

MEMO TO: Mr. Clyde Wells QC (Chair), ATIPPA Review Committee

DATE: September 18, 2014

Re: Supplement to OPE Brief to ATIPPA Review Committee

Further to the Office of Public Engagement's (OPE) presentation to the Review Committee, please find below additional information relating to the brief we provided:

I. Fees

- a. Since we tabled our brief, an additional fee of \$150.00 had been identified as being paid in fiscal year 2013-14 which brings the total applications with fees paid to 7 (rather than 6) and the post 2012 average to 9 applications (rather than 8) with the average paid being \$1,171 (rather than \$1,096). Could you please replace Table 10 on page 32 with the following:

Table 10: Fee Estimates provided to Applicant and Fees Paid (Departments)						
Fiscal Year	Total Fee Estimates			Fee Estimates Paid		
	#	%	Total	#	%	Total
2008-09	46	18%	\$13,272	21	8%	\$2,086
2009-10	33	11%	\$15,640	19	6%	\$1,328
2010-11	43	13%	\$27,222	9	3%	\$564
2011-12	27	10%	\$9,513	13	5%	\$3,707
Pre-2012 Avg.	37	13%	\$16,412	16	5%	\$1,921
2012-13	23	7%	\$10,635	10	3%	\$1,227
2013-14	30	10%	\$15,761	7	2%	\$1,114
Post-2012 Avg.	27	9%	\$13,198	9	3%	\$1,171

- b. The Committee asked for further information on the reasons for estimates not being paid as supplementary information to Table 10. Please see the following table.

Fee estimates where no fees were paid by Fiscal Year (Government Departments)																
Reason for no payment	2008-09		2009-10		2010-11		2011-12		Pre-2012		2012-13		2013-14		Post-2012	
	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%
Abandoned	22	88%	11	79%	32	94%	10	71%	19	86%	7	54%	11	48%	9	47%
Modified to remove fees	1	4%	2	14%	0	0%	2	14%	1	5%	3	23%	7	30%	5	26%
Withdrawn	1	4%	0	0%	0	0%	0	0%	0	0%	0	0%	2	9%	1	5%
Waived	0	0%	0	0%	1	3%	0	0%	0	0%	2	15%	2	9%	2	11%
Applicant did not pay	1	4%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
No responsive records	0	0%	1	7%	1	3%	0	0%	1	5%	0	0%	0	0%	0	0%
Sent electronically	0	0%	0	0%	0	0%	2	14%	1	5%	1	8%	0	0%	1	5%
Refunded	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	4%	1	5%
Total	25	100%	14	100%	34	100%	14	99%	22	101%	13	100%	23	100%	19	99%

II. Third Party Business Information

Government Purchasing Agency (GPA) fully agrees with the need for transparency and accountability relating to public procurement and GPA is of the view that in some circumstances, certain types of competitive information are appropriate to withhold, to protect third parties in their bids, and in some cases, to help public entities achieve better value over the long term and encourage a more creative and accommodating market place.

With respect to the issue of the harm test in section 27 used to assess whether competitive information should be withheld or disclosed, the data included in GNL's brief indicates the use of section 27 has not increased with the one-part test. A review of OIPC rulings suggests the current one-part test of section 27(1) does not appear to have been a restrictive factor in OIPC's rulings related to procurement decisions and OIPC continues to require a high threshold to be met in order to protect third party business information.

While GPA has not conducted an in-depth review of the use of section 27, GPA is not aware of situations where the changes made in section 27 have practically lead to changes in Government's position on disclosure of procurement information.

III. Municipalities

Training is being provided to administrators of municipalities in September 2014 and to councilors in October 2014. Additionally, a guide specific to municipalities to support this and further training including frequently asked questions is under development.

IV. Access Policy and Procedures Manual

To enhance the awareness and usage of the ATIPPA Access Policy and Procedures Manual, reference to this manual is now noted in the acknowledgement letter to applicants. The OPE is reviewing other mechanisms to enhance awareness, including potential changes and enhancements to the website.

V. Records Management

The Office of the Chief Information Officer (OCIO) is responsible for the administration of the *Management of Information Act*. This provides authority for the establishment of policies, directives, standards, guidelines, procedures and training materials for implementing an information management program. The OCIO has developed this program and provided these materials to all departments. The OCIO also provides guidance and Information Management advisory services to government employees and supports an information management community of practice. For example, a Corporate Records and Information Management Standard (C-RIMS), a Guide to Developing an Information Management Program for Public Bodies, FAQs relating to the use of mobile devices, an email management policy and guidelines and IM training modules for general employees and for managers and directors have been developed and distributed/delivered. Other resources can be found on their website at <http://www.ocio.gov.nl.ca/index.html>. The *Management of Information Act* holds departments responsible for the management of their information.

While the OCIO establishes policies and procedures, as well as provides guidance relating to information management, it is also responsible for establishing and supporting the Government Records Committee (GRC). The GRC is chaired by the OCIO and has representation from the departments of Finance, Justice and The Rooms, Provincial Archives. Departments are responsible for drafting records retention and disposal schedules which sets the time period for how long records will be kept and their ultimate disposition. Through the process departments consult with owners of the business records, IM practitioners, legal and the archives. The GRC reviews and makes recommendation to departments. Once approved, departments are responsible for compliance with the schedule (i.e. ensuring records are disposed of in accordance with the schedule). Additional information relating to records disposal within Government can be found at <http://www.ocio.gov.nl.ca/ocio/im/disposal.html>.

VI. Solicitor-Client Privilege

During our presentation, the ability of the Information and Privacy Commissioner to review solicitor-client privileged (section 21) records was discussed including 15 requests reviewed by the Commissioner relating to the use of solicitor-client privilege.

These requests were received by public bodies after the Supreme Court Trial Division had determined that the Office of the Information and Privacy Commissioner did not have the authority to compel the production of and review documents for which section 21 had been claimed, and before the Commissioner's appeal of that decision had been heard. In 2011, the Court of Appeal overturned a Supreme Court, Trial Division decision, and held that section 52 of

the Act permitted the Commissioner to compel the production of and review records for which solicitor-client privilege is claimed. Following this decision, the Commissioner reviewed 15 requests involving section 21. During his presentation to your Committee, the Commissioner advised that of these 15 requests, they found that section 21 had been inappropriately applied in 80% of these requests.

Since our presentation to your Committee, Government and the Commissioner have met and discussed these files. Of the 15 requests, seven relate to government departments with legal advice provided by the Department of Justice and eight relate to other public bodies (i.e. Workplace Health, Safety and Compensation Commission (two) and the College of the North Atlantic (six)) with legal advice provided by their legal counsel.

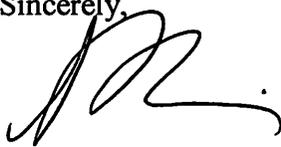
In relation to the seven requests made to government departments,

- in two requests the information withheld as solicitor client privilege information was released following the Commissioner's involvement (NR/4/2009 and EDU/12/2011);
- in two requests, the Commissioner agreed with the use of section 21 (JUS/13/2010 and NR/16/2010); and,
- in three requests, some information was subsequently released following the Commissioner's involvement with the Department of Justice maintaining the position that solicitor client privilege applied and despite the risk of waiver (JUS/1/2009/, JUS/34/2010 and JUS/18/2011).

Annex A includes the details of the seven government department requests. Given the variation and the extent of the use of section 21 in each request, we are unsure if the application of a percentage of all requests reflects the complexity and outcome of each individual request.

In summary, Government is looking forward to receiving advice and guidance from the Review Committee.

Sincerely,



SANDY COLLINS, MHA
Minister Responsible for the Office of Public Engagement

Annex A

Overview of 15 requests involving solicitor-client privilege reviewed by the OIPC

Requests made to Government Departments

Public Body	Wording of the Request	Comment
<p>JUS (JUS/1/2009)</p>	<p>Applicant is requesting the entire contents of a file held by Chantelle MacDonald Newhook in relation to herself. She would like also like records held by Jerome Kennedy, Don Burrage, Paul Noble, Tom Marshall, Ralph Alcock, Patricia Power, Chris Curran.</p>	<p>December 2008: Request made by an applicant. JUS initially denied the request for access in its entirety on the basis of s. 21, as the request was specifically for the file of the solicitor handling the matter.</p> <p>March 2009: JUS filed an application at the Supreme Court, Trial Division (SCTD) regarding the OIPC’s ability to compel the production of the records in question.</p> <p>February 2010: SCTD agreed with JUS position that OIPC could not review.</p> <p>October 2011: Court of Appeal overturned SCTD decision noting in paragraphs 54 and 55 the requested records as “<i>an employment file</i>” and “<i>documents in the hands of a DOJ solicitor regarding an employment issue.</i>” OIPC requested records be provided for purposes of review. JUS complied.</p> <p>January 2012: During informal review OIPC recommended that certain records should be released to the applicant immediately as they were publicly available, were sent to or from the applicant, or otherwise did not meet the requirements of section 21.</p> <p>March 2012: JUS released some additional records to the applicant, while still maintaining that s. 21 applied.</p> <p>November 2012: JUS agreed to release an additional 3 pages of information originally withheld under section 21. Informal resolution stage ends, and OIPC advises that the matter has been referred for formal investigation.</p>

Public Body	Wording of the Request	Comment
		<p>January 2013: JUS provides a formal submission to OIPC with respect to the remaining records over which section 21 is claimed. JUS maintains that all outstanding records are subject to solicitor-client privilege on the basis that they form part of the continuum of communications between the JUS solicitor and her client (the RNC). An additional 109 pages of information (which had previously been withheld under section 30 – personal information) are released to the applicant at this time.</p> <p>March 2013: OIPC releases Report A-2013-004. The OIPC generally accepts the statements regarding continuum of communication but disagrees with JUS interpretation and recommends the release of 55 additional pages to the applicant, on the grounds that the documents do not form part of a continuum of communication, do not indicate the legal advice being given and contain only independently obtainable facts.</p> <p>After consultation with the RNC (the client), and given the passage of five years from the initial request, JUS released the remaining 55 pages, while still maintaining the position that s. 21 applied .</p> <p>OIPC found that 73% of the records claimed as solicitor-client privilege were improperly withheld.</p>
<p>JUS (JUS/13/2010)</p> <p>NR (NR/16/2009)</p>	<p>I request, under the Access to Information Act: Copies of all invoices paid to WeirFoulds LLP, from Jan. 01, 2007 to May 26, 2010.</p>	<p>JUS and NR received the same request. JUS and NR initially released the invoice number, invoice amount, and invoice date. Copies of the invoices were withheld on the basis of s. 21 as the remainder of information contained in the invoices was subject to solicitor-client privilege.</p> <p>JUS and NR provided records to OIPC after the CA decision in October 2011. OIPC closed their file in Feb. 2012 with no</p>

Public Body	Wording of the Request	Comment
		<p>further recommendations or formal report.</p> <p>OIPC found that 100% of the records claimed as solicitor-client privilege were properly withheld.</p>
<p>JUS (JUS/34/2010)</p>	<p>A complete copy of my file including but not limited to the following. For the purpose of this request, the Newfoundland and Labrador Department of Justice includes Support Enforcement and Legal Aid as well as any other part of your department...</p>	<p>JUS initially withheld some information in the responsive records on the basis of s. 21.</p> <p>Records were provided to OIPC in Dec. 2011 after CA decision.</p> <p>After informal discussion with OIPC, JUS agreed to cease its reliance on s. 21 in some instances (three pages of the responsive records) and released additional information to the applicant. Some of the information for which s. 21 had been claimed, however, continued to be withheld on the basis of s. 30 (personal information).</p> <p>March 2014: OIPC issued Report A-2014-006 in relation to this request. The OIPC agreed that with respect to the remaining s. 21 records, JUS had properly applied the exception and that the remaining documents for which the privilege had been claimed should be withheld.</p> <p>OIPC found that 10% of the records claimed as solicitor-client privilege were improperly withheld.</p>
<p>JUS (JUS/18/2011)</p>	<p>I am requesting the following information: Part one - All personal information wherein my name appears and all personal information as defined by the ATIPPA in the custody or control of the Department of Justice. This would include but not be limited to all emails, letters, memos and reports. Part two: All records in the custody or control of the Department of Justice which has to do with or</p>	<p>April 2011: Request received from an applicant. JUS initially withheld certain records under s. 21, as well as s. 20 (policy advice/ recommendations) and s. 30 (personal information).</p> <p>December 2011: s. 21 records were forwarded to OIPC for review after CA decision. JUS maintained its reliance on s. 21, s. 20 and s. 30.</p> <p>July 2012: After discussions with OIPC, and while maintaining that s. 21 was appropriately applied, JUS released some</p>

Public Body	Wording of the Request	Comment
	<p>references in any way any of the following four pieces of correspondence which are referenced as 1-4. This would include, but not be limited to, all emails, letters briefing notes, memos and reports. 1. My June 01, 2010 letter sent to The Honourable Thomas Marshall. The letter was sent by email as an attachment in pdf format. 2. The August 09 2010 letter to me from The Honourable Thomas Marshall, QC, Minister of Finance. In that letter Minister Marshall stated, "As your letter references "evidence of blatant wrongdoing" and "malfeasance" a copy of your letter has been referred to the Department of Justice for consideration." 3. The August 26 2010 letter to me from Mr. Paul Nobel [sic], Assistant Deputy Minister of Justice. In that letter Mr. Nobel [sic] stated, "I wish to advise that your letter of June 01 2010 has been referred to the Royal Newfoundland Constabulary for investigative follow up as deemed appropriate by them in relation to your allegations of possible criminal actions." 4. The April 03 2011 email from me to Mr. Paul Noble. In that email I stated, "I am requesting the status of the mater referred to the Royal Newfoundland Constabulary as noted in your letter to me of August 26 2010.</p>	<p>of the remaining information on the basis that the applicant was aware of the fact the legal advice had been sought from JUS. The remainder of the information for which s. 21 had been claimed continued to be withheld.</p> <p>August 2012: After informal resolution, OIPC closed their file with no further recommendation or formal report.</p> <p>OIPC found that 70% of the records claimed as solicitor-client privilege were improperly withheld.</p>
NR (NR/4/2009)	<p>...a copy of my information contained in the e-mails of Donna Collins (incoming/outgoing) and any information relating to me. Also I want copies of e-mails to/from</p>	<p>Six of 179 pages were initially redacted on the basis of s. 21.</p> <p>After informal review by the OIPC, NR released all information previously</p>

Public Body	Wording of the Request	Comment
	<p>Craig Martin containing my personal information and my name. Also e-mails to/from Kris Slaney containing my personal information until today (Jan 2008 – March 2009). All of the above individuals work for the Royalties Division at the department of Natural Resources.</p> <p>In summary I want access to:</p> <ol style="list-style-type: none"> 1. Ingoing/outgoing e-mails of Donna Collins referring to me 2. Ingoing/outgoing e-mails of Craig Martin referring to me 3. Ingoing/outgoing e-mails of Kris Slaney referring to me 	<p>redacted under s. 21.</p> <p>OIPC found that 100% of the records claimed as solicitor-client privilege were improperly withheld.</p>
<p>EDU (EDU/12/2011)</p>	<p>The contents of any emails and attachments between any (Darrin Pike or his representatives) and (Cam Hill OR Dillon Hill OR other employee) of Hill Advisory Services between the dates of 3/1/10 and 9/30/10.</p>	<p>June 2011: EDU received request from applicant. Of 53 pages of responsive records, s. 21 was claimed in relation to 4 lines of one email. Section 20(1) (policy advice/recommendations) was also claimed with respect to this email.</p> <p>November 2011: Records were forwarded to OIPC for review re s. 21.</p> <p>During informal resolution, EDU agreed that s. 21 did not apply to the email in question. OIPC agreed that the record in question was, however, properly withheld under s. 20.</p>

Requests made to other Public Bodies

Public Body	Wording
<p>CNA (PB/211/2009)</p>	<p>I am requesting the email(s) referred to by _____, Cox Palmer, Legal Counsel for the College of the North Atlantic, on October 27, 2009. The reference to the email(s) was made as part of a hearing at The Supreme Court of Newfoundland and Labrador, Trial Division, St. John's. The reference to the email(s) by _____ is contained in the following transcription of the discussion which took place at that hearing. (see file for exact wording of transcription of hearing).</p>

Public Body	Wording
CNA (PB/234/2010)	All emails or email conversations or email attachments that reference the following personal information (search terms are bulleted). My name or any reasonable derivative of it. - ___ - ___ - _____ My former position or any derivative of it - VPLR - Vice President Learning Resources - VP Learning Resources - Learning Resources - VPLS (this is a term often mistakenly used to identify my position) Departments that reported to me or initiatives that would have been part of my locus of control as VPLR or member of the executive - ALT Center or ALT Centre - Advanced Learning Technology Center or Advanced Learning Technology Centre - Advanced learning - ALT - Service Learning - D3L - Desire 2 learn - Strategic Plan - SP - Student - Annual Plan Period from July 1, 2009 - Current.
CNA (PB/71/2011)	Part 1 - All records having to do with the payment of any invoices from Hill Advisory Services Inc.; made by the College or any campus of the College or by another party on behalf of the College for the period April 4, 2008 up to and including April 4, 2011. This request would include but not be limited to the actual invoices submitted by Hill Advisory Services Inc. during any part of this period and the College payment authorization records. I am interested in being able to determine the total cost paid to Hill Advisory Services for their services leading to the delivery of the report titled: CNA-Qatar Workplace Assessment Report. Part 2 - All records in the custody or control of the College, having to do with the firm Hill Advisory Services Inc. conducting a Workplace Assessment (or an assessment by another name) at the College, or a campus of the College leading to a report called CNA-Qatar Workplace Assessment Report. This would include but not be limited to; records setting out the contract between the firm of Hill Advisory Services Inc. and the College whereby the work to be performed by Hill Advisory Services, and the cost to the College was set out and correspondence including emails between Hill Advisory Services Inc. and the College. Hill Advisory Services has its address listed in Winnipeg MB and the firm is listed as Hill Advisory Services, Harassment Investigators, Canada.
CNA (PB/94/2011)	I am requesting all documents in the control or custody of the College of the North Atlantic which are known as or titled as CNA-QATAR Workplace Assessment Report. This would include all revisions, edited copies, or any variations or draft copies of that report. To assist in the search for the documents responsive to this request, I am providing the following description of one specific document, which is requested, and it is my understanding that this specific document is in the custody of the College: - That document has about twenty-four (24) pages. - That document may have a date of on or about April 25, 2010. - That document has the following text within the document which appears on or about the corresponding page numbers as presented herein: (...did not get contracts renewed for no reason (appearing on or about page 4)); (When participants were questioned about whether they had any ongoing disputes or concerns with management, senior executives or the interim President's office the following responses were provided (appearing on or about page 11)); (Participants were asked to describe the communication flow within CNA-Q from the Interim President's

Public Body	Wording
	office and the following comments were given: (appearing on or about page 14)); (Participants were asked to describe the leadership style of the Interim President's office and the following comments were provided)).
CNA (PB/84/2010)	I am requesting all emails sent to, from or copied to Dr. _____, former president of the Qatar campus of the College of the North Atlantic, for the period of April 16, 2003 up to and including May 15, 2003. This may include, but is not limited to my personal as defined by the ATIPPA. This request is to include but not be limited to those records defined by the College as "work product". This should include records found in the archived records referenced as the December 2003 archived files and the search criteria should be limited only to the dates referenced. I am not requesting any attachments to the responsive emails; however I am requesting that for any email with an attachment the email be supplied. I am requesting that the records be supplied to me in electronic format.
CNA (PB/141/2010)	I am requesting: (1) the College records(s) of payment (which may be referred to as the pay advice or bi-weekly pay stub showing the money paid to Dr. _____, former employee of the College, for the period of November 30, 2004 until the end of until the end of Dr. _____'s employment with the College. The record(s) of payment would normally indicate the amount paid as salary which was paid to the employee for a two week period. (2) Any record of any severance or similar payment, or any payment made to Dr. _____ for services rendered to the College after November 30, 2004 which is not covered in number (1) above. This request does not include any payment made for travel or expenses.
WHSCC (PB/170/2010)	Transcontinental's OHS Committee meeting minutes since Prime started. WHSCC's _____ intervened on my behalf with OHS. I would like all correspondence between Mrs. _____ and OHS to date. And any other correspondence that deals with my case and is not in my file and any information WHSCC's prevention Department has on my file and company.
WHSCC (PB/34/2010)	All Internal Legal Memos concerning 2 work place injuries. Claim _____ in 1993 and Claim _____ for lower back injury 1983 and how it was justified to deny payment for treatment and medical intervention for these injuries.