stakeholders and Standing Committees, the Act had never subjected to a comprehensive review until the Department of Justice committed to undertake this work in 2012. The results of that review informed the development of Bill 29.

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<sup>1</sup> Section 1, *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994,c.20

Bill 29 received second reading in the Legislative Assembly on October 30, 2018, and was referred to the Standing Committee on Government Operations for review.

The work of the Standing Committee to amend Bill 29 is set out in this report. The report contains recommendations to government on the implementation of the revised legislation. It also provides a rationale for the motions moved by the Committee to amend specific provisions in the bill. These motions are listed in Appendix 1 in order of their appearance in the bill and are referred to in this report by the number assigned in the appendix.

## **THE PUBLIC REVIEW OF BILL 29**

In this digital age, where data of all descriptions is easily accessible by personal computer and phone, people have become increasingly aware of the need to protect their personal information, and the potential impacts of failing to do so. At the same time, the public is demanding more accountability and openness from government. Citizens want access to documents held by government, so they may determine if government decision-making is reasoned, defensible and being carried out in accordance with the legislative and policy framework that government has put in place.

In this environment, it is vitally important to have strong access and privacy legislation governing how the public sector collects, manages and discloses personal information. Committee was pleased to see the Minister of Justice bring forward Bill 29, in accordance with Mandate commitment 5.3.1.

In addition to soliciting input through letters sent to stakeholders, the Committee traveled to, and held public hearings on Bill 29, during the week of January 21, 2019, in Fort Smith, Inuvik and Fort McPherson,. A final public hearing was held in Yellowknife on January 24, 2019. Committee thanks everyone who attended these meetings or provided written submissions to the Committee for sharing their views on Bill 29.

Committee noted a great deal of public interest in Bill 29. In addition to the input received from residents in the communities we visited, Committee received both verbal and written submissions from:



- The City of Yellowknife;
- The NWT Association of Communities;
- OpenNWT; and
- The Information and Privacy Commissioner of the Northwest Territories, Ms. Elaine Keenan Bengts, who was accompanied by former British Columbia IPC, Mr. David Loukidelis.

Committee also received written submissions from the Hamlet of Tulita and the Northwest Territories Branch of the Canadian Bar Association.

Given the breadth of input and the complexity of the legislation, public input is noted in greater detail under the topic headings below.

## **WHAT WE HEARD AND DID**

### **Scope of the Act**

#### ***Inclusion of Municipalities***

#### ***Input Received***

Clause 2 of Bill 29 provides for Northwest Territories' municipalities to be included under ATIPP by extending the definition of a "public body" to include municipalities as defined under the *Cities, Towns and Villages Act*, the *Charter Communities Act* or the *Hamlets Act*. Clause 2 also specifies that a municipality must be designated in the regulations in order for ATIPP to take effect. This mechanism ensures that municipalities do not immediately assume responsibilities under the amended legislation when it goes into force, but rather, when the GNWT amends the regulations.

Clause 10 of Bill 29 specifies which municipal records are to be exempt from disclosure under ATIPP. In her submission, the IPC urged the government to consult with her office regarding which municipalities are to be designated as public bodies and indicated that she hopes to see the larger communities designated first. She also noted her support for the protection provided to municipal confidences under clause 10.

In its submission, the City of Yellowknife emphasized the degree to which they are already very open and transparent. The City claimed to already be covered under PIPEDA, the federal *Personal Information Protection and Electronic*

*Documents Act.* The City expressed concern about the potential impact of ATIPP on their *Whistleblower Policy*, which allows complainants to remain anonymous in order to encourage reporting without fear of reprisal. The City is also concerned about its capacity to implement this change and the costs associated with the requirement to designate an ATIPP coordinator. They said:

*“If ATIPP is amended to include municipalities, it is imperative that the territorial government provide appropriate financial, records management and training resources to municipalities.”*

The Hamlet of Tulita noted that its records management is probably similar to other NWT communities in that there is no standardized indexing system or centrally-maintained file system. They said:

*“Being able to access information is critical to the effective functioning of ATIPP. Council would like to see, before any such action is taken to require community governments to become compliant, that the GNWT (probably through MACA) provide training and assistance to the community governments in standardized record management.”*

The Hamlet went on to suggest that perhaps the electronic systems being used in larger NWT communities could be acquired by the Department of Municipal and Community Affairs (MACA) as a standard records management system for all communities.

The NWT Association of Communities (NWTAC) advised the Committee that they had passed a resolution stating:

*“The implementation of ATIPP legislation to communities needs to be done in a measured, realistic and highly planned way; and further that any implementation plan needs to include adequate resources and training to ensure its success.”*

In addition, the NWTAC called upon the Committee to do all it can to ensure that the GNWT honour commitments made in 2018 to support a staged implementation recognizing operational challenges, and to ensure that the Departments of Municipal and Community Affairs and Justice work with community governments – to assess capacity, resource requirements and training – and consult with communities on implementation timing.

In its submission, OpenNWT noted that the:

*“Inclusion of municipalities under the Act is an important one that has been a long time coming...Much of the current conversation has been filled by “what ifs” – what if there are too many requests, what if records capacity isn’t there – these are all systems that can evolve with time.”*

This submission further pointed out that when the Act was first brought into force, the GNWT “did not have any advanced records management system in place either.”

### **Committee Response**

The Committee does not take a position on the application of PIPEDA to municipal governments but notes guidance on this subject from the federal Information and Privacy Commissioner which suggests that, contrary to the City’s assertion, PIPEDA may have limited application to municipalities in the Northwest Territories only to the extent that it applies to information about municipal employees.<sup>2</sup>

With respect to the City’s concern regarding the impact of ATIPP on the confidentiality of the process under its *Whistleblower Policy*, again, the Committee does not take a position on this. Committee does, however, note the following provision from the Government of the Northwest Territories’ *Harassment Free and Respectful Workplace Policy* which suggests that protecting the anonymity of complainants is inconsistent with due process:

*7. The investigation process is conducted following the principles of procedural fairness and natural justice. This means:*

*(a) Only those complaints in which the complainant’s identity is disclosed may be taken through the mediation and/or investigation processes. Anonymous complaints do not allow for due process.*

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<sup>2</sup> Office of the Information and Privacy Commissioner of Canada, “The Application of PIPEDA to Municipalities, Universities, Schools, and Hospitals,” December 2015.

The Committee supports the inclusion of municipalities under ATIPP legislation, but is cognizant of the very real concerns municipal authorities have about ensuring that implementation is staged and orderly. Accordingly, the Committee makes the following recommendation:

#### **Recommendation 1**

**The Standing Committee on Government Operations recommends that the Department of Municipal and Community Affairs, working with the Department of Justice, develop a detailed and costed plan to guide the implementation of ATIPP for municipalities.**

**Additionally, the Standing Committee recommends that the plan identify: i) time lines for the inclusion of different categories of municipalities in the ATIPP Regulations; ii) the resources needed by each municipal government to comply with ATIPP, to ensure adequate funding for initial implementation and ongoing operational requirements; along with iii) any other significant considerations as determined through consultation on development of the plan.**

**The Standing Committee further recommends that, before being finalized, the plan be provided in draft so that input may be obtained from: the appropriate Standing Committee; the NWT Association of Communities; and the Local Government Administrators of the Northwest Territories.**

### ***Inclusion of Local Housing Organizations***

#### ***Input Received***

The Information and Privacy Commissioner noted the importance of bringing local housing organizations under ATIPP.<sup>3</sup> Her submission notes that,

*“From a privacy perspective, housing corporations collect, use and disclose significant amounts of personal information about their residents. This includes financial information, information about*

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<sup>3</sup> For the purposes of this report, the term “local housing organizations” is used to collectively refer to housing associations incorporated under the *Societies Act* and housing authorities incorporated under section 45 of the *NWT Housing Corporation Act*.

*their employment and personal information about their family situation. It can also include sensitive information about any conditions that a resident may have. The many privacy complaints my office receives show a clear need for these corporations to live under the same privacy rules as other public sector actors.*<sup>4</sup>

### **Committee Response**

From its review of the IPC's *2017-2018 Annual Report*, Committee is aware of an instance in which a person sought access to information held by a local housing organization. In this case,<sup>5</sup> the Northwest Territories Housing Corporation directed the local housing organization to respond to the request, even though the housing organization is not bound by ATIPP. In Committee's view, this suggests that the NWT Housing Corporation recognizes the need for open and transparent conduct by local housing organizations.

Committee considered bringing forward a motion to define local housing organizations as "public bodies" under the Act, but recognized that this would not be consistent with the manner by which public bodies are designated under the Act. To be consistent with the existing structure of the legislation, the most appropriate way to include local housing organizations under ATIPP would be to define them as public bodies by including them in Schedule A to the regulations.<sup>6</sup> Accordingly, Committee makes the following recommendation:

#### **Recommendation 2**

**The Standing Committee on Government Operations recommends that the Minister of Justice propose, for approval by the Commissioner in Executive Council, amending the *Access to Information and Protection of Privacy Regulations* to include Housing Associations incorporated under the *Societies Act* and Housing Authorities incorporated under section 45 of the *NWT Housing Corporation Act*, as public bodies under the *Access to Information and Protection of Privacy Act*.**

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<sup>4</sup> IPC submission, p. 24.

<sup>5</sup> *2017-2018 Annual Report of the Information and Privacy Commissioner of the Northwest Territories*, Review Report 17-160, p. 22.

<sup>6</sup> Access to Information and Protection of Privacy Regulations, R-206-96.

## **Powers of the Information and Privacy Commissioner**

The ATIPP Act sets out the powers of the IPC with respect to both access and privacy matters. The Committee gave a great deal of consideration to the scope of these powers.

### ***Modernizing the Role of the IPC***

Bill 29 proposes a number of changes to strengthen the powers of the IPC. Clause 35 expands the powers of the IPC to:

- Provide educational programs about the Act and the public's rights;
- Consult with any person with expertise in any matter related to the Act;
- Provide comments on the privacy implications of new technology;
- Provide comments on practices and procedures to improve access and privacy;
- Advise the heads of public bodies when their staff fail to fulfill the duty to assist applicants; and
- Inform the public of deficiencies in the system, including in the office of the IPC.

Committee supports the inclusion of the powers set out in Clause 35, which will modernize the IPC's powers and align them with other provincial and territorial privacy commissioners. However, Committee feels that Bill 29 could do more to strengthen the IPC's powers in the following areas:

### ***Initiating Access and Privacy Reviews on IPC's Own Initiative***

Committee supports the proposal under Clause 28 to allow the IPC to initiate a review relating to a privacy breach on her own initiative, without receiving a complaint. Committee notes that this is something the IPC has called for in her past annual reports and is a power afforded to information and privacy commissioners in other Canadian jurisdictions, and to other statutory officers with Ombud-like powers in the Northwest Territories.

This would give the IPC the authority to investigate problems that might be systemic, and thus not restricted to a single complaint. The Committee sees no sound policy rationale for giving the IPC this authority only for privacy matters, as proposed under clause 28, and believes that the IPC should also have the

authority to investigate systemic issues relating to access matters. Consequently, Committee moved Motions 10(a) and (b) to ensure that the IPC has this power to initiate an investigation relating to an access matter without the prerequisite of having received a complaint. Committee also moved Motion 15, to clarify that the IPC's power to initiate reviews related to privacy matters on her own initiative, also includes reviews related to the correction of personal information.

### ***Making Binding Recommendations***

#### ***Input Received***

From the IPC, Committee heard that:

*“A key shortcoming of Bill 29 is that it would continue to give public bodies the unacceptable ability to ignore adjudicated decisions by the IPC...NWT public bodies can pick and choose which decisions they will respect and which they will not. From a rule-of-law perspective, this is an unacceptably weak regime. It is also not clear why access to information – which the Supreme Court of Canada has stated has constitutional dimensions – does not merit better protection.”<sup>7</sup>*

In its submission, OpenNWT noted that:

*“The current process for making ATIPP requests can be difficult for the public and onerous. Currently, when a Government Body refuses to release a record the applicant can appeal to the Commissioner for a review. However, these reviews are not binding...and it is up to the applicant to then seek a judicial order. Considering the disparity in resources available to the government vs a private citizen or organization this is fundamentally unfair.”*

Both the IPC and OpenNWT recommended that the GNWT adopt an approach found in the Newfoundland and Labrador *Access to Information and Protection of Privacy Act*, which was designed to enhance the enforceability of the IPC's recommendations. In this model, a public body is required to comply with the IPC's recommendations. If the public body does not wish to comply, it must apply

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<sup>7</sup> IPC submission, p. 18.

to the Court, within a prescribed timeline, for a declaration that it is not required to comply with the IPC's recommendation. In its application, the public body must substantiate the reason it disagrees with the IPC's recommendations and justify how its own decision to refuse access was guided by the provisions of the Act. *"It should not be left to public bodies to pick and choose which access to information rights/privacy rights they will respect."*<sup>8</sup>

### **Committee Response**

Currently, the recommendations made by the IPC under the ATIPP Act are not binding on the GNWT or its boards and agencies. If the IPC finds in favour of a complainant and recommends that a public body give access to a record that it has refused to release, and the public body refuses to accept the recommendation, the only recourse left to the complainant is to file a notice of appeal with the Supreme Court, pursuant to section 37 of the Act. The Act does not provide any similar avenue of appeal for privacy complaints. Committee was in agreement that the recommendations of the IPC need to be strengthened so that they are binding upon government in some fashion.

Committee looked closely at the "Newfoundland model." Committee believes that, because the GNWT is more adequately resourced to undertake legal actions, requiring the GNWT to go to Court for approval to disregard the IPC's recommendations is fairer than requiring an applicant to go to Court when the GNWT refuses to comply with the IPC's recommendation. Committee views this approach as consistent with the GNWT's commitment to a more open and accountable government. The Newfoundland model would even the playing field, making the access and privacy system in the Northwest Territories more accessible for those with access or privacy concerns.

The Committee further believes that this approach would, by its nature, promote more careful and justifiable decision-making on the part of public bodies, whose heads will be more inclined to assess whether or not their decision on an access matter is likely to be viewed favourably by the Courts.

In considering the scope of powers available to the IPC, Committee was aware that other statutory officers, such as the NWT Human Rights Adjudication Panel, have the power to make orders having the weight of court rulings. Committee

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<sup>8</sup> IPC submission, p. 19.



considered that providing the IPC with order-making power would be an alternative approach to the status quo and to the Newfoundland model.

Because Ministerial concurrence with Committee motions is required if a bill is to be amended at the Committee stage, Committee met with the Minister of Justice and his staff to discuss a number of potential amendments to Bill 29. Committee was surprised to learn, at this meeting, that the Department of Justice views the option of providing the IPC with order-making power more favourably than the Newfoundland model. The Department offered the insight that the most frequent reason the GNWT refuses to comply with the IPC's recommendations, is because those recommendations often lack a degree of precision necessary to allow the government comply in a manner consistent with its mandate and operating structure. Providing the IPC with order-making power, the Department suggested, would impose a level of discipline on the IPC that would result in more specific and precise direction to government. The Minister indicated his willingness to concur with such an amendment, on the condition that he could obtain the support of Cabinet.

Accordingly, Committee moved Motions 12 and 12(a) to amend Bill 29 to provide the IPC with order-making power related to access matters and Motion 16 to provide the IPC with order-making power related to privacy matters.

### **Public Interest Override**

Clause 4 of Bill 29 proposes to amend the ATIPP Act to provide that, for certain records, the exemption from disclosure provided under the Act will not apply, where the applicant *“demonstrates that a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.”* This means that, where the Act prohibits a record from being disclosed, the person seeking access may be able to obtain the record if they are able to demonstrate that the public's need to know is more important than the privacy considerations that would otherwise prevent the record from being disclosed.

### ***Input Received***

Committee heard from Mr. David Loukidelis, a former British Columbia Information and Privacy Commissioner who appeared before the Committee as a witness at the invitation of the NWT IPC. Mr. Loukidelis asserted that the proposal doesn't go far enough because it only allows the public interest to override four of the Act's disclosure exemptions: advice from officials (section

14), intergovernmental relations (section 16), government's economic interests (section 17) and harm to the applicant or another individual (section 21). In contrast, Mr. Loukidelis notes, the public interest prevails over *all* of the secrecy provisions contained in the ATIPP acts of Alberta, British Columbia, Prince Edward Island and New Brunswick.

*"The bar is set too high – the public interest would only win out over secrecy where there is a "compelling" public interest that "clearly outweighs the purpose of the exemption. Experience with similar language in Ontario shows that the bar is so high that the override will effectively be illusory."*

Both Mr. Loukidelis and the IPC additionally point out that Clause 4 of Bill 29 only applies in instances where someone has made a request for a record. They argue that there should be a positive duty on government to disclose information that is in the public interest. As the NWT IPC noted,

*"Bill 29 should be amended to provide that a public body is required to disclose to the public, an affected group of people or an applicant, as promptly as practicable, information about a risk of serious harm to the environment or to the health or safety of the public or a group of people. This duty should apply, to be clear, regardless of whether an access request has been made"*<sup>9</sup>

Finally, both the IPC and Mr. Loukidelis express concern that clause 4 of Bill 29 places the onus on a member of the public to demonstrate a compelling public interest "from a position of complete or near complete ignorance." This observation served to confirm Committee's view that this places an unreasonable burden of proof on the applicant.

### **Committee Response**

In response to these concerns, Committee moved Motion 2, which places a positive duty on government to disclose to the public, without delay, information about a risk of significant harm to the environment or to the health or safety of the public or information that, for any other reason, should be disclosed because it is clearly in the public interest to do so. This public interest override applies

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<sup>9</sup> IPC submission, p. 6.

throughout the Act, not just to the four disclosure exemptions provided for in clause 4 of the Bill. It also removes the requirement for a member of the public to demonstrate a compelling public interest and, instead, puts the onus on government to ensure that, regardless of protections provided under ATIPP, information in the public interest is properly disclosed.

### **Labour Relations Information**

Clause 17 of Bill 29 proposes to add a new section 24.1 to the Act, that would require a public body to refuse to disclose to an applicant “labour relations information, the disclosure of which could reasonably be expected to reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations matter.”

### ***Input Received***

As pointed out by the IPC in her submission, “this would be a mandatory exemption, and a public body would not be permitted to waive its protection.”<sup>10</sup> She goes on to express the view that “this is a potentially vast black hole in the Act. For one thing, the terms “labour relations information” and “labour relations matter” are not defined. They could be very broad in their scope.”

The IPC also expresses her concern with the proposal to “withhold even the final report of a labour arbitrator or similar decision-maker,” noting that, with respect to arbitration decisions, “there is no good reason for an access to information law to require them to be secret.” She argues that “these decisions are an important part of our law and the Act should not require them to remain (secret) when an access request is made for an unpublished decision.”

### ***Committee Response***

Committee agrees that the exemption from disclosure of information harmful to the GNWT’s labour relations interests is too broad as set out in clause 17 of Bill 29. Committee discussed with Justice the possibility of adding a definition to the Act and was persuaded by the Department’s concern that such a definition this might inadvertently capture types of information that should not be exempted or,

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<sup>10</sup> IPC submission, p. 12.

conversely, fail to address types of information that should. Committee also considered an approach that would narrow the scope of the provision by inserting a “harms test.” The effect of this would be to require a public body to give consideration to the nature of the information being requested, to determine if it “could reasonably be expected to (i) harm the competitive position of the GNWT as an employer; (ii) interfere with the negotiating position of the public body as an employer, or (iii) result in financial loss or gain to the public body as an employer.”

Unfortunately, an amendment to clause 17 of the Bill could not be finalized in time for this provision to be amended at the Committee stage. Had such an amendment been completed, it would have been moved as Motion 7, which is why readers of this report will not find such a motion in Appendix 1 to this report.

Committee has enjoyed a positive and extremely collaborative relationship with the Minister of Justice and his staff on the review of Bill 29, and work to resolve the Committee’s concern is still underway as this report is being read into the record. Committee has every confidence that a solution can be reached, that is satisfactory to both the Minister and to Committee, and that will result in a further amendment to this Bill on the floor of the House.

### **Obligations of Public Bodies**

The ATIPP Act places a number of obligations on public bodies. Bill 29 proposes to amend certain of these obligations.

### ***Response to the IPC’s Access-Related Recommendations***

As set out in Bill 29, clause 31 proposes to require a public body to provide the IPC with a status report on its implementation of the IPC’s privacy-related recommendations.

The Committee originally supported this proposal because it is something that has been long sought by the IPC. However, Committee could see no sound policy reason for this obligation to exist only with respect to privacy-related matters. Committee considered moving a motion which proposed to also place this obligation on public bodies with respect to access-related recommendations by the IPC. However, the subsequent decision to provide the IPC with order-making power, for both access and privacy matters, as set out in Motions 12 and 16, supplanted the need for either clause 31 of the Bill or an amendment

requiring public bodies to report on the status of access-related recommendations.

Motions 12 and 16, require a public body to comply with an order of the IPC within 20 or 40 business days, respectively. Because the IPC's orders become mandatory under these amendments, the IPC will no longer be left wondering to what extent recommendations accepted by a public body are being implemented.

### ***Records That May Be Disclosed Without an Access Request***

Section 72 of the ATIPP Act gives public bodies discretionary authority to identify categories of records that do not contain personal information and can, therefore, be made available to the public without the need for a formal access request under the Act.

Clause 37 of the Bill proposes to make this requirement mandatory, rather than optional, for public bodies. Committee supports this proposal, but wants to ensure that the public has a way of knowing which categories of records may be requested without an access request.

Committee therefore moved Motion 19, which obligates public bodies not only to develop these categories of records, but also to publish them, so that people seeking information held by the government will know which records they may readily access without need to make a formal request under the Act.

### ***Privacy Impact Assessments***

#### ***Input Received***

The IPC has spoken to the Committee, many times, about the importance of "privacy by design," which is the notion that whenever government is developing a new initiative, it should give consideration, in the earliest planning stages, to the initiative's impacts on the privacy of individuals. One of the ways to achieve this is through the use of a privacy impact assessment (PIA), which describes how individuals, whose personal information will be collected, used or disclosed, would be affected by the initiative.

Committee heard from the IPC on this subject, who said:

*"PIAs help ensure that initiatives proceed only if there are no compliance concerns that cannot be mitigated. They enable what is*

*known as privacy by design, with privacy compliance being designed into the initiative at the outset. PIAs also enable public bodies to assess whether, even if an initiative is legally compliant, it is not good policy from a privacy perspective. A PIA is an important and highly-desirable business risk assessment tool and should be mandatory.”<sup>11</sup>*

Committee sees the value in privacy impact assessments, noting that such assessments are required under the *Health Information Act* for any proposed change to an information system or communication technology relating to the collection, use or disclosure of personal health information.

### **Committee Response**

Committee was persuaded to seek an amendment to Bill 29 requiring public bodies to conduct privacy impact assessments, not only by the IPC’s evidence, but out of consideration for impacts related to “common or integrated programs or services,” a concept introduced in Bill 29.

One of the key features of the ATIPP Act is that it places an obligation on public bodies to limit their collection of personal information to only that which is needed to deliver a given program or service. It also requires that each public body must disclose to an individual the reasons for which their personal information is being collected. As a result, public bodies are not authorized to share the personal information they have collected, such that it can be used for purposes other than those for which it was first collected. Bill 29 proposes to change this with the introduction of the concept of a “common or integrated program or service.”

A common or integrated program or service is one that provides one or more services through a public body working collaboratively with one or more other public bodies. The rationale for this approach is to break down the silos that tend to occur within government, so that different government departments or agencies may collaborate to deliver programs and services.

While this may be desirable from a program-delivery perspective, it creates challenges for collaborating offices, as they are currently prevented under the Act from sharing with one another the personal information they have collected from

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<sup>11</sup> IPC submission, p. 28.

their clients. As a result, clause 26 of Bill 29 proposes to amend the Act to allow public bodies to share personal information they have individually collected for the purpose of collaboratively delivering a common or integrated program or service. Committee sees privacy impact assessments as vitally important in this context.

As a result, Committee moved Motion 13 to amend Bill 29. This amendment requires public bodies to develop privacy impact assessments for any proposed enactment, system, project, program or service – including common or integrated programs and services – involving the collection, use or disclosure of personal information. These PIAs must be submitted to the head of the public body for review and comment. It further requires that privacy impact assessments done for common or integrated programs or services be submitted to the IPC for her review and comment. Finally, this motion also requires the head of a public body to notify the IPC at an early stage, when developing common or integrated programs or services.

### ***Mandatory Breach Notification***

#### ***Input Received***

The Northwest Territories *Health Information Act*, which came into force on October 1, 2015, places an obligation on the custodians of health information to advise affected individuals if the privacy of their health information is breached. Having had experience with this legislation, the IPC has recommended that public bodies under ATIPP should be required to provide the same breach notification for personal information under their control. She says,

*“The duty to notify individuals of a breach that meets a statutorily-defined risk of harm is necessary for several reasons. First, it enables those affected to protect themselves from identity theft or fraud, and in some cases from personal harm. Second, the duty to notify affected individuals, and the public, serves as an important incentive for governments to take privacy seriously and avoid breaches in the first place. Third, a breach notification requirement would require public bodies to investigate the details of breaches,*

*notably how they happened, and thus give them a solid information base for steps to prevent similar breaches in the future.”<sup>12</sup>*

OpenNWT also recommended mandatory breach notification for ATIPP, stating that *“Based on the large number of privacy breaches in the NWT it is important that our residents are notified individually.”*

### **Committee Response**

Committee was persuaded of the value of amending the Act to include a mandatory breach notification. To determine how to achieve this, Committee looked at the relevant provisions of the NWT’s *Health Information Act* and Nunavut’s *ATIPP Act, Division E – Data Breach Notification*. Committee moved a lengthy Motion 17, to incorporate into Bill 29 a section, largely modeled on the Nunavut example, which provides a definition of “harm” and sets out a process governing public bodies with respect to data breach notifications. In addition, Committee moved Motion 20, to provide the Minister with the authority, under section 73 of the Act, to make regulations respecting the requirements to be fulfilled by public bodies in the event of a data breach

### **Protecting the Privacy of Individuals Making Access Requests**

#### **Input Received**

The IPC has recommended that the identity of access requesters be protected under the Act. She notes that *“although it is convention not to disclose the identity of access requesters within a public body, there is no legal bar to doing so.”<sup>13</sup>*

### **Committee Response**

Committee believes that people seeking access to government records should be afforded a right to privacy, especially in a jurisdiction such as ours, where the population is small and many members of the public and the public service are known to one another.

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<sup>12</sup> IPC submission, p. 26.

<sup>13</sup> IPC submission, p. 25.



Committee moved Motion 3, which amends Bill 29 to provide that the identity of a person requesting access to information constitutes personal information which should be known only to the public body's ATIPP coordinator. It further provides that the identity of an access requester may only be disclosed by the ATIPP coordinator, to other employees in a public body, to the extent required in order to fulfill the access request.

### ***Annual Reporting to the Responsible Minister***

Consistent with the GNWT's commitment to openness and transparency, Committee sees the value of having public bodies report annually on activities they have undertaken as required by ATIPP. Committee moved Motion 23, which requires public bodies to submit a report to the responsible Minister, within 60 days of the fiscal year end, detailing the:

- Number of requests received;
- Time taken to process the requests;
- Number of requests that were denied and the exceptions that were relied upon by the public body, in determining the denial;
- Fees collected;
- Justification relied upon for any extensions of time; and the
- Number of privacy impact assessments the public body has conducted in the fiscal year.

### **Obligations of the Responsible Minister**

#### ***Annual Reporting to the Legislative Assembly***

Motion 23, which requires annual reporting on ATIPP by public bodies, also requires that the Responsible Minister compile the reports submitted by the public bodies into an annual report, to be tabled within 60 business days of receiving the year-end information from the public bodies or, if the Legislative Assembly is not sitting at that time, at the next sitting of the Assembly. This will ensure that the information produced by public bodies as part of their year-end reporting is made available to the public.

### ***Statutory Review of the Act***

As noted at the outset of this report, the Northwest Territories' ATIPP legislation is just a few years shy of being a quarter of a century old. While it has been amended from time-to-time, the legislation has not, until now, been subjected to a comprehensive review.

ATIPP legislation governs the collection, use and disclosure of personal information. Processes used for collecting, exchanging, cataloguing and distributing personal information are intrinsically linked with technological changes. To put the age of the current ATIPP Act into perspective with respect to technological advancement, consider that in the same year it went into force the DVD was launched, smartphones were in their infancy, and there were roughly 45 million internet users, none of whom had yet heard of Google, as compared with today's 1.4 billion internet users.

Given the impact of changing technology on ATIPP, Committee sees a greater-than-average need to ensure that the legislation is kept current. Clause 39 of Bill 29 achieves this by proposing to amend the Act to include a requirement that the responsible Minister undertake a review of the legislation every seven years.

Based on past reviews of the *Official Languages Act*, Committee is aware that mandated reviews of legislation occurring at arbitrary intervals – be it every five years, seven years, or whatever the case may be – do not always lend themselves to producing amended legislation. One reason for this is that, if the date for a review happens to coincide with the final year of an Assembly, there will not be enough time remaining to complete any recommended legislative changes arising from a review.

Committee prefers to see the statutory requirement to review legislation be tied to the life span of a sitting assembly. In this way, the review period can be synched to coincide with the four year term of an assembly, allowing enough time for any required changes to the legislation to make their way through the legislative process.

Committee moved Motion 21 to amend Clause 39 of the Bill, to require the Minister to carry out the review within 18 months of the start of the Twentieth Legislative Assembly and within 18 months of every second assembly thereafter. This will result in ongoing reviews of the Act at 8 year intervals.

Committee debated whether or not to also amend the proposal in Clause 39 of the bill to require that the review be done by a Committee of the Legislative Assembly, rather than being done by the Minister, as is the case with the *Official Languages Act*. Regardless of who does the review, it will ultimately be up to the Responsible Minister to sponsor amending legislation to implement the findings of the review. On this basis, Committee was satisfied with leaving the responsibility for the review in the hands of the Minister, providing that the results of the review be tabled in the Legislative Assembly for the consideration of Members. Committee moved Motion 22 to provide for this reporting requirement.

### **Time Limits**

As noted at the start of this report, Bill 29 proposes to revise time limits in the Act by: restating them as business days rather than calendar days; shortening some turn-around times; and adding time limits for certain actions required under the Act that did not previously have them. Committee is proposing changes to a number of the time limits set out in Bill 29.

### ***Time Limit for IPC to Complete Reviews***

#### ***Input Received***

Presently, the ATIPP Act requires the IPC to complete her reviews on access and privacy matters within 180 calendar days, or approximately 6 months. Clauses 22 and 29 of Bill 29 propose to shorten this timeframe to 60 business days, which is approximately three months. It is, perhaps, not surprising that the IPC would not be in favour of this amendment. Noting her deep concern, she asserts that the

*“Imposition of such a severe constraint without my office having more resources would either cause my office to fail to meet that standard or, in order to do so, to divert scarce resources from other important tasks, such as privacy complaints under the Health Information Act. Neither outcome is desirable.”<sup>14</sup>*

She goes on to argue for the complete elimination of her time limit, pointing out that her office’s review functions differ from those of public bodies. Public bodies

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<sup>14</sup> IPC submission, p. 16.

act on the basis of their own records and the contextual information they receive. In contrast, the IPC is entirely dependent upon public bodies to be timely in their responses to the IPC's requests for information when processing an applicant's request for a review.

### ***Committee Response***

The Committee considered this input, along with the testimony from Department of Justice representatives who pointed out that, in their review of the ATIPP Act, they heard from the public that the entire process is too lengthy.

Committee recognizes that the public should be able to have access to a process that is as expedient as possible. At the same time, Committee notes that the cut to the IPC's time limit proposed in Bill 29 is the most severe cut proposed to any of the timelines contained in the Act, while her Office has far fewer resources than most public bodies. Committee is of the view that a reduction of that size would have a negative impact on the IPC's ability to complete thorough reviews. Committee moved Motions 11(a) and (b), which set the IPC's time limit for completing access and privacy reviews respectively at 90 calendar days, which is approximately four and a half months. Committee believes this will expedite the process for the public, while still allowing the IPC adequate time to complete her work.

### ***Time Limit for a Public Body Responding to an Access Request***

Clause 5 of Bill 29 proposes to amend the deadline for a public body to respond to an access request from 30 calendar days to 20 business days. Under subsection 11(1), the Act allows a public body to extend this initial deadline "for a reasonable period." Clause 6 of the Bill changes strikes out "for a reasonable period" and substitutes "for a period not exceeding 20 business days," placing a hard deadline on the extension a public body may grant itself. The combined effect of these amendments is that a public body will have a total of 40 business days to respond to an access request. Committee supports both of these proposals.

Should a public body require further time, clause 7 of Bill 29 requires the head of a public body to seek a further extension from the IPC. Under proposed subsection 11.1(3), while this request is being made, the time limit for replying to the request is suspended. If this request is then denied by the IPC, the original time limit does not resume under the bill as drafted. Rather, under the proposed

new subsection 11.2(6), the clock is re-set and the public body is required to reply no later than 20 business days after receiving the decision of the IPC.

Committee expressed concern with this latter provision because, even if the request for an extension is denied by the IPC, proposed subsection 11.2(6), in effect, grants an extension of the same length (20 business days) as that which the public body was originally able to grant itself. This builds an incentive into the Act for public bodies to seek extensions, in every instance, with the knowledge that even a denial from the IPC will result in an additional 20 days to complete the request.

Committee considered a motion to address this concern, but the motion was later superseded by the decision to grant the IPC order-making power, as set out under Motions 12 and 16. Motion 12 gives the IPC the authority to “reduce, deny or authorize an extension of a time limit under section 11 or 11.1.” Motion 4 complements Motion 12, by deleting subsections 11.2(2) to 11.2(7) which would have set out the IPC’s authority to grant an extension of a public body’s deadline. Instead, in accordance with Motion 4, a request by a public body for an extension of its deadline will be treated as a “review” in accordance with Division D of the Act, which deals with Reviews and Recommendations of the IPC. As such, a decision by the IPC related to a deadline extension will be final and binding upon the public body.

### ***Time Limit for Notice to Third Parties***

Division C of the ATIPP Act is concerned with the rights of third parties with respect to the disclosure of information. Where a public body is considering giving access to a record that may contain information potentially constituting an unreasonable invasion of a third party’s privacy, or negatively impacting on their business or other interests, the public body is required to give notice to the third party. Paragraph 26(2)(c) gives the third party 60 calendar days to respond. Clause 19 of Bill 29 proposes to shorten that deadline to 30 business days. Committee has no objection to this proposal.

Upon receiving input from a potentially-affected third party, the head of a public body must consider that input in determining whether or not to give the applicant access to the requested record. Section 27 of the Act requires that the head must wait for a reply from the third party, or until at least 61 days have passed since notice was given to the third party, before making a decision on the

request. The same section also provides that the head of a public body cannot wait any later than 90 calendar days to respond to the applicant.

Clause 20(b) of the Bill proposes to shorten, from 61 calendar days to 31 business days, the period during which the public body must wait for the third party's reply. Clause 20(a) proposes to amend the deadline for the public body to reply to the applicant from 90 calendar days to 45 business days.

In effect, Bill 29 proposes a 15-day window between the last day upon which a third party has to respond to the public body and the last day upon which the public body must provide an answer to the applicant. Committee heard that this time period was still too long. As a result, Committee moved Motion 8, to change the deadline for the public body's reply to the applicant from 45 business days, to 40 business days, thereby reducing the 15-day window to 10 days.

### ***Appeal Notice Time Limit***

Section 27 of the Act also specifies time limits for a public body to give notice that a third party has a right of appeal where access to a record is being granted to an applicant, and that an applicant has a right of appeal where access to a record is being denied by a public body. When the Bill was drafted, an oversight resulted in these deadlines of 30 calendar days each not being converted to business days. While a straight conversion of calendar to business days would have resulted in an amendment setting these deadlines at 20 business days, Committee learned, in discussions with Justice, that the department had intended to reduce these deadlines to 15 business days. In the interest of expediting the entire ATIPP process, Committee was in agreement with this proposal. Motion 9 was moved at the Committee stage to make this change.

### **Miscellaneous or Technical Amendments**

Committee also proposed a number of miscellaneous or technical amendments to the Bill, some of which were completed in cooperation with the Department of Justice to address oversights and other drafting-related matters. This includes Motion 1 which corrects a typographical error, amending "public body" to the plural "public bodies." Other miscellaneous or technical amendments are as follows:

### ***Transfer of Access Request to Appropriate Public Body***

Subsection 12(1) of the Act provides that a public body may transfer an access request to another public body, where the other public body has custody of the requested record. To ensure that access requests are administered by the appropriate public body having care and control of the requested record, Committee considers that this transfer should be compulsory under the Act, instead of being discretionary, as is currently the case. Committee moved Motion 5, which amends Clause 8 of the Bill by changing “may” to “shall.”

### ***Disclosure Harmful to Conservation***

Subsection 19(b) of the Act allows that the head of a public body may refuse to disclose information having “aboriginal cultural significance.” Committee moved Motion 6, which amends the word “aboriginal” to “Indigenous” to reflect the current standard terminology in use by the GNWT.

### ***Publication of ATIPP Coordinator Contact Information***

Clause 36 of Bill 29 requires public bodies to designate an ATIPP coordinator, and sets out the responsibilities associated with the position. Committee moved Motion 18 to enhance this provision by adding a requirement for public bodies to ensure that the contact information for ATIPP coordinators is made publicly available.

### ***Reference to “Spouse” in the Act***

Section 48 of the ATIPP Act sets out a lengthy list of circumstances under which a public body has the discretion to disclose personal information. Clause 26 of the Bill adds additional circumstances, including one [s. 48(q.4)] that permits disclosure of a deceased person’s personal information to a “surviving spouse, adult interdependent partner or relative.”

Committee looked further into the meaning of the term “adult interdependent partner” in the context of Bill 29. Committee’s research revealed that the Province of Alberta enacted the *Adult Interdependent Relationship Act* in 2002 to legally define common-law and same-sex relationships outside of the definition of marriage, which is “an institution that has traditional religious, social and cultural meaning for many Albertans.” An “adult interdependent partner” is defined in the legislation within this context.

In discussion with Justice, Committee asked whether or not the term “adult interdependent partner,” that is not defined in Bill 29, is necessary or whether the term spouse, as used in Clause 26 of the Bill, is sufficient to include spouses in the Northwest Territories who are in common-law and same-sex marriages. It was determined that the word “spouse,” as defined in the Northwest Territories’ *Interpretation Act*, does include individuals in common-law and same-sex marriages, rendering the term “adult interdependent partner” unnecessary in Bill 29. Motion 14 removes this term from the Bill.

## **CLAUSE-BY-CLAUSE REVIEW OF THE BILL**

Given the complexity of this Bill and the number of proposed amendments, the Committee requested and received two extensions to the 120 day deadline for the review of bills provided rule 75(1)(c) of the *Rules of the Legislative Assembly*. These extensions provided time, following the public consultation process, for motions to be drafted and reviewed by the Committee and by Cabinet. Committee thanks the Legislative Assembly for granting these extensions.

The clause-by-clause review of the Bill was held on May 22, 2019. At this review, the Committee moved 25 motions set out in Appendix 1.

The Minister concurred with all of the motions moved by Committee, allowing for extensive amendments to Bill 29 at the Committee stage.



## **CONCLUSION**

Committee wishes to thank the Minister for his concurrence with the motions to amend the Bill that were moved during the clause-by-clause review. Committee also again thanks the Minister and his staff for their assistance and collaboration on the review of Bill 29. Committee also thanks the public for their participation in the review process and everyone involved in the review of this Bill for their assistance and input.

Following the clause-by-clause review, a motion was carried to report Bill 29: *An Act to Amend the Access to Information and Protection of Privacy Act*, as amended and reprinted, as ready for consideration in Committee of the Whole.

This concludes the Standing Committee on Government Operations' Review of Bill 29.

## **APPENDIX 1**

### **MOTIONS TO AMEND BILL 29**

The Standing Committee moved the following motions to amend Bill 29:

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND THE PROTECTION OF  
PRIVACY ACT

**That subclause 2(4) of Bill 29 in the English version be amended in the proposed definition "common or integrated program or service" by striking out "one or more other public body" and substituting "one or more other public bodies".**

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que la version anglaise du paragraphe 2(4) du projet de loi 29 soit modifiée par suppression de «one or more other public body», dans la définition proposée de «common or integrated program or service», et par substitution de «one or more other public bodies».**

MOTION 2: Public Interest Override

KM\ML\DRAFT #05\FEBRUARY 28, 2019\MOTIONS\THIRD.17\An Act to Amend the Access to Information and Protection of Privacy Act\Clause 4 new model OC/MEM/6 MARS 2019/ÉB. 03

MOTION		MOTION	
AN ACT TO AMEND THE ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT		LOI MODIFIANT LA LOI SUR L'ACCÈS À L'INFORMATION ET LA PROTECTION DE LA VIE PRIVÉE	
<b>That clause 4 of Bill 29 be amended by deleting proposed clause 5.1 and substituting the following:</b>		<b>Il est proposé que l'article 4 du projet de loi 29 soit modifié par suppression de l'article 5.1 proposé et par substitution de ce qui suit :</b>	
Information must be disclosed if in the public interest	<p>5.1. (1) Notwithstanding anything in this Act and whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information</p> <ul style="list-style-type: none"><li>(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or</li><li>(b) the disclosure of which is, for any other reason, clearly in the public interest.</li></ul>	5.1. (1) Malgré les autres dispositions de la présente loi et qu'une demande d'accès soit faite ou non, le responsable de l'organisme public divulgue sans délai au public, au groupe de personnes touchées ou à l'auteur de la demande des renseignements, les renseignements, selon le cas :	Renseignements pouvant être divulgués si l'intérêt public le justifie
Notification where practicable	<p>(2) Before disclosing information under subsection (1), the head of a public body shall, if practicable, notify in accordance with subsection (3)</p> <ul style="list-style-type: none"><li>(a) any third party to whom the information relates; and</li><li>(b) the Information and Privacy Commissioner.</li></ul>	<p>(2) Avant de divulguer des renseignements en application du paragraphe (1), le responsable de l'organisme public, si possible, avise conformément au paragraphe (3) les personnes suivantes :</p> <ul style="list-style-type: none"><li>a) tout tiers visé par les renseignements;</li><li>b) le commissaire à l'information et à la protection de la vie privée.</li></ul>	Avis dans le cas où la divulgation est possible
Content of notice	<p>(3) A notice to a third party provided under paragraph (2)(a) must</p> <ul style="list-style-type: none"><li>(a) state that a decision has been made to disclose information, the disclosure of which may affect the interests or invade the personal privacy of the third party;</li><li>(b) identify the criteria in subsection (1) relied on for disclosing the information; and</li><li>(c) include a copy of the record or that part of the record that contains the information in question.</li></ul>	<p>(3) L'avis au tiers fourni en vertu de l'alinéa (2)a) :</p> <ul style="list-style-type: none"><li>a) mentionne qu'une décision a été prise pour divulguer des renseignements, une telle divulgation peut porter atteinte aux intérêts du tiers ou violer sa vie privée;</li><li>b) identifie les critères mentionnés au paragraphe (1) sur lesquels se fonde la divulgation de renseignements;</li><li>c) comprend une copie du document ou de la partie du document qui contient les renseignements en question.</li></ul>	Contenu de l'avis
Notification where not practicable	<p>(4) If it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure</p>	<p>(4) S'il lui est impossible de se conformer au paragraphe (2), le responsable de l'organisme public envoie par la poste un avis de la divulgation :</p>	Avis dans le cas où la divulgation

- (a) to the last known address of the third party, containing the information referred to in paragraphs (3)(a) and (b); and
- (b) to the Information and Privacy Commissioner, containing all information referred to in subsection (3).

- a) d'une part, à la dernière adresse connue du tiers, et cet avis contient les renseignements visés aux alinéas (3)a et b);
- b) d'autre part, au commissaire à l'information et à la protection de la vie privée, et cet avis contient tous les renseignements visés au paragraphe (3).

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That Bill 29 be amended by adding the following after clause 4:**

4.1. The following is added after subsection 6(3):

Identity of  
applicant

(4) The identity of an applicant shall be kept confidential by the head of the public body and the coordinator designated under section 68.1, and may be disclosed only to the extent required to respond to the request for access.

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que le projet de loi 29 soit modifié par insertion, après l'article 4, de ce qui suit :**

4.1. La même loi est modifiée par adjonction de ce qui suit après le paragraphe 6(3) :

(4) L'identité du requérant est gardée confidentielle par le responsable de l'organisme public et le coordonnateur désigné en application de l'article 68.1, et ne peut être divulguée que dans la mesure nécessaire pour répondre à la demande d'accès.

Identité du  
requérant

**MOTION 4: IPC review of public body request for extension**

KM\ML\DRAFT#01\MAY 15, 2019\MOTIONS\THIRD.17\New - Clause 7

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That clause 7 of Bill 29 be amended by deleting  
proposed subclauses 11.2(2) to 11.2(7) and  
substituting the following:**

Review

(2) A review under this section must be held in  
accordance with Division D of this Part.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 7 du projet de loi 29  
soit modifié par suppression des  
paragraphe 11.2(2) à 11.2(7) proposés et par  
substitution de ce qui suit :**

(2) Une révision au titre du présent article doit se  
dérouler conformément à la section D de la présente  
partie.

Révision

**MOTION 5: "may" to "shall" - compulsory transfer of access request**

KM\ML\DRAFT#01\JANUARY 15, 2019\MOTIONS\THIRD.17\Clause 8 OC/MEM/22 JANVIER 2018/ÉB. 01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND THE PROTECTION OF  
PRIVACY ACT**

**That subclause 8(1) of Bill 29 be amended by striking out "may, within 10 business days" and substituting "shall, within 10 business days".**

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que le paragraphe 8(1) du projet de loi 29 soit modifié par suppression de «peut, dans les 10 jours ouvrables qui suivent la réception par un organisme public d'une demande d'accès à un document, transmettre» et par insertion de «transmet, dans les 10 jours ouvrables qui suivent la réception par l'organisme de cette demande,».**



**MOTION 6: "aboriginal" to "Indigenous"**

KM\ML\DRAFT#01\JANUARY 15, 2019\MOTIONS\THIRD.17\Clause 12 OC/MEM/22 JANVIER 2019/ÉB. 01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND THE PROTECTION OF  
PRIVACY ACT**

**That clause 12 of Bill 29 be amended in the  
proposed paragraph 19(b) by striking out  
"aboriginal" and substituting "Indigenous".**

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 12 du projet de loi 29  
soit modifié par suppression de «autochtones», dans  
l'alinéa 19b) proposé, et par insertion de  
«Autochtones».**

**MOTION 8: Notice to 3rd parties - deadline for response**

KM\ML\DRAFT#01\FEBRUARY 22, 2019\MOTIONS\THIRD.18\An Act to Amend the Access to Information and Protection of Privacy Act\Clause 20(a) MEM/OC/27 FÉVRIER 2019/ÉB. 01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That paragraph 20(a) of Bill 29 be amended by striking out "45 business days" and substituting "40 business days".**

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'alinéa 20a) du projet de loi 29 soit modifié par suppression de «45 jours ouvrables» et par substitution de «40 jours ouvrables».**

**MOTION 9: Appeal notice deadline - "30 calendar days" to "15 business days"**

KM\ML\DRAFT#01\JANUARY 15, 2019\MOTIONS\THIRD.17\Clause 20 OC/MEM/22 JANVIER 2019/ÉB. 01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND THE PROTECTION OF  
PRIVACY ACT**

**That clause 20 of Bill 29 be renumbered as  
subclause 20(1) and the following be added after  
that renumbered subclause:**

(2) Subsections 27(3) and (4) are each amended  
by striking out "within 30 days" and substituting  
"within 15 business days".

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 20 du projet de loi 29  
soit modifié par renumérotation du  
paragraphe 20(1), et par insertion, après ce  
paragraphe renuméroté, de ce qui suit :**

(2) Les paragraphes 27(3) et (4) sont modifiés par  
suppression de «dans les 30 jours» et par substitution  
de «dans les 15 jours ouvrables».

**MOTION 10(a): Access review on IPC's own initiative**

KM\ML\DRAFT#04\MAY 23, 2019\MOTIONS\THIRD.18\An Act to Amend the Access to Information and Protection of Privacy Act\Clause 20.1 MEM/OC/23 MAI 2019/ÉB. 04

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That Bill 29 be amended by adding the  
following after clause 20:**

20.1. Section 28 is amended by adding the following  
after subsection (2):

Review on own  
initiative

(3) The Information and Privacy Commissioner  
may initiate a review relating to access to a record  
without a formal request for a review being received  
from an applicant or a third party.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que le projet de loi 29 soit  
modifié par insertion, après l'article 20, de ce qui  
suit :**

20.1. L'article 28 est modifié par insertion, après le  
paragraphe (2), de ce qui suit :

(3) Le commissaire à l'information et à la  
protection de la vie privée peut initier la révision  
concernant l'accès à un document sans qu'une  
demande formelle de révision n'ait été présentée par  
un requérant ou un tiers.

Révision de  
sa propre  
initiative

**MOTION 10(b): Notifying public body of IPC own-initiative review**

KM\ML\DRAFT#01\MAY 23, 2019\MOTIONS\THIRD.17\Clause 21.1 - notifying public bodies OC/23 MAI 2019/ÉB.  
01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That Bill 29 be amended by adding the  
following after clause 21:**

21.1. Section 30 is renumbered as subsection 30(1) and  
the following is added after that renumbered  
subsection:

Notifying  
public body of  
review on own  
initiative

(2) On initiating a review under subsection 28(3),  
the Information and Privacy Commissioner shall notify  
the head of the public body concerned.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que le projet de loi 29 soit  
modifié par insertion, après l'article 21, de ce qui  
suit :**

21.1. L'article 30 est renuméroté et devient le  
paragraphe 30(1) et la même loi est modifiée par  
insertion, après le paragraphe renuméroté, de ce qui  
suit :

(2) Lorsqu'il procède à une révision en vertu du  
paragraphe 28(3), le commissaire à l'information et à  
la protection de la vie privée avise le responsable de  
l'organisme public concerné.

Avis à  
l'organisme  
public lors  
d'une révision  
de sa propre  
initiative

MOTION 11(a): IPC's deadline for review - "60 business days" to "90 business days"

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That clause 22 of Bill 29 be amended by striking out "within 60 business days" and substituting "within 90 business days".**

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que l'article 22 du projet de loi 29 soit modifié par suppression de «dans les 60 jours ouvrables» et par substitution de «dans les 90 jours ouvrables».**

MOTION 11(b): IPC's deadline for review - "60 business days" to "90 business days"

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That clause 29 of Bill 29 be amended by striking out "within 60 business days" and substituting "within 90 business days".**

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que l'article 29 du projet de loi 29 soit modifié par suppression de «dans les 60 jours ouvrables» et par substitution de «dans les 90 jours ouvrables».**



MOTION 12 - IPC's order-making power (Part I: Access)

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That Bill 29 be amended by deleting clause 23  
and substituting the following:**

23. Sections 35, 36, and 37 are repealed and the  
following is substituted:

Commissioner's Written Reports and Orders

Concurrence  
by Information  
and Privacy  
Commissioner

35. (1) On completing a review, if the Information  
and Privacy Commissioner agrees with a decision, act  
or failure to act of the head of a public body, the  
Information and Privacy Commissioner shall

- (a) prepare a written report with respect to  
the matter, setting out the  
Commissioner's reasons for agreeing  
with the decision, act or failure to act;
- (b) by order, confirm the decision of the  
head; and
- (c) provide a copy of the report referred to in  
paragraph (a) and the order referred to in  
paragraph (b) to the person who asked  
for the review, the head of the public  
body concerned and any other person  
given a copy of the request for a review  
under section 30.

Disagreement  
by Information  
and Privacy  
Commissioner:  
access to a  
record

(2) On completing a review, if the Information  
and Privacy Commissioner does not agree with a  
decision by the head of a public body to give or to  
refuse to give access to all or part of a record, the  
Information and Privacy Commissioner shall

- (a) prepare a written report with respect to  
the matter, setting out the  
Commissioner's reasons for disagreeing  
with the decision of the public body to  
give or to refuse to give access to all or  
part of a record;
- (b) by order, require the head to provide the  
applicant access to all or part of a record;  
and

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que le projet de loi 29 soit modifié  
par suppression de l'article 23 et par substitution  
de ce qui suit :**

23. Les articles 35, 36 et 37 sont abrogés et remplacés  
par ce qui suit :

Rapports écrits et ordonnances du commissaire

35. (1) Une fois la révision terminée, s'il est d'accord  
avec la décision, l'action ou l'omission du responsable  
de l'organisme public, le commissaire à l'information  
et à la protection de la vie privée procède comme suit :

- a) il rédige un rapport à ce sujet énonçant  
les motifs pour lesquels il est d'accord  
avec la décision, l'action ou l'omission;
- b) par ordonnance, il confirme la décision  
du responsable;
- c) il remet une copie du rapport visé à  
l'alinéa a) et de l'ordonnance visée à  
l'alinéa b) à la personne qui a exercé le  
recours en révision, au responsable de  
l'organisme public concerné et à toute  
autre personne qui a reçu une copie de la  
demande en révision en vertu de  
l'article 30.

Motifs  
concurrents du  
commissaire à  
l'information  
et à la  
protection de  
la vie privée

(2) Une fois la révision terminée, s'il est en  
désaccord avec la décision, l'action ou l'omission du  
responsable de l'organisme public de donner ou de  
refuser de donner communication partielle ou totale  
d'un document, le commissaire à l'information et à la  
protection de la vie privée procède comme suit :

- a) il rédige un rapport à ce sujet énonçant  
les motifs de son désaccord avec la  
décision de l'organisme public de donner  
ou de refuser de donner communication  
partielle ou totale d'un document;
- b) par ordonnance, il exige du responsable  
qu'il donne au requérant communication  
partielle ou totale d'un document;

Désaccord du  
commissaire à  
l'information  
et à la  
protection de  
la vie privée :  
communicatio  
n  
d'un document



- (c) provide a copy of the report referred to in paragraph (a) and the order referred to in paragraph (b) to the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for a review under section 30.

- c) il remet une copie du rapport visé à l'alinéa a) et de l'ordonnance visée à l'alinéa b) à la personne qui a exercé le recours en révision, au responsable de l'organisme public concerné et à toute autre personne qui a reçu une copie de la demande en révision en vertu de l'article 30.

Disagreement by Information and Privacy Commissioner: review of any other decision, act or failure to act

(3) On completing a review, if the Information and Privacy Commissioner does not agree with a decision, act or failure to act of the head of a public body, other than a decision referred to in subsection (2), the Information and Privacy Commissioner shall

- (a) prepare a written report with respect to the matter, setting out the Commissioner's reasons for disagreeing with the decision, act or failure to act;
- (b) by order, do one or more of the following:
  - (i) reduce, deny or authorize an extension of a time limit under section 11 or 11.1,
  - (ii) reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met,
  - (iii) specify how personal information is to be corrected,
  - (iv) require a public body to stop collecting, using or disclosing personal information in contravention of Part 2 of this Act,
  - (v) require the head of a public body to destroy personal information collected in contravention of this Act, and
- (c) shall provide a copy of the report referred to in paragraph (a) and the order referred to in paragraph (b) to the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for a review under section 30.

(3) Une fois la révision terminée, s'il est en désaccord avec la décision, l'action ou l'omission du responsable de l'organisme public, autre que la décision visée au paragraphe (2), le commissaire à l'information et à la protection de la vie privée procède comme suit :

- a) il rédige un rapport à ce sujet énonçant les motifs de son désaccord avec la décision, l'action ou l'omission;
- b) par ordonnance, il prend une ou plusieurs mesures suivantes :
  - (i) réduire, refuser ou autoriser la prorogation du délai en vertu de l'article 11 ou 11.1,
  - (ii) réduire les droits ou ordonner un remboursement, dans les circonstances appropriées, notamment si le délai n'est pas observé,
  - (iii) spécifier la manière dont les renseignements personnels doivent être corrigés,
  - (iv) exiger de l'organisme public qu'il cesse de recueillir, d'utiliser ou de divulguer des renseignements personnels en violation de la partie 2 de la présente loi,
  - (v) exiger du responsable de l'organisme public qu'il détruise les renseignements personnels recueillis en violation à la présente loi;
- c) il remet une copie du rapport visé à l'alinéa a) et de l'ordonnance visée à l'alinéa b) à la personne qui a exercé le recours en révision, au responsable de l'organisme public concerné et à toute autre personne qui a reçu une copie de la demande en révision en vertu de l'article 30.

Désaccord du commissaire à l'information et à la protection de la vie privée : révision de toute autre décision, action ou omission

Notice of appeal rights

(4) A report of the Information and Privacy Commissioner referred to in paragraph (1)(a) must include a statement setting out the appeal rights of an

(4) Le commissaire à l'information et à la protection de la vie privée inclut, dans le rapport visé à l'alinéa (1)a), une déclaration faisant état du droit

Avis des droits d'appel

	applicant and a third party under subsection 37(1).	d'appel d'un requérant ou d'un tiers prévu au paragraphe 37(1).	
Terms and conditions	(5) The Information and Privacy Commissioner may specify any terms or conditions in an order made under this section.	(5) Le commissaire à l'information et à la protection de la vie privée peut préciser toutes conditions dans une ordonnance rendue en vertu du présent article.	Conditions
Enforcement of orders	(6) An order of the Information and Privacy Commissioner may be made an order of the Supreme Court by filing a certified copy of it with the Clerk of the Supreme Court, and on filing, that order is enforceable in the same manner as an order of the Court.	(6) Les ordonnances du commissaire à l'information et à la protection de la vie privée peuvent être homologuées par la Cour suprême, sur dépôt d'une copie certifiée conforme au greffe de la Cour; leur exécution s'effectue dès lors selon les mêmes modalités que les ordonnances de la Cour.	Homologation des ordonnances
D u t y t o comply with order	36. Subject to subsection 37(3), within 20 business days after receiving the written report and order of the Information and Privacy Commissioner under subsection 35(2) or (3), the head of the public body concerned shall comply with the order.	36. Sous réserve du paragraphe 37(3), dans les 20 jours ouvrables qui suivent la réception du rapport écrit et de l'ordonnance du commissaire à l'information et à la protection de la vie privée prévus au paragraphe 35(2) ou (3), le responsable de l'organisme public concerné se conforme à l'ordonnance.	Obligation de se conformer à l'ordonnance
<div> <div>Appeal to Supreme Court</div> <div>Appel à la Cour suprême</div> </div>			
Appeal of decision: applicant or third party	37. (1) Where the Information and Privacy Commissioner agrees under subsection 35(1) with a decision, act or failure to act of the head of a public body, an applicant or a third party given a copy of the request for review may appeal the Information and Privacy Commissioner's order by filing a notice of appeal with the Supreme Court and serving the notice on the head of the public body within 20 business days after the day the appellant receives the copy of the report and order of the Information and Privacy Commissioner.	37. (1) Dans le cas où le commissaire à l'information et à la protection de la vie privée est d'accord avec la décision, l'action ou l'omission du responsable de l'organisme public concerné en application du paragraphe 35(1), le requérant ou un tiers qui a reçu copie de la demande en révision peut interjeter appel de l'ordonnance du commissaire à l'information et à la protection de la vie privée en déposant un avis d'appel auprès de la Cour suprême et en signifiant une copie de l'avis d'appel au responsable de l'organisme public dans les 20 jours ouvrables qui suivent la réception de la copie du rapport et de l'ordonnance en cause par le requérant.	Appel de la décision : requérant ou tiers
Appeal of decision: head of a public body	(2) Where the Information and Privacy Commissioner does not agree under subsection 35(2) or (3) with a decision, act or failure to act of the head of a public body, the head of a public body may appeal the Information and Privacy Commissioner's order by filing a notice of appeal with the Supreme Court and serving the notice on the person who asked for the review and any other person given a copy of the request for a review under section 30, within 20 business days after the day the public body receives the copy of the report and order of the Information and Privacy Commissioner.	(2) Dans le cas où le commissaire à l'information et à la protection de la vie privée est en désaccord avec la décision, l'action ou l'omission du responsable de l'organisme public en application du paragraphe 35(2) ou (3), le responsable de l'organisme public peut interjeter appel de l'ordonnance du commissaire à l'information et à la protection de la vie privée en déposant un avis d'appel auprès de la Cour suprême et en signifiant l'avis d'appel à la personne qui a exercé le recours en révision et à toute autre personne qui a reçu une copie de la demande en révision en vertu de l'article 30, dans les 20 jours ouvrables qui suivent la réception du rapport et de l'ordonnance en cause par l'organisme public.	Appel de la décision : responsable de l'organisme public

Order stayed  
until court  
application

(3) If an appeal to the Supreme Court is made before the end of the 20 business day period referred to in section 36, the order of the Information and Commissioner is stayed until the application is dealt with by the court.

(3) Si appel est interjeté auprès de la Cour suprême avant la fin du délai de 20 jours ouvrables prévu à l'article 36, l'ordonnance du commissaire à l'information et à la protection de la vie privée est suspendue jusqu'au prononcé de la décision sur la demande par la cour.

Suspension de  
l'ordonnance

Parties to  
appeal

(4) An applicant or a third party described in subsection (1) who has been given notice of an appeal under this section may appear as a party to the appeal.

(4) Peut comparaître à titre de partie à l'appel le requérant ou le tiers visé au paragraphe (1) qui a reçu l'avis d'appel prévu au présent article.

Parties à  
l'appel

MOTION 12(a) - IPC's order-making power (Part I: Access) - incidental

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That clause 24 of Bill 29 be deleted.**

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que l'article 24 du projet de loi 29  
soit supprimé.**

**MOTION 13: Privacy Impact Assessments**

KM\ML\DRAFT#03\FEBRUARY 28, 2019\MOTIONS\THIRD.17\Clause 25.1 SP/MEM/OC/8 MARS 2019/ÉB. 03

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That Bill 29 be amended by adding the  
following after clause 25:**

25.1. The following is added after section 42:

Definition:  
"privacy  
impact  
assessment"

42.1. (1) In this section, "privacy impact assessment" means an assessment that is conducted by a public body to determine if a current or proposed enactment, system, project, program or service, including a common or integrated program or service, meets or will meet the requirements of this Part.

Privacy  
impact  
assessment

(2) Subject to subsection (3), a public body shall, during the development of a proposed enactment, system, project, program or service that involves the collection, use or disclosure of personal information, prepare and submit a privacy impact assessment to the head of the public body for review and comment.

Common or  
integrated  
program or  
service

(3) The head of a public body, with respect to a common or integrated program or service, shall, during the development of the proposed program or service, prepare and submit a privacy impact assessment to the Information and Privacy Commissioner for review and comment.

Notification of  
a common or  
integrated  
program or  
service

(4) The head of a public body must notify the Information and Privacy Commissioner of a common or integrated program or service at an early stage of developing the program or service.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que le projet de loi 29 soit modifié  
par insertion, après l'article 25, de ce qui suit :**

25.1. La même loi est modifiée par insertion, après l'article 42, de ce qui suit :

42.1. (1) Au présent article, «évaluation des facteurs relatifs à la vie privée» s'entend d'une évaluation effectuée par un organisme public pour établir si un texte, projet, programme ou service actuel ou proposé, y compris un programme ou service commun ou intégré, satisfait ou satisfera aux exigences de la présente partie.

Définition :  
«évaluation  
des  
f a c t e u r s  
relatifs  
à la vie privée»

(2) Sous réserve du paragraphe (3), un organisme public prépare, lors de l'élaboration d'un texte, système, projet, programme ou service proposé relatif à la collecte, l'usage ou la divulgation de renseignements personnels, et présente une évaluation des facteurs relatifs à la vie privée afférente au responsable de l'organisme public pour examen et commentaire.

Évaluation des  
f a c t e u r s  
relatifs  
à la vie privée  
obligatoire

(3) En ce qui concerne un programme ou service commun ou intégré, le responsable d'un organisme public prépare, lors de l'élaboration d'un programme ou service proposé, une évaluation des facteurs relatifs à la vie privée et la présente au commissaire à l'information et à la protection de la vie privée pour examen et commentaire.

Programme ou  
service  
commun ou  
intégré

(4) Le responsable d'un organisme public notifie au commissaire à l'information et à la protection de la vie privée tout programme ou service commun ou intégré dès les premières étapes de l'élaboration.

Notification

**MOTION 14: Delete "adult interdependent partner"**

KM\ML\DRAFT#01\JANUARY 15, 2019\MOTIONS\THIRD.17\Clause 26 OC/MEM/22 JANVIER 2019/ÉB. 01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND THE PROTECTION OF  
PRIVACY ACT**

**That clause 26 of Bill 29 be amended in  
proposed paragraph 48(q.4) by striking out", adult  
interdependent partner".**

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 26 du projet de loi 29  
soit modifié par suppression de « , partenaire adulte  
interdépendant » dans l'alinéa 48q.4) proposé.**

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That clause 28 of Bill 29 be amended in proposed subclause 49.1(1.1) by adding "or correction of personal information" after "relating to a privacy breach".**

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que l'article 28 du projet de loi 29 soit modifié par insertion de «ou une correction de renseignements personnels», au paragraphe 49.1(1.1), après «relative à une atteinte à la vie privée».**



**MOTION 16: IPC's order-making power (Part II: Privacy)**

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That Bill 29 be amended by deleting clause 30  
and substituting the following:**

30. Sections 49.5 and 49.6 are repealed and the  
following is substituted:

Information  
and Privacy  
Commissioner  
to report

49.5. On completing a review, the Information and  
Privacy Commissioner shall

- (a) prepare a written report with respect to  
the matter, setting out the Information  
and Privacy Commissioner's reasons for  
agreeing or disagreeing with the decision  
of the public body with respect to the  
collection, use or disclosure of the  
individual's personal information and the  
reasons for the recommendations;
- (b) make an order described in  
subsection 35(2); and
- (c) provide a copy of the report referred to in  
paragraph (a) and the order referred to in  
paragraph (b) to the individual who asked  
for the review and the head of the public  
body concerned.

Decision of  
head

49.6. Within 40 business days after receiving the  
report and any order of the Information and Privacy  
Commissioner under section 49.5, the head of the  
public body concerned shall comply with any order of  
the Information and Privacy Commissioner.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 30 du projet de loi 29  
soit supprimé et remplacé par ce qui suit :**

30. Les articles 49.5 et 49.6 sont abrogés et remplacés  
par ce qui suit :

49.5. Une fois la révision terminée, le commissaire à  
l'information et à la protection de la vie privée procède  
comme suit :

Rapport du  
commissaire à  
l'information  
et à la  
protection de  
la vie privée

- a) il rédige un rapport à ce sujet, contenant  
les motifs de son accord ou de son  
désaccord avec la décision de  
l'organisme public au sujet de la collecte,  
de l'utilisation ou de la communication  
des renseignements personnels de  
l'individu ainsi que les motifs de ses  
recommandations;
- b) il rend une ordonnance prévue au  
paragraphe 35(2);
- c) il remet une copie du rapport visé à  
l'alinéa a) et de l'ordonnance visée à  
l'alinéa b) à l'individu qui a exercé le  
recours en révision ainsi qu'au  
responsable de l'organisme public  
concerné.

49.6. Dans les 40 jours ouvrables qui suivent la  
réception du rapport et de toute ordonnance du  
commissaire à l'information et à la protection de la vie  
privée en application de l'article 49.5, le responsable  
de l'organisme public concerné se conforme à  
l'ordonnance.

Décision du  
responsable



MOTION 17 - Data breach notification

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That Bill 29 be amended by deleting clause 31  
and substituting the following:**

31. The following is added after section 49.6:

DIVISION E - DATA BREACH NOTIFICATION

Definition:  
"harm"

49.7. In this Division, "harm" includes bodily harm, humiliation, damage to reputation, damage to a relationship, loss of an employment, business or professional opportunity, a negative effect on a credit record, damage to or loss of property, financial loss and identity theft.

Breach of  
privacy

49.8. For the purposes of this Division, a breach of privacy occurs with respect to personal information if

- (a) the information is accessed and the access is not authorized under this Act;
- (b) the information is disclosed and the disclosure is not authorized under this Act; or
- (c) the information is lost and the loss may result in the information being accessed or disclosed without authority under this Act.

Public body to  
report to  
Information  
and  
Privacy  
Commissioner

49.9. (1) The head of a public body that knows or has reason to believe that a breach of privacy has occurred with respect to personal information under the control of the public body shall report the breach of privacy to the Information and Privacy Commissioner in accordance with this section if the breach is material.

Material breach  
of privacy:  
factors

(2) The factors that are relevant in determining whether a breach of privacy with respect to personal

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que l'article 31 du projet de loi 29  
soit supprimé et remplacé par ce qui suit :**

31. La présente loi est modifiée par insertion, après l'article 49.6, de ce qui suit :

SECTION E - NOTIFICATION DES ATTEINTES  
À LA PROTECTION DES DONNÉES

49.7. Dans la présente section, «préjudice» s'entend notamment de la lésion corporelle, de l'humiliation, du dommage à la réputation, du dommage aux relations, de la perte d'emploi, d'occasions d'affaires ou d'activités professionnelles, de l'effet négatif sur le dossier de crédit, du dommage aux biens ou de leur perte, de la perte financière et du vol d'identité.

Définition :  
«préjudice»

49.8. Pour l'application de la présente section, il y a atteinte à la vie privée à l'égard de renseignements personnels dans l'un ou l'autre des cas suivants :

- a) il y a accès aux renseignements alors que la présente loi n'autorise pas l'accès;
- b) les renseignements sont divulgués alors que la présente loi n'autorise pas la divulgation;
- c) les renseignements sont perdus et la perte peut occasionner l'accès à ceux-ci ou leur divulgation sans autorisation prévue par la présente loi.

Atteinte à la  
vie privée

49.9. (1) Le responsable d'un organisme public qui sait ou a des motifs de croire qu'il y a eu atteinte à la vie privée à l'égard de renseignements personnels relevant de l'organisme public en fait rapport au commissaire à l'information et à la protection de la vie privée conformément au présent article, si l'atteinte est importante.

Rapport de  
l'organisme  
public au  
commissaire à  
l'information  
et à la  
protection de  
la  
vie privée

(2) Les facteurs pertinents servant à établir si une atteinte à la vie privée à l'égard de renseignements

Atteinte  
importante à la  
vie privée :

	information under the control of a public body is material include	personnels qui relève d'un organisme public est importante sont, notamment :	facteurs
	<ul style="list-style-type: none"> <li>(a) the sensitivity of the personal information;</li> <li>(b) the number of individuals whose personal information is involved;</li> <li>(c) the likelihood of harm to the individuals whose personal information is involved; and</li> <li>(d) an assessment by the public body whether the cause of the breach is a systemic problem.</li> </ul>	<ul style="list-style-type: none"> <li>a) la nature délicate des renseignements personnels;</li> <li>b) le nombre d'individus dont les renseignements personnels sont touchés;</li> <li>c) la probabilité qu'un préjudice soit causé aux individus dont les renseignements personnels sont touchés;</li> <li>d) l'évaluation de l'organisme public à savoir si la cause de l'atteinte est un problème systémique.</li> </ul>	
Time of report	(3) The report required by subsection (1) must be made as soon as reasonably possible after the head of the public body knows or has reason to believe that the breach of privacy occurred and determines that the breach is material.	(3) Le rapport qu'exige le paragraphe (1) est fait dès qu'il est raisonnablement possible de le faire une fois que le responsable de l'organisme public sait ou a des motifs de croire qu'il y a eu atteinte à la vie privée et qu'il établit que celle-ci est importante.	Délai de remise du rapport
Content of report	(4) The report required by subsection (1) must describe the steps taken by the head of the public body to comply with sections 49.10 and 49.11 and must contain such other information as may be prescribed.	(4) Le rapport qu'exige le paragraphe (1) décrit les mesures prises par le responsable de l'organisme public pour se conformer aux articles 49.10 et 49.11, et contient les autres renseignements réglementaires.	Contenu du rapport
Public body to notify individual	49.10. (1) The head of a public body that knows or has reason to believe that a breach of privacy has occurred with respect to an individual's personal information under the public body's control shall notify the individual of the breach of privacy in accordance with this section, if it is reasonable in the circumstances to believe that the breach creates a real risk of significant harm to the individual.	49.10. (1) Le responsable d'un organisme public qui sait ou a des motifs de croire qu'il y a eu atteinte à la vie privée à l'égard des renseignements personnels d'un individu relevant de l'organisme public en avise l'individu conformément au présent article, s'il est raisonnable de croire, dans les circonstances, que l'atteinte à la vie privée présente un risque réel de préjudice grave à son endroit.	Obligation de l'organisme public d'aviser l'individu
Real risk of significant harm: factors	<p>(2) The factors that are relevant in determining whether a breach of privacy with respect to an individual's personal information creates a real risk of significant harm to the individual include</p> <ul style="list-style-type: none"> <li>(a) the sensitivity of the personal information; and</li> <li>(b) the probability that the personal information has been, is being or will be misused.</li> </ul>	<p>(2) Les facteurs pertinents pour établir si une atteinte à la vie privée à l'égard des renseignements personnels d'un individu présente un risque réel de préjudice grave à son endroit sont, notamment :</p> <ul style="list-style-type: none"> <li>a) la nature délicate des renseignements personnels;</li> <li>b) la probabilité que les renseignements personnels ont fait, font ou feront l'objet d'une utilisation abusive.</li> </ul>	Risque réel de préjudice grave : facteurs
Time of notice	(3) The notice required by subsection (1) must be given as soon as reasonably possible after the head of the public body knows or has reason to believe that the breach of privacy occurred and determines that the breach creates a real risk of significant harm to the individual.	(3) L'avis qu'exige le paragraphe (1) est donné dès qu'il est raisonnablement possible de le faire une fois que le responsable de l'organisme public sait ou a des motifs de croire qu'il y a eu atteinte à la vie privée et qu'il établit que cette atteinte présente un risque réel de préjudice grave à l'endroit de l'individu.	Délai de remise de l'avis
Content of notice	<p>(4) The notice required by subsection (1) must contain</p> <ul style="list-style-type: none"> <li>(a) sufficient information to allow the individual to</li> </ul>	<p>(4) L'avis qu'exige le paragraphe (1) contient les éléments suivants :</p> <ul style="list-style-type: none"> <li>a) suffisamment d'information pour permettre à l'individu :</li> </ul>	Contenu de l'avis

	<ul style="list-style-type: none"> <li>(i) understand the significance to him or her of the breach of privacy, and</li> <li>(ii) take steps, if any are possible, to reduce the risk of, or mitigate, any harm to him or her that could result from the breach of privacy;</li> </ul> <p>(b) information describing what steps the head of the public body has taken to reduce the risk of, or mitigate, any harm to the individual that could result from the breach of privacy; and</p> <p>(c) such other information as may be prescribed.</p>	<ul style="list-style-type: none"> <li>(i) de comprendre l'importance, pour lui, de l'atteinte à la vie privée,</li> <li>(ii) de prendre, si cela est possible, des mesures pour réduire le risque de préjudice qu'il pourrait subir du fait de l'atteinte à la vie privée, ou pour atténuer un tel préjudice;</li> </ul> <p>b) des renseignements décrivant les mesures qu'a prises le responsable de l'organisme public pour réduire le risque de préjudice que l'individu pourrait subir du fait de l'atteinte à la vie privée, ou pour atténuer un tel préjudice;</p> <p>c) tout autre renseignement réglementaire.</p>	
Public body to notify others	<p>49.11. The head of a public body that notifies an individual of a breach of privacy under section 49.9 shall, at the same time, also notify a federal, provincial, territorial or Indigenous government institution, a part of that government institution or another public body of the breach of privacy if</p> <ul style="list-style-type: none"> <li>(a) the government institution, part of the government institution or other public body may be able to reduce the risk of, or mitigate, any harm to the individual that could result from the breach of privacy; or</li> <li>(b) a prescribed condition is satisfied.</li> </ul>	<p>49.11. Le responsable d'un organisme public qui avise un individu d'une atteinte à la vie privée en application de l'article 49.9 en avise aussi en même temps toute institution gouvernementale fédérale, provinciale, territoriale ou autochtone, ou subdivision d'une telle institution, ou tout autre organisme public si, selon le cas :</p> <ul style="list-style-type: none"> <li>a) l'institution ou subdivision gouvernementale ou l'autre organisme public peut être en mesure de réduire le risque de préjudice pour l'individu qui pourrait résulter de l'atteinte à la vie privée, ou d'atténuer un tel préjudice;</li> <li>b) une condition réglementaire est remplie.</li> </ul>	Obligation de l'organisme public d'aviser des tiers
Recommendation from Information and Privacy Commissioner to public body	<p>49.12. If the Information and Privacy Commissioner receives a report under section 49.9 about a breach of privacy with respect to personal information under the control of a public body and determines that the breach of privacy creates a real risk of significant harm to one or more individuals to whom the information relates, the Information and Privacy Commissioner may recommend the head of the public body to</p> <ul style="list-style-type: none"> <li>(a) take steps specified by the Information and Privacy Commissioner relating to notifying those individuals about the breach of privacy, if the Information and Privacy Commissioner is of the opinion that the steps taken by the head of the public body to comply with section 49.9 were not sufficient;</li> <li>(b) take steps specified by the Information and Privacy Commissioner to limit the consequences of the breach of privacy; and</li> <li>(c) take steps specified by the Information and Privacy Commissioner to prevent the occurrence of further breaches of privacy</li> </ul>	<p>49.12. Si le commissaire à l'information et à la protection de la vie privée reçoit un rapport visé à l'article 49.9 au sujet d'une atteinte à la vie privée à l'égard de renseignements personnels relevant d'un organisme public et qu'il décide que l'atteinte à la vie privée présente un risque réel de préjudice grave à l'endroit d'un ou de plusieurs individus auxquels se rapportent les renseignements, il peut recommander au responsable de l'organisme public de faire ce qui suit :</p> <ul style="list-style-type: none"> <li>a) prendre les mesures qu'il précise relativement à l'avis à donner aux individus au sujet de l'atteinte à la vie privée, s'il est d'avis que les mesures qu'a prises le responsable de l'organisme public pour se conformer à l'article 49.9 ne sont pas suffisantes;</li> <li>b) prendre les mesures qu'il précise pour limiter les conséquences de l'atteinte à la vie privée;</li> <li>c) prendre les mesures qu'il précise pour empêcher que ne se reproduise une atteinte à la vie privée à l'égard de renseignements personnels relevant de</li> </ul>	Recommandation du commissaire à l'information et à la protection de la vie privée

with respect to personal information under the public body's control, including, without limitation, implementing or increasing security safeguards within the public body.

l'organisme public, notamment appliquer ou renforcer les mesures de sécurité au sein de l'organisme public.

Decision of head	49.13. Within 30 days after receiving a recommendation under section 49.12, the head of the public body concerned shall <ul style="list-style-type: none"> <li>(a) make a decision to follow the recommendation of the Information and Privacy Commissioner or make any other decision the head considers appropriate; and</li> <li>(b) give written notice of the decision to the Information and Privacy Commissioner and any individual notified under section 49.10.</li> </ul>	49.13. Dans les 30 jours suivant la réception d'une recommandation visée à l'article 49.12, le responsable de l'organisme public concerné: <ul style="list-style-type: none"> <li>a) prend la décision de suivre la recommandation du commissaire à l'information et à la protection de la vie privée ou prend toute autre décision qu'il estime indiquée;</li> <li>b) donne un avis écrit de sa décision au commissaire à l'information et à la protection de la vie privée et à l'individu qui a été avisé en application de l'article 49.10.</li> </ul>	Décision du responsable
Report on implementation of recommendations	49.14. The head of a public body shall, within 120 business days of the notice given under paragraph 49.13(b), provide to the Information and Privacy Commissioner a report on the status of its implementation of recommendations accepted under section 49.13.	49.14. Le responsable d'un organisme public fournit au commissaire à l'information et à la protection de la vie privée, dans les 120 jours ouvrables de la transmission de l'avis en vertu de l'alinéa 49.13b), un rapport de l'état de la mise en oeuvre des recommandations acceptées en vertu de l'article 49.13.	Rapport sur la mise en oeuvre des recommandations
Disclosure by Information and Privacy Commissioner	49.15. If the Information and Privacy Commissioner receives a report under section 49.9 about a breach of privacy with respect to personal information under the control of a public body and determines that the breach of privacy creates a real risk of significant harm to one or more individuals to whom the information relates, the Information and Privacy Commissioner may, notwithstanding section 56, <ul style="list-style-type: none"> <li>(a) disclose the breach of privacy to the individuals in the manner that the Information and Privacy Commissioner considers appropriate, if the Information and Privacy Commissioner has given the public body a recommendation under paragraph 49.12(a) and the public body has not taken the steps specified in the recommendation within the times specified in the recommendation; and</li> <li>(b) disclose the breach of privacy to the public in the manner that the Information and Privacy Commissioner considers appropriate, if the Information and Privacy Commissioner is of the opinion that the disclosure is in the public interest.</li> </ul>	49.15. Si le commissaire à l'information et à la protection de la vie privée reçoit un rapport visé à l'article 49.9 au sujet d'une atteinte à la vie privée à l'égard de renseignements personnels relevant d'un organisme public et qu'il décide que l'atteinte à la vie privée présente un risque réel de préjudice grave à l'endroit d'un ou de plusieurs individus auxquels se rapportent les renseignements, il peut, malgré l'article 56 : <ul style="list-style-type: none"> <li>a) d'une part, divulguer l'atteinte à la vie privée aux individus de la manière qu'il estime appropriée, s'il a fait à l'organisme public une recommandation selon l'alinéa 49.12a) et que ce dernier n'a pas pris les mesures précisées dans la recommandation dans les délais qui y sont précisés;</li> <li>b) d'autre part, divulguer l'atteinte à la vie privée au public de la manière qu'il estime appropriée, s'il est d'avis que la divulgation est dans l'intérêt public.</li> </ul>	Divulgaration par le commissaire à l'information et à la protection de la vie privée

**MOTION 18: Public contact info for ATIPP Coordinators**

KM\ML\DRAFT#01\JANUARY 15, 2019\MOTIONS\THIRD.17\Clause 36 MEM/OC/22 JANVIER 2019/ÉB.01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND THE PROTECTION OF  
PRIVACY ACT**

**That clause 36 of Bill 29 be amended by adding  
the following after proposed subclause 68.1(2):**

Contact  
information for  
coordinator

(3) The head of a public body shall ensure that  
contact information for the coordinator designated  
under subsection (1) is made publicly available.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 36 du projet de loi 29  
soit modifié par insertion après le  
paragraphe 68.1(2) proposé, de ce qui suit :**

(3) Le responsable d'un organisme public  
s'assure que les coordonnées du coordonnateur  
désigné en application au paragraphe (1) sont  
disponibles au public.

Coordonnées  
du  
coordonnateur

MOTION

AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT

**That clause 37 of Bill 29 be amended by deleting proposed subclause 72(1) and substituting the following:**

Records  
available  
without  
request

72. (1) The head of a public body shall
- (a) establish categories of records that are in the custody or under the control of the public body, and that do not contain personal information, to be made available to the public without a request for access under this Act; and
  - (b) publish any categories of records established under paragraph (a).

MOTION

LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE

**Il est proposé que l'article 37 du projet de loi 29 soit modifié par suppression du paragraphe 72(1) proposé et par substitution de ce qui suit :**

Documents  
disponibles  
sans demande

72. (1) Le responsable d'un organisme public :
- a) d'une part, établit des catégories de documents qui relèvent de l'organisme public, et qui ne contiennent pas de renseignements personnels, qui doivent être disponibles au public sans qu'il soit nécessaire de présenter une demande d'accès en vertu de la présente loi;
  - b) d'autre part, publie toute catégorie de documents établie en application de l'alinéa a).

**MOTION 20: Regulation making authority re data breaches**

KM\ML\DRAFT#02\FEBRUARY 26, 2019\MOTIONS\THIRD.17\Clause 38 data breach MEM/OC/28 FÉVRIER/ÉB.  
02

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That clause 38 of Bill 29 be amended by**

**(a) striking out the period at the end of  
paragraph (b) and substituting ";  
and"; and**

**(b) adding the following after  
paragraph (b):**

**(c) by adding the following after  
paragraph (j):**

**(j.1) respecting the requirements in the event  
of a data breach under Division E of  
Part 2;**

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 38 du projet de loi 29  
soit modifié par :**

**a) suppression du point à la fin de  
l'alinéa b) et par substitution d'un  
point-virgule;**

**b) insertion, après l'alinéa b), de ce qui  
suit :**

**c) insertion, après l'alinéa j), de ce qui suit :**

**j.1) régir les exigences advenant une atteinte  
à la protection des données au titre de la  
section E de la partie 2;**

**MOTION 21: Timing of statutory review by Minister**

KM\ML\DRAFT#02\FEBRUARY 26, 2019\MOTIONS\THIRD.17\Clause 39 SP/OC/28 FÉVRIER 2019/ÉB. 01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That clause 39 of Bill 29 be amended by  
deleting proposed clause 74 and substituting the  
following:**

Review of Act 74. This Act must be reviewed by the Minister within  
18 months after the commencement of the Twentieth  
Legislative Assembly and within 18 months of every  
second Legislative Assembly thereafter.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 39 du projet de loi 29  
soit modifié par suppression de l'article 74 proposé  
et par substitution de ce qui suit :**

74. Le ministre révisé la présente loi dans les 18 mois  
qui suivent l'entrée en vigueur de la Vingtième  
Assemblée législative et dans les 18 mois de chaque  
deuxième Assemblée législative par la suite.

Révision de  
la loi



**MOTION 22: Table report on statutory review**

KM\ML\DRAFT#02\FEBRUARY 26, 2019\MOTIONS\THIRD.17\Clause 39 tabling of report SP/OC/28 FÉVRIER 2019/ÉB. 01

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That clause 39 of Bill 29 be amended by renumbering proposed clause 74 as subclause 74(1) and adding the following after that renumbered subclause:**

Report of  
review to be  
tabled

(2) The Minister shall table in the Legislative Assembly a report on the results of a review conducted under subsection (1) at the earliest opportunity.

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que l'article 39 du projet de loi 29 soit modifié par renumérotation de l'article 74 proposé, qui devient le paragraphe 74(1), et par adjonction, après ce paragraphe renuméroté, de ce qui suit :**

(2) Le ministre dépose à l'Assemblée législative, dans les meilleurs délais, un rapport des résultats de la révision effectuée en application du paragraphe (1).

Dépôt du  
rapport de la  
révision

**MOTION 23: Annual reporting by public bodies**

KM\ML\DRAFT#04\MAY 17, 2019\MOTIONS\THIRD.17\Clause 39.1 SP/MEM/OC/17 MAI 2019/ÉB. 04

**MOTION**

**AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF  
PRIVACY ACT**

**That Bill 29 be amended by adding the  
following after clause 39:**

39.1. The following is added after section 74:

Reporting by  
public bodies

75. (1) Every public body that is subject to this Act shall, within 60 business days after the end of the fiscal year, report the following to the Minister:

- (a) the number of requests made under this Act received by the public body in the fiscal year;
- (b) the time taken to process the requests;
- (c) the number of requests that were denied, and the exceptions that were relied on by the public body;
- (d) the amount of fees collected;
- (e) the justification relied on for any extension of time;
- (f) the number of privacy impact assessments the public body has conducted in the fiscal year.

Annual report  
by Minister

(2) The Minister shall table in the Legislative Assembly a report containing the information reported by every public body under subsection (1)

- (a) within 60 business days after receiving the reports under subsection (1); or
- (b) during the next sitting of the Legislative Assembly, if the Legislative Assembly is not sitting on the expiry of the period referred to in (a).

**MOTION**

**LOI MODIFIANT LA LOI SUR L'ACCÈS À  
L'INFORMATION ET LA PROTECTION  
DE LA VIE PRIVÉE**

**Il est proposé que le projet de loi 29 soit modifié  
par insertion, après l'article 39, de ce qui suit :**

39.1. La même loi est modifiée par insertion de ce qui suit après l'article 74 :

Rapport par les  
organismes  
publics

75. (1) Chaque organisme public qui est assujéti à la présente loi, dans les 60 jours après la fin de l'exercice, fait rapport au ministre de ce qui suit :

- a) le nombre de demandes présentées en vertu de la présente loi qu'a reçues l'organisme public au cours de l'exercice en cause;
- b) le délai de traitement des demandes;
- c) le nombre de demandes rejetées et d'exceptions sur lesquelles s'est fondées l'organisme public;
- d) le montant des droits perçus;
- e) le motif invoqué pour justifier toute prorogation de délai;
- f) le nombre d'évaluations des facteurs relatifs à la vie privée auxquelles l'organisme public a procédé au cours de l'exercice en cause.

Rapport annuel  
du ministre

(2) Le ministre dépose à l'Assemblée législative un rapport contenant les renseignements rapportés par chaque organisme public en application du paragraphe (1) dans l'un ou l'autre des délais suivants :

- a) dans les 60 jours ouvrables de la réception des rapports au titre du paragraphe (1);
- b) au cours de la prochaine séance de l'Assemblée législative si elle ne siège pas à l'expiration du délai visé à l'alinéa a).

## **APPENDIX 2**

### **SUBMISSIONS**

The Standing Committee received the attached written submissions:

.....

**NORTHWEST TERRITORIES LEGISLATIVE ASSEMBLY**

**STANDING COMMITTEE ON GOVERNMENT OPERATIONS**

**PUBLIC HEARINGS**

***Bill 29: An Act to amend the Access to Information and Protection of Privacy Act***

This Bill amends the *Access to Information and Protection of Privacy Act* to provide for the application of the Act to municipalities that are designated in regulations.

***Bill 31: Northwest Territories 9-1-1 Act***

This Bill creates directs the Minister of Municipal and Community Affairs to establish the NWT 9-1-1 service, a service for receiving and transferring emergency calls within the NWT

**PRESENTATION BY  
THE CITY OF YELLOWKNIFE**

**Thursday, January 24, 2019 - 7:00 P.M.**

**Committee Room "A" - Legislative Assembly Building**

**Yellowknife, Northwest Territories**

**Chair Kieron Testart  
Deputy Chair R.J. Simpson  
Kevin O'Reilly  
Daniel McNeely  
Michael Nadli  
Herb Nakimayak**

**ACKNOWLEDGE CHAIRPERSON AND COMMITTEE MEMBERS (AND ANY MEMBERS OF COUNCIL PRESENT)**

Good evening, Chairman and Committee Members.

On behalf of the City of Yellowknife, I want to thank you for the opportunity to appear before the Standing Committee today, it is a pleasure and an honour.

**PREAMBLE AND POSITIONING:**

I am pleased to represent the City of Yellowknife in sharing our perspective on the bills currently before Committee. This is the first opportunity that we have been invited to engage or seen the proposed legislative amendments to ATIPP and the draft bill for 9-1-1. In the spirit of partnership, we always appreciate being meaningfully engaged on issues that affect us, and encourage the GNWT to work with us sooner than later in the preparation of legislative proposals and legislation that impacts community governments. As direct stakeholders, we have a lot of value to add. My remarks will initially focus on the effects of the proposed amendments to the *Access to Information and Protection of Privacy Act*. I will then address the proposed legislation to establish a territorial-wide 9-1-1 service.

**1. BILL 29 – An Act to amend the *ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT***

Openness and transparency are the cornerstones of good government and discussion about the access to public records and protection of personal information are often at the forefront of public debate.

The City of Yellowknife supports and encourages practices, policies and legislation that provide the public with the appropriate tools to hold municipal governments accountable for their decisions. Governance and decision-making at the municipal level is more transparent than at other orders of government as defined in our governing legislation. When determining the framework for access to information and appropriately upholding privacy, the territorial government must give consideration to the size and capacity of municipal governments, as well as the cost relative to the benefits.

**(i) Current Status**

Although the territorial *Access to Information and Protection of Privacy Act* has not yet applied to the City or any other municipal government in the NWT, we are governed by federal access and privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA). In practice, we have developed systems and procedures in the interest of increased transparency and accountability, including providing broad access to information, and engaging and informing the public. In addition, we consider every request for information and privacy issue in accordance with PIPEDA and also the purpose and principles outlined in the current territorial privacy legislation.

**(ii) Openness and Transparency**

The proposed amendment to include municipalities under ATIPP builds on a tradition of openness in municipal government. Municipalities in the Northwest Territories have a long history of governing and making decisions at meetings that are open to the public. The federal and provincial governments have Executive Councils, which meet in private and have significant executive decision-making authority. Municipalities have the most open decision-making process of the three orders of government in Canada. Municipal councils are permitted to hold private meetings, but only in relation to very specific matters that require confidentiality.

As municipal officials, we recognize that the work of municipalities impacts the daily lives of citizens, so it's important to make information readily available to the public. Many of our municipalities are already doing an excellent job of providing access to municipal records, as

well as providing municipal information online. In recent years, websites have become more prevalent tools of open communication - less expensive to develop and easier to update. This has contributed to the growing amount of municipal information available on municipal websites; however, the workload and competing priorities in some municipal offices continues to be an obstacle to keeping information online current.

***(iii) Role of Information and Privacy Commissioner***

I'd like to address the proposed amendments regarding the role of the Information and Privacy Commissioner next. Amendments to the Act propose to update the general role of the Information and Privacy Commissioner and expand the ability of the Information and Privacy Commissioner from performing reviews and making recommendations based on a request from the public to initiating reviews related to a privacy breach without receipt of a formal complaint. It is the City's position that the duties of the Information and Privacy Commissioner should remain at the arm's length and investigative role until such time as the effect of the application of the Act to municipalities can be assessed, specifically whether the Information and Privacy Commissioner is faced with an increase in volume of complaints.

***(iv) Resources***

The amendments introduce many changes that affect municipal governance and administration. Imposing the Act on municipalities could represent a significant cost and administrative burden to municipal governments that already suffer from a lack of resources, including underfunding by the GNWT, as per the GNWT's own methodology.

Frankly, the City of Yellowknife, the largest municipal government in the territory thereby appearing to have the internal expertise needed for administration of the Act, is concerned about the capacity required to address the volume of access requests, especially in light of the proposed amendments to reduce timelines. Records management is an area that many municipalities have not had the capacity to comprehensively and proactively manage. While we are all working to enhance our capacity, support will be needed to enable a systematic approach to ensuring there is municipalities are able to respond to ATIPP requests. The Act will

require the City (section 68.1) to designate a coordinator to receive and process requests, coordinate responses, communicate with applicants and third parties, and track requests and outcomes. The designated staff person will have to make a determination as to what information can be released under the law and what information is protected. Furthermore, requests for information may involve third parties that have to be consulted. This can result in a process that is more time consuming, which must be balanced with other municipal pressures and priorities. We would suggest that fulsome analysis be undertaken by GNWT to identify the process flow differences between PIPEDA and ATIPP as they apply to municipalities to fully comprehend the impacts that we could be facing.

If the *Access to Information and Protection of Privacy Act* is amended to include municipalities, it is imperative that the territorial government provide appropriate financial, records management and training resources to municipalities.

## **2. BILL 31: NORTHWEST TERRITORIES 9-1-1 ACT**

The City of Yellowknife commends the territorial government for contemplating Bill 31. Implementation of a 9-1-1 system quite simply saves lives. A 9-1-1 system achieves this by eliminating any doubt or delay regarding the correct number to call in an emergency. As tourism increase the number of visitors to our city, it is becoming increasingly important to have a 9-1-1 system that is recognized by travelers worldwide to ensure that emergencies are reported in a timely manner to avoid adverse consequences.

### *(i) Current Status*

The City of Yellowknife currently operates a Dispatch Service that receives emergency calls for fire, ambulance and other emergency situations. The proposed Northwest Territories *9-1-1 Act* will bind the participation of the City of Yellowknife as a local authority. It is the City's position that the GNWT must undertake detailed consultation with the City of Yellowknife to ensure successful implementation of 9-1-1 services.



(ii) *Costs*

The City of Yellowknife has always expressed an interest in working with the GNWT specifically, Municipal and Community Affairs, towards implementing 9-1-1 services for our residents. However, having recognized that implementation of 9-1-1 service is a high priority, the costs associated with territory-wide coverage are significant and the City has concerns about any increased cost of living for our residents. It is the City's position that the GNWT must fund any costs incurred by the City of Yellowknife as a result of the transition to a 9-1-1 system such as incremental costs incurred as a result of any necessary improvements to the Yellowknife fire dispatch as a result of implementation of territorial wide 9-1-1 and telephone network costs that are not covered by 9-1-1 fees charged on monthly phone bills.

**CONCLUDING REMARKS:**

In the updated priorities of the 18<sup>th</sup> Legislative Assembly, the GNWT commits to building stronger relationships with community governments and stakeholders. By adopting the amendments proposed in Bill 29 and Bill 31, Members must ensure that the community governments which are most affected are consulted meaningfully and included throughout the process in accordance with this clearly stated priority.

Municipal governments have an open and transparent decision-making process, and the City has embraced modern practices and policy directions to build on that tradition. If including municipal governments in ATIPP is deemed necessary, the GNWT must take a staged approach with respect to implementation within municipalities that includes the provision of training and financial resources to effectively implement an ATIPP program prior to designating them as a public body under the Act

Thank you for this opportunity to meet with the Standing Committee on Government Operations today.

**From:** [SAO](#)  
**To:** [Jennifer Franki-Smith](#)  
**Subject:** Comments on Bill 29 – Amend Access to Information and Protection of Privacy Act (ATIPP).  
**Date:** January 18, 2019 9:54:12 AM  
**Attachments:** [image001.png](#)

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January 18, 2019

Greetings from the Hamlet of Tulita.

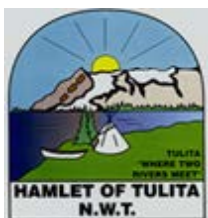
As part of the Regular Council Meeting, held on January 14<sup>th</sup>, Council for the Incorporated Hamlet of Tulita discussed the request for feedback and comments on Bill 29 – Amend Access to Information and Protection of Privacy Act (ATIPP). These notes summarize their comments:

Council has been advised that the records management for the Hamlet is most probably similar to other NWT communities in that there is not a standardized indexing system or centrally-maintained file system. Being able to access information is critical to the effective function of ATIPP. Council would like to see, before any such action is taken to require community governments to become compliant, that the GNWT (probably through MACA) provide training and assistance to the community governments in standardized records management.

As a side note: As Administration was research information for Council, it was apparent that those northern communities that are ready for ATIPP do NOT depend on paper file systems but, rather, digital filing systems. One possible option to consider would be for MACA to research (and acquire?) a digital solution that could be installed in the various communities which, in itself, would become the *defacto* standard records management system.

Kindest regards,

Larry Baran  
Interim SAO  
Hamlet of Tulita  
867-588-4351 (Office)  
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January 25, 2019

Standing Committee on Government Operations  
Legislative Assembly  
PO Box 1320  
Yellowknife, NT X1A 2L9

**Re: Public Review of Bill 29, An Act To Amend The Access to Information And Protection of Privacy Act**

Dear Standing Committee members,

Thank you for holding public hearings as part of your review of *Bill 29, An Act To Amend The Access to Information And Protection of Privacy Act*. These amendments to the legislation have been a very long time coming and are certainly necessary in the NWT. The current version of the bill is certainly an improvement on the existing legislation, but we believe there is more that can be improved in the legislation. As the first comprehensive amendments to this legislation to be undertaken since its initial introduction in the mid-1990s, it is important to get it right. There is an opportunity for the NWT to put in place strong access legislation that significantly modernizes our current practices.

1. **Municipalities:** Inclusion of municipalities under the Act is an important one that has been a long time coming. This implementation must be done properly, but also with expediency in the interest of establishing more open governments. Much of the current conversation has been filled by “what ifs” – what if there are too many requests, what if records capacity isn’t there – these are all systems that can evolve with time. The Act was originally brought into force in the mid-90s and, at the time, the Government of the Northwest Territories did not have any advanced records management system in place either.
2. **Specific Documents:** The amendments provide some additional clarity as to which documents are or are not covered by ATIPP, there should be more specific lists of documents included. Other jurisdictions (i.e. Canada or Newfoundland), have good examples of this. The plainer the language used and more specific the lists of documents are the easier it is for members of the public to make use of this information. This will also improve the quality of information requests and avoid situations where basic requests are not clear.
3. **Decision Making Authority for the Commissioner:** The current process for making ATIPP requests can be difficult for the public and onerous. Currently, when a Government Body refuses to release a record the applicant can appeal to the Commissioner for a review. However, these reviews are not binding on the Government Body and it is up to the applicant to then seek a judicial order. Considering the disparity in resources available to the government vs a private citizen or organization this is fundamentally unfair. Rather than give the Commissioner completely binding authority not subject to review, the system used in Newfoundland and Labrador again points to a better method. In that jurisdiction, the Commissioners orders are

binding on the Government Body, who is then able to seek judicial review to overturn the decision if they disagree.

Placing the onus for review onto the government creates a fairer and even playing field for applicants. It also solidifies the role of the Commissioner, but still provides an avenue for oversight. This important change would put the rights of the people and access to information first in the NWT.

#### **Areas of Legislation not addressed in Bill 29:**

4. **Proactive Disclosure:** The legislation fails to introduce the concept of proactive disclosure. The NWT has provided proactive disclosure for many years of certain government information (procurement, Ministerial travel expenses, etc.), but none of these disclosures are codified in legislation or regulation. By adding proactive disclosure as a core principal of the legislation and specifying information to be published, it will improve public transparency and ensure that this continues beyond the whim of a future government.
5. **Specific Organizations Included:** The inclusion of the Legislative Assembly and Executive Council/Minister's Offices. Records from both of these bodies are fundamental to good government and records from both should be easily accessible to the public. Rather than debate which records in a Minister's Office are under the control of a Department, the Offices should be explicitly covered.
6. **Salary Disclosure:** Best practice in many jurisdictions in Canada includes the disclosure of public salaries at a certain level. The appropriate level varies across Canada but is generally set to a higher salary figure and can include allowances for inflation, an appropriate starting figure might be \$120,000/year. Whenever such disclosures have been raised in the NWT, the Act has been used as an excuse to not do it. The Act should be amended to explicitly allow for this type of disclosure.
7. **Remuneration of the Commissioner:** The remuneration of offices of the Assembly continues to be opaque at best. The Act should provide transparency and public oversight of the Commissioner's position by including standard information on salary and benefits. Continuing to include a role with no information available both limits future applicants and prevents true transparency. This specific issue has been raised with regards to the Chief Electoral Officer and the newly created Ombud position. Unlike other jurisdictions, these positions do not have a clear salary target, nor are they provided any benefits including pension.
8. **Fees:** Access to information application fees should be completely eliminated following the contemporary example of other Canadian jurisdictions, including the Federal Government. These fees simply act as a barrier to access information. While fees for time spent may be

maintained for large or onerous access requests, there should be no application fees or fees for standard amounts of time required to complete access requests.

9. **Confidentiality of the Applicant:** Under the current Act, it could be assumed that the identity of the applicant would be confidential under the privacy provisions this is not explicitly stated. In many other jurisdictions this is an explicitly provision in the legislation - the applicant's name be held as confidential and only known to the Access Coordinator within the Public Body. This is a very important part of Access legislation, especially in a jurisdiction as small as the Northwest Territories.
10. **Annual Reporting:** Access requests vary widely across Departments and Government Bodies and each organization subject to the legislation should be required to report on ATIPP requests on an annual basis. This reporting should include number of requests of each type (access and privacy) along with other statistical information such as time to complete requests, pages disclosed, fees collected and justification for any time extensions sought.
11. **Availability of Completed Requests:** Like many jurisdictions in Canada, completed information requests should be posted online and available broadly. As the records have been screened for third part or personal information and are now considered 'public', there should be no barrier to this information being made available.
12. **Communication with Applicant/File Formats:** The legislation must allow for digital communication with applicants including making the original request. Additionally, the legislation should require that requests can be responded to digitally, and that where possible, the responsive documents must be provided in machine-readable formats. This would be consistent with other Canadian jurisdictions and would demonstrate a modern NWT.
13. **"One Window" Portal:** To improve the accessibility of the ATIPP process, especially with the extension to municipalities, the GNWT should implement an "one window" online portal system for ATIPP requests. The Federal Government has moved to an online portal for requests and several other jurisdictions around the world have made similar changes in recent years and considering the geographically disperse nature of the NWT this could dramatically improve ability for residents to access the process and eliminate any confusion over how to submit requests.

### **Privacy Matters**

14. **Mandatory Breach Notification:** In the event of a private information breach, there must be a requirement for mandatory breach notification. Individuals should be made aware of when their records are breached and made available. Follow up notification should include the plan to address the breach and any actions being taken to prevent the situation from occurring in the

future. Based on the large number of privacy breaches in the NWT it is important that our residents are notified individually.

15. **Data Sharing:** On the matter of data sharing between government organizations, while this will improve the ability for governments to develop programs and services there is also a downside. Members of the public should know what information the government is sharing between organizations and be fully aware of the consequences.

Regards,



David Wasylciw  
Founder



***SUBMISSIONS OF THE  
INFORMATION AND PRIVACY COMMISSIONER***

***BILL 29—AN ACT TO AMEND THE ACCESS TO  
INFORMATION AND PROTECTION OF PRIVACY ACT***

January 2019



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## INTRODUCTION

This submission offers my comments on Bill 29, which would amend the *Access to Information and Protection of Privacy Act* (Act).

Many of the proposed amendments are very positive and I strongly support them. Some of the amendments are, however, less constructive and my concerns about them are expressed below, arranged by theme and topic.

Similarly, I am concerned that the amendments would not respond to some of the issues raised in my October 2015 submission in response to the government's consultation on possible amendments to the Act.<sup>1</sup>

Accordingly, while I commend the government for its commitment to improving the Act through Bill 29, I urge the government to introduce amendments to Bill 29 in light of this submission.

This document first sets out my submissions on Bill 29, while the second part discusses amendments that are not found in Bill 29 but which, in my view, are vital to ensuring that the amendments are as current as they can be to meet the needs of today's business realities.

I look forward to appearing before the committee to elaborate on the observations in this submission and to assist the House with Bill 29.

January 2019

Elaine Keenan Bengts  
Information and Privacy Commissioner

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<sup>1</sup> *Submissions of the Information and Privacy Commissioner on the Comprehensive Review of the Access to Information and Protection of Privacy Act* (October 13, 2015), referred to below as the "2015 submission" and found here: <https://atipp-nt.ca/wp-content/uploads/2018/08/Comprehensive-Review-Submissions.pdf>.

## **1.0 COMMENTS ON BILL 29'S AMENDMENTS**

This section discusses the proposed amendments that would affect the Act's scope and coverage. It also discusses amendments to the Act that should be addressed in Bill 29.

### **1.1 COVERAGE OF MUNICIPALITIES**

Local governments provide vitally-important services to residents and have a direct impact on their day-to-day life. The well-accepted policy of transparency and accountability underlying the Act should apply to local governments. In this light, a very positive aspect of Bill 29 is that it will enable municipalities to be designated by regulation as public bodies under the Act.<sup>2</sup> This is a welcome step.

I urge the government to consult with my office regarding which municipalities are to be designated as public bodies. I would hope that the larger municipalities such as Hay River, Inuvik, Fort Smith, and especially Yellowknife, would be designated at an early date.

Section 10 of Bill 29 would add a new section 13.1, which would protect certain municipal confidences. It would protect draft bylaws and resolutions and the substance of *in camera* deliberations of municipal councils and their committees. The new provision is acceptable, noting that it aligns well with similar protections in other access laws, including Ontario, Alberta and British Columbia.

### **1.2 EXCLUSION OF CONSTITUENCY RECORDS**

Section 3 of Bill 29 would exclude from the right of access any "personal or constituency record" of a member of the Legislative Assembly that is in the custody or control of the member, the Legislative Assembly or a public body. It would also exclude such records of a member of a municipality. As stated in my 2015 submission, I see no reason for either exclusion. My office has not had matters of this kind come before it and the existing concepts of "custody" and "control" under the Act can easily deal with such issues if they arise.<sup>3</sup> Introducing the new concepts of "personal" or "constituency" records, which are not defined, is not necessary and could create confusion.

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<sup>2</sup> Bill 29 would amend section 2 of the Act to provide that a "public body" covered under the Act includes any municipality under the *Cities, Towns and Villages Act*, the *Charter Communities Act* or the *Hamlets Act* that is designated as a public body by regulation.

<sup>3</sup> 2015 submission, pages 5-6.

### **1.3 PUBLIC INTEREST OVERRIDE**

My 2015 submission called for introduction of a requirement that to disclose information the disclosure of which is in the public interest, despite any of the Act's disclosure exemptions.<sup>4</sup> The proposed amendments include a form of public interest override. The proposal does not go far enough by a long stretch in terms of which exemptions it would override. It also inappropriately places a burden on access applicants to demonstrate that there is a public interest in disclosure of information that, by definition, they know nothing about.

The override proposed in a new section 5.1 would prevail over only four of the Act's many disclosure exemptions: advice from officials (section 14), intergovernmental relations (section 16), economic interests of the government (section 17), and harm to another individual or the applicant (section 21). By contrast, the public interest overrides in the *British Columbia Freedom of Information and Protection of Privacy Act* and the *Alberta Freedom of Information and Protection of Privacy Act* prevail over all of the secrecy provisions in those laws where disclosure is "clearly in the public interest".<sup>5</sup> Those laws also add a second public interest consideration, by requiring disclosure of information where it is about a risk to health or safety or to the environment.

Starting with the latter public interest test, risk of harm to the environment or human health or safety is surely paramount to considerations of business or government secrecy. So is protection of the environment. What if, for example, the government possesses information showing that a particular business is polluting the environment and that this creates a serious risk of harm to human health or safety? Surely the business's interests should not prevail over the health or safety of communities or groups of people? There needs to be a public interest override in such cases.

Therefore, Bill 29 should be amended to provide that a public body is required to disclose to the public, an affected group of people or an applicant, as promptly as practicable, information about a risk of serious harm to the environment or to the health or safety of the public or a group of people. This duty should apply, to be clear, regardless of whether an access request has been made.

Beyond cases of risk of harm to health or safety or the environment, public interest disclosure should be required where the public interest otherwise favours it. This is the approach in other

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<sup>4</sup> 2015 submission, pages 2-3.

<sup>5</sup> Sections 25(1) of the *British Columbia Freedom of Information and Protection of Privacy Act* [BC FIPPA] and section 32(1) of the *Alberta Freedom of Information and Protection of Privacy Act* [Alberta FIPPA].

jurisdictions, including Ontario, Alberta and British Columbia. The Ontario threshold requires a “compelling” public interest in disclosure.

Another significant concern is that the amendment would trigger disclosure only where a “compelling” public interest “clearly outweighs the purpose of the exemption”. Requiring there to be a “compelling” public interest that “clearly outweighs” the goal of each exemption that might apply imposes an inordinately high bar. Experience in Ontario with similar language shows that the bar is so high that the override will effectively be illusory. The proposed public interest override will, given this unnecessarily onerous text, effectively gut itself in practice.

By contrast to Ontario, both Alberta and British Columbia have set a threshold that requires disclosure where it is “clearly in the public interest”.<sup>6</sup> This is, in my view, more consistent with the important public policy goals of access to information legislation. In that spirit, I believe the Act should require a public body to disclose information where the public interest in disclosure “clearly outweighs” the policy objectives underlying the access exemptions that would otherwise apply and permit the information to be kept secret. This is the approach taken in Newfoundland and Labrador, an approach I have previously endorsed.<sup>7</sup>

It is also desirable for the public interest override to override *all* of the Act’s provisions, as is the case in Alberta and British Columbia, not just a select few. If disclosure of information is truly in the public interest it should override all other considerations, and thus all of the Act’s access exemptions. In this regard, it is useful to recall the policy goals of access to information as they reflect the public interest:

[I]n a modern law and one that reflects leading practices in Canada and internationally, it is necessary to broaden the public interest override and have it apply to most discretionary exemptions. This would require officials to balance the potential for harm associated with releasing information on an access request against the public interest in preserving fundamental democratic and political values. These include values such as good governance, including transparency and accountability; the health of the democratic process; the upholding of justice; ensuring the honesty of public officials; general good decision making by public officials. Restricting the public interest to the current narrow list implies that these other matters are less important.<sup>8</sup>

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<sup>6</sup> BC FIPPA, section 25(1)(b).

<sup>7</sup> This recommendation is set out in the 2015 submission, which adopts the recommendation of the Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act* (Queen’s Printer, Newfoundland and Labrador, 2014) [Newfoundland report], at page 79.

<sup>8</sup> Newfoundland report, at page 78.

As noted earlier, the Bill 29 approach would only override four of the Act's exemptions, leaving a number of other exemptions to apply even though they could, in a meritorious case, needlessly stymie disclosure in the public interest. The fact that a public body might, in a given case, waive a discretionary exemption and disclose information is not an answer to this concern. However, if Bill 29 is not amended so that all exemptions can be overridden, the list of exemptions that can be overridden should be expanded.

At present Bill 29 would permit the public interest to override only four exemptions, as noted above. A notable omission from the list is section 24 of the Act, which protects certain third-party business interests. It is entirely plausible to think of a situation where business information that may be protected under section 24 reveals an environmental or public health threat and thus ought to be disclosed in the public interest. The example of pollution data comes to mind. In fact, such a case recently arose in British Columbia, with the Information and Privacy Commissioner of British Columbia requiring the government to release the results of water testing that had found pollution of local water tables due to activities on privately-owned land.<sup>9</sup> Section 24 therefore should be added to the list of exemptions in section 4 of Bill 29. Section 18, which protects the results of tests or audits, should also be added for the same reasons.

A similar argument exists for Cabinet confidences. The protection for Cabinet-related materials, found in section 13 of the Act is very broad and could exempt materials the disclosure of which is clearly in the public interest. The point is that, at common law, the public interest immunity principle that protects Cabinet confidences is not absolute in the first place. The Supreme Court of Canada has affirmed more than once that "the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield".<sup>10</sup> However, this balancing test applies only in litigation and is not available under the Act. Extending the public interest override under the Act to Cabinet confidences would provide that necessary mechanism. Section 13 should be added to the list of exemptions listed in section 4 of Bill 29.

Two other features of the new section 5.1 proposed under Bill 29 raise concerns.

First, unlike Ontario, British Columbia or Alberta, section 5.1 would explicitly place the burden on an access applicant to prove, to "demonstrate", that the public interest compellingly favours disclosure of the information. Applicants will, by definition, not know what is in the

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<sup>9</sup> Investigation Report F16-02: <https://www.oipc.bc.ca/investigation-reports/1972>.

<sup>10</sup> *Babcock v. Canada (Attorney General)*, 2002 SCC 57, at paragraph 19.

records they have asked for and their knowledge of surrounding circumstances often will be incomplete.

Put another way, applicants will in almost all cases be in the dark yet be expected to legally “demonstrate”, from a position of complete or near-complete ignorance, how there is a “compelling” public interest in disclosure of the hidden information. This places an unacceptable burden on individual applicants and would all but completely gut the override. This feature of the amendment is out of line with public interest overrides in other Canadian jurisdictions. Bill 29 should not impose any burden on access applicants to “demonstrate” a public interest in disclosure. Public bodies should have the responsibility for determining, in each case, whether the public interest favours disclosure of information.

Second, section 5.1 should require a public body to consider whether disclosure is in the public interest even if an access request has not been made for the information in question. At present, section 5.1 would only be triggered if someone happens to make an access request for the information. This leaves protection of the public interest to chance. If disclosure is in the public interest, surely it should be mandatory? If a public body is aware of information about a serious risk of harm, or information the disclosure otherwise might be in the public interest, the public body should be required to consider whether release is required and to act on that basis. This would more fully respect the vitally-important public policy goals of access legislation as outlined above. It would also better serve other important public policy goals.

#### **1.4 CHANGES TO DISCLOSURE EXEMPTIONS**

Bill 29 would amend some access exemptions under the Act and my comments follow. If I have not commented below on a Bill 29 amendment, it means I support the amendment.

**Cabinet confidences**—Section 9 of Bill 29 would replace section 13, of the Act, which protects Executive Council confidences. It would include a definition of “Executive Council record”. With two notable exceptions that definition, which would closely mirror the existing section 13, is supportable. The first concern is inclusion, through a new section 13(1)(g), of protection for any “record created during the process of developing or preparing a submission for the Executive Council or Financial Management Board”. No guidance is offered on the nature or limits of the meaning of the term “process” for developing such submissions. At its extreme, it could sweep all aspects of public service communications that in any way were “created during” whatever ill-defined “process” is involved. This could include records that actually contain no policy, any advice or any recommendations. As long as a record was “created during” an ill-defined “process” that record would have to be protected (section 13 is mandatory: it cannot be



waived). The proposed section 13(1)(g) should be removed (or, perhaps, clarified and restricted in scope).

The second concern with the proposed section 13 is that a new section 13(1)(h) would *require* the government to refuse to disclose “that portion of a record which contains information about the contents of a record” otherwise protected under section 13. This is very broad and conceivably could, noting government’s increasing use of electronic records, include metadata. Metadata are data about data. Metadata can convey information about how other data—here, the contents of an “Executive Council record”—were created, when the record was created, who created it, on which computer the record was created, the size of the records and how it was processed.

Knowing when a record was created, who created it and where it was created can be valuable information, without affecting the public policy goals of section 13, since none of this information is likely to reveal, directly or indirectly, the substantive content of an Executive Council record. Yet knowledge of this information could be valuable in achieving the accountability and transparency goals of the Act. As an example, this information could reveal that a business seeking a favourable legislative change submitted a fully-fledged legislative submission, including draft legislation, to the Executive Council. This would not disclose the contents of the submission, just the fact that it was made and by whom. This knowledge could be important in holding government to account for the outsourcing of public policy to private interests. Section 13(1)(h) should not be enacted.

***Municipal confidences***—As noted above, I support the proposed section 13.1, which would protect certain municipal government confidences.

***Advice from officials***—I strongly support section 11 of Bill 29, which would amend section 14(1) of the Act, to eliminate sections 14(1)(b) and (f). Section 14 protects advice, recommendations and other work product of public servants. Section 14(1)(b) permits the government to withhold “consultations or deliberations involving” public servants, members of Cabinet or Cabinet staff members. This provision as currently written has been used in many circumstances in an attempt to avoid the disclosure of records which, for whatever reason, might be embarrassing if disclosed or which a public body simply does not want to disclose for some reason. The current language is so vague as to be open to abuse so its elimination is a very positive step.

Elimination of section 14(1)(f) is welcome for the same reasons. It permits an agency, board, commission, corporation, office or other public body to withhold the “contents of agendas or

minutes of meetings” of that public body. Regardless of whether a meeting agenda or minutes contain any advice or recommendations, or other information meriting protection, a public body can now refuse disclosure altogether. This can leave the public in the dark about what is going on inside a public body in the ordinary course with no counterbalancing public interest benefit to this secrecy. If agendas or minutes contain information that should be protected, other aspects of section 14, and other exemptions under the Act, are available to do so. I strongly support this amendment.

***Confidential employment evaluations***—I am deeply concerned about the proposed new section 22(2) of the Act.<sup>11</sup> That provision would authorize a public body to refuse to disclose personal information that could reasonably identify “a participant in a formal employee evaluation process about the applicant” where that information is supplied in confidence. As the new section 22(3) suggests, this appears to be aimed at protecting formal peer review processes, where colleagues evaluate each other’s job performance, but this is not entirely clear. Even if that is the intent, I am concerned that this amendment would inappropriately privilege the interests of anonymous commentators over the interests of individuals to know what is being said about them, true or not. There is no clear public interest case for this amendment, no plausible need to so dramatically up-end the balance between an employer’s interest in proper evaluations and an individual’s right to be protected against inaccurate or malicious comments.

An individual’s right of access to her or his own personal information is of fundamental importance. This remains the case where co-workers are evaluating a colleague’s performance. Even where a “formal employee evaluation process” is involved, there can be a real risk of unfounded or malicious evaluations. Statutory anonymity for those who provide inaccurate or wilfully false information would, perversely, be an incentive for carelessness or worse. Yet ill-informed or malicious comments can cost an employee possible future job promotions, or future career prospects elsewhere. These are, to say the least, significant consequences.

Each employee therefore should continue to have the right to know who has said what about them, in order to be able to counter false or inaccurate statements (or to add, knowing the context, his or her perspective on the statements). I recognize that this new section would only prevent disclosure of information that could reasonably identify the evaluator, not the evaluations themselves. However, especially in small workplaces, this undoubtedly could prevent employees from having access to the evaluation itself. Individuals who assess others should be prepared to stand behind what they say. This amendment should not proceed.

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<sup>11</sup> This would be added by section 14 of Bill 29.

***Exclusion of information about a “labour relations matter” or “workplace investigations”***— Bill 29 would enact two new exclusions from the right of access under the Act. Like the proposed section 22(2), section 24.1 would drastically affect the current balance between privacy and transparency in this area.

It would require a public body to refuse to disclose “labour relations information” the disclosure of which could reasonably be expected to reveal any information whatsoever that has been supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a “labour relations matter”. This would be a mandatory exemption, and a public body would not be permitted to waive its protection.

This is a potentially vast black hole in the Act. For one thing, the terms “labour relations information” and “labour relations matter” are not defined. They could be very broad in their scope. If these exemptions are enacted, my office will be required to give them some meaning through case-by-case adjudication. The preferred route is to define both of these terms in the Act and to define them narrowly.

I am also concerned, regarding the proposed section 24.1, that it would require public bodies to withhold even the final report of a labour arbitrator or similar decision-maker. It is not an answer to say that arbitration decisions are often published. This is by convention and in any case there is no good reason for an access to information law to require them to be secret. These decisions are an important part of our law and the Act should not require them to remain that way when an access request is made for unpublished decisions.

***Business information of a third party***—Bill 29 would enact a new version of section 24(1) of the Act. I support the new version of section 24(1)(a), which would clarify what kinds of third-party information may be protected under section 24(1). However, I do have concerns about other aspects of section 24.

I refer here to existing aspects of that exemption that would be continued through the new section 24, namely, the mandatory exemption of the following: amounts billed by a public body to a third party (new section 24(1)(c)); the amount of financial assistance provided to a third party by a “prescribed corporation or board” (new section 24(1)(d)); and information supplied by a third party in support of an application for financial assistance from a prescribed corporation or board (new section 24(1)(e)). Bill 29 presents an opportunity to remove these provisions and enhance public body accountability and I strongly believe they should be removed now.

These three exemptions are class exemptions: they authorize a public body to keep information secret as long as it falls within the described class. There is no need for the public body to show harm to its interests through disclosure or that disclosure would cause harm to someone else. At the same time, these exemptions shield possibly important information from public scrutiny.

It is not clear, for example, why a public body should not disclose financial information about the amounts it charges to a third party for “routine services” (whatever that vague term means). If disclosure in a given case could harm the public body, then it could rely on section 17(1). There is no reason for the broad blanket exemption, regardless of any possible harm, in section 24(1)(c).

The same argument applies to what will become sections 24(1)(d) and (e). In principle, if a “prescribed corporation or board” is giving public funds to a “third party” there is a strong public interest in knowing how much is being given at public expense. This is the case whether the third party is a public or private sector entity. Similarly, if a third party is seeking financial assistance from public funds, there is a strong argument for transparency around the information it supplies in support. If there is concern about harm to the third party’s interests, section 24(1)(a) can protect the third party where there is evidence that disclosure of the information would cause harm. There is no reason to have the added blanket, class-based, exemption in section 24(1)(e).

There is no public policy reason to retain any of these class-based exemptions, including because any concerns about harm to a public body are very well dealt with through section 17 of the Act. Bill 29 should be amended to repeal sections 24(1)(c), (d) and (e).

### **1.5 PROCESS-RELATED & OTHER AMENDMENTS**

Bill 29 would implement a number of changes to request-processing procedures under the Act. My comments on these proposed changes follow.

***Business, not calendar, days***—Section 5 of Bill 29 would substitute business days for calendar days in calculating time under the Act. Since a “business day” will exclude a Saturday, Sunday and statutory holiday, times under the Act will be calculated differently. This is not, in my view, of concern when it comes to access request response times. At present, section 8 of the Act requires public bodies to access requests within 30 calendar days after receipt. Bill 29 would change that to 20 business days. In practice, however, this amounts to roughly the same time period, one month.

***Time extensions***—Section 6 of Bill 29 would amend section 8 of the Act, to limit the ability of a public body to extend its time for responding to an access request, by imposing a 20-business day limit on initial extensions. This is a welcome change.

Also welcome is the new section 11.1, which would give the Information and Privacy Commissioner the authority to grant a further time extension. Requests can be complex and can involve a large number of records. They may also require consultation with other governments, agencies or individuals before an appropriate decision can be made. The new time limit on initial extensions and the ability for the Information and Privacy Commissioner to further extend the response time are consistent with my 2015 recommendations and are very welcome.<sup>12</sup>

However, I am concerned that the 20-day time limit on initial extensions taken by public bodies would not work if the third-party response time remains at 30 business days, as Bill 29 proposes. As noted below, Bill 29 would give third parties 30 business days to respond to a consultation notice. This means that, even if a public body extended the response time on the very day an access request is received, the extension by 20 business days would be too short to accommodate the 30 business days that the third party has to respond. As noted below, the third-party response period for consultations should be reduced to at most 15 business days, not 30. A 15-day consultation period would give public bodies five business days to make a decision after hearing from third parties, but this is the only way the 20 business days proposed in Bill 29 could work.

Another solution for this concern could be to add a new provision to the Act, to specifically deal with extensions where a public body has triggered a third-party consultation. Under this approach, the Bill 29-amended section 11 would authorize an initial 20-business day extension, but if a third party has been notified under section 26, a new provision would say something to the effect of, “where a public body has notified a third party pursuant to section 26 of the Act, the public body may extend the time for responding to a request for information for a period not exceeding “x” business days”.

***Transferring access requests***—I also welcome section 8(1) of Bill 29, which would amend section 12(1), to require a public body that seeks to transfer a request to another body to do so within 10 business days after it receives the request. These amendments are consistent with my 2015 submission and will help ensure prompt transfers of requests to those who should properly reply.<sup>13</sup>

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<sup>12</sup> 2015 submission, pages 15-16.

<sup>13</sup> 2015 submission, pages 15-16.

**Consultations with third parties**—Bill 29 offers the opportunity to fix concerns about the third-party consultation process under section 26 of the Act. Section 26 of the Act requires a public body to give notice to third parties in certain cases. The first is where the public body is considering disclosing personal information that may be protected under section 23; the second is where it is considering disclosure of business information that may be protected under section 24.<sup>14</sup> Bill 29 would somewhat shorten some of the timelines for third-party consultations, but it should reduce them further, as even the amended timelines will entail unnecessary delay in access requests.

Section 20 of Bill 29 would amend section 26 of the Act, to reduce the time for a third party to respond to a consultation notice from 60 days to 30 business days. This still gives third parties some six weeks to respond, which is still excessively generous. The response time in the comparable BC FIPPA provision is 20 business days;<sup>15</sup> in Ontario the response time is 20 calendar days.<sup>16</sup> There is no good reason for third parties to have six weeks to respond, while the impact on timely access requests is plain. Section 26 should, rather, be amended to give third parties 15 business days, or roughly three weeks, to respond. At the highest, it should give them 20 business days. Thirty business days is too long.

Similar changes are needed for the time a public body has to make its decision after it has heard from third parties. Bill 29 would amend section 27 of the Act to reduce the 30 calendar days for a public body to make a decision after hearing from third parties to 15 business days. In other words, this reduces the post-representation response time from roughly one month to approximately three weeks. There is no good reason for a public body to have up to three weeks to decide such matters. The post-representation timelines in the British Columbia and Ontario statutes are 10 business days<sup>17</sup> and 10 calendar days.<sup>18</sup> The timeline under our Act should not exceed 10 business days.

I will also note here, in passing, my concern about the timing of public body notifications under section 26. My office often encounters cases in which a public body has waited until the last possible moment before its 30-day access request deadline has expired before it gives third-party notice. This will inevitably add to delay in response to the access request. This is not

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<sup>14</sup> The third party is then entitled to make written representations explaining why the information should not be disclosed or to consent to its disclosure. The public body is not bound by written representations but considers them in deciding whether to disclose the requested records.

<sup>15</sup> BC FIPPA, section 23(3)(c).

<sup>16</sup> *Freedom of Information and Protection of Privacy Act* (Ontario) [ON FIPPA], section 28(5).

<sup>17</sup> BC FIPPA, section 24(1).

<sup>18</sup> ON FIPPA, section 28(4).

something that can be fixed through the Act. I do, however, urge all public bodies to give third-party notice as soon as practicable during the 30-day response period.

Another recommendation relates to the practice of many public bodies to consult third parties even where they are not required to do so under section 26, *i.e.*, even where there is no third-party personal information or business information involved. The Act does not prevent this from happening and I acknowledge that consultations may help improve decisions, by providing contextual information to the public body. Nonetheless, I urge public bodies to conduct such informal consultations only where absolutely necessary, *e.g.*, where the information may be protected under section 16(1) (intergovernmental relations) or section 20 (prejudice to a law enforcement matter).

***Processing of access reviews***—I am deeply concerned about the change proposed by section 22 of Bill 29, which could have a drastic impact on my office's work. This provision would amend section 31(3) of the Act to reduce the time limit for my office to review public body access decisions. It would significantly decrease the time we have to do our work thoroughly and carefully, from 180 calendar days (roughly six months) to 60 business days (roughly three months).

The reason for this drastic step is not at all clear. Certainly, our caseloads are already such that, with current resources, we are not able to keep up with demand in as timely a fashion as I would like or that the public can expect. Imposition of such a severe constraint without my office having more resources would either cause my office to fail to meet that standard or, in order to do so, to divert scarce resources from other important tasks, such as privacy complaints under the *Health Information Act*. Neither outcome is desirable.

There is, in any case, a good case for eliminating the time limit altogether. My office's review functions differ from the work of public bodies when they decide whether or not to disclose information. They base such decisions on analysis of their own records and of contextual information that they possess.<sup>19</sup> By contrast, my office is utterly dependant on public bodies to be timely in responding to our requests for information when we receive an applicant's request for review.

We frequently encounter delays on the part of public bodies in providing us with copies of the records in dispute and in providing other information to assist our review. These delays are

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<sup>19</sup> Third-party consultations are an exception to this, I acknowledge, requiring public bodies to rely on third parties to respond in a timely way and provide relevant information. As discussed above, however, this reliance on third parties is conditioned by the Act's express timelines for third-party responses.

often not deliberate, being due, rather, to lack of resources or other understandable factors. But the fact remains that we are often at the mercy of events outside our control, making it difficult for us to meet the existing 180-day timeline much less one half as long, as proposed.

Further, in a review the commissioner decides all questions of fact and law, *i.e.*, a review is a legal process requiring evidence, consideration of precedents, review of records and careful decision-making efforts. This is a time-consuming process in principle. As a practical matter, access to information disputes can be complex and very detailed, often with large volumes of records to review, often on a page-by-page, line-by-line basis. For these reasons, reviews are not quick and easy matters. They take time. Cutting my office's timelines for these matters by such a drastic amount would not be practical and would not recognize the efforts required to complete reviews.

In recognition of this, Bill 29 should not cut my office's response time in half. It should remain as it is, expressed of course in business days. Regardless, section 31 should also be amended to permit the commissioner to extend the review period, by notice to the parties, giving an anticipated date for completion. This is the approach in Alberta and Ontario imposes no time limits at all on its commissioner.<sup>20</sup>

***New offences and fines***—Bill 29 would amend section 59(2) in ways that I strongly support. Significantly, it would create a new offence of wilfully destroying records to evade an access request. It would also create a new offence of attempting to gain access to, or gaining access to, personal information for which the person has no authority to do so. Both of these will significantly enhance access and privacy rights. Similarly, the new maximum fine of \$10,000.00 for each offence. These changes are commendable.

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<sup>20</sup> Under section 69(6) of AB FIPPA, the commissioner may extend the period by notice, and must give an anticipated completion date when doing so. There is no maximum on the extension period. If, despite the above submission, a time limit is to remain for my office to complete a review, the authority to extend should be "for a reasonable period" or for successive extensions of up to 60 days each.



## 2.0 WHAT'S MISSING FROM BILL 29

As welcome as many of the proposed amendments are, Bill 29 fails to address some important matters and I recommend that it be amended to do so, as discussed below.

### 2.1 ENFORCEMENT OF THE LEGISLATION

Bill 29 would amend the powers of the Information and Privacy Commissioner but would not address some key weaknesses in the Act. The proposed amendments would authorize my office to initiate a privacy investigation in the absence of a complaint. Bill 29 would also require public bodies to report to my office on their implementation of recommendations made in a privacy investigation (but not in response to an access to information appeals). These are welcome but do not go far enough, as discussed below.

***Meaningful enforcement of rulings***—A key shortcoming of Bill 29 is that it would continue to give public bodies the unacceptable ability to ignore adjudicated decisions by the Information and Privacy Commissioner. Some Canadian jurisdictions give their Information and Privacy Commissioners the authority to make decisions, but only to recommend to public bodies that they comply. Several other jurisdictions give their Information and Privacy Commissioners order-making powers. This is the case in Prince Edward Island, Quebec, Ontario, Alberta and British Columbia.<sup>21</sup> Most recently, Newfoundland and Labrador has enacted a stronger form of enforcement, with a direct role for the courts to ensure compliance with decisions of the Information and Privacy Commissioner while providing oversight of those decisions.

By contrast, Northwest Territories public bodies can pick and choose which decisions they will respect and which they will not. From a rule-of-law perspective this is an unacceptably weak regime. It is also not clear why access to information—which the Supreme Court of Canada has stated has constitutional dimensions<sup>22</sup>—does not merit better protection. There is no public policy case for continuing this situation. It is time for the Northwest Territories to ensure that it is not open to public bodies to decide whether or not to respect the law, as adjudicated by the Information and Privacy Commissioner.

Some observers might argue that this is not desirable. They might argue that the recommendations-only approach is preferable as a practical matter, on the basis that it encourages co-operation and facilitates settlement of access to information appeals. They

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<sup>21</sup> In all of these cases Information and Privacy Commissioner decisions are subject to judicial review in the courts, which ensures effective oversight by the courts.

<sup>22</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

might argue that the adversarial model of adjudication negates this advantage. I am aware of no evidence that any such practical advantage is so clear and overwhelming that it warrants leaving the decisions of my office toothless and open to being ignored. It cannot plausibly be argued that the recommendations-only approach is more productive and constructive.

Nor is there any argument in principle against a mechanism to require public bodies to comply with decisions. Many statutory decision-makers who are charged with enforcing important rights—including human rights, employment standards and labour relations matters—are empowered to issue binding decisions. These matters involve both private and public sector organisations. Why is the public sector subject to binding decisions in so many other areas, but not when it comes to access to information? No plausible argument has been made to justify this state of affairs. The public interest in access to information, and the constitutional dimensions of access to information, mean that a proper enforcement mechanism is needed. Any countervailing public interest in the confidentiality of public body information is amply protected under the Act and respected in my office's decisions under the Act where the public body makes its case. It should not be left to public bodies to pick and choose which access to information rights they will respect.

This discussion extends equally to enforcement of the Act's privacy provisions. The Supreme Court of Canada has affirmed on many occasions that privacy has constitutional dimensions. All of the above arguments for an order-making power apply with equal force in relation to the Act's privacy provisions. If the Information and Privacy Commissioner decides, for example, that a public body is collecting citizens' personal information without authority under the Act, there should be a mechanism for requiring the public body to stop violating citizens' privacy. It should not be left to public bodies to pick and choose what privacy rights they will respect.

The best approach, in principle and practice, would be for the Information and Privacy Commissioner to be given order-making powers, as is the case in Prince Edward Island, Quebec, Ontario, Alberta and British Columbia. At the very least, the Act should be amended to adopt the enforcement approach now taken in Newfoundland and Labrador.

Under that province's *Access to Information and Protection of Privacy Act* the Information and Privacy Commissioner adjudicates access to information matters but continues to make recommendations only. However, a public body now has two choices, to comply with the recommendations or to apply to the Supreme Court of Newfoundland and Labrador for a declaration that the public body is not required to comply with the recommendation. Failing such a declaration, the public body must comply with the Information and Privacy Commissioner's decision.

This model could maintain the efficiency and informality of the ombudsperson model while shifting the onus of seeking court review to public bodies, which are far better-placed in terms of having the resources to do so.<sup>23</sup> Keeping in mind that approximately 90% of recommendations are accepted by public bodies,<sup>24</sup> the extra burden on public bodies would not be that significant, particularly if it also results in better submissions to the IPC and thus higher-quality outcomes.

There are areas where I believe my office should have direct order-making power, such as disputes about access to information fees, time extensions and cases in which a public body wishes to ignore an access request that is frivolous or vexatious.<sup>25</sup>

***Compelling records for investigations and adjudications***—It is also desirable, in light of a recent Supreme Court of Canada decision, to further clarify the powers of the Information and Privacy Commissioner to obtain and view records where necessary for the purposes of reviewing a public body’s decision to refuse access.

Section 49.4 of the Act authorizes the Information and Privacy Commissioner to require the production of and examine any record to which the Act applies, despite “any other Act or any privilege available at law”.

As discussed below, this language permits my office to require a public body to give us records over which solicitor-client privilege is claimed, so that we can consider whether the alleged privilege is made out. However, my office fully respects the fundamental importance of solicitor-client privilege. For this reason, we rarely compel production of allegedly privileged records and do so only where it is absolutely necessary to do so, where there is no alternative.<sup>26</sup> In the vast majority of the reviews we conduct there is no need to do this. We are, in fact, able in almost all cases to decide the issue based on a description of the nature and purpose of a record (e.g., a description that a record is a legal opinion authored by a named lawyer for the public body). Nonetheless, because there will continue to be rare cases where

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<sup>23</sup> Moreover, this onus would be appropriate in principle because it would public bodies, whose decisions are under review in the first place, to the test of standing by the correctness of their decisions and not my office’s decisions.

<sup>24</sup> It is not an answer to suggest that, because some 90% of my office’s recommendations are respected, change is not needed. The 10% of cases in which the findings and recommendations are ignored almost certainly represent many of the most important cases, where the public interest in compliance is highest. These are, in other words, likely the cases that most require a real enforcement backstop.

<sup>25</sup> 2015 submission, page 46.

<sup>26</sup> This is the standard that courts apply when they decide whether it is necessary for them to view records for which solicitor-client privilege is claimed.

we must view a record to decide a claim of privilege, the power to compel their production remains necessary.

In my view, section 49.4's reference to "any privilege available at law" includes any claim of solicitor-client privilege, meaning legal professional privilege and litigation privilege. However, the Supreme Court of Canada has recently affirmed that a statutory power to compel production of records despite a claim of solicitor-client privilege can be enacted, but it must be clear and unequivocal.<sup>27</sup> That decision, *University of Calgary*, is not binding in relation to section 49.4, including because it dealt with language in AB FIPPA that differs from our provision. In addition, a recent Saskatchewan Court of Appeal decision, which dealt with language identical to section 49.4, has affirmed that this language is sufficiently clear and unequivocal to authorize Saskatchewan's Information and Privacy Commissioner to compel such records.<sup>28</sup>

For greater certainty, however, I recommend that this be made even clearer by adding, immediately after "at law", the words "including legal professional privilege or litigation privilege". I also recommend, for greater certainty, that section 49.4 be amended by adding a new subsection that affirms that production of privileged records to my office, voluntary or compelled, does not waive the privilege. Section 44(2.1) of BC FIPPA contains such language.

In closing, it must be emphasized again that production of allegedly privileged records to my office is only compelled where it is absolutely necessary for my office to view those records in order to determine whether a public body's claim of privilege is made out. It must also be underscored that my office never discloses records whether or not we have determined are privileged or not privileged. Regardless of our finding, only the public body in question actually discloses the records. Further, a court reviews our decisions on privilege using the correctness standard of review, as would doubtless continue to be the case under the above-recommended enforcement model. This means the court owes, and will owe, no deference to our decisions, being able to substitute its own decision on privilege. This fully protects privilege in public body records.

## **2.2 DUTY TO DOCUMENT DECISIONS & ACTIONS**

As I recommended in my 2015 submission, the Act should be amended to include a duty to document key government decisions.<sup>29</sup> This becomes more important each year. As the territory moves further down the road of electronic information systems and the electronic management of government information, a key component should be a duty to adequately,

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<sup>27</sup> *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 [*University of Calgary*].

<sup>28</sup> *University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34.

<sup>29</sup> 2015 submission, page 50.

appropriately, document government decisions. A proper record of key government decisions and actions is a vital part of good government. It is necessary for the fiscally-sound and efficient administration of publicly-funded programs and services. It underpins the accountability of executive government and key public agencies, including through access to information; it is part of the foundation of a proper archival and historical record.

A number of jurisdictions around the world have recognized this and have created a duty to document. Leading examples are the State of Queensland and British Columbia. In each case, a statutory duty to document decisions and actions is created but detailed guidance is left to the government archivist or similar expert. To be clear, none of the examples assessed for this submission comes close to requiring each and every decision or action to be documented. This would be absurd. What is needed, however, is a core duty to document significant decisions, determined agency-by-agency in accordance with central guidance.

In Queensland, for example, the State Archivist has issued detailed guidance under the *Public Records Act, 2002* that, among other things, requires each state agency to “create complete and reliable records”:

Complete and reliable records provide evidence of activities of the agency and allow the business to operate effectively. Agencies must ensure complete and reliable records are created and retained as appropriate by:

- identifying all the records that allow the business to operate – these provide evidence of decisions, support accountability and transparency, mitigate risk, help the agency meet legislative requirements and reflect the business of the agency
- specifying how these records must be created, when they must be created, the format they must be created in, who must create them and implementing security and preservation requirements associated with those records
- integrating record creation into existing business processes
- ensuring recordkeeping is considered when decisions are made about business systems (particularly decisions around migration and end of life).<sup>30</sup>

As another example, British Columbia’s *Information Management Act* will, when amendments passed in 2017 come into force, require provincial government ministries and other core government agencies to document certain decisions.<sup>31</sup> Each such body will be required to

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<sup>30</sup> *Records governance policy*, State Archivist, State of Queensland:  
<https://www.qgcio.qld.gov.au/documents/records-governance-policy>.

<sup>31</sup> *Information Management (Documenting Government Decisions) Amendment Act, 2017* (Third Reading, March 15, 2017, in force by regulation) [amending Act]: <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/40th-parliament/6th-session/bills/third-reading/gov06-3>.

ensure that “an appropriate system is in place within the government body for creating and maintaining, in accordance with applicable directives or guidelines” issued by the provincial government’s chief records officer “an adequate record of that government body's decisions”.<sup>32</sup>

The necessary amendments could be made to the Act or, perhaps more appropriately, to the *Archives Act*. What is clear, however, is that a statutory duty to document is needed, in the interests of accountability and good government.<sup>33</sup>

### **2.3 ROUTINE DISCLOSURE OF RECORDS**

As noted elsewhere in this submission, access to information is recognized as being of fundamental importance to the accountability and transparency of public institutions. The right of access to information under the Act is therefore a key tool for the public to hold public bodies accountable.

The right for citizens to make individual access requests for specific records is not, however, the only method for making government information available to citizens. As other jurisdictions have recognized, the routine, proactive disclosure of records without access request can be a cost-effective supplement to access requests. The United Kingdom’s *Freedom of Information Act 2000* and BC FIPPA, for example, include requirements for proactive, routine disclosure of records. Many provinces, including Ontario and Alberta, also have rules requiring routine disclosure of public servants’ remuneration.

Consistent with the recommendation in my 2015 submission, therefore, Bill 29 should be amended to include a framework for the routine disclosure, without request, of certain records.<sup>34</sup> Bill 29 would go part way by introducing a new section 72(1) of the Act. Section 72(1) would require each public body to “establish categories of records ... to be made available on demand” without an access request. This proposal would still require someone to make a “demand” for such records.

I would prefer to see a requirement for public bodies to publish certain records proactively, ideally on their websites, and without a “demand”. If the demand element is to be retained, public bodies should be required to publish lists of the categories of records that are routinely

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<sup>32</sup> Section 5 of the amending Act, which will enact section 19(1.1) of the *Information Management Act*.

<sup>33</sup> Consistent with the discussion below about use of private email and messaging accounts, there is also a need to address, either in the legislation or in regulation, the use of personal devices and accounts (email, text messages, etc.) outside of a public body’s system, and to ensure that public body decisions that are to be documented are not documented in private accounts.

<sup>34</sup> 2015 submission, pages 2-3.

available on demand. Consideration should also be given to a backstop for this new duty. Specifically, the responsible minister should also be empowered to establish categories of records that are to be disclosed without request, with government departments and cities being required to disclose such records as directed by the minister.<sup>35</sup>

On this point, I believe that routine disclosure should be made of records such as statistical surveys, opinion polls, environmental impact assessments, pollution monitoring data, reports of pollution spills, contract award information. There should also be a duty to disclose the remuneration of each public body employee who earns more than, for example, \$100,000.00 in salary or wages each year, together with information about employee benefits.

## **2.4 OTHER NECESSARY ACCESS TO INFORMATION AMENDMENTS**

**Coverage of housing corporations**—It is extremely important that Bill 29 be amended so that housing authorities under the *Housing Corporation Act* are included within the definition of public body.

As noted in my 2015 submission, my office has received many access requests and privacy complaints about government-funded housing organisations.<sup>36</sup> From a transparency and accountability perspective, it is important to note the importance of these corporations in the lives of their residents, and communities. Further, these organisations spend public money, which is another reason for their coverage to be secured through Bill 29.

From a privacy perspective, housing corporations collect, use and disclose significant amounts of personal information about their residents. This includes financial information, information about their employment and personal information about their family situation. It can also include sensitive information about any conditions that a resident may have. The many privacy complaints my office receives show a clear need for these corporations to live under the same privacy rules as other public sector actors. The Act's privacy-related provisions will not impede their work while also ensuring that the privacy of housing corporation residents is respected.

**Restricting use of private email and social media for official business**—Another gap in the legislative scheme is the need to ensure that government employees do not attempt to avoid the right of access by using personal email or social media services.

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<sup>35</sup> The model for this recommendation is section 71.1 of BC FIPPA.

<sup>36</sup> 2015 submission, page 53.

Although emails created using a private email account are almost certainly going to be within a public body's custody or under the control, and thus subject to the Act, making this clear through appropriate rules is necessary for two reasons. First, clear rules would avoid most uncertainty around coverage of such emails for access to information purposes. Second, such rules would greatly reduce the risk that personal information of citizens is not adequately protected, as will be the case with free, web-based email, which is not encrypted.

These rules could perhaps be put into the Act itself, although the preferred route would be to create a new regulation-making power and then pass the appropriate regulations. A third alternative would be to issue policy-based rules on the matter.<sup>37</sup> Regardless of how this is achieved, the need for rules that apply to *all* public bodies is abundantly clear.

The ideal would be a requirement that all public body business be conducted using work-issued email, with an express prohibition on use of private email, social media accounts or messaging apps for public body business. An exception might be made for exigent circumstances, where work-issued accounts are temporarily not available.<sup>38</sup> In these limited cases, employees should be required to copy their work email on any work-related email they send from a personal account and, where they do not respond, to forward to their work account any emails they receive.

***Protecting the identity of access requesters***—Although it is convention not to disclose the identity of access requesters within a public body, there is no legal bar to doing so. The Act should be amended to prohibit disclosure of the identity of a requester at any stage before the public body has responded to the request.

## **2.5 ENHANCING PRIVACY PROTECTIONS**

Bill 29 fails in important respects to properly secure the privacy rights of citizens. The vital importance of privacy in our modern society has been affirmed many times. This is especially important as governments seek to collect, use and disclose ever-more information about each of us, information that is often very sensitive. The risks of over-collection and excessive sharing of personal information within government are growing. The privacy risks of increasingly prevalent electronic information systems are clear. The following concerns should be addressed but Bill 29 fails to do this. The Bill should be amended to deal with these concerns.

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<sup>37</sup> This would not reach local governments or housing corporations, however, if issued by the territorial government. This would create an undesirable gap.

<sup>38</sup> For example, where a work-issued phone malfunctions or there is a government-wide email system shutdown.



**Privacy breach notifications**—Bill 29 would not keep pace with legislative developments across Canada in respect of requirements for public bodies and private sector organisations to notify individuals whose personal information has been affected by a privacy breach (*i.e.*, unauthorized access to, or collection, use or disclosure, or loss of their personal information). While it is true that the recent legislative focus has been on private sector privacy laws, with governments being reluctant to require themselves to notify citizens when there has been a privacy breach, public sector breach notification requirements are going to spread. This is the time for the government to ensure that our public bodies notify citizens of breaches that affect their personal information.

The duty to notify individuals of a breach that meets a statutorily-defined risk of harm is necessary for several reasons. First, it enables those affected to protect themselves from identity theft or fraud, and in some cases from personal harm. Second, the duty to notify affected individuals, and the public, serves as an important incentive for governments to take privacy seriously and avoid breaches in the first place. Third, a breach notification requirement would require public bodies to investigate the details of breaches, notably how they happened, and thus give them a solid information base for steps to prevent similar breaches in the future. The requirement to notify would, in other words, present key learning opportunities and contribute to improved privacy practices in the future.

It is therefore time for the territorial government to recognize this and enact a duty for the territorial government and all other public bodies to notify affected individuals of a privacy breach involving their personal information. Such a step in our territory would not be unique. Nunavut, for example, has since 2012 had a comprehensive breach notification process for public bodies<sup>39</sup> and Newfoundland's new legislation contains similar provisions. In addition, Ontario's *Personal Health Information Protection Act* has for some years included a breach notification requirement, as does section 87 of our own *Health Information Act*.

The section 87 duty arises where personal health information about an individual is used or disclosed other than as permitted by the *Health Information Act*, is lost or stolen, or is altered, destroyed or otherwise disposed of without authorization. Notice must be given to the affected individual as soon as reasonably possible. This might be a starting point for a privacy breach notification scheme under the Act.<sup>40</sup> That said, I believe the Nunavut example ought to be given serious consideration as a model for the Northwest Territories.

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<sup>39</sup> *Access to Information and Protection of Privacy Act*, sections 49.7 through 49.14

<sup>40</sup> I acknowledge that recent federal legislative changes (through amendments to the federal private sector privacy law, the *Personal Information Protection and Electronic Documents Act*, respecting breach notification) and legislation in Alberta (Alberta's *Personal Information Protection Act*) require notification only where there is a real

***Sharing of personal information for common or integrated programs***—Bill 29 would add a new definition of “common or integrated program or service”, being “a program or service that provides one or more services through a public body working collaboratively with one or more other public body [sic], or with an agency or a combination of public bodies and agencies”.<sup>41</sup> Sections 41 and 48 would be amended to authorize public bodies to disclose and collect personal information where necessary for the delivery of a common or integrated program or service.

I recognize that governments increasingly are taking a joined-up approach to service delivery. Existing silos between government departments are being broken down, so that citizens can receive collaboratively-delivered expert services. Such integrated services are often seen in the social services sector, where high-needs clients may require expert support and resources found in more than one department. While I recognize the trend, and the need to support collaborative service delivery, the amendments need to be tightened up.

The key issue here is the very broad, ill-defined, scope of what can qualify as a common or integrated service or program. At the very least, it should be necessary for the existence and nature of the supposed service or program to be documented through a form of agreement among the participating public bodies.<sup>42</sup> The agreement would be completed after the PIA has been completed and it would describe the personal information that will be collected, used and disclosed. There should also have to be senior executive approval of the PIA and service agreement before it can begin.

***Privacy impact assessments should be mandatory***—The Act does not, at present, require public bodies to conduct a privacy impact assessment (PIA) when a program, activity or system

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risk of “significant” harm, whereas the *Health Information Act* does not require there to be a risk of “harm” from the breach. If a harms test is added to the Act, the risk should not be one of “significant” harm. It is neither fair nor reasonable to shift the burden to citizens of enduring the risk of harm by requiring notification only where the risk is “significant”. Why should citizens bear any risk of harm? What incentive would there be for government to properly protect citizens’ personal information in lesser cases. Citizens have no choice but to allow government to collect their information in the first place. They vote with their wallets, as they can in their private dealings, by refusing to deal with businesses that have poor privacy track record. This is another argument for a lower public sector threshold.

<sup>41</sup> First, use of the singular as noted above appears to be a typographical error. Second, the term “agency” is not defined in Bill 29 or the Act, or the *Interpretation Act*, so the breadth of its meaning is not clear. It may be intended to cover only agencies prescribed as public bodies by regulation under the Act, but this is not at all clear. This should be clarified.

<sup>42</sup> This is of course also desirable to ensure that the participants are clear as to each other’s duties, clear about governance, and clear about who pays for what and how.

involving personal information is being created or amended. It should do so, and Bill 29 should be the vehicle to do that.

PIAs have for many years now been recognized as a basic tool of good privacy practice in government. They help public bodies decide whether an initiative they are considering may be problematic from a privacy-compliance perspective. PIAs help ensure that initiatives proceed only if there are no compliance concerns that cannot be mitigated. They enable what is known as privacy by design, with privacy compliance being designed into the initiative at the outset. PIAs also enable public bodies to assess whether, even if an initiative is legally compliant, it is not good policy from a privacy perspective.

A PIA is an important and highly-desirable business risk assessment tool and should be mandatory. Bill 29 should amend the Act to require territorial departments and cities to complete a PIA for any proposed system, project, program or service, whether new or amended. Consideration should also be given to requiring each PIA to be submitted to my office for comment.<sup>43</sup>

Last, the Act should require that all completed PIAs be made publicly available through the routine disclosure provisions discussed above.

## ***2.6 REMUNERATION OF THE COMMISSIONER***

My last concern about Bill 29 is that it would miss the opportunity to address a worrisome aspect of the Act, a matter that should be dealt with—how the remuneration for the next Information and Privacy Commissioner will be set. Looking ahead, past my tenure, the independence and impartiality of future Information and Privacy Commissioners must not continue to be open to question because they have to negotiate their remuneration with the territorial government. Concerns around real or apparent conflict or bias on the part of our independent judiciary and tribunals have caused legislatures to introduce independent mechanisms to set remuneration of judges and tribunal members. This policy concern needs to be addressed in the Act.

The British Columbia approach is to stipulate in BC FIPPA that the remuneration of the Information and Privacy Commissioner is that of the chief judge of the Provincial Court of

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<sup>43</sup> I am not proposing that my office would approve PIAs, including because it is necessary to keep my office free to respond later to any complaints related to a PIA's subject-matter.

British Columbia.<sup>44</sup> I am not necessarily recommending the same approach, though a similar provision could be introduced (with the remuneration being pro-rated if the position continues to be part-time). Another approach would be similar to that in Saskatchewan, which provides that the salary of the Information and Privacy Commissioner is “equal to the average salary of all the deputy ministers and acting deputy ministers of the Government calculated as at April 1 in each year”.<sup>45</sup> A last option might perhaps be to require a committee of the Legislative Assembly to unanimously set the Information and Privacy Commissioner’s remuneration. The overall aim must, again, be to ensure that the impartiality and independence of the Information and Privacy Commissioner cannot be questioned because he or she has had to bargain with the government or with the legislative assembly for appropriate remuneration.

### **3.0 CONCLUSION**

As this submission makes clear, Bill 29 would enact some very welcome changes to the Act. It would promote efficiency in some areas and make some desirable substantive changes. I support those aspects of Bill 29. However, for reasons given above, some aspects of Bill 29 are problematic and should be changed or withdrawn. Bill 29 also fails to grapple with some vitally-important issues, such as the need for proper enforcement of my office’s decisions. Accordingly, while I commend the government for the positive aspects of Bill 29, I strongly believe that changes to it are necessary and urge the government to make those changes before Bill 29 proceeds any further.

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<sup>44</sup> Section 40, which also states that the Information and Privacy Commissioner is entitled to participate in the public service pension plan.

<sup>45</sup> *Freedom of Information and Protection of Privacy Act*, section 41(1).

***NORTHWEST TERRITOIRES  
BILL 29—PUBLIC HEARING COMMENTS***

*January 25, 2019*

**PUBLIC INTEREST OVERRIDE** (written submission, page 6)

- All access to information laws are based on the recognition that it is in the public interest, the interest of the public, that as much government information be made available as is possible. Access to information is in the public interest because it helps hold governments to account for their actions and decisions. It also helps members of the public inform themselves about government policy and exercise their vote in a better-informed manner.
- The right of access to information is of course not absolute and these laws protect important interests by enabling certain information to be withheld. Those exceptions are limited in number in recognition of the public interest in access to information.
- That clear public interest is honoured in all laws by ensuring that even the access exceptions, the protections, sometimes must be overridden by the public's right to know, by the public interest in information.
- As the commissioner has noted, Bill 29 would commendably introduce a public interest override, but the commissioner rightly has concerns that it is weak and will rarely if ever be of use in advancing the public interest. I respectfully share the commissioner's concerns for reasons I'll now share.
- First, the proposal doesn't go far enough, because it would only allow the public interest in access to information to override only

four of the Act's disclosure exemptions: advice from officials (section 14), intergovernmental relations (section 16), economic interests of the government (section 17), and harm to another individual or the applicant (section 21).

- It's true that a similar approach is taken in Ontario's law, and in fact the wording of the proposed section 5.1 here is similar to Ontario's language in some ways. The Ontario version goes further, however, because it lists many more of that law's access exemptions than Bill 29 does. This means that in Ontario the public interest can override more protections, which makes the Ontario version stronger.
- An even stronger approach than either Bill 29 and Ontario is found in both Alberta and BC (as well as PEI and New Brunswick). The laws in both provinces provide that the public interest prevails over *all*, not just some, of the secrecy provisions in those laws. For that reason alone, the other laws I've just mentioned, which are second generation laws, offer much greater openness and transparency than Bill 29 would do.
- Another reason Bill 29 doesn't go far enough is that it sets a very high bar for it to apply. The public interest would only win out over secrecy where there is a "compelling" public interest in disclosure that "clearly outweighs" the purpose of the exemption that would apply to the requested information. Experience in Ontario over the last 30 years has shown that such a high bar results in very few uses of the Ontario override. The bar has been set too high. The NWT has the opportunity here to amend Bill 29 so that information must be disclosed where that is "clearly in the public interest", not just

where, as Bill 29 now reads, there is a “compelling” public interest. The threshold should be lower.

- Another feature that should be added is that, as in BC and Alberta, there should be a positive duty to disclose information where that’s in the public interest. In Ontario and under Bill 29, the public interest only gets assessed when someone has requested a record and the government is considering what to disclose and what to withhold. In Alberta and BC, even where no access request has been made, there is a positive duty for government to disclose information that is clearly in the public interest. There is also a duty to disclose information where it is about a risk to health or safety or to the environment and as the commissioner has argued, this should be a feature of the NWT law.
- The last concern with the proposed override is that, unlike any of the other laws I’ve mentioned, the access applicant would have the legal burden of proving that there is a compelling public interest in disclosure that clearly outweighs the purpose of any applicable provision. Let’s leave aside the very real concerns about how this would work in practice, how a public body might hear from an applicant in a given case. The real concern is that, even if an applicant had their say, by definition they don’t know what the information they have asked for is, don’t know its contents. How can they satisfy the test if they don’t know what the information is? It will be all but impossible to do this. The Ontario law quite rightly doesn’t impose such a burden and the Act here should not do so either.

- To summarize, while it is welcome that Bill 29 would improve the Act by introducing a limited public interest override, it is too narrow in scope, sets too high a bar for the public interest to prevail and inappropriately forces applicants to prove the public interest should win out. Without improvement, the proposed public interest would be dead-on-arrival.

### **COMMON OR INTEGRATED PROGRAMS & SERVICES (page 27)**

- Bill 29 would add a definition to the Act of “common or integrated program or service”, which would be “a program or service that provides one or more services through a public body working collaboratively with one or more other public body [*sic*], or with an agency or a combination of public bodies and agencies”. Sections 41 and 48 of the Act would be amended to authorize public bodies to disclose and collect personal information where necessary for the delivery of a common or integrated program or service.
- As the commissioner has said in written submission, governments increasingly are delivering services across the silos of government departments, and across different governments. She has also stated her support for collaborative service delivery, and for the sharing of personal information across the silos where that is necessary.
- At the same time, Bill 29 would leave doubt about the important question of what exactly a common or integrated program or service is. For this reason, in BC, which is the only other jurisdiction that has a similar concept, they have required some structure around such programs and services. First, the existence and nature of the



supposed service or program has to be documented through a written agreement among the participating public bodies and agencies. Second, that agreement has to clearly state what kinds of personal information are being handled and set out the participants' respective obligations, which would include privacy obligations. (For example, to protect against breaches and who does what when a breach happens.)

- Since I'll be talking about privacy impact assessments later, I'll only note here that this is an area where the requirement for a privacy impact assessment would be very useful before citizens' personal information starts getting shared among departments, other governments and agencies.

## **DUTY TO DOCUMENT (page 21)**

- The commissioner recommended as far back as 2015 that the Act be amended to include a duty to document key government decisions and she has done so in her submission to you earlier this month. As the commissioner has said, a proper record of key government decisions and actions is a vital part of good government. It is necessary for the fiscally-sound and efficient administration of publicly-funded programs and services. It underpins the accountability of executive government and key public agencies, including through access to information; it is part of the foundation of a proper archival and historical record.
- As she has also said, governments everywhere are moving ahead with electronic information systems and the electronic management

of government information. This makes it more and more important to adequately, to appropriately, document key government decisions. This is needed because today a decision may be made through an exchange of emails or even text messages, with no one person being responsible to retain the relevant emails or to file them properly. Yet this is hardly an adequate record of decision, and it jeopardizes sound management of government and the archival and historical record.

- Several jurisdictions around the world have recognized this and created a duty to document. Leading examples are the State of Queensland and BC, with New Zealand also taking steps in this direction. Queensland and BC have enacted a statutory duty to document decisions and actions while leaving is created but detailed guidance is left to the government archivist or a similar expert.
- I should emphasize that none of the detailed guidance that I've seen comes anywhere close to requiring each and every government decision or action to be documented. This would be absurd. What is aimed at is solely a duty to document significant decisions, determined agency-by-agency in accordance with central guidance. Examples include decisions about procurement, to create or terminate programs or services, to award grants or make loans, and so on.
- As the commissioner has pointed out in her submission, the necessary amendments could be made to the Act or, perhaps more appropriately, to the *Archives Act*. as she has pointed out, a

statutory duty to document is needed in the interests of accountability and good government.

## **PRIVACY IMPACT ASSESSMENTS (page 27)**

- The Act does not, at present, require public bodies to conduct a privacy impact assessment (PIA) when a program, activity or system involving personal information is being created or amended. As the commissioner has said in her submissions, Bill 29 should be the vehicle to do that.
- PIAs have for many years now been recognized as a basic tool of good privacy practice in government. They can identify and avoid privacy challenges before money is spent on an initiative. They allow privacy to be designed in at the outset, not bolted on after, which can be very expensive. And in some cases, they allow government to recognize a spandex rule situation, namely, sometimes, just because you can doesn't mean you should. A proposal might be legally okay, but still be bad privacy policy and publicly unpopular.
- PIAs are for these reasons a desirable business risk assessment tool. Their use has spread but I agree with the commissioner that they need to be mandatory. Not all Canadian jurisdictions have gone this way, although both Alberta and BC have done so through their second-generation laws.
- In Alberta, the *Health Information Act* requires a PIA for any new information system, and it has to be submitted to the commissioner

there for comment. In and BC, government ministries and local public bodies do them for new programs, activities and other initiatives. In some cases, notably proposed common programs or services, as mentioned earlier, they have to be submitted to the commissioner for comment.

- I respectfully agree with the commissioner that Bill 29 should amend the Act to require a PIA for any proposed system, project, program or service, whether new or amended, and there would be great benefit in her office receiving PIAs for comment.



THE CANADIAN  
BAR ASSOCIATION  
Northwest Territories Branch

February 8, 2019

Kieron Testart  
Chair of the Standing Committee of Government Operations  
Legislative Assembly of the Northwest Territories

Via email: [Kieron\\_Testart@gov.nt.ca](mailto:Kieron_Testart@gov.nt.ca); [Jennifer\\_Franki-Smith@gov.nt.ca](mailto:Jennifer_Franki-Smith@gov.nt.ca)

Dear Sir:

RE: Bill 29: An Act to Amend the Access to Information and Protection of Privacy Act

I am writing on behalf of the Labour and Employment and Administrative Sections of the Canadian Bar Association, Northwest Territories Branch. The Canadian Bar Association is the voice of Canada's legal community, representing some 36,000 legal professionals across Canada, and is dedicated to supporting the rule of law and improving the administration of justice in Canada.

The Labour and Employment and Administrative Law Sections, Northwest Territories Branch, is pleased to offer this written submission regarding *Bill 29: An Act to Amend the Access to Information and Protection of Privacy Act*. We offer the following specific comments for consideration by the Standing Committee reviewing Bill 29:

- Section 2(3)(b.1): the proposed amendments broadens the definition of "public body" to include "any municipality under the *Cities, Towns and Villages Act* ("CTV Act"), the *Charter Communities Act* (the "CCA Act") or the *Hamlets Act*, that is designated as a public body in the regulations". The legislation would be clearer and easier for local governments and members of the public to understand if this section covered all the local governments as of the date of the legislation coming into force, rather than having to wait on regulations designating them as public bodies. It is also unclear what the intention is with respect to communities that are not covered by the CTV Act, the CCA Act or the *Hamlets Act*.
- Section 5.1: This section provides that exemptions from disclosure of a record do not apply in certain circumstances where "the applicant demonstrates that a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". The term "public interest" is not defined. The draft legislation does not contain a process or any parameters around how a determination would be made, who would make this decision, or whether the decision would be final or subject to review. We suggest that more specific language on what this test means would provide all parties with more clarity regarding the "public interest" exemption.

Please do not hesitate to contact our sections with any questions or concerns and thank you for considering this submission.

Yours truly,

Cynthia Levy  
Member of the Labour and Employment and Administrative Law Sections