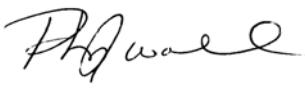
The language in the Access to Information and Protection of Privacy Act, like other access and privacy statutes in Canada, creates a bias in favour of disclosure. By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it. Furthermore, the legislation places the burden squarely on the head of a public body that any information that is withheld is done so appropriately and in accordance with the legislation.

NL OIPC Report 2005-002

November 30, 2007

The Honourable Roger Fitzgerald
Speaker
House of Assembly
Newfoundland and Labrador

I am pleased to submit to you the Annual Report for the Office of the Information and Privacy Commissioner in accordance with Section 59 of the *Access to Information and Protection of Privacy Act*. This Report covers the period from April 1, 2006 to March 31, 2007.



Philip J. Wall
Commissioner

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FOREWARD

Under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), Newfoundlanders and Labradorians are given legal rights to access government information with limited exceptions. Access to information refers to the public's right to records relating to the operations of public bodies in the Province, ranging from general records on administration and practices as well as information on legislation and even government policies. The basic objective is to make government open and transparent, and in doing so to make government officials and politicians more accountable to the people of the Province.

Over the past three decades, all jurisdictions in Canada have introduced legislation relating to the public's right to access information and to their right to have their personal privacy protected.

These legislative initiatives represent an evolution from a time when governments in general consistently demonstrated stubborn resistance to providing open access to records. How times have changed! Today, access to information is a clearly understood right which the public has demanded and which governments have supported through legislation and action. No doubt there are still instances when unnecessary delays and unsubstantiated refusals to release information are encountered by the public. But certainly in this Province, such cases are more and more the exception. The rule and spirit of "giving the public a right of access to records" is increasingly the norm.

The *ATIPPA*, like legislation in all other Canadian jurisdictions, established the Information and Privacy Commissioner as an Officer of the House of Assembly, with a mandate to provide an independent and impartial review of decisions and practices of

public bodies concerning access to information and privacy issues. The Commissioner is appointed under section 42.1 of the *ATIPPA* and reports to the Legislature. The Commissioner is independent of the government in order to ensure impartiality.

Our Office has been given wide investigative powers, including those provided under the *Public Inquiries Act*, and has full and complete access to all records in the custody or control of public bodies. If the Commissioner considers it relevant to an investigation, he may require any record, including personal information, which is in the custody or control of a public body to be produced for his examination. This authority provides the citizens of the Province with the confidence that their rights are being respected and that the decisions of public bodies are held to a high standard of openness and accountability. While citizens are prepared to accept that there may be instances of delays by public bodies, and there may also be mistakes and misunderstandings, they also expect that such problems will be rectified with the help of this Office when they occur. The manner in which public bodies respond to our involvement is a key factor in how the public will measure the true commitment of the government and its agencies to the principles and spirit of the legislation.

On the privacy side, I note that the Province still has not proclaimed Part IV of the *ATIPPA,* despite the earlier indication from the Department of Justice that the timing would likely be in June or July, 2007. This would have been a major step forward, as the privacy provisions give legislative protection to the privacy rights of citizens of the Province by prohibiting the unauthorized collection, use and disclosure of personal information by public bodies. These provisions would have also given individuals a specific right to request the correction of errors involving their own personal information. This legislation has been delayed for too long, and this Office urges the government to proclaim it on a priority basis. When proclaimed, it will be the first of its kind in our Province. Unfortunately, I must express my continuing dismay that Newfoundlanders and Labradorians do not enjoy privacy protection and related

rights similar to all other jurisdictions in the country, rights which are outlined in Part IV of the *ATIPPA* and which this Office is mandated to uphold.

ACCESSING INFORMATION

It should not be a difficult process for individuals to exercise their right of access to records in the custody or control of a government department or other public body covered by the *ATIPPA*. Many people are seeking records containing information which may be handled without a formal request under the access legislation. This is referred to as routine disclosure and I am pleased to report that more and more information requests are being dealt with in this timely and efficient manner. Where the records are not of a routine nature, the public has a legislated right of access under the *ATIPPA*. The process is outlined below.

How to Make an Access to Information Request

- Determine which public body has custody or control of the record.
- Contact the public body, preferably the Access and Privacy Coordinator, to see if the record exists and whether it can be obtained without going through the process of a formal request.
- To formally apply for access to a record under the Act, a person must complete an application in the prescribed form, providing enough detail to enable the identification of the record. Application forms are available from the public body or from our website www.gov.nl.ca/oipc.
- Enclose a cheque or money order for the $5.00 application fee payable to the public body to which the request is submitted (or, if a government department, payable to the Newfoundland Exchequer).

- Within 30 days, the public body is required to either provide access, transfer the request, extend the response time up to a further 30 days or deny access. Additional fees may also be imposed.

- If access to the record is provided, then the process is completed. If access is denied, or other action has been implemented which you dispute, you may request a review by the Information and Privacy Commissioner, or an appeal may be made to the Supreme Court Trial Division.

How to File a Request for Review with the Information and Privacy Commissioner

- Submit a Request for Review form to our Office. The form and the contact information are available on our website www.gov.nl.ca/oipc.

- Upon receipt of a complaint or formal request for review, the Information and Privacy Commissioner will review the circumstances and attempt to resolve the matter informally.

- If informal settlement is unsuccessful, the Information and Privacy Commissioner will prepare a Report and, where necessary, will make recommendations to the public body. A copy of the Report is provided to the applicant and to any third party notified during the course of our investigation.

- Within 15 days after the Report is issued, the public body must decide whether or not to follow the recommendations, and the public body must inform the applicant and the Commissioner of this decision.

- Within 30 days after receiving the decision of the public body, the applicant or the Information and Privacy Commissioner may appeal the decision to the Supreme Court Trial Division.

WITHHOLDING INFORMATION

While the *ATIPPA* provides the public with access to government records, such access is not absolute. The *Act* also contains provisions which allow public bodies to except certain of those records from disclosure. The decision to withhold records by governments and their agencies frequently results in disagreements and disputes

between applicants and the respective public bodies. The recourse for applicants in such cases is to the Office of the Information and Privacy Commissioner. Their complaints range from:

- being denied the requested records;
- being requested to pay too much for the requested records;
- being told by the public body that an extension of more than 30 days is necessary;
- not being assisted in an open, accurate and complete manner by the public body;
- other problems related to the *ATIPPA*.

While the Commissioner's investigations provide him access to any records in the custody or control of public bodies, he does not have the power to order a complaint to be settled in a particular way. He and his investigators rely on persuasion to solve most disputes, with his impartial and independent status being a strong incentive for public bodies to abide by the legislation and provide applicants with the full measure of their rights under the *Act*.

As mentioned, there are specific but limited exceptions to disclosure under the *ATIPPA*. These were listed in last year's Report but warrant repeating.

Mandatory Exceptions

- *Cabinet confidences* – where the release of information would reveal the substance of deliberations of Cabinet.

- *Personal information* – recorded information about an identifiable individual, including name, address or telephone number, race, colour, religious or political beliefs, age, or marital status.

- *Harmful to business interests of a third party* – includes commercial, financial, labour relations, scientific or technical information and trade secrets.

Discretionary Exceptions

- *Local public body confidences* – includes a draft of a resolution, by-law, private bill or other legal instrument, provided they were not considered in a public meeting.

- *Policy advice or recommendations* – includes advice or recommendations developed by or for a public body or minister. Advice is considered to be a suggested course of action and not a progress or status report.

- *Legal advice* – includes information that is subject to solicitor-client privilege and legal opinions by a law officer of the Crown.

- *Harmful to law enforcement* – includes investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed.

- *Harmful to intergovernmental relations* – includes federal, local, and foreign governments or organizations.

- *Harmful to financial or economic interests of a public body* – includes trade secrets, or information belonging to a public body that may have monetary value, and administrative plans/negotiations not yet implemented.

- *Harmful to individual or public safety* – includes information that could harm the mental or physical well-being of an individual.

Unsupportable refusals to release information and delays in responding to requests for access are particularly frustrating to applicants as well as to this Office. This being said, it is of significant comfort to acknowledge that there is a sustained effort under way by government through the ATIPP Office in the Department of Justice to train public bodies in their obligations under the *ATIPPA,* especially as it relates to the timeframes for notification and action. The government's *ATIPPA* Policy and Procedures Manual is an integral part of the ongoing training program. This Office has and will continue to work with government in this effort.

It is noted here that public bodies often express resentment that they too often receive requests for information that they would call repetitive, trivial or even vexatious. They argue that knowing how much a minister or a CEO spends on hotel

bills and meals doesn't do anything to promote good public policy, or that requesting copies of thousands of e-mails leading up to a dismissal of an employee does nothing to further the mandate or efficiency of an agency or municipality. Whether these assertions are correct or not, the fact is that in the grand scheme of things, requests for records which may seem petty to some, may be a serious issue for certain citizens whose right to make a request is protected by the *ATIPPA*. The legislation does not provide for or allow this Office to pick and choose whether an access request is important, useful or frivolous. Referring back to the above examples, politicians who appreciate that their expenses may become public, might be a little more conscious of thrift when traveling, while public bodies preparing to dismiss an employee may be a little more sensitive and professional in their human resources practices.

The bottom line is that it is inevitable that the public's recourse to access laws will likely grow. Whether they are policy, financial, economic, political or personal, issues are becoming more and more complex and the public is becoming more questioning. The right to demand access to such information, even if it seems trivial or unimportant to all but the requester, is still paramount in that process.

THE ROLE OF THE COMMISSIONER

In accordance with the provisions of the *ATIPPA*, when a person makes a request for access to a record and is not satisfied with the resulting action or lack thereof by the public body, they may ask the Commissioner to review the decision, act or failure to act relating to the request. The Commissioner and his Office therefore have the key role of being charged by law with protecting and upholding access to information and protection of privacy rights under the *ATIPPA*.

This responsibility is specific and clear, and this Office takes it seriously. However, there are often questions concerning how we see our role, and how we do our job. It has been mentioned earlier that the Office is independent and impartial. There are occasions when the Commissioner has sided with applicants and other occasions when the Commissioner supports the positions taken by public bodies. In every case, having done our research carefully and properly, all conflicting issues are appropriately balanced, the law and common sense are applied and considered, and the requirements of the legislation are always met. Applicants, public bodies and third parties must understand that this Office has varied responsibilities, often requiring us to decide between many conflicting claims and statutory interpretations.

A key tenet of our role is to keep the lines of communication with applicants, public bodies and affected third parties open, positive, and hopefully productive.

As noted, this Office does not have enforcement or order power. We do not see this as a weakness, rather it is a strength. Order power may be seen as a big stick which could promote an adversarial relationship between this Office and public bodies. We promote and utilize negotiation, persuasion and mediation of disputes and have experienced success with this approach. Good working relationships with government bodies are an important factor and have been the key to this Office's success to date. Success for this Office translates into public access to information, and therefore into success for citizens.

Success can be measured by the number of satisfied parties involved in the process, by fewer complaints, and by more and more information being released by public bodies without having to engage the provisions of the *ATIPPA*.

This Office is committed to working cooperatively with all parties. We will respect opposing points of view in all our investigations but will pursue our

investigation of the facts vigorously. We are always available to discuss requests for review and related exceptions to the fullest extent at all levels without compromising or hindering our ability to investigate thoroughly. We emphasize discussion, negotiation and cooperation. Where appropriate, we are clear in stating which action we feel is necessary to remedy disagreements. In that regard, we will continue to make every effort to be consistent in our settlement negotiations, in our recommendations and in our overall approach.

ACTIVITIES AND STATISTICS

2006 - 2007 Statistics

During the year ended March 31, 2007, this Office received 92 Requests for Review under section 43 of the *ATIPPA* and 9 complaints under section 44. In addition, there were 10 Requests for Review carried over from the previous year. This reflected increases of 80% and 125%, respectively, from the 51 Requests for Review and 4 complaints received during the initial fourteen months of our operation which ended March 31, 2006.

Of the Requests for Review, 45 were resolved through informal resolution and 15 resulted in a Commissioner's Report. The remainder were either closed or carried over to the 2007 - 2008 fiscal year. In addition to Requests for Review, this office received 73 access to information related inquiries during the 2006 - 2007 year. Of the 9 complaints received under section 44, relating either to the fees being charged or to extensions of time by public bodies, 7 were investigated and concluded by this Office and the remainder were carried over to the 2007 - 2008 fiscal year.

Of the 111 Requests for Review and complaints dealt with in the 2006 - 2007 year:

- 89 (or 80%) were initiated by individuals
- 10 (or 9%) were initiated by businesses
- 5 (or 4%) were initiated by political parties
- 3 (or 3%) were initiated by the media
- 2 (or 2%) were initiated by another public body
- 1 (or 1%) was initiated by an interest group
- 1 (or 1%) was initiated by a legal firm

Forty percent of all cases were related to provincial government departments. Thirty-six percent of the cases were related to educational bodies. Fifteen percent of the cases were related to local government bodies. Five percent of the cases were related to health care bodies and four percent of the cases were related to agencies of the Crown.

For more information on the statistics for the year 2006 - 2007 see the Figures and Tables on pages 31 to 39.

OIPC Website

Our website, (www.gov.nl.ca/oipc), continues to be a valuable resource for members of the public and public bodies. In addition to information and resources available on this website, we have now added a Table of Concordance. The purpose of this Table of Concordance is to provide an index of references in Commissioner's Reports to specific sections of the *ATIPPA*. This allows for quick and easy searching of specific topics that the Commissioner has discussed in one or more of our Reports.

Education and Awareness

Providing information on access and privacy to the public and to interested groups continues to be an important mandate of this Office. We welcome invitations to speak to groups, organizations and public bodies throughout the province. The following is a list of presentations and awareness activities conducted by this Office during fiscal year 2006 - 2007:

- April 25, 2006 – ATIPP Educational Bodies, St. John's
- September 25, 2006 – Departmental ATIPP Coordinators, St. John's
- September 27, 2006 – Privacy Committee of the Public Sector CIO Council, St. John's
- September 28, 2006 – CBC Radio Noon Crosstalk, St. John's
- September 29, 2006 - Newfoundland and Labrador Association of Municipal Administrators, Deer Lake
- December 5, 2006 – Council on Governmental Ethics Law, New Orleans
- December 8, 2006 - Newfoundland and Labrador Association of Municipal Administrators, St. John's
- December 8, 2006 - Newfoundland and Labrador Association of Directors of Education, St. John's
- March 23, 2007 – Newfoundland and Labrador Youth Centre, session held in St. John's.

Consultation/Advice

This Office continues to receive numerous inquiries and requests for advice and consultation. In response, our staff routinely provides guidance to individuals, organizations and public bodies. We consider this to be an important aspect of our overall mandate and we encourage individuals and organizations to continue seeking our input on access and privacy matters. As an example, this Office worked with various stakeholders in the development of proposed personal health information legislation for the Province. In addition to providing input on specific provisions, this

Office participated in consultation sessions on the proposed legislation in December 2006 and January 2007.

Staffing

As is evident from this year's statistics, the demand for the services of this Office has practically doubled from last year to this year. This has obviously had a significant effect on our operations. In response, we hired a second Investigator in February 2007, bringing our staff complement to four full-time positions, in addition to the part-time Commissioner. While all staff members work diligently and tirelessly to meet the challenges of this increased demand, it is obvious that our workload is quite high and will continue to be high well into the future. As predicted in our first Annual Report, individuals and organizations are now more familiar with this Office and with the *ATIPPA* and, as a result, are exercising their rights under the legislation more often. We are encouraged by this and will continue to seek additional resources accordingly.

I should also note that our Office is still anticipating proclamation of the privacy provisions of the *ATIPPA* at some point in the future. In addition, it is anticipated that personal health information legislation will be introduced during the next session of the House of Assembly. As with the *ATIPPA*, this Office is expected to be the review mechanism for this new legislation. Both of these initiatives will undoubtedly create even more demand on this Office and, as such, additional staffing increases will be necessary. We will monitor these developments closely and we anticipate Government's support in seeking these increases as appropriate.

PRIVACY

In our 2005 - 2006 Annual Report, we discussed at length the privacy provisions of the *ATIPPA* (Part IV) and, in particular, the fact that they had still not been proclaimed into force. While I do not wish to repeat my commentary in this regard, I will provide a brief background for reference purposes.

Part IV of the *ATIPPA* governs the collection, use and disclosure of personal information by public bodies in the Province. Personal information is defined in section 2 of the legislation as recorded information about an identifiable individual. This type of legislation is intended to protect the privacy of citizens by prohibiting the unauthorized collection, use and disclosure of personal information by public bodies and by giving individuals a specific right of access to their own personal information. The *ATIPPA* was passed by the Legislature in 2002, and proclaimed into force on January 17, 2005, with the exception of Part IV. At that time, Government chose to delay proclamation of the privacy provisions in order to allow public bodies to prepare for the impact that these provisions may have on their operations.

To date, nearly three years after proclamation of all other provisions, Part IV has still not been proclaimed into force. As such, Newfoundland and Labrador remains the only jurisdiction in Canada without legislation requiring public bodies to appropriately protect the personal information of individuals. We are disappointed that Government continues to delay this very important rights based legislation and we once again encourage Government to proclaim Part IV of the *ATIPPA* at the earliest possible time. While our Office accepted that a certain delay was warranted, we do not believe there is any justification to delay proclamation for such a long period of time. In fact, the Province has now become conspicuous both nationally and internationally in its failure to proclaim privacy legislation that was passed by the legislature over five years ago.

As with our first year of operation, we continue to receive numerous privacy related inquiries and complaints (a total of 114 during the period of this Report), many of which are legitimate concerns about the manner in which personal information is collected, used or shared. Unfortunately, this Office still has no statutory authority to investigate these concerns. As we have done from the beginning, however, we will work with public bodies in a collaborative effort to address certain significant privacy issues that may arise in an effort to allay individual concerns and to mitigate future occurrences. For example, our Office dealt with one particular public body that had mistakenly mailed a number of records containing very sensitive personal information to the incorrect address. In another example, an employee of a public body inappropriately accessed the personal health information of an individual for reasons completely unrelated to the operation of the public body. In both of these situations, this Office contacted the public body involved and initiated an informal review of the circumstances surrounding each case. Both public bodies acknowledged the concerns raised, cooperated fully with this Office and took significant steps to ensure that similar occurrences did not happen in future.

While this Office has met with considerable success in resolving privacy related complaints, not all such complaints are resolved to the satisfaction of all parties. For this reason, and for the reasons highlighted in our previous Annual Report, this Office strongly believes that the time has come to proclaim the privacy provisions and to put in place the appropriate statutory controls and requirements with respect to privacy protection, as well as to provide the citizenry with the oversight and protection of this Office, as envisioned and approved by the legislature.

REPORT SUMMARIES

As indicated in our previous Annual Report, the majority of Requests for Review received at this Office continue to be resolved through informal resolution. Approximately 75% of the Requests completed within the period of this Annual Report were resolved through this means. In these cases, we write the applicant and the public body, as well as any applicable third party, confirming that a resolution has been achieved and advising all parties that the file is closed or will be closed within a specified time period. Where informal resolution is successful, no Commissioner's Report is issued.

In the event that our attempt at an informal resolution is not successful, the file will be referred to a formal investigation. The results of this investigation, including a detailed description of our findings, are then set out in a Commissioner's Report. The Report will either contain recommendations to the public body to release records and/or to act in a manner consistent with the spirit and intent of the *Act*, or will support the position and actions of the public body. All Commissioner's Reports are public and are available on our website.

The following are summaries of selected Reports issued during the period of this Annual Report:

Report 2006-006 – Department of Municipal and Provincial Affairs

On 11 October 2001 a meeting was held between several organizations and agencies, including representatives from all three levels of government. The purpose of this meeting was to discuss the Province's overall response to the diversion of aircraft and passengers on 11 September 2001 as a result of terrorist attacks in the United States. In September 2005 an Applicant applied for access to a copy of the minutes of this

meeting and a copy of a document referred to as "lessons learned." The Department of Municipal and Provincial Affairs initially indicated to the Applicant that access would be granted, but later denied access to these records in their entirety, claiming that they contained legal advice (section 21) and personal information (section 30). In addition, the Department claimed that the records were provided in confidence and, as such, should be withheld in accordance with section 23(1)(b). In claiming section 23(1)(b), the Department argued that it was not necessary to show harm, as is required with section 23(1)(a).

The Commissioner agreed that a small portion of the record was appropriately withheld as solicitor-client privileged. He also agreed that any personal information in the record, as defined in the legislation, should be withheld. It is interesting to note that the Department made no reference to section 30 in its submission, but given the mandatory nature of this exception the Commissioner identified the personal information and recommended that it be severed from the responsive record before disclosing the record to the Applicant.

With respect to section 23, the Commissioner agreed that a determination of harm is not necessary when considering the application of section 23(1)(b), establishing an important distinction between this section and section 23(1)(a). The Commissioner's analysis, therefore, focused on the term "received in confidence" as required by section 23(1)(b). The Commissioner also noted that section 23(1)(b) only applies to those organizations listed in section 23(1)(a). While the majority of organizations that participated in the 11 October meeting are clearly included in this list, other participants included private corporations. The Commissioner determined that any information provided by these latter organizations cannot be protected under section 23(1).

In analyzing this exception, the Commissioner distinguished between the terms "received in confidence" and "supplied in confidence." This latter term is used in

another exception and focuses on the establishment of whether or not the supplier of the information intended that it be supplied in confidence. When using the term "received in confidence," however, the intent of the receiver of the information is an important consideration in determining confidentiality, in addition to the intent of the supplier. When claiming section 23(1)(b), therefore, a public body must show clear and convincing evidence that when it received the information it did so with an expectation of confidentiality. The Commissioner also suggested that the issue of confidentiality should be clarified at the time the information is received.

In this case, the Commissioner was not convinced that the Department had received the responsive record in confidence as anticipated by section 23 of the *ATIPPA*: "I am not convinced that a mere statement that information that had been provided to a public body some four and one half years ago was provided in confidence should justify the withholding of that information from disclosure." As such, the Commissioner determined that the Department could not rely on section 23(1)(b) and he recommended that the responsive record be released to the Applicant, with the exception of specifically identified legal advice and personal information.

The Department agreed to release the majority of the information recommended for release by this Office. However, the Department decided to sever some information due to concerns with intergovernmental relations and security implications. Neither the Applicant nor this Office filed an appeal with the Supreme Court Trial Division.

Report 2006-012 – Department of Education

In February 2006 an Applicant applied for access to the notes and/or the transcript of interviews conducted by the Department of Education with her and her husband and with her 14 year old son. The son had been previously diagnosed with a number of disorders. The Department released a copy of the notes taken during the

interview with the Applicant and her husband, but claimed that the notes taken during the interview with the son were personal information and releasing them would constitute an unreasonable invasion of the son's privacy, as per section 65(d) of the *ATIPPA*.

Subsequent to its decision to deny access to the son's interview notes, the Department received a second request for the same information, this time signed by the son. The Department, however, took the position that notwithstanding the signature affixed to the access request, it was effectively for the benefit of the mother. As such, the Department continued to rely on section 65(d) and again denied access to the information. In response, the mother filed a Request for Review with this Office and asked that the Commissioner review the decision of the Department to deny her son access to his own personal information.

In conducting this investigation the Commissioner was faced with two main issues. First, he had to determine who the Applicant actually was, the mother or the son, and second, he had to determine whether the Applicant was entitled to the responsive record.

On the first issue, the Commissioner agreed that the son likely did not fully comprehend the nature of his request for information, nor the process involved in filing such a request. As such, the Commissioner concluded that the son did not initiate the request completely on his own accord. In addition, the Commissioner noted that the son lived with the mother, that the mother had made previous attempts to gain access to the information and that the mother filed the Request for Review and all subsequent correspondence with this Office. At no point did the son submit any information on his own behalf. Based on the evidence before him, the Commissioner determined that the mother was the person seeking access to the information and, as a result, he considered the mother to be the Applicant for the purpose of this request.

Having identified the mother as the Applicant, the Commissioner then considered her right to have access to her son's interview notes. The Commissioner first determined that the notes constituted the "personal information" of the son, as defined by the *ATIPPA*. The Commissioner then considered the application of section 65(d) which allows a parent or guardian of a minor to exercise a right or power of that minor, except where the exercise of that right or power would result in an unreasonable invasion of the minor's privacy. While the Commissioner acknowledged the intent of section 65(d), he emphasized the clear recognition of the privacy rights of individuals, including minors. In this case, the Commissioner determined that the mother was acting on her own behalf in attempting to gain access to the information and, as such, he concluded that her request did not outweigh the son's right to have his privacy protected.

The Commissioner agreed that the Department acted appropriately in denying access to the responsive record and, accordingly, he did not issue a recommendation. No appeal was filed with the Supreme Court Trial Division.

Report 2006-014 – College of the North Atlantic

In March 2006 the Applicant applied for access to all communications, including e-mails, letters and electronic recordings, to and from a defined group of six individuals wherein the Applicant's name was referenced. The Applicant subsequently amended his request by reducing the number of individuals from six to five and by specifying a date range for the communications. The College of the North Atlantic ("CNA") denied access to the responsive records, claiming that certain parts constituted a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity (section 5(1)(b)). In addition, CNA claimed that disclosure of portions of the information would deprive a person of the right to a fair trial or impartial adjudication (section 22(1)(h)), harm the conduct of existing or imminent legal proceedings (section

22(1)(p)), or disclose personal information to the Applicant (section 30(1)). CNA also denied access to some of the information on the basis that it had already been provided to the Applicant (section 13). During informal resolution efforts brokered by this Office, CNA decided to release a number of records to the Applicant, including all information that had been withheld under section 13.

In defending its position, CNA indicated that the individuals named in the request either served on a "harassment committee […] or are now part of the team dealing with impending legal proceedings." As such, CNA argued that these individuals were serving in a quasi-judicial capacity or were somehow involved in making determinations with respect to an ongoing legal matter involving the Applicant. In analyzing this issue, the Commissioner referred, in part, to the criteria for determining whether a matter is judicial or quasi-judicial, as set out by the Supreme Court of Canada in *Minister of National Revenue v. Coopers & Lybrand*, 92 D.L.R. (3d) 1, 1978 CarswellNat 257 (eC). Such a determination is based in large part on whether a decision or order is one **required by law**. In this regard, the Commissioner concluded that the procedure which resulted in the responsive records was nothing more than an internal, employment-related disciplinary investigation and there was no evidence to support that the procedure was established on a statutory basis. The Commissioner further determined that the harassment committee was purely investigatory and had no authority to render a decision. For these reasons, the Commissioner concluded that the individuals named in the Applicant's request were not acting in a judicial or quasi-judicial capacity and, therefore, CNA could not rely on section 5(1)(b).

With respect to CNA's section 21(1)(h) claim, CNA argued that it is a "person" for the purposes of this exception and that disclosure of the information would seriously compromise its right to a fair and impartial adjudication on an ongoing labour relations matter. CNA relied in part on the definition of "person" in the *Interpretation Act*, RSNL 1990, c. I-19. The Commissioner, however, established a distinction between

a "person" and a "public body" for the purposes of the *ATIPPA*. While the Commissioner acknowledged that an incorporated entity, such as CNA, is considered a person under the *Interpretation Act*, he concluded that the intent of the legislators in defining the term "public body" in section 2, yet using the word "person" in section 22(1)(h) was to allow the protection of information associated with an incorporated entity which is not also a public body. To do otherwise would suggest that one category of public bodies would enjoy the protection afforded to a person while another category of public bodies (those not incorporated) would not. Relying on the specific purposes of the *ATIPPA*, the Commissioner did not accept that the legislators intended to create this double standard. To do so would be inconsistent with the intent and object of the *ATIPPA*. As such, the Commissioner concluded that CNA could not rely on this exception.

CNA also relied on section 22(1)(p) to deny access. CNA argued that there is an ongoing legal proceeding and the release of the information would "…undermine the CNA position." Based on the specific wording of section 22(1)(p), the Commissioner determined that the exception is not meant to protect public bodies from harm, but to protect the conduct of the proceeding itself. The Commissioner contrasted section 22(1)(p) of the *ATIPPA* with section 15(1)(d) of Saskatchewan's *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c. F – 22.01, which does expressly protect public bodies. Relying on the well established test of a reasonable expectation of probable harm, the Commissioner concluded that CNA had largely failed to discharge its burden of proving that such an expectation of probable harm exists in this case. Notwithstanding the Commissioner's conclusions in this regard, and despite CNA's failure to make a significant case in support of its position, the Commissioner did accept that release of a few brief passages of the record may cause harm as anticipated by section 22(1)(p). The Commissioner recommended, therefore, that these passages may be withheld. CNA could not, however, rely on section 22(1)(p) to withhold any other information.

The final exception claimed by CNA was section 30(1). CNA claimed that these records "dealt with personal matters of individuals other than the applicant with no reference made to the applicant." The Commissioner agreed with CNA in this regard. Due to the mandatory nature of section 30(1), however, the Commissioner recommended that additional information, not identified by CNA as personal information, be withheld by CNA under this exception.

In concluding this Report, the Commissioner raised concerns over the manner in which CNA conducted itself in this case, including its choice of discretionary exceptions and its failure to meet the required burden of proof in relation to those exceptions. The Commissioner suggested that CNA improve its performance in the future to ensure compliance with the spirit and intent of the *ATIPPA*.

Report 2007-002 – Department of Innovation, Trade and Rural Development

This Request for Review was filed in August of 2006 by a Third Party (represented by Counsel) who opposed a decision by the Department of Innovation, Trade and Rural Development to release records pertaining to it. This process began with a request from the Applicant to the Department in May of 2007. The Department notified the Third Party of the request as required by section 28 of the *ATIPPA*, and advised the Third Party that the requested records may contain information, which, if disclosed, could affect its business interests as set out in section 27. The Department supplied a copy of the records requested by the Applicant to the Third Party, which indicated which information the Department intended to release, and which information it intended to withhold. The Third Party objected to the disclosure of much of the information which the Department had planned to release. The Department considered the Third Party's objections, and it decided to withhold an additional portion of the information based on the Third Party's objections, but it maintained its decision to release most of the records as per its previous determination. In response,

the Third Party filed a Request for Review with this Office. Informal resolution efforts were not successful, and the Commissioner invited all three parties by letter to forward their written representations to this Office no later than 1 November 2006.

It was noted in the Commissioner's Report, however, that the Third Party had made reference in its initial Request for Review about making representations "at the review hearing." The Commissioner also noted that when the Third Party was in contact with staff of this Office for preliminary informal resolution discussions, the Third Party again made reference to his wish to make representation to the Commissioner at a hearing. Each time the Third Party raised this notion in those discussions, staff clearly explained to him that it is not the usual practice of this Office to hold hearings, but rather to give parties an opportunity to make written submissions which are then considered by the Commissioner in concert with the responsive records, the *ATIPPA*, case law, and any other factors determined to be relevant through the course of investigation. The Third Party was advised that if he maintained his wish to appear at a hearing before the Commissioner, that he should make that specific request to the Commissioner in writing. No written request for a hearing was received from the Third Party, neither before nor after the issuance of the letter from this Office on 18 October 2006 inviting written submissions by the deadline of 1 November 2006. Furthermore, no written submission of any kind was provided by the Third Party. A brief submission was received from the Applicant, but the Department declined to make a submission.

The Commissioner then proceeded with his Review using the information which was on file. The Commissioner noted that the basis for the Review was a Third Party objection to the disclosure of information under section 27 of the *ATIPPA* (a mandatory exception to disclosure) which, if disclosed, would be harmful to the business interests of a Third Party. Section 64(2) of the *ATIPPA* provides that the burden of proof is on the Third Party to prove that the information must not be released. The Commissioner

summarized the elements of the three part harms test, all three parts of which must be met in order for any party to rely on section 27 to withhold or prevent the release of records. The three part harms test has been discussed in previous Reports by the Commissioner, including Report 2005-003 wherein he quoted directly from *Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, [1997] N.S.J. No. 238 (N.S.S.C.). In that decision, Kelly, J set out the three parts of the test as follows:

> (*a) that disclosure of the information would reveal trade secrets of commercial, financial, labour relations, scientific or technical information of a third party;*
> *(b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and*
> *(c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).*

The Commissioner explained that all three parts of the test must be met in order to sever the record. The Commissioner also noted that Nova Scotia's section 21(1)(c) is identical to section 27(1)(c) of the *ATIPPA*, except the *ATIPPA* adds a fourth injury in relation to a report involving the resolution of a labour relations dispute, which was not relevant to the present Review.

The Commissioner then examined the records in detail in relation to each part of the test. The Commissioner found that some information met the first part of the test, in that it was commercial or technical in nature. The Commissioner found that much of the information, however, was of a more general nature, related to the overall industry of the Third Party, as well as application forms, etc.

Lacking any convincing evidence to conclude that the information was supplied explicitly or implicitly in confidence, the Commissioner found that part two of the three part test had not been met. In making this determination, the Commissioner referred to his earlier decision in Report 2006-001 in which he quoted from Order 01-39 of the

British Columbia Information and Privacy Commissioner, which was upheld on judicial review in *Canadian Pacific Railway v. British Columbia*, 2002 BCSC 603, 2002 CarswellBC 1022.

Even though all three parts of the three-part harms test must be met in order to withhold information under section 27, and the Commissioner had already determined that the second part of the test had not been met, he nevertheless decided to comment on the operation of the third part of the test. In doing this, the Commissioner explained that a case must be made that disclosure of the information would lead to a reasonable expectation of probable harm in order for part three of the test to be met. Furthermore, the Third Party must be able to present detailed and convincing evidence of the facts that led to the expectation that harm would occur if the information were disclosed, and there must be a link between the disclosure of the information and the harm which is expected from release.

The Commissioner determined that no such case had been made by the Third Party, neither to the Department, nor to this Office, and therefore the third part of the three part harms test had not been met. Furthermore, the Commissioner commented that much of the information which was the subject of the objection by the Third Party was available on the Third Party's web site, would be easily obtainable from the Third Party by customers or potential customers of the Third Party, and is likely common knowledge or assumed throughout the industry in which the Third Party is involved.

The Commissioner concluded that the Department had already severed any information which could possibly meet the threshold of the three part harms test as required under section 27 of the *ATIPPA*. The Commissioner therefore recommended that the Department release all of the information it had intended to release.

The Third Party appealed to the Supreme Court Trial Division, but did so outside of the statutory time limit as set out in section 60 of the *ATIPPA*. This issue is currently before the Court.

Report 2007-003 – Memorial University of Newfoundland

On 15 March 2006 an Applicant applied to Memorial University for access to a 1994 Report dealing with research integrity. This Report (hereinafter referred to as the "record") had been referred to in a television broadcast in early 2006 and was referenced on Memorial's website.

In denying access to the entire record, Memorial claimed that the record was not subject to an access request under the *ATIPPA* because of the operation of section 5(1)(k) of the *Act* which provides that the *Act* does not apply to records relating to an ongoing prosecution. In support of its claim Memorial provided evidence that the record was part of a civil action in which it was involved and submitted that the term "prosecution" includes both civil and criminal proceedings. The Commissioner, however, agreed with the Applicant's submission that the term "prosecution" in section 5(1)(k) refers only to a criminal proceeding and that the civil proceeding in which Memorial was involved was not a prosecution within the meaning of section 5(1)(k). Therefore, the Commissioner determined that the record was not excluded from the *ATIPPA* by the operation of section 5(1)(k).

Memorial also submitted that a number of exceptions set out in the *ATIPPA* allowed it to refuse disclosure of the record. The Commissioner discussed each of the exceptions claimed.

Memorial claimed the exception set out in section 22(1)(a) which provides that a public body may deny access where disclosure of the information could reasonably be

expected to interfere with, disclose information about, or harm a law enforcement matter. Memorial relied on the definition of "law enforcement" set out in section 2(i) which provides that law enforcement includes an investigation that could lead to a penalty or sanction being imposed and submitted that the activities of the authors of the 1994 Report were intended to investigate allegations against an individual and to recommend appropriate sanctions. The Commissioner determined that the investigation leading to the 1994 Report was an investigation within the meaning of section 2(i), but found that there was no evidence that the investigation did or will lead to the imposition of a penalty or a sanction. Therefore, the Commissioner concluded that it was not a law enforcement matter and the exception in section 22(1)(a) was not applicable to the record.

Memorial also relied on the exception in section 22(1)(h) which allows a public body to refuse access where the disclosure of the information could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication. Memorial claimed that disclosure of the record could prejudice its right to claim evidential privilege in relation to the record during the civil action in which it was involved. The Commissioner following the reasoning set out in Report 2006-014 determined that Memorial is not a "person" within the meaning of section 22(1)(h). Furthermore, the Commissioner concluded that there was not convincing evidence presented to establish that the disclosure of the record would deprive Memorial of a fair trial or impartial adjudication.

The Commissioner also discussed Memorial's reliance on section 22(1)(p) which provides that a public body may refuse access where the disclosure of the information could reasonably be expected to harm the conduct of existing or imminent legal proceedings. Memorial claimed that disclosure of the record would result in harm to the legal proceedings in which it was involved by further exacerbating and injuring the relationship between the parties engaged in the legal proceeding. The Commissioner,

following his reasoning in Report 2006-004, stated that in order to rely on section 22(1)(p) Memorial had to prove that releasing the record would result in a reasonable expectation of probable harm to the conduct of the legal proceeding in which it was involved. The Commissioner ruled that Memorial had not presented convincing evidence that the release of the record could harm the legal process in which it was involved.

Memorial in addition submitted that it could deny access based on the exception set out in section 24(1) which permits a public body to refuse access where disclosure of the information could reasonably be expected to harm its financial or economic interests. In support of its position Memorial offered the evidence that release of the record could increase the claim for punitive damages against it in the civil action in which it was involved. The Commissioner concluded that an award of damages against Memorial by a Court would not constitute financial or economic harm within the meaning of section 24(1) and, therefore, that section did not apply to the withheld record.

The Commissioner then dealt with Memorial's submission on the applicability of section 27(1), which is a mandatory exception requiring a public body to deny access where the disclosure of the information would be harmful to the business interests of a third party. Memorial acknowledged that in order for section 27(1) to apply it had to meet the three part harms test which the Commissioner has discussed in previous reports, including Reports 2005-003 and 2006-001. Memorial submitted that all three elements of the test were present: (a) the record contains information regarding financial support and scientific conclusions in relation to a third party, (b) the information in the record was gathered with an explicit understanding of confidentiality, and (c) the release of the record was likely to seriously impair the effectiveness of future investigations into scholarly or research fraud. The Commissioner noted that the information at issue must be about third parties in order

to meet the first part of the three part test. The Commissioner determined that this information was not about third parties but rather was about either employees of Memorial or persons who were under contract to perform services for Memorial. Therefore, the Commissioner concluded that the first part of the required test was not met and thus section 27(1) was not applicable to the record.

Memorial also denied access to the record on the basis of section 30(1) which contains a mandatory prohibition against the disclosure of personal information. The Commissioner pointed out that in order for information to be protected from disclosure by section 30(1) two conditions must be met: (a) the information must meet the definition of personal information found in section 2(o), and (b) the information must not fall into one of the categories in section 30(2), which sets out a number of exceptions to the rule against non-disclosure of personal information found in section 30(1). The Commissioner determined that the record did contain certain information that met the definition of personal information in section 2(o) and this should not be disclosed. On the other hand, the Commissioner concluded that certain other personal information should be disclosed because it fell into one of the categories of exceptions in section 30(2). Specifically, some of the personal information in the record was covered by the exception in section 30(2)(f) because it was information about the positions or functions of employees or members of Memorial. Other personal information in the record was recommended for release because it was found by the Commissioner to be captured by the exception set out in section 30(2)(h) in that it consisted of the opinions or views given by individuals in the course of performing services for Memorial.

The Commissioner also noted that it was necessary to comment on the applicability of section 31(1) which requires the head of a public body to disclose to the public information about a risk of significant harm to the health or safety of the public where it would be clearly in the public interest to do so. The Commissioner stated that before information is required to be released pursuant to this section a two-part test

must be met: (a) there must be a risk of significant harm, *and* (b) the disclosure must clearly be in the public interest. The Commissioner concluded that while a strong argument could be made for the release of the information in the public interest, there was no evidence to prove that not releasing the record would result in significant harm. Therefore, the Commissioner ruled that he could not recommend release of the record on the basis of section 31(1).

In conclusion, the Commissioner recommended the release of the record with the exception of specific personal information as indicated on a copy of the record that was provided to Memorial by this Office.

Memorial made a decision not to follow the recommendation of the Commissioner. Neither the Applicant nor this Office filed an appeal of that decision with the Supreme Court of Newfoundland and Labrador, Trial Division.

STATISTICS

Figure 1: Requests for Review/Complaints Received

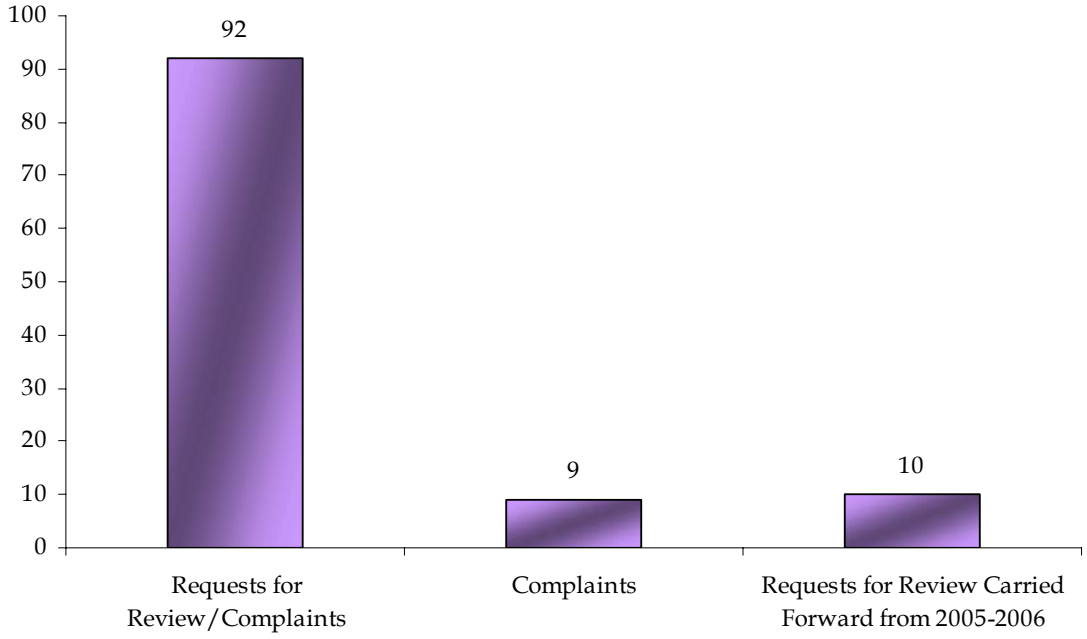
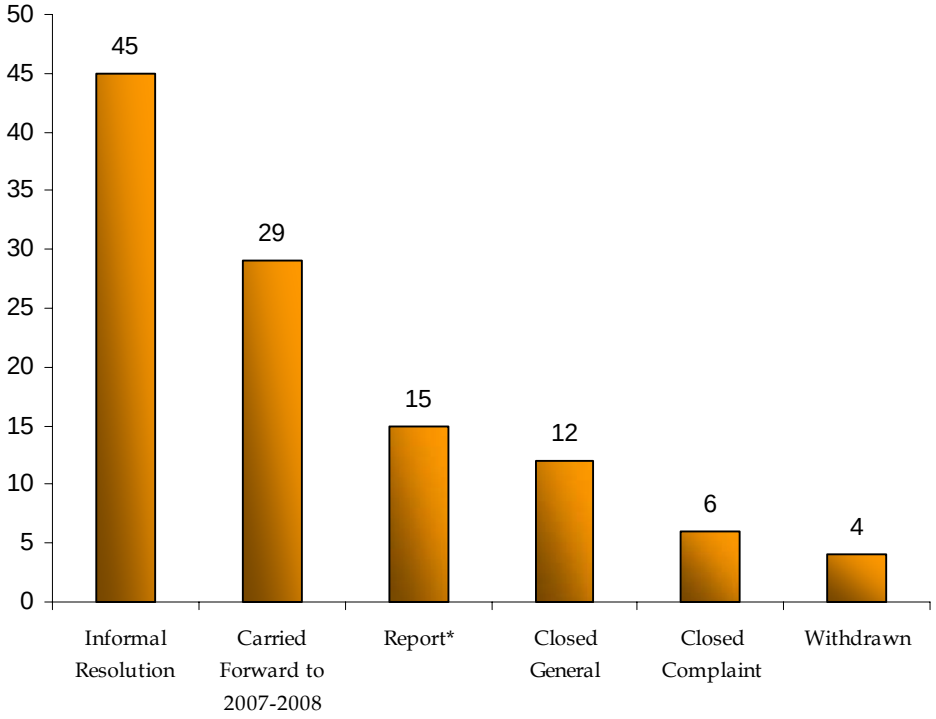


Figure 2: Outcome of Requests for Review/Complaints Received



* Ongoing Appeal - Report 2007-002.

Figure 3: Requests for Review/Complaints by Applicant Group

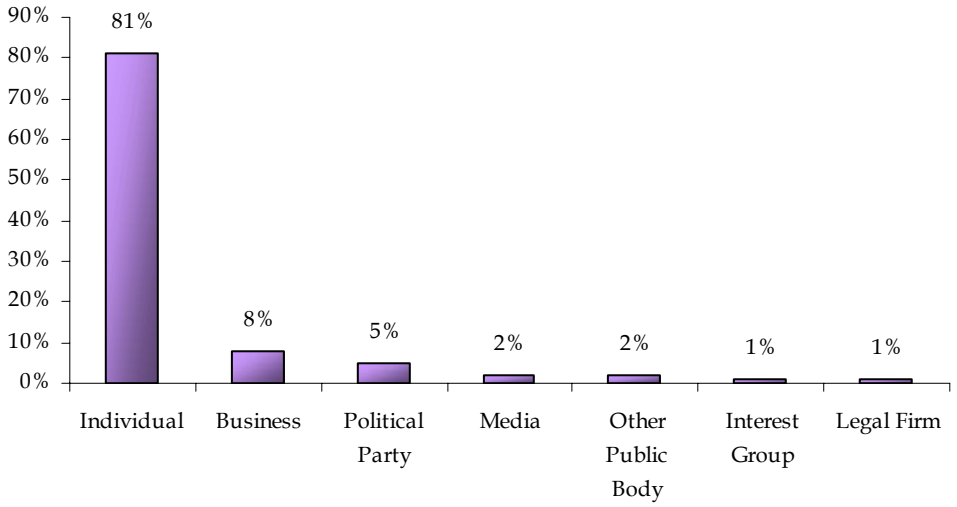


Table 1: Requests for Review/Complaints by Applicant Group

Public Body	*Number of Reviews*	*Percentage*
Individual	82	81%
Business	8	8%
Political Party	5	5%
Media	2	2%
Other Public Body	2	2%
Interest Group	1	1%
Legal Firm	1	1%

Figure 4: Requests for Review/Complaints by Information Requested

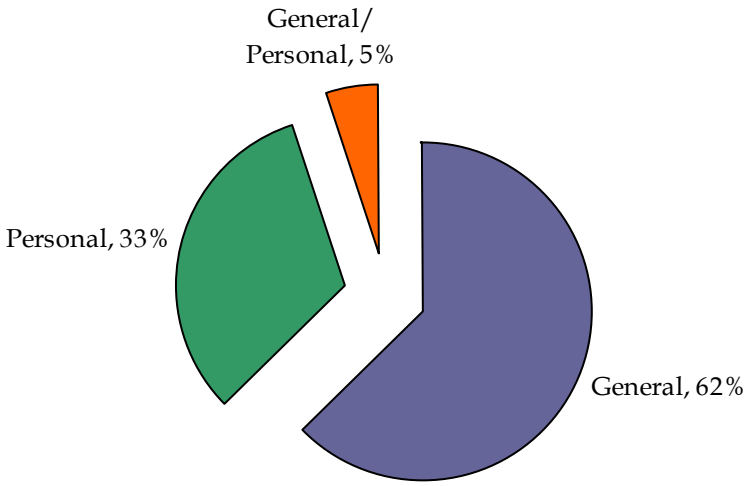
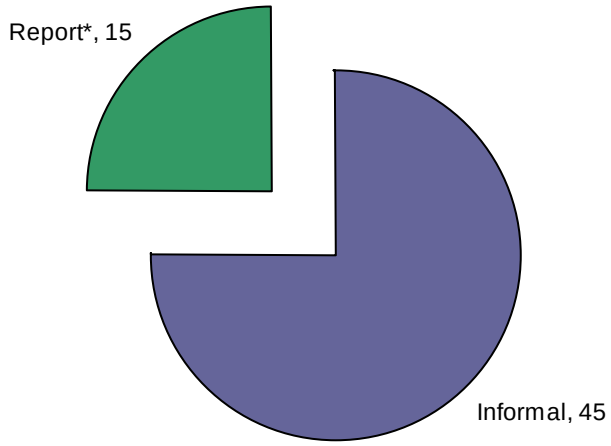


Table 2: Requests for Review/Complaints by Information Requested

General	*Personal*	*General/Personal*
63	33	5
62%	33%	5%

Figure 5: Requests for Review - Resolutions



*Report 2006-013 involved two Requests for Review.

Table 3: Requests for Review - Resolutions

Informal	*Report*
45	15
75%	25%

Figure 6: Conclusions of Commissioner

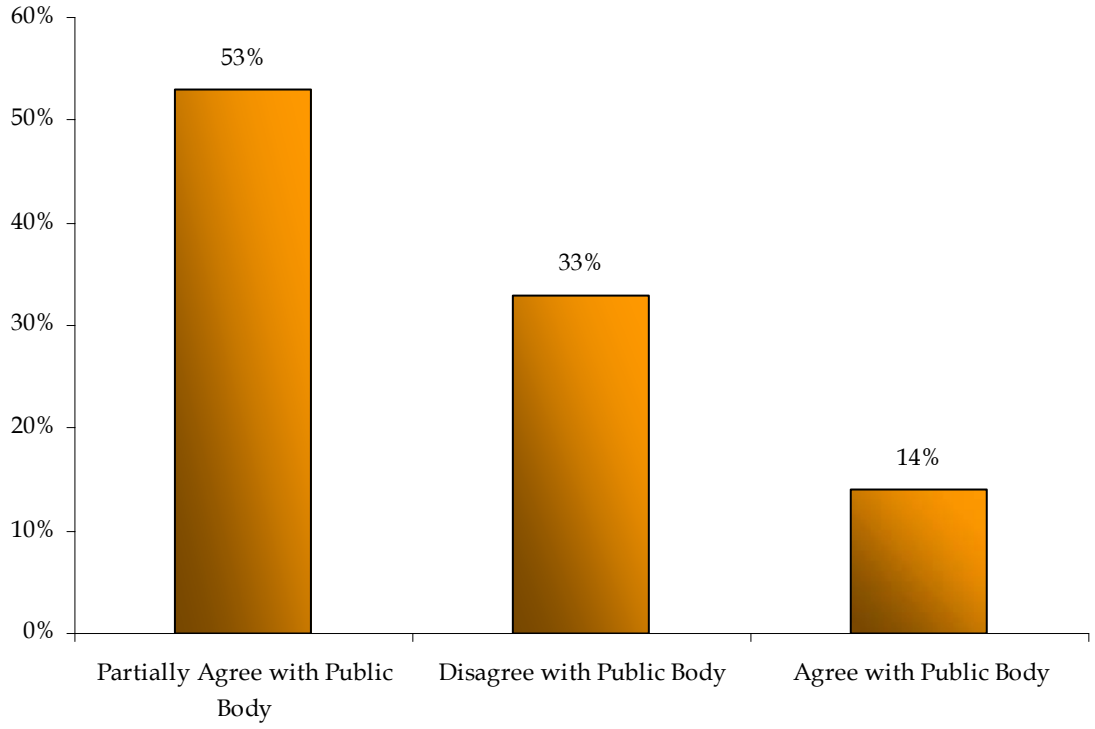


Table 4: Conclusions of Commissioner

Partially Agree with Public Body	*Disagree with Public Body*	*Agree with Public Body*
8	5	2
53%	33%	14%

Figure 7: Public Body Response to Commissioner's Reports

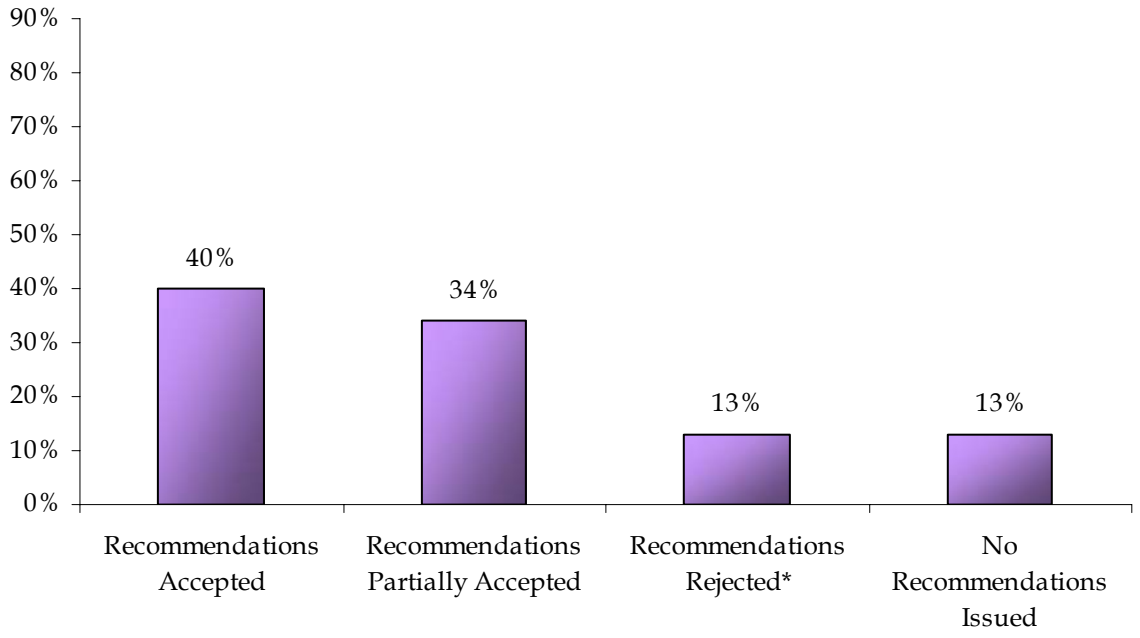


Table 5: Public Body Response to Commissioner's Reports

Recommendations Accepted	*Recommendations Partially Accepted*	*Recommendations Rejected**	*No Recommendations*
6	5	2	2
40%	34%	13%	13

*In one case, recommendations to release information were subsequently accepted and further information was released (See Report Summary 2006-014).

Figure 8: Public Body Covered by Requests for Review/Complaints

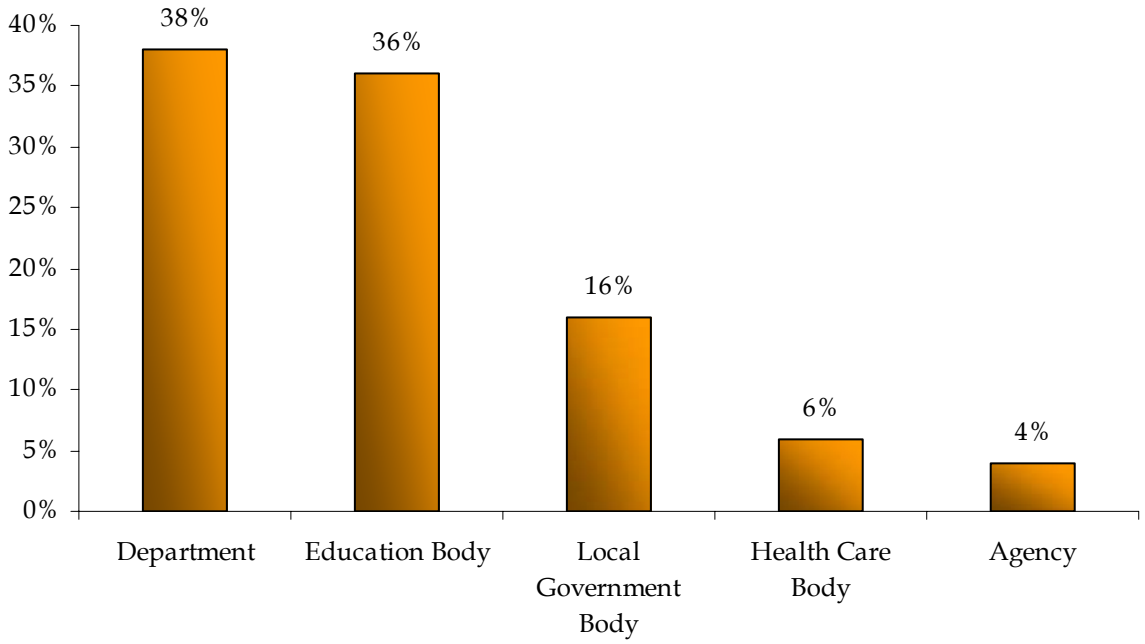


Table 6: Public Body Covered by Requests for Review/Complaints

Department	*Education Body*	*Local Government Body*	*Health Care*	*Agency*
38	37	16	6	4
38%	36%	16%	6%	4%

Figure 9: Requests for Review/Complaints by Issue*

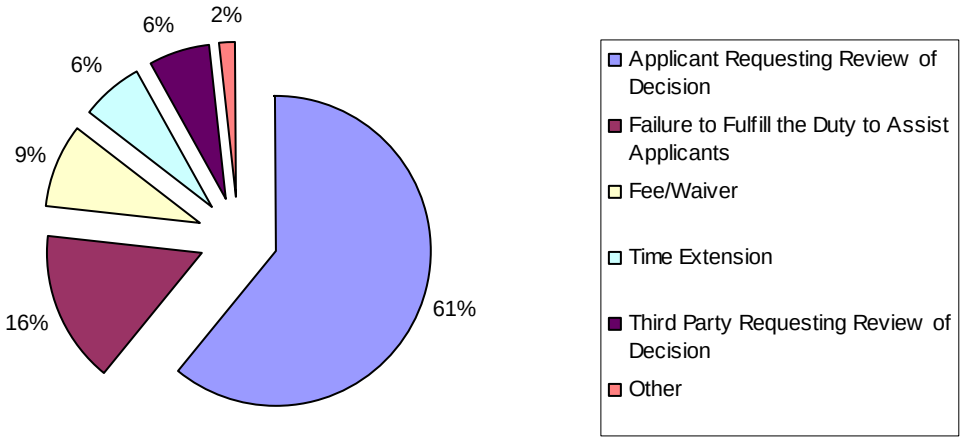


Table 7: Requests for Review/Complaints by Issue*

Applicant Requesting Review of Decision	*Failure to Fulfill the Duty to Assist*	*Fee/Waiver*	*Time Extension*	*Third Party Requesting Review of Decision*	*Other*
76	20	11	8	8	2
61%	16%	9	6%	6%	2%

*A Request for Review/Complaint often relates to several issues.

Figure 10: Inquiries

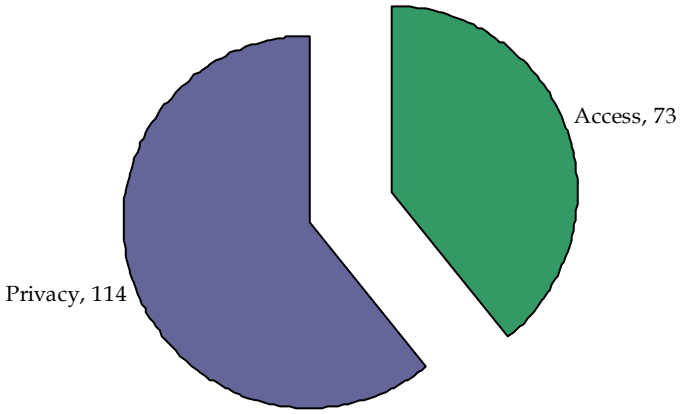


Figure 11: Requests for Review/Complaints Received (Monthly)