OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Submission of the

Office of the Information and Privacy Commissioner to the

Review of Statutory Offices of the House of Assembly

May 15, 2023

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

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VIA EMAIL

Honourable Robert Fowler
Chair
Review of Statutory Offices of
the House of Assembly
c/o DianeBlackmore@rsonl.ca

Subject: OIPC Review of Statutory Offices of the House of Assembly Submission

Dear Chair Fowler,

I am pleased to provide the initial submission of the Office of the Information and Privacy Commissioner in relation to the Review of Statutory Offices of the House of Assembly.

Please do not hesitate to contact our Office should you or the Committee members require clarification on any items discussed in the submission.

Yours truly,

Michael Harvey
Information and Privacy Commissioner

Submission to the Review of Statutory Offices of the House of Assembly

INTRODUCTION

The Office of the Information and Privacy Commissioner (OIPC) for Newfoundland and Labrador appreciates the opportunity to provide this submission on the Review of Statutory Offices of the House of Assembly. Our submission is constructed based on the terms of reference of the Committee, but a few introductory remarks are in order.

OIPC welcomes any ideas that might improve the functioning of our Office in pursuit of our legislative mandate, the furtherance of the purposes of the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*) and the *Personal Health Information Act* (*PHIA*) and the access and privacy rights of Newfoundlanders and Labradorians more broadly[1]. That said, we are generally of the view that this Office performs very well in comparison to its counterparts elsewhere in the country. Of course, like every part of the provincial government, this is in large part due to the hard work and integrity of our officials but mainly it is due to how the careful design of the Office fits the particular function set out for us by our legislation, as a consequence of careful consideration by the 2014 Statutory Review Committee of *ATIPPA.*

Our central recommendation[2] is therefore that the basic structure of our Office be maintained because it fits the very specific function set out for it in its legislative mandate, which differs from any other statutory office, for which it was designed, and the performance of which is the envy of comparable offices across the country. However, we do believe that there is room for improvement, in particular in both the perception and reality of the Office's independence from the executive branch of government.

OIPC's Form = Function

Newfoundland and Labrador's access to information system is generally held to be one of the highest performing access to information systems in Canada. We often claim that the people of this province get access to more information, faster and usually for free than elsewhere in the country. This is because of specific aspects of *ATIPPA, 2015*:

[1] This submission primarily focuses on *ATIPPA, 2015* with fewer references to *PHIA*. This is because it is the former statute that creates the office and the unique hybrid quasi-judicial / ombuds nature of our Office arises from our *ATIPPA, 2015* authorities. Our authorities under *PHIA* are presently entirely of an ombuds character, though this may be subject to change as that statute is presently under review. The bulk of our investigations, and thus the quantifiable work that we do, are investigations under *ATIPPA, 2015* but the work that we do related to *PHIA* should not be underestimated. The largest investigation that we have ever conducted (the ongoing investigation into the cyberattack on the health system) is both an *ATIPPA, 2015* and a *PHIA* investigation and a considerable amount of our education and advocacy work has been related to *PHIA* in recent years.

[2] A roll up of all recommendations can be found in Annex A.

- there is a 20 business day legislative timeline for public bodies to respond to access requests;
- public bodies can only extend timelines by seeking approval from OIPC;
- failures to respond to access requests by these timelines are deemed to be refusals of access, which trigger complaint rights to OIPC;
- there is no application fee, and fees for large requests are only triggered when responsive records are quite large, and OIPC can investigate fee complaints;
- complaints to OIPC must be resolved informally or by report within 65 business days; the Commissioner can apply to court to extend that deadline only in extraordinary circumstances – there is no backlog of access investigations;
- OIPC has a unique hybrid oversight regime that includes a mix of ombuds and quasi-order making authorities, carefully designed so that public bodies take its recommendations seriously, but without making it an unwieldy proto-court.

These design features were the result of the 2014 Statutory Review of *ATIPPA*, which comprised the Honourable Clyde Wells, former Privacy Commissioner of Canada Jennifer Stoddart and prominent local veteran journalist Doug Letto (henceforth, the Wells Committee). The Wells Committee was mandated to do a full review of *ATIPPA* as a consequence of the controversy surrounding the 2012 amendments of *ATIPPA* – commonly referred to as Bill 29 – which were generally seen to be a retrenchment of the rights of access from the original *Act* which came into force in 2005. In doing so, they addressed the functioning of the entire access system, which like many other access systems in the country (then and now) faced long response times for access requests and also large backlogs and lengthy timelines for oversight investigations, which at their conclusions had only ombuds recommendations.

The Wells Committee embraced the notion that, with respect to access to information, the purpose of OIPC was to make the *Act* more "user friendly" and thus to further the established purposes of the statute, as outlined in section 3 of the *Act*. In terms of the review process, the primary problem with which the Wells Committee was seized was not, ultimately, compliance with the legislation by public bodies but rather delays on the part of both public bodies and OIPC itself. It concluded:

> An ombuds-model oversight body must advocate for the right of citizens to access information and to ensure that their personal information in the hands of government is protected. It must also help citizens exercise those rights. The responsibility in an ombuds model is both proactive and reactive. The Commissioner has the reactive power to investigate complaints about a public body's actions or inaction. Additional proactive powers are conferred on the Commissioner … to make recommendations that will ensure compliance with and better administration of the *Act*.
>
> …

> Adequate jurisdiction, independence, expertise, efficiency and user-friendly practices and procedures are determining factors for success in an ombuds-style office of the Commissioner (pp. 207-209).

The Wells Committee considered the potential value of an order-making power but concluded that: "If an order-making model were put in place … delays would almost certainly be exacerbated" (p. 209)

In our counterpart offices elsewhere in the country where there is order-making power, the staff that conduct investigations are split into two separate parts – staff who attempt to mediate resolutions between complainants and public bodies, and staff who adjudicate matters for which this mediation has not been successful. The adjudication process is a more highly legalistic process that produces orders rather than recommendations, and those orders are written in the detailed, comprehensive style more akin to a judicial decision, which requires a much more time and resource-intensive process.

It was the clear intent of the Wells Committee that this be avoided in favour of an office that produced more timely outcomes.

However, the Committee still deemed it necessary to give OIPC more teeth:

> One additional change, a kind of hybrid of order-making and ombuds, could greatly improve the circumstance for the less than three on average of the Commissioner's recommendations that are rejected by public bodies each year. That change would be a statutory requirement that upon receipt of an OIPC recommendation the public body concerned would, within 10 business days, have the option *only* of complying with the recommendation or applying to court for a declaration that, by law, it is not required to comply.
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> …
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> The big benefit of the hybrid approach is that the burden of initiating a court review and the burden of proof would be on the public body. As well, the Commissioner would be in a position to respond to the public body's application for the declaration, because he would not be the maker of an order under review by the court, and because he would have a statutory responsibility to champion access … The hybrid model would eliminate both the additional delays inherent in the order making-model and the disadvantage of the Commissioner's being unable to respond to any court application by the public body.

The balance that was struck by the Wells Committee in their design of *ATIPPA, 2015* has proven to be critical to the function of the access system as it has developed since 2015. The number of access requests (and complaints) increased substantially after 2015 after which point it settled down to a level that was higher than before, but stable. The rate of requests

and complaints seems to have surged again since 2020. In some respects, this post-2015 increase is a result of the success of the new statute: with no application fees, stricter response timelines, and a complaint process that produces outcomes within three months, more and more Newfoundlanders and Labradorians are using the system to get the information to which they are entitled. There is little question that the effect, however, has been a greater burden on public bodies and, pertinent to this Review, a burden on this Office. Despite this, we are proud that we have been able to meet the legislative timelines that we face, while continuing to resolve most complaints informally, and producing high quality, user-friendly reports when this is not possible.

The Wells Committee deliberately and carefully considered whether order-making or an ombuds model would be appropriate for this jurisdiction and instead concluded that it would find a third option that preserved the value of both. This is due primarily to what was desired – a user-friendly oversight body that would have: the advocacy virtues of an ombud-type body; some of the teeth of an order-making body; without making the sacrifices of timeliness that are involved with a more highly legalistic body; and preserving the Commissioner's right to intervene as a friend of the court during trials *de novo*. This design was also developed in light of the appropriate size of the Office. The Committee observed:

> … the present legislative jurisdiction, procedures, and practices of the OIPC do not permit that office to be easily modified. The recasting will require so many changes to the existing *ATIPPA* that the most expeditious way to proceed is to structure a revised statute by retaining and incorporating in it all that is good and useful of the existing version and adding the new provisions necessary to achieve the desired recasting (p. 209).

While the form of OIPC cannot be separated from its function, we would be wary about its expansion to other functions. While it is appropriate that the Commissioner has authority to be an advocate for privacy and access, and that this can be effectively balanced with the impartial assessment of individual complaints, to further stretch that advocacy role to include other policy areas would, we anticipate, create difficulties. As we will expand upon below, when investigating an access or privacy complaint about a government body, it is of great benefit to our relationship with both the public body and the complainant in being able to credibly claim to be totally neutral about whatever the subject matter of the information in question is about.

A final introductory note about form and function: we note that in launching this review of statutory offices, the provincial government excluded the Auditor General because the *Auditor General Act* had recently been reviewed. However, both *ATIPPA, 2015* and *PHIA* have also been subject to recent review, as required by statute. *ATIPPA, 2015* was comprehensively reviewed by the Honourable David Orsborn starting in 2020 and his report was provided to the Minister responsible for Access to Information and Protection of Privacy in June 2021. Amendments have yet to be introduced as the report is still under consideration. A review of *PHIA* was initiated in 2016 by a committee chaired by Dr. David Morgan and provided its report

to the Minister of Health and Community Services in 2017. No amendments were introduced. In 2021, per the schedule required by statute, another review was initiated and is currently being conducted by INQ Consulting. Reviews of these statutes have the inherent mandate to examine both the form *and* the function of the Office, and the requirement that they be undertaken every five years provides the provincial government with regular opportunities to examine how the Office is executive its mandate.

Independence of the Statutory Office

The main area that we would like to highlight for the attention of this review relates to the perceptions, and in some instances reality, of the independence of the Office – a feature that is critical for it to discharge both the investigations and advocacy components of its mandate.

The independence of OIPC must be both vis-à-vis the executive branch and the legislature itself. As it relates to our independence from the latter, as expanded upon below, we are only partially independent from an administrative standpoint. While it might theoretically be argued that we do not need administrative independence to have substantive independence, the practical reality is that the two are not so cleanly separated. Nevertheless, we appreciate that the administrative involvement of the legislature – through the Management Commission, is not only administratively convenient and a prudent use of public resources, but involves necessary oversight for OIPC as a public body itself. Instead, the primary challenge of independence is not OIPC's independence from the House of Assembly (HOA) but rather its perceived independence from the executive branch of government.

It is very common for us to find that members of the public do not differentiate this Office from government bodies or departments. Most commonly we are confused with the Office of the Chief Information Officer (OCIO) or the ATIPP Office, both currently part of Executive Council. Even more generally, many members of the public consider the government an undifferentiated whole and do not appreciate the separation of powers between the executive branch and the legislative branch, or indeed that executive power in our democracy is exercised on the basis of delegation from, and oversight by, the House of Assembly, consistent with the principles of popular sovereignty and parliamentary supremacy, and in the form of law. This is entirely understandable. The nuances of the Westminster system of government are complex and, particularly given that in this province the government has held majorities in, and thus has had control of, the legislature in all but a small number of exceptions, it is reasonable that many members of the public would not understand how the legislative branch is independent from the executive branch.

However, in our experience, this failure to appreciate the differences between the executive and the legislative branch occasionally occurs with people *within* the government as well, with consequences for the exercise of our mandate. This dynamic is perhaps to be anticipated. The phenomenon of centralization of power in first ministers and cabinet offices has been observed across the country, most prominently at the federal level in Donald Savoie's seminal

Governing From the Centre, published 30 years ago. It has become conventional wisdom that this trend is found at the provincial level as well.

In this province, there are reasons to expect that centralization and perceptions thereof would be exacerbated. One could hypothesize about our size, demographics, political culture and the nature of our political economy, but a hypothesis that is more relevant to this review could focus on our legislature. The House of Assembly sits for the fewest days of any province and the legislative process does not have standing legislative committees which, among other activities, regularly hear from witnesses. With only rare exceptions, bills pass through the legislature very quickly. A review of the Progress of Bills page on the House of Assembly's website reveals that the vast majority of statutes passed in this session of the House were voted on at second reading and committee stage on the same day and that almost none of them had any amendment at committee stage. In short, the legislature itself has a limited visible role even during the legislative process. It does not help that, unlike as is the case in many other jurisdictions in Canada, the physical location and visible symbol of political power – the Confederation Building – is home to both the executive branch and the legislature.

We think a reasonable hypothesis is that the centralization of power and political attention on the Premier's Office and Cabinet, combined with the preponderance of majority governments, and a legislature that is less active during the legislative process, have combined to leave the legislative branch with a diminished political identity. This has implications for the legislature's ability – and that of its statutory officers – to perform their oversight roles.

If this hypothesis is correct, the issues involved are fundamental and mostly outside of the scope of this Review; however, OIPC would be supportive of ideas to increase the visible independence of the House of Assembly vis-à-vis the executive branch. One example might be co-location. As we express below, co-locating OIPC with other statutory offices or the House of Assembly Services (HOAS) would need to be done carefully so as not to undermine the confidentiality with which OIPC staff need to work, among other issues. But if OIPC was to have a secure office space within a building that visibly houses the other statutory offices, then this visibility and branding efforts might help the public understand that the legislative branch of government is separate.

In sum, the commentary that follows will make two fundamental recommendations:

> **Recommendation 1**: Great care should be taken with recommendations regarding the form of OIPC because it is inextricably related to its function, which was both carefully considered in recent statutory reviews and is commonly held to be among the most effective and successful in the country.

Recommendation 2: OIPC would support ideas to enhance the real and perceived independence of statutory offices and, indeed, the legislative branch as a whole, from the executive branch as this will enhance the way that they perform their mandates in the Westminster system of government.

The minimum required competencies for each statutory officer

We expect that the most likely suggestion on this question is that the Commissioner should have qualifications and experience as a lawyer, and our response is mainly structured in response to this idea. OIPC recommends against that notion and, more broadly, the inclusion of specific minimum required competencies for the Information and Privacy Commissioner.

It might seem, given that most Commissioners in Canada are lawyers, and it is critical that OIPC have legal expertise given its hybrid quasi-judicial role, that the normal professional background for the Commissioner would be as a lawyer. However, it is important to recognize that the design of the function of the Office was that it primarily be an ombuds office rather than an adjudicator. Moreover, the volume of investigations that it undertakes means that the bulk of work on each investigation is done by office staff, not the Commissioner themselves. Finally, the Commissioner was intended to be a strong and vocal advocate for access and privacy matters in the province. For these reasons, competencies and credentials related to senior public administration, public policy-making, communications and organizational leadership are just as important, if not moreso, for a Commissioner as would be legal expertise. The weighing of competencies are best left to the selection committee and ultimately the House of Assembly. Below, we expand on these points.

Information and Privacy Commissioners (IPCs) and equivalents in Canada do not have requirements for credentials in legislation, though in some instances there is reference to an appropriate level of experience in the area. There have been some instances in which the recruitment process has indicated that they are seeking a lawyer (PEI) and in other instances (e.g. NWT/NU) Commissioners have always been lawyers. It should be noted that in these particular instances the offices are extremely small – consisting of just the Commissioner alone or with perhaps one or two additional staff. In such instances, the importance of having legal expertise in the office means that an individual must be found with *all* of the above-noted competencies. This, however, is not the case for OIPC in this province. The Commissioner has a staff of eight analysts, at present all of which are lawyers (non-practicing) and a management team that presently includes one lawyer (also non-practicing).

Most IPCs in Canada are currently lawyers, but not all. Some of Canada's most prominent IPCs have been non-lawyers: Elizabeth Denham was British Columbia's IPC before going on to be the Information Commissioner for the United Kingdom, during which time she was the President of the Global Privacy Assembly and the International Conference of Information Commissioners. Her similarly internationally renowned predecessor, David Flaherty, was also

not a lawyer. Ann Cavoukian, three-term Commissioner in Ontario, and Jill Clayton, who served for ten years in Alberta, are other examples of non-lawyers.

As explored above, OIPC is not a judicial body; deliberately so. The purpose of *ATIPPA, 2015* as it relates to the role of OIPC is to provide a user friendly, comprehensive, means for oversight of access to information and protection of privacy by public bodies, with a similar mandate under *PHIA* for custodians of personal health information. While it is important for OIPC to have legal expertise on staff (as it currently does and has had since its early days) it is specifically and by design *not* a court. In fact, it was admonished by the Wells Committee for issuing reports that were too long and of a legal character. In this regard, it may be beneficial for the Commissioner to be a non-lawyer, so as to perform the challenge function with staff that are primarily trained in the legal profession.

Beyond the complaint investigation role of OIPC, there is an important education and advocacy role. This has become more important in an era of rapid technological change with implications for access and privacy. Other forms of expertise and experience – e.g. information management and cybersecurity – have become increasingly important in the role. Given that the most important things that the Commissioner should advocate about are access and privacy matters related to public policy development in general, including program development and development of statutes and regulations, experience in public administration is critical. The Commissioner also is required to have a public voice for their education and advocacy role, which includes the ability to speak publicly at provincial and national conferences and on a regular basis, to the media. Therefore, communications expertise is critical for the function. Finally, as the leader of an organization with a complex mandate and a diverse skill set, leadership experience may be the most important competence for a Commissioner.

> **Recommendation 3**: no minimum requirements should be established for the Commissioner but the required competencies should be the purview of the selection committee provided for by the *Act*.

The number of statutory offices and whether a statutory officer could fulfil the obligations of more than one statutory role; which offices/statutory officers could be combined based on common objectives, functions, qualifications, clients etc.

OIPC will limit its comments on this matter to its own mandate and consideration of whether other statutory roles might be combined with it. In short, flowing from comments made above and as expanded upon below, our recommendation is that the mandate of OIPC be left unaltered at this time. The form of OIPC was carefully designed to meet its very unique function – unique among the statutory offices of this province and until recently, uniquely in this province. OIPC has a hybrid quasi-judicial/ombuds role that is incompatible with the roles of the other statutory officers, and therefore our view is that the mandate of OIPC remain separate from other statutory officer roles and largely unaltered.

There are numerous models across Canada whereby offices are combined. Indeed, the model in NL already includes a form of consolidation – of the Information and Privacy Commissioners – as these two roles can be conceived separately, as they are at the federal level.

The most common model among provinces and territories (PTs) is the consolidated IPC with no other functions – which is the model in NL, PEI, NS, QC, ON, SK, AB and BC. It should be noted that in BC, the Commissioner is also the Commissioner of Lobbyists, though this is conceived as a separate role as opposed to inherently a role that the Commissioner holds.

In MB and NB the model is that there is a single Ombud, who serves the general ombuds function as well as the functions of the information and privacy commissioner, all conceived as one role. In YK the IPC also (and always has) served as the Ombudsperson and the Public Interest Disclosure Commissioner.

The essence of our argument to maintain the current basic structure of OIPC, is that its structure is unique among the statutory offices, and was carefully designed to fit its core function – access and privacy oversight – and it would be harmful to this mandate to merge it with the entirely ombuds oversight mandates of the other statutory offices. As it relates to the advocacy mandate, the importance of transparency and accountability to our democracy, and of privacy in the context of the rapidly changing technological context, mean that there is real value of having an identifiable individual officer charged with advocacy on these topics.

Oversight

As discussed above, the quasi-judicial nature of OIPC's advocacy work under *ATIPPA, 2015* and *PHIA*, which includes paths to court in a number of instances even when recommendation authorities are of an ombuds character, is unique to the oversight role of OIPC among the other statutory officers. The other statutory officers may make recommendations based on discrete investigations or audits, and these recommendations may be public (as is the case for the Auditor General or the Child and Youth Advocate) or normally confidential (as is the case for the Citizens' Representative) or a mix (as appears to be the case for the Commissioner for Legislative Standards) but in all instances the recommendations are not binding upon the body to which they are applied. The quasi-judicial function of OIPC makes it fundamentally different in orientation than the other statutory offices.

OIPC is of the view that enhancing its ombuds role to include elements of the mandates of the Citizens' Representative, the Child and Youth Advocate or the Seniors' Advocate would undermine the performance of its existing mandate under *ATIPPA, 2015* and *PHIA*. It is very common that an analyst, when working with a complainant, is dealing with an individual who is quite upset with the government for matters not limited to access to information. The most common scenario is that they are upset with some action or policy of the government that they have sought information about through the access to information system, and has come to complain to our Office because they are unhappy with the response to that access request. During the investigation, particularly the informal phase, the analyst has to attempt to mediate

between the public body and the complainant to attempt to get the latter the maximum amount of information to which they are entitled. To do so in good faith requires all parties to see the OIPC analyst as impartial with respect to the matter in question. If the public body understands that OIPC is indifferent to the substance of the matter, it will be more likely to use its discretion to release information and less likely to resist interpretations of exceptions that would result in the releasing of additional information. Similarly, it is helpful for the complainant to understand the limits of our ability to assist them – we would be unlikely to satisfy their concerns more broadly but we generally can assist them on their access to information matter, even if only to help them understand how the law applies to their request. If the Commissioner's mandate included administrative fairness then this could potentially affect expectations of complainants and public bodies alike. Moreover, the ability of the Commissioner to make recommendations that have the force of orders with respect to access and privacy may confuse complainants who might expect the same amount of force with respect to administrative fairness recommendations.

The Citizens' Representative, in the role as Public Interest Disclosure Commissioner, and the Commissioner for Legislative Standards, perform a specific type of investigation that the other statutory officers do not normally perform, namely in that the objects of their investigations are individuals rather than public bodies. OIPC does not normally investigate individuals except in rare cases where we uncover evidence in the course of an investigation that meets the threshold of the offence provision in *ATIPPA, 2015* or *PHIA*.

A specific note should be made of the investigatory role of the Commissioner for Legislative Standards. This not only is a role that involves the investigation of individuals, but a significant component of the role involves the investigation of political actors. There is an inherent risk involved in the performance of oversight that political actors may mistake or confuse non-partisan oversight with political resistance, seeing political motives where none exist because the outcome – resistance to an agenda – may look the same. If this occurs, it is damaging to the officer's performance of their role. While this is an unavoidable risk of those roles, if this type of investigation is linked to other non-partisan roles, then it exposes the remainder of their mandates to that risk.

Advocacy

OIPC also performs an advocacy role under both *ATIPPA, 2015* and under *PHIA*. This role is entirely separate from our oversight role, which is conducted impartially considering the records at issue, the relevant policies and statutes, and jurisprudence. Apart from the oversight context, our advocacy mandate provides the Commissioner authority to speak publicly about all manner of access and privacy matters and engage in provincial and national-level conversations. This role is increasingly important because of the complex and quickly evolving sphere of activity related to information, and that technological evolution is occurring on a worldwide scale, requiring connection and interaction with national and sometimes international contacts. Some have characterized the world as currently in the midst of a third economic revolution – the Information Revolution – no less consequential for human

civilization than the Agricultural and Industrial Revolutions that have proceeded it. As a consequence, there is a dramatically increasing amount of information being collected – much of it by public bodies and custodians, and this information is being used at a scale and with impacts that were never before imagined. How information collected today will be used even in two or three years is in some cases difficult to predict.

The provincial government, like other Canadian jurisdictions, does not have a single department with a responsibility for this realm of human activity. While Executive Council has an ATIPP Office, the Department of Digital Government and Service NL has a mandate for policy related to digital government services, and the Office of the Chief Information Officer has responsibility for information management systems of public bodies, there is no Department of Information. The lack of concentration of responsibility for matters related to information within the hands of a liberal democratic government is probably a good thing. However, it is useful to have a body, like OIPC, with a broad mandate to advocate on matters related to information (particularly from a statute-entrenched individual rights perspective) but conspicuously *without* an operational mandate, situated within the legislative branch and with legislation to protect against partisanship.

Indeed, as the environment becomes increasingly complex, it may be beneficial to reframe the IPC as a Data Commissioner. Consider the growing use of Artificial Intelligence (AI) by public bodies and custodians. There is an increasing consensus that legislative reform is required to address AI, but while there are implications of AI implementation for access and privacy, there are probably greater implications for ethics, considerations of which are not presently situated within OIPC's mandate. OIPC has made submissions on this matter to both the recent review of *ATIPPA, 2015* and the ongoing review of *PHIA*.

Recommendation 4: OIPC should not be combined with other Statutory Offices.

Whether each Statutory Office requires the dedication of a full-time statutory officer or whether it could be part-tine or on an as-needed basis

The Information and Privacy Commissioner is a full time position and cannot be performed on a part-time or an as-needed basis. While the first Commissioner was a part-time Commissioner (2005-2007), this was prior to the full set of statutory responsibilities coming into force. Only the access to information provisions of *ATIPPA* were in force initially, with the privacy provisions being proclaimed in 2008. *PHIA* came into force in 2011.

ATIPPA, 2015 specifies that the Commissioner is prohibited from carrying on a trade, business or profession or sitting in the House. This is essential to avoid real or perceived conflicts. It would not be possible for the Commissioner to perform their responsibilities while, for example, working as a lawyer or some other professional.

Moreover, the current volume of work faced by the Commissioner means that the position mainly involves being the leader of a team of professionals, and this requires a full time presence and executive leadership. It is therefore unreasonable for the position to be a part-time job.

Recommendation 5: The Information and Privacy Commissioner be maintained as a full time position.

How each statutory officer should be recruited, appointed, re-appointed, compensated, disciplined, and removed from office

OIPC has a number of comments on these matters primarily aimed at maximizing the independence of the position as a statutory officer of the legislative branch vis-à-vis the executive branch.

Recruitment, Appointment and Reappointment

The appointments procedure of the Information and Privacy Commissioner is unique among the statutory officers and was developed following the recommendations of the Wells Committee. Other statutory review officers are appointed by Lieutenant-Governor-in-Council (i.e. Cabinet) following a resolution of the House of Assembly, and in practice the resolution is brought by the government following reference to the Independent Appointments Commission (IAC). For the Information and Privacy Commissioner, however, the selection process is detailed in section 85 of the *Act*, which provides that a selection panel (membership of which is delineated) be created to develop a roster to be submitted to the Speaker (rather than, as is the case for the IAC process, the responsible Minister) who shall consult with the leaders of the parties in the House and then cause a resolution to be brought.

OIPC strongly recommends maintaining this process. This was the subject of submissions to the 2020 Statutory Review of *ATIPPA, 2015* and ultimately Chair Orsborn agreed with this recommendation. We recently made a submission to the Statutory Review of the Independent Appointments Commission (see Annex C) which sets out our position on this matter. In short:

- The provincial government has indicated an interest in bringing consistency to the appointment process of all of the statutory officers. We do not understand what the inherent benefit of standardization is, as these officers have quite different mandates and the types of competencies required from each can differ.
- During the 2020 Statutory Review of *ATIPPA, 2015*, the provincial government indicated an interest in appointing the Information and Privacy Commissioner through the IAC process, ostensibly for standardization.
- OIPC notes that the Wells Committee expressly considered the appointments process and explicitly designed a process to put the discretion over appointments in the hands of the legislative branch of government rather than the executive branch, over which the Commissioner has oversight.

- The IAC process is designed to support the executive branch's decision-making process and this is the purpose of the *Independent Appointments Commission Act* (sections 3 and 4). The IAC process provides a roster of individuals to Cabinet, which ultimately selects one. In the case of the other statutory officers, this individual is then the subject of a motion that is brought before the House by the government. Discretion is left to Cabinet but the House has no information about candidates other than the one brought forward.
- The process in *ATIPPA, 2015* provides a roster of officials to the Speaker who consults the leaders of the parties in the House and then introduces a motion regarding one of those individuals. Discretion is left to the House in a manner that allows for open debate about the merits of candidates without actually bringing the names of alternative candidates onto the floor of the House.

OIPC does not have any fundamental problem with the composition of the IAC as a selection panel, as compared to the panel provided for in *ATIPPA, 2015*. The latter panel was specifically designed in consideration of the nature of OIPC, but we also have respect for the types of individuals appointed to the IAC. Our concern is about what happens after the roster is provided by the IAC compared to that provided by the *ATIPPA, 2015* process. Therefore, it would not be particularly problematic if, for the purposes of appointment of the Commissioner, the IAC was used to provide a roster to the Speaker and then the process set out in *ATIPPA, 2015* continued from there. If there was a desire to standardize the appointments process of the statutory officers, then perhaps this process could be used for all of them. That said, it may be inappropriate to repurpose the IAC, which was created for the statutory purpose of providing advice on appointments to ministers and Cabinet.

> **Recommendation 6**: Retain the existing appointments process for the Information and Privacy Commissioner with respect to how a roster is provided to the Speaker.

There is, however, a minor, solvable, problem with the *ATIPPA, 2015* procedure: the process provides for consultation with the leaders of the parties of the House by the Speaker, but does not provide guidance on what should be done if there is no consensus. This is not itself inherently problematic: the Speaker can have the discretion to make the choice from the roster if there is no consensus and the *Act* recognizes this by saying that the next step in the process is to be taken by the Speaker in that they will "cause to be placed before the House of Assembly a resolution". However, this does not reflect the Speaker's role in the House – they are not intended to have positions on the substance of the matters before the House. It is also not realistic: even when the government does not hold a majority, it does hold the confidence of the House and thus rightly controls, within set parameters, how matters are to come before it. In any case, the Speaker has no authority to bring resolutions before the House. So how then is the resolution to be brought? OIPC recommends clarifying that some other actor (e.g. the Government House Leader) will (shall) bring the resolution.

Recommendation 7: That the appointment process for the Commissioner be modified such that, following consultation by the Speaker of the leaders of the registered parties represented in the House, that the Government House Leader will bring a resolution before the House.

The re-appointments process is described in section 87 of *ATIPPA, 2015* and is explained by the Wells Committee on page 217 of its Report. The prospect of up to a total of 12 years (two six year terms) was deemed to be necessary to attract suitable candidates. However, requiring a simple majority of the House was seen to open the risk that a Commissioner might be more favourable toward the government during their first term; thus the provision was made for re-appointment on the basis of a double majority (majorities of both the government and the opposition sides of the House) of a motion brought by the Lieutenant-Governor-in-Council.

A flaw in this approach is that Cabinet, if displeased with decisions of the Commissioner, may decide simply (and silently) not to bring such a resolution before the House in the first place and let the Commissioner's term naturally expire. Thus, the executive branch has a veto over a decision that rightfully should be with the legislative branch. The Wells Committee was concerned that a single majority would create an incentive for the Commissioner to be friendly towards the government towards the end of their first term. The double majority, however, does not actually remove that incentive but rather modifies it: it could be said that the Commissioner must be friendly enough to the government so that it does not quietly let their term naturally expire, but not so *overtly* friendly as to lose the confidence of the opposition. In the context of a legislature that is controlled by the government of the day, there is little to be done about the requirement for the government to support a re-appointment; however the principle to be preserved is that the choice should be an open one in the legislature. If the government does not want to appoint a Commissioner who is interested in serving a second term, it should be the subject of open debate in the House. If its desires are legitimate – e.g. poor performance rather than political displeasure – then it should be prepared to explain and defend this position.

OIPC therefore recommends that, if the Commissioner is willing to be re-appointed, there should be an automatic trigger at some reasonable point prior to the end of the first term: i.e. the Speaker shall cause (as above) a motion to be brought before the House requiring a double majority. The executive branch (represented by government members) would still essentially have a veto over reappointment, through a requirement for a majority of yes votes from its members, but the decision would be formally one of the legislative branch, and it would be in the public domain and subject to debate, rather than a decision which could be taken quietly and suddenly, by Cabinet or indeed by the Premier alone exercising prerogative.

Recommendation 8: There be an automatic trigger towards the end of the Commissioner's first term so that a motion to re-appoint the Commissioner would be the subject of debate in the House.

Compensation

Section 90 of *ATIPPA, 2015* simply states that the salary of the Commissioner is to be fixed by the Lieutenant-Governor-in-Council following consultation with the Management Commission.

In practice, the salary of the Commissioner is currently set at EP-10 of the Government of Newfoundland and Labrador salary scales. General economic increases and other adjustments are per those policies as well. Our understanding is that some years ago all of the statutory offices went through a classification process and all of them were classified at EP-10. We understand that the EP-10 band is comparable to junior deputy ministers within the executive branch. Senior deputy ministers at the top of their bands make about $20,000 more.

We also understand that some of the other statutory officers are, or have been, on "personal contracts" which differ from the EP-10 band. This is apparently consistent with general practice for movement among the executive ranks within the provincial government – when an executive employee moves to a more highly classified position, they will benefit from an increase in compensation, but if they move to a position that is of a lower compensation, then they will not have their salary reduced.

The salary level of Information and Privacy Commissioners across Canada varies, as does the method of setting it. In BC and at the federal level, Commissioner's salaries are set at the rate of provincial and federal court judges respectively (approximately $290,000 and $390,000 respectively). In AB and ON the amount is set by a legislative committee but the levels are broadly comparable to that of BC. In other jurisdictions (e.g. SK, NB, MB) there is reference in statute to the level at which deputy ministers are paid, though this can vary substantially, for example in SK the Commissioner's salary is in the order of $240,000 while the top of scale for the Manitoba Ombudsman is $177,000. Comparisons are challenging because jurisdictions vary in what and how they disclose about salaries but also varying level of responsibilities of the position, e.g. BC, AB and QC have oversight of private sector privacy statutes while other provinces, such as NL, have oversight of only the public and health sectors.

The Wells Committee examined the compensation levels of the Commissioner carefully. See pages 217 and 218 of its Report. It identified the following factors:

- that the Commissioner's salary should be "calculated by relating it to the salary of a person holding a senior responsible position";
- it should be "determined objectively by a process that is independent of government";
- it should "reflect the importance and responsibility of the position and be sufficient to attract persons with the training, experience and skill that will result in a sound performance of the office"; and
- "the Commissioner's salary be comparable to the deputy minister level".

Ultimately the Committee concluded that, to remove the connection to the executive branch's setting of salary – as is the case with deputy ministers – but to preserve the linkage to the deputy minister level of remuneration, the Commissioner's salary should be linked to that of a provincial court judge, the salary of which is set by a tribunal rather than by the Treasury Board classification process. It thus recommended that the level be set at 75 percent of a provincial court judge, which it calculated to be approximately similar to that of a "senior deputy minister". The provincial government of the day seems to have chosen not to accept this recommendation. The Commissioner's salary was not changed following the Wells Committee review.

OIPC would make only a few observations. First, it has recently been observed that all present statutory officers are either former provincial government executives or else rose within the ranks of their statutory offices. By our own logic above, this is not necessarily a bad thing in the case of OIPC or more broadly: public administration and leadership expertise are critical competencies and they are commonly obtained through experience as a provincial government executive. That said, if *all* of the statutory officers are *always* from the same pool, and it is the very same pool that the statutory officers are charged with overseeing, then the problem that has been raised above – a difficulty in differentiating the executive from the legislative branch – may be exacerbated.

It may be the case that the salary is not sufficient to attract interest from qualified candidates from outside the executive ranks of the provincial government, such as other jurisdictions, or the federal, municipal, academic or private sectors. It appears to be the case that deputy minister salaries in this province are lower, and growing more slowly, than is the case in some (but not all) other provinces. Also, deputy minister salaries also appear to be lagging those of many provincial agencies, boards, and commissions, senior Memorial University staff, and those of chief administrative officers of large and medium sized municipalities within this province. The Committee might wish to seek access to de-identified information about the nature of the applicant pool from the 2019 competition to examine this matter.

> **Recommendation 9**: Revisit the Wells Committee recommendation that the Commissioner's salary be set at 75 percent of a provincial court judge.

Discipline and Removal From Office

Section 88 of *ATIPPA, 2015* describes the authority of the House and Lieutenant-Governor-in-Council to remove or suspend the Commissioner for incapacity to act, neglect of duty or misconduct.

OIPC has no concerns with this provision and no recommendations to make.

How to manage conflicts which arise between Statutory Offices, who should investigate alleged misconduct of a statutory officer, and how that investigation should be conducted (internally, externally, independent ADR etc.)

OIPC is of the view that the notion of "conflict between statutory offices" which appeared to trigger the present review, has never been a problem for this Office and the operation of our mandate. We have, within our legislative mandate, conducted investigations of other statutory offices on numerous occasions because they are public bodies subject to *ATIPPA, 2015*. If another statutory office was to have cause to investigate this Office within its legislative mandate, that would be appropriate, and we would not consider it to be something requiring extraordinary procedures or a bespoke conflict resolution process.

OIPC considers that there are three situations that might be considered "conflicts" between statutory officers. The first, discussed in greater detail below, is a situation in which one statutory officer launches an investigation of another using its lawful authorities. While we expand on this somewhat, OIPC's position is that this is not a conflict. While it may be awkward and unpleasant for people involved, it is nevertheless one office executing its responsibilities.

Since 2007, the OIPC and other statutory offices (and the House of Assembly itself) have been public bodies subject to *ATIPPA, 2015*. OIPC has conducted a number of investigations based on complaints about decisions made or actions (actually or allegedly) taken by these public bodies, both on related to access to information and privacy, and some basic information about these (2007 to present) is provided in Annex B. OIPC treats these public bodies just like any other. Sometimes the issue is resolved informally, as is the case for most of our investigations. Sometimes, in accordance with discretion provided for in the statute, the Commissioner has decided not to pursue the investigation further, in which case a letter is written explaining this decision to both complainant and public body. In some cases a formal report is written which, like every other report, is released to the public via news release and published on OIPC's website. It should be noted that, as is the case with OIPC's investigations in general, most of these investigations have been related to access to information. There is a broad, record-level mandatory exception to access at section 41(c) of *ATIPPA, 2015* regarding records related to the investigatory function of statutory officers. For these reasons, most investigations into statutory offices have been quite straightforward. Nevertheless, none of them have proven to be particularly awkward or problematic either in how they have proceeded or the manner in which they have been concluded.

OIPC has not, to date, been the subject of an investigation by another statutory office, however if another statutory office had statutory authority and cause to initiate such an investigation, we would of course cooperate fully.

One way in which OIPC is *not* a public body like any other is that the Commissioner (like other statutory officers) does not report to a Minister and/or Board like other heads of public bodies. Therefore, we feel that matters related to their discipline as individual employees, including being subject to policies related to harassment and workplace safety and compliance with

codes of conduct, are best dealt with within the legislative branch, by the Commissioner for Legislative Standards. Indeed, though this does not rise to the level of investigation or discipline, the current Commissioner has had occasion to consult the Commissioner for Legislative Standards on ethical matters (in particular, invitation to sit on boards of directors) and this process has been smooth and constructive.

In sum: when it comes to investigatory functions of statutory offices in general, OIPC and the statutory offices should be treated just like any other public body. When it comes to alleged misconduct, unless that misconduct is criminal in nature in which case the police should be involved, then the matter should be investigated per policies comparable to those that apply to Members of the House of Assembly. The fact that such investigations may be undertaken by the Citizens' Representative or the Commissioner for Legislative Standards, i.e. another statutory officer, is not inherently problematic from OIPC's perspective. Statutory officers have no special relationship with each other.

A "conflict" might be better understood as an incident whereby two offices have some vested interests that are not aligned. An investigation under statutory authority is not such a situation. Certainly there are interests at stake for the investigated office, but the investigating office is dispassionate and uninterested, and merely needs to conduct the investigation in a manner consistent with its mandate and principles of procedural fairness.

Beyond that, statutory officers would only normally find that their interests are in conflict with each other if their mandates overlapped in some sense. This has not been a major issue for us. Given the broad audit powers of the Auditor General in the context of modern performance audits, it is possible that the Auditor General, in an audit, may comment on matters related to access to information or privacy. In particular, it is easy to imagine the Auditor General doing an audit that may relate to the security of one or more information systems. This has never occurred in NL, however, and thus it is difficult to speculate on a solution to a problem that only exists in theory. Another example of note arose recently when the acting Commissioner for Legislative Standards wrote a report in which she found that the Citizens' Representative had improperly disclosed information. This is a matter that happened to be the subject of an active privacy complaint before OIPC. As it happened, however, OIPC decided to make use of section 75(b) of the *Act* and cease to further investigate the matter, determining that the matter had been adequately dealt with by another procedure and any conflict was avoided. It is possible, however, that we could have released a report, such a report could have agreed with the Commissioner for Legislative Standards, but it could also have differed from it. Note that she conducted her review under the authority and through the lens of the *House of Assembly Accountability, Integrity and Administration Act* while OIPC could conduct its investigation under *ATIPPA, 2015* authority and through that lens. It is not clear that, even if there was a difference of opinion, this would have been problematic: neither report would have legally compelled its recipients to take action one way or the other. Again, the situation may have been awkward and uncomfortable but did not risk creating a legal quandary. It is not clear that a statutory solution is therefore necessary to respond to such situations that are, above all, highly rare.

A final situation in which statutory officers might find themselves in an adversarial situation might be before the courts where a statutory officer, having been investigated by another officer, is making use of certain rights that they may have following that investigation. In this situation, unlike in the context of an investigation where the investigating officer is dispassionate and does not have an inherent interest in the outcome, before the courts the officer might have a certain interest in the legal interpretation that they are putting forward. Nevertheless, this is not inherently problematic; resolution of such conflicts is precisely what the courts are for, and their interpretation of legislation helps advance its implementation.

In short: from OIPC's perspective and experience, we are not convinced that there is a problem arising from the potential for conflict with other statutory offices. To the extent that conflict may seem to arise from investigations by or of OIPC, under our mandate or that of another statutory officer, we do not see these as problematic or even, for that matter, conflicts at all rather than the statutes operating as they should. To the extent that conflict may emerge from the friction between interests of statutory officers as their mandates overlap or abut, in OIPC's experience there have been ways to address this in statute already (such as the section 75 decision referenced above) and in any case, these have been rare. To the extent that officers may find themselves in an adversarial situation before the courts, again this is rare but in any case this is what courts are for. While any of the situations above may be awkward or unpleasant, it is not clear how they are problematic in the sense that they create legal quandaries.

> **Recommendation 10**: that no special provision be developed for conflict resolution between or among statutory offices but that the provisions of their legislation prevail.

Whether and how quality assurance and performance of each statutory officer/Statutory Office should be measured and overseen

The Commissioner is required to report on performance by three statutes: the *Transparency and Accountability Act* (*TAA*), *ATIPPA, 2015* and *PHIA*. For many years OIPC published two separate reports in compliance with *TAA* and *ATIPPA, 2015* /*PHIA* respectively, but considering the overlap, in recent years has begun tabling a single report that meets the requirements of all three statutes.

Much of OIPC's work is done in the public domain and open to public scrutiny. All formal reports are issued with news releases and published and maintained online. Other work, such as guidance documents and newsletters, are similarly available online. OIPC also maintains statistics about access and privacy, including its own performance. More than a dozen statistics are tracked each year and data is available back to 2013-2014.

OIPC would be pleased to have the opportunity to present its Annual Report to a Committee of the House or the Management Commission and answer questions about it should we be invited to do so.

Recommendation 11: OIPC views that its current Annual Reporting requirements as set out in the noted statutes are sufficient performance measurements.

What is an appropriate administrative oversight model for the Statutory Offices, inclusive of financial management, human resources management, information management, procurement, and any other "back office" functions; structure;

The current administrative oversight model for the statutory offices has been in place since the coming into force of the *House of Assembly Accountability, Integrity and Administration Act* (*HOAAIAA*), developed following the Review Commission on Constituency Allowances and Related Matters conducted by the Honourable Derek Green in 2007. In general, OIPC is of the view that this is an appropriate arrangement.

Former Justice Green found that:

> it is unclear … just what degree of administrative authority and control is exercisable by the financial staff of the House administration over the operations of each statutory officer and whether financial, human resource and general administrative policies promulgated by the [Internal Economy Commission] … may be applied to the respective administrations of each statutory office.
>
> …
>
> This creates a very unsatisfactory situation. It should be clarified.
>
> …
>
> In my view, there is nothing in the notion of "independence" of these offices … that necessarily requires the complete autonomy of the offices in respect of financial matters … with the IEC and the [Chief Financial Officer of the House] already having an involvement on the financial and administrative side, the Clerk should likewise have authority, as chief permanent officer of the House administration. While [the Clerk] should be the manager of House operations, [that] authority should stop at matters of general administrative policy with respect to the statutory offices.

The Report therefore made recommendations that the Management Commission and, supporting them, the Clerk, should maintain financial and administrative oversight of the statutory offices but that this should stop short of "general administrative policies". See recommendations 37 and 38 of the Report and section 20 of the *HOAAIAA*.

OIPC agrees with former Justice Green that OIPC does not require complete financial independence in order to be sufficiently independent in the discharge of its mandate. That said, at least since 2015 OIPC has had sufficient resources to fulfill its mandate and in each instance in which it has sought additional resources from the Management Commission

through the budgetary process, such resources have been forthcoming. Should we, as some of our colleagues in other jurisdictions, have been in a position where we felt otherwise, and had been denied such resources, we may have formed a different opinion. That said, as it currently stands we appreciate that every public body, whether part of the executive branch or legislative branch of government, requires oversight. The independence required from a financial or administrative perspective is only that which would allow us to achieve the independence that is most important – that in discharging our substantive statutory responsibilities.

OIPC is of the view that it has sufficient financial and administrative independence to discharge its mandate with sufficient independence. The principle that former Justice Green seems to suggest and that has been the practice in the intervening years, is that OIPC should have autonomy in its day to day operations, and it is free to set administrative policies so long as they do not vary from policies that the Management Commission has set. The Management Commission has decided to set some of its own policies but where it has not done so, policies set by Treasury Board apply. This is, for the most part, a satisfactory arrangement for OIPC. As a public body, we need the oversight and support that the Management Commission and the House of Assembly Service provide. Moreover, it is administratively convenient that the House of Assembly Service and the Government of Newfoundland and Labrador provides support on a range of matters, such as human resources, procurement and information technology, as OIPC does not have the capacity to provide such services on its own. We are of the view that it would not be a prudent use of public resources to develop them.

We are of the view that, in general, the more policies and services the Management Commission/House of Assembly Services develops on its own rather than relying on the default of Treasury Board policies, the better as this will help with the recognition of the legislative branch as an identifiably independent branch of the government. For example, further to a recent decision, the House of Assembly will be posting its vacant positions and those of the statutory offices on a separate recruitment portal. We view this as positive as it will help highlight our employment opportunities as separate and prevent them from being lost amongst the very many executive branch positions. There have also been some discussions about a separate news release portal as, at the moment, all news releases are published on a single GNL portal. We would also view that as a positive development. On the other hand, in some jurisdictions Information and Privacy Commissioners have entirely separate information technology/information management systems while we and the other statutory offices rely on the services, and comply with the IT/IM policies, of the Office of the Chief Information Officer. We do not view it as an appropriate use of public resources for a separate IT/IM capacity to be developed for the legislative branch, though perhaps it would be appropriate for an MOU to be developed between the OCIO and the HOAS that governs the relationship.

Recommendation 12: That the administrative oversight model involving the Management Commission and the House of Assembly Service be maintained.

Whether physical space and administrative functions could be shared among Statutory Offices

While OIPC believes that it would not be necessary or feasible to share administrative functions with other statutory offices, the idea of co-location may have benefits.

OIPC currently leases an office suite within a government building (NL Housing) and next to another statutory officer (the Seniors' Advocate). This is an acceptable arrangement. There is no reason that OIPC could not be co-located in this fashion with other statutory officers or even the HOAS/HOA itself. However, it should be noted that one problem that many statutory officers share is that they have a difficult time explaining to the public that they are independent from government. Co-locating services would complicate that, if it were in the proximity of the Confederation Building. The Confederation Building, while the home of the legislature, is associated in the minds of the public with executive power.

On the other hand, co-location of the statutory offices in a different location, in a visible and distinct building, using the symbols of the legislature (the Coat of Arms), could be beneficial in assisting the idea in the public's imagination, and public official's actions, that the legislature is a separate branch, through which popular sovereignty flows. Were cost no object, such a building could house the legislature itself but this is unlikely to be a priority for public funding when a perfectly functional legislature already exists.

While neighbouring office suites, including in the same building, is an appropriate arrangement, sharing office suites would not be appropriate. OIPC must maintain confidentiality in a variety of ways. Our complainants expect a high level of discretion. Also, because we require access to all manner of government documents at the highest level of sensitivity – cabinet confidences, solicitor-client protected documents, etc. – to perform our oversight role, we must be able to ensure the highest level of security in the handling of these documents and in the discussions necessary among staff about them. To do this we require our Analysts to have their own offices so they can converse confidentially by telephone or virtual meeting with complainants and respondents. Sharing office space with other offices would undermine that security. We have a boardroom that is used very regularly and it would not be feasible to share it. Even facilities like our kitchenette and break room need to be behind our security layer so that staff who are supporting, mentoring or advising one another on an investigation may do so during lunch, something that we encourage for learning and collegiality.

We do not envision efficiency gains through sharing administrative functions. We have two permanent administrative staff that share both standard administrative support functions and also information management responsibilities specific to OIPC functionality. It would not be possible for them to carry out those responsibilities and also fulfil non-OIPC related tasks. We therefore do not have any excess administrative capacity that could be shared.

Recommendation 13: We would not object to co-location of the statutory offices in a single building with separate, secure office suites for each statutory office.

Where reports from each Statutory Office should be directed, such as whether any of the reports of the Statutory Offices should go to a standing or select committee of the House of Assembly for review and analysis

As noted above, all of the investigation reports of OIPC are made public, per section 107(c) of *ATIPPA, 2015*. This is appropriate given the Office's quasi-judicial nature as the reports form part of an ever evolving provincial and national jurisprudence in the area of access and privacy. Our audits are also made public. There may be some circumstances whereby some part of a report may need to be issued confidentially, as it may relate to a matter concerning the privacy or security of an individual, group or the government as a whole, but we have yet to do that and it would only be done to the extent necessary.

It would not be appropriate for investigation reports or audit reports to go to the House or any committee for analysis prior to their public release as this would erode the independence of the Office. While the court process that is open to public bodies, custodians, complainants and third parties after we issue reports is a trial *de novo* and not a review or appeal of the report but rather that of the prior administrative decision-maker, our findings and recommendations are certainly open to scrutiny during that process.

Section 106 of *ATIPPA, 2015* provides for the Commissioner to conduct a special report about anything related to the *Act*. We have never used that process, and if we did, the circumstances may or may not require it to be disseminated in confidence.

We have no recommendations to make on this subject.

Annex A: Recommendations

1. Great care should be taken with recommendations regarding the form of OIPC because it is inextricably related to its function, which was both carefully considered in recent statutory reviews and is commonly held to be among the most effective and successful in the country.

2. OIPC would support ideas to enhance the real and perceived independence of statutory offices and, indeed, the legislative branch as a whole, from the executive branch as this will enhance the way that they perform their mandates in the Westminster system of government.

3. No minimum requirements should be established for the Commissioner but the required competencies should be the purview of the selection committee provided for by the *Act*.

4. OIPC should not be combined with other Statutory Offices.

5. The Information and Privacy Commissioner be maintained as a full time position.

6. Retain the existing appointments process for the Information and Privacy Commissioner with respect to how a roster is provided to the Speaker.

7. That the appointment process for the Commissioner be modified such that, following consultation by the Speaker of the leaders of the registered parties represented in the House, that the Government House Leader will bring a resolution before the House.

8. There be an automatic trigger towards the end of the Commissioner's first term so that a motion to re-appoint the Commissioner would be the subject of debate in the House.

9. Revisit the Wells Committee recommendation that the Commissioner's salary be set at 75 percent of a provincial court judge.

10. That no special provision be developed for conflict resolution between or among statutory offices but that the provisions of their legislation prevail.

11. OIPC views that its current Annual Reporting requirements as set out in the noted statutes are sufficient performance measurements.

12. That the administrative oversight model involving the Management Commission and the House of Assembly Service be maintained.

13. We would not object to co-location of the statutory offices in a single building with separate, secure office suites for each statutory office.

Annex B: OIPC Investigations of Other Statutory Offices (Access and Privacy)

Public Body	Informal	Report	Investigation Not Conducted	New File Not Concluded	Total
HOA	15 (A) 1(P)	2(A)			18
Chief Electoral Office	3(A)		1(A)		4
Child and Youth Advocate		1(A)	1(A)	1(A)	3
Citizens' Representative	1 (A)	1(A)	1(P)		3
Commissioner for Legislative Standards	1(A)	2(A)	2(P)		5
OIPC			2(A) 1(P)		3
Seniors' Advocate	1(A)				1

Total Complaints: 37

Annex C: OIPC *Independent Appointments Commission Act* Submission

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

May 5, 2023

VIA EMAIL

Mr. David Conway
IACreview@gov.nl.ca

Dear Mr. Conway:

Subject: *Independent Appointments Commission Act* Submission

I am writing to comment on the review of the *Independent Appointments Commission Act* (*IAC Act*). I appreciate the opportunity to share our views, which are limited to one topic – the potential use of the process in the *Act* to support the appointment of the Information and Privacy Commissioner. It is our view, which I explain below, that the Independent Appointments Commission (IAC) should not be used to appoint the Information and Privacy Commissioner, because while it may be a sound means to appoint people to agencies, boards and commissions of the executive branch of government, it leaves significant discretion over the final decision in the hands of Cabinet, the seat of executive power of the government. The Information and Privacy Commissioner is a statutory officer of the legislative branch of government, charged with oversight of the executive branch. To place the penultimate decision over the appointment of such an office with Cabinet would undermine the independence of the Commissioner and Office. While the IAC is not currently used to appoint the Commissioner, the potential for it to be used in this manner was raised by the Department of Justice and Public Safety as part of the 2020 Statutory Review of the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*). It may well re-emerge in the review being undertaken of statutory offices by former Justice Robert Fowler as the appointment procedures for statutory officers is within the terms of reference of that review.

The current process for appointing the Commissioner is provided for by section 85 of *ATIPPA, 2015*. It provides for a selection committee to be formed by the Speaker comprising the Clerk of the Executive Council, the Clerk of the House of Assembly, the Chief Judge of the Provincial Court, and the President of the University, with provisions made for specific designates for

each of these positions. This committee is required to develop a "roster of qualified candidates and in doing so may publicly invite expressions of interest". In the most recent case, the committee formed by the Speaker was assisted by the Public Service Commission in this process. The roster is then submitted to the Speaker, who is required to consult the Premier, the Leader of the Official Opposition and the leader or member of a registered party represented on the House of Assembly Management Commission and, thereafter, cause a resolution to be brought to the House to appoint one of the individuals named on the roster.

This process was designed by the 2014 Statutory Review Committee of *ATIPPA* which examined the pre-2015 appointments process, which was simply that the House of Assembly vote on a resolution brought forward by the Lieutenant Governor-in-Council. In their report, they said:

> Effectively the decision to approve the appointment is that of the House of Assembly, and in actually making the appointment, the Lieutenant-Governor in Council is the agent implementing the decision of the House of Assembly.
>
> Of course, "Lieutenant-Governor in Council" is simply the constitutional name for the Cabinet or the government in power at the time. That government is made up of members of the political party having the majority of members of the House of Assembly. As a result, the political party in power has control of both bodies. However, the requirement for decision by a majority vote in the House of Assembly precludes secret determination by the government. Requiring approval by resolution of the House of Assembly ensures opportunity for open public debate on the merits or otherwise of the proposed appointee. The Committee is satisfied that this is an appropriate process for initial appointment and should be retained. However, the Committee is of the view that the perception of a Commissioner who is independent from government would be greatly enhanced if the choice resulted from efforts by a selection committee that would identify leading candidates for consideration. Such a committee could consist of persons holding offices such as the Clerk of the Executive Council, Clerk of the House of Assembly, Chief Judge of the Provincial Court, and President of Memorial University.

The process was designed prior to the development and introduction of the *Independent Appointments Commission Act* and in a certain sense, there are three parallels. As with the IAC process, the *ATIPPA, 2015* process provides for a panel of people with identified expertise, that this panel will develop a roster of qualified candidates, and that an element of choice will be left to the final decision maker. And it is with these parallels that the critical differences can be found, and we would argue, should be preserved.

Section 3 of the *IAC Act* establishes that the purpose of the Act is to require a merit-based process for appointments and to establish an independent commission to provide recommendations for those appointments. Sections 4 and 5 further clarify that the Lieutenant-Governor in Council (LGIC, i.e. Cabinet) or a minister shall consider these recommendations in "making an appointment" but that this requirement does not fetter the

discretion of LGIC or a minister in making an appointment per their authority under an Act or other authority. The key elements here are that the purpose of the Act is to assist LGIC in making appointments, and that it is critical that the discretion of LGIC not be fettered but must remain latitude for decision making. This is appropriate and critical for the functioning of the IAC in a manner that does not invalidate the authorities of LGIC and ministers as they may have otherwise been provided for. The appointment of individuals to agencies, boards and commissions which implement government's policy on its behalf is a key function of the executive branch of the government. The IAC was established to support, but not fetter, this crucial executive function. Therefore, the process that has been implemented since the *IAC Act* came into force has been that, for each position subject to an appointment, the IAC provides a roster of up to three names to the minister responsible for the appointment. The Minister will then bring this roster into Cabinet, which will choose from among them. Discretion is always maintained: the identity of the candidates is subject to cabinet confidences and Cabinet has the latitude to freely choose among them, or not appoint any of them.

The *ATIPPA, 2015* process has parallels but is different in important and intentional ways. Similarly this panel of people appointed with specific expertise and experience develop a roster of individuals and hand this roster over to the ultimate decision-maker – in this instance the House of Assembly via the Speaker. The decision-maker here is notably different than above. While agencies, boards and commissions are bodies that implement the policies of the executive branch, a statutory officer such as the Information and Privacy Commissioner is an officer of the legislature. The Commissioner is mandated by *ATIPPA, 2015* to provide oversight of executive branch public bodies and the *Personal Health Information Act* to provide oversight of custodians (i.e. those organizations and people who provide health services as part of our predominantly public health care system). Just as it is critical that Cabinet maintain discretion over appointments within the executive branch, so too is it critical that the House maintain discretion over appointments within the legislative branch. This means, as the 2014 Statutory Review Committee pointed out, that the legislature must be able to publicly deliberate on the candidates. The legislature is a public body, and so an open debate that identified multiple specific individuals, at least one of whom will not be appointed, seems unduly invasive and may deter candidates from participating. But revealing the roster to the leaders of the parties in the House, and consulting them on it before introducing a motion, establishes a balance between protecting privacy and unduly fettering discretion. Admittedly, this can create challenges when the leaders of the parties do not agree on a preferred candidate, but resolving such differences is precisely what legislatures are intended to do.

During the 2020 Statutory Review of *ATIPPA, 2015* the Department of Justice and Public Safety recommended that *ATIPPA, 2015* be amended such that the Commissioner be appointed using the IAC process. As the above comparison is intended to demonstrate, this would be inappropriate. The IAC process was clearly designed to support, short of eliminating Cabinet's discretion, the appointments process within the executive branch. The *ATIPPA, 2015* process was clearly designed to support, short of eliminating the legislature's discretion, the appointments' process by the legislative branch.

The rationale that was offered by the Department at that juncture was appointing the Information and Privacy Commissioner through the IAC process would have the benefit of standardizing the appointment process of all of the statutory officers of the House of Assembly. It is beyond my mandate to comment on the appointments process of those officers; however, I do not understand what the inherent benefit of standardization would be. As far as I am aware, however, the appointments process for the Information and Privacy Commissioner is the only one of these processes that has been subject to focused analysis in the way that the 2015 Statutory Review Committee provided. Prior to *ATIPPA, 2015* the Commissioner had been appointed on an LGIC resolution brought before the House, just as the other statutory officers. The challenge with this approach is that the House, in being presented with just one candidate, would not be aware of the comparative merits of other candidates. It would not be aware if, for example, there was a candidate with more credentials or with more experience. The executive branch of government might be seen to face conflict here – the appointee would be provided with authorities to regulate it for six years. It arguably creates an incentive to hire a person who, while meeting the qualifications, was not quite so experienced or qualified and therefore might be less formidable in their oversight. Any MHAs who are not part of Cabinet would be none the wiser and have no way of knowing if a more qualified candidate was intentionally overlooked. Their discretion is therefore fettered. In recommending the appointment procedure that it did, in 2015, the Committee intentionally and substantially improved the independence of the Office. If there is a desire for standardization of the process, an option might be to consider standardizing the appointments of the other statutory officers to align with the procedure in *ATIPPA, 2015*.

The Chair of the 2020 Statutory Review Committee of *ATIPPA, 2015* considered and recommended against the proposal of the Department of Justice and Public Safety. His full analysis is available at pages 271-275 of his report, available at nlatippareview.ca, but I will quote him in part here:

> The appointment of all other statutory office holders – including the Auditor General – is made simply by the Lieutenant-Governor-in-Council "on resolution of the House of Assembly". However, these appointments are made under the procedures established in the *Independent Appointments Commission Act*, SNL 2016, c. I-2.1. That *Act* provides for an independent committee to conduct a merit-based screening process and to recommend to the Lieutenant-Governor-in-Council three (where possible) persons for the appointment. The Lieutenant-Governor-in-Council is required to consider the recommendations but is not limited to those recommendations in bringing forward a name to the House of Assembly. As such the process following receipt of the committee's recommendations is very much controlled by the executive branch of government.
>
> Government suggested to this Committee that the appointment of the Information and Privacy Commissioner could be subject to the same process. I am not prepared to recommend that. The Wells Committee carefully considered the matter and, recognizing the unique and varied role of the commissioner,

> constructed an appointment process for the commissioner with significant involvement of the legislative branch. Further, the *Independent Appointments Commission Act* was enacted in 2016, subsequent to ATIPPA, 2015. The schedule to the Independent Appointments Commission Act includes the other statutory offices; the Information and Privacy Commissioner was not, indicating a clear legislative intention to leave the current appointment process in place. Two appointments have been made since 2015. There is no reason to establish a new process and, in my view, good reason to maintain the primary involvement of the legislative branch.

All that being said, while the composition of the selection committee in section 85(3) of ATIPPA, 2015 is entirely valid, if there were some inherent value in making the process more consistent for statutory officers of the house, one option might be to proceed with statutory amendments that would see the members of the IAC form the selection committee, have them develop the roster referenced in 85(4) and (5), and forward that roster to the Speaker instead of the LGIC, retaining the same process as outlined in 85(6). The issue that I raise has less to do with the composition of the *ATIPPA, 2015* selection committee vs the IAC as it does with how the roster developed by such a committee is used to inform a resolution brought before the House.

In sum, the OIPC's position is that while the Independent Appointments Commission Act was designed to support, but not fetter, the appointment making power of the executive branch of government, it is not, as it currently exists, designed to support the appointment making power of the legislative branch of government. Using it to support this process – and the appointment of the Information and Privacy Commissioner is the position in particular about which I have the mandate to comment – inappropriately fetters the discretion of the House and tilts power towards the executive branch and away from the legislative branch and undermines the independence of the position.

Thank you for consideration of these views.

Yours truly,

Michael Harvey
Information and Privacy Commissioner