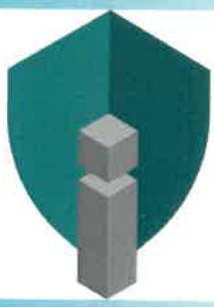
Office of the
INTEGRITY
COMMISSIONER



Bureau du
COMMISSAIRE
À L'INTÉGRITÉ

Annual Report

2017-2018

Members' Conflict of Interest Act

Lobbyists' Registration Act

Right to Information and Protection of Privacy Act

Personal Health Information Privacy and Access Act

Prepared December 2018

ACCESS TO INFORMATION AND PRIVACY
ACCÈS À L'INFORMATION ET PROTECTION DE LA VIE PRIVÉE
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access.info.privacy@gnb.ca acces.info.vieprivee@gnb.ca
www.info-priv-nb.ca

CONFLICT OF INTEREST AND LOBBYIST REGISTRY
CONFLIT D'INTÉRÊTS ET REGISTRE DES LOBBYISTES
Maison Edgecombe House, 736 rue King St., Fredericton, NB E3B 1G2
506.457.7890 506.444.5224
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December 19, 2018

The Hon. Daniel Guitard
Speaker of the Legislative Assembly
Legislative Building
P. O. Box 6000
Fredericton, New Brunswick
E3B 5H1

Dear Mr. Speaker:

Re: 2017-2018 Annual Report – Office of the Integrity Commissioner

I am pleased to present to you the inaugural Annual Report for the Office of the Integrity Commissioner for the 2017-2018 fiscal year. This Annual Report has been prepared and is submitted in accordance with s. 31(1) of the *Members' Conflict of Interest Act,* s. 64.3 of the *Right to Information and Protection of Privacy Act*, and s. 65.3 of the *Personal Health Information Privacy and Access Act.* While there is no express obligation for me to report annually on the Office's activities under the *Lobbyists' Registration Act*, I have done so in this Annual Report for the sake of completeness.

Respectfully,

The Honourable Alexandre Deschênes, Q.C.
Integrity Commissioner for the Province of
New Brunswick

Table of Contents

COMMISSIONER'S MESSAGE

This is the inaugural Annual Report for the recently created Office of the Integrity Commissioner. I was initially appointed as Commissioner in December 2016, at which time I became responsible for the mandate of the *Members' Conflict of Interest Act*. On April 1, 2017, the beginning of the present reporting year, the *Lobbyists' Registration Act* came into effect and was added to my responsibilities. Last but certainly not least, I assumed the role and responsibilities of the former Access to Information and Privacy Commissioner under the *Right to Information and Protection of Privacy Act* and the *Personal Health Information Privacy and Access Act* on September 1, 2017, which was the final step to bring all of the intended mandates under the umbrella of the Office of the Integrity Commissioner. Before I go any further, I would like to thank former Commissioner Anne Bertrand, Q.C., for her unparalleled commitment to this Office during her 7-year tenure as the Access to Information and Privacy Commissioner.

Needless to say, it was a year of significant transition for the Office on many fronts, with the installation of a new Commissioner, new mandates, the administrative tasks involved with changing the name of the Office, the implementation of legislative amendments to the statutes this Office oversees, all during which the workload facing the Office and my staff continued at its usual busy pace. It was a challenging year for both myself and my staff for these reasons, and I continue to be grateful for and impressed with the way my staff rose to the occasion and assisted me deciding how best to navigate the transition challenges.

While I will address each of the Office's four mandates in greater detail below, I will take this opportunity to sum up the highlights and challenges over the year for each.

It was business as usual with respect to my duties and functions under the *Members' Conflict of interest Act.* That having been said, important changes will be recommended in relation to the future mandate of the Integrity Commissioner.

When the *Lobbyists' Registration Act* came into effect on April 1, 2017, we encountered some early challenges and issues with the online registration system, which was not as user-friendly or effective as anticipated. While this caused some initial problems for lobbyists seeking to register to be compliant with their new statutory obligations, it was a learning opportunity to find a way to improve both the registry itself and the registration process. We are currently in the process of building a new Office website that will include a new online registry, which is being designed to be easier to access and navigate for both lobbyists seeking to register and the general public who are looking to find out who is lobbying government and for what purpose. A more substantive update on the progress on this front will be contained in the Office's next Annual Report.

On September 1, 2017, my responsibilities as Integrity Commissioner were fully realized when I assumed the mandates under the *Right to Information and Protection of Privacy Act*, the governing access and privacy statute for the public sector, and the *Personal Health Information Privacy and Access Act*, the governing statute for personal health information in both the public and private sectors. I quickly discovered why the majority of the resources of this Office must be dedicated to these two mandates, given the significant number of files open at any given point in time and the often complex nature of the work involved in investigating complaints under both statutes. Further, I was also aware that the government had recently completed its legislative review of both statutes, which resulted in amendments to the *Personal Health Information Privacy and Access Act* that came into force on September 1, 2017 and that substantive amendments to the *Right to Information and Protection of Privacy Act*, including changes to this Office's timelines to address complaints, would be coming into effect in the coming months.

With all of this in mind, it quickly became apparent to me and my staff that this was an excellent opportunity to undertake a review of the Office's internal practices and operations to find any additional possible efficiencies to ensure that we are able to meet all of our obligations under the law and to provide thorough and timely outcomes on investigation matters. This was no small task, but fortunately my dedicated staff were committed to making this work and provided helpful feedback and direction.

As a result, I decided to delegate additional responsibilities to staff to effect informal resolution of complaints wherever possible, with the goal of creating a clear delineation between the work conducted during the informal resolution process by staff, and a formal review by the Commissioner for matters that cannot be informally resolved. I also decided to streamline the process for reviewing and addressing self-reported privacy breaches of personal health information from custodians under the *Personal Health Information Privacy and Access Act* and to only open investigation files where there is an issue of concern that needs to be addressed (for example, cases of unauthorized access to health files ("snooping").

While these changes are still in their early days at this point, I can say that they appear to be having the desired effect and, as per the statistical information set out below, the Office seems to be managing the caseload under these two mandates well and is in a good position to meet the new tighter investigation timelines under the coming amendments to the *Right to Information and Protection of Privacy Act*.

In addition to the work on investigation files, my staff and I also undertook a number of activities to address the changes to the Office on the administrative side. In March 2018, we approved the new logo for the Office, which now appears on all output from this Office. We are also in the process of developing a new Office website that we hope will be a user-friendly way for everyone to easily find information they are seeking about all four of our mandates. This is a significant undertaking and a work in progress at this point, as staff have been busy working with the website developer on design and layout, as well as drafting and reviewing website content.

Part of the work in developing website content includes staff updating and adapting Office resource documents (best practices and guidance documents), in light of the recent and anticipated legislative amendments under the

Right to Information and Protection of Privacy Act and the *Personal Health Information Privacy and Access Act.* This is also a work in progress at this point and the goal is to have guidance documents on the most common issues and questions of interpretation up on the new website as a resource for those we oversee and the general public.

These items remain a work in progress at this time as my staff are doing their best to incorporate this additional work into their existing caseload work. I am confident that we will be able to launch the new website before the end of December 2018, and I look forward to being able to publicly announce when this occurs.

During this fiscal year my staff was composed of:

Rosanne Landry Richard, Administrative Assistant and Administratrix of the Lobbyist Registry
Kara Patterson, Senior Legal Counsel
Chantal Gionet-Bergeron, Senior Legal Counsel
Anik Cormier, Legal Counsel
Lucrèce Nussbaum, Portfolio Officer II (until September 2017)
Melanie Grant, Portfolio Officer I

Kara Patterson, Rosanne Landry Richard, Melanie Grant, Chantal Gionet-Bergeron, Anik Cormier, Marie-Eve Grégoire (April 9/18)
Commissioner Hon. Alexandre Deschênes, Q.C.

In conclusion, I am proud of the Office's achievements over this past year of transition and am thankful for the dedication, work ethic, and expertise shown by my staff every day.

The Honourable Alexandre Deschênes, Q.C.
Integrity Commissioner

This report is broken down into the following sections:

- *Members' Conflict of Interest Act*, Annual Report for the fiscal year 2017-2018 pursuant to s. 31 of that *Act*;
- *The Lobbyists' Registration Act;*
- *Right to Information and Protection of Privacy Act* Annual Report, pursuant to s. 64.3 of that *Act*; and
- *Personal Health Information Privacy and Access Act* Annual Report, pursuant to s. 65.3 of that *Act*.
- *Other office information*

MEMBERS' CONFLICT OF INTEREST ACT

The role of the Integrity Commissioner under this mandate is to provide advice and recommendations with respect to each Member of the Legislative Assembly's ("MLA") obligations under the *Act* in the exercise of their functions as elected officials.

Members are required to file a private disclosure statement with my office and have an annual consultation with the Commissioner. I am pleased to report that all members have complied with such obligations and that public disclosure statements for each member were filed by my office with the Clerk of the Legislative Assembly. The public can access these statements by visiting the Clerk's Office or the Legislative Assembly's website (https://www.gnb.ca/legis/index-e.asp).

The Integrity Commissioner has the authority to investigate allegations of conflict of interest made by any person against any member of the Legislative Assembly. I am pleased to report that no investigation of an alleged conflict of interest took place during the 2017-2018 fiscal year.

Blind trust or management agreements

Members of the Executive Council are prohibited from the activities enumerated in s. 14 of the *Act*. As a result, it may be necessary for some members to enter into a blind trust or management agreement, or obtain an exemption under s. 14(2) from the Commissioner to be permitted to be involved in a prohibited activity. All members who were required to enter into such agreements have complied. Some members were granted exemptions, as I was satisfied that doing so would not create a conflict between the member's private interest and the member's public duty. This information is reported in the public disclosure statements filed with the Clerk of the Legislative Assembly.

Conflict of interest, real or apparent/perceived

Throughout 2017-2018, dozens of members of the Executive Council, and former members, sought my advice and recommendations on a confidential basis with respect to their obligations under the *Act*.

Gifts

Some misunderstanding still exists with respect to the acceptance of gifts. In general terms, the rules are as follows:

A member (or a member's immediate family member) is not allowed to accept a gift, fee or other personal benefit that is connected in any way with the performance of his or her duties of office unless the benefit received is an incident of protocol or social obligations of his or her office and does not exceed the sum of two hundred and fifty dollars. If the gift or benefit received is an incident of protocol or social obligations of his or her office but exceeds that sum, it must be disclosed immediately on a gift disclosure form provided by the Office of the Integrity Commissioner. This Office has provided a guide with respect to gifts that are not received as an incident of protocol or social obligations and it is available on our website. In general terms, in order for any gift or benefit (apart from gifts as incidents to protocol or social obligations) to be acceptable to the Commissioner, it must be, in the Commissioner's view, of such a nature that it could not reasonably be regarded as likely to influence the member in the performance of his or her duties.

"Designated judges" pursuant to the Conflict of Interest Act

For two decades now, former Commissioners and the government's own Legislative Administration Committee (LAC) have urged government to abandon the "designated judge" system. This system was designed to provide oversight related to conflict of interest issues for senior public servants (Deputy-Ministers and Heads of Crown corporations and their respective executive staff), in lieu of oversight by an independent commissioner. The duties and obligations of the designated judge under the *Conflict of Interest Act* are similar to those of the Integrity Commissioner under the *Members' Conflict of Interest Act* covering former members and members of the Legislative Assembly.

I join all other commissioners in advocating the abandonment of the "designated judge" system in favor of placing senior civil servants under the supervision of the Integrity Commissioner's office. In my view, this change must take place as soon as possible for two main reasons: one, the duties and obligations of the "designated judge" appointed under the direction of Cabinet (a Court of Queen's Bench or Court of Appeal judge), a system that does not exist anywhere in the country, may be incompatible with the concept of an independent judiciary from the executive branch of government and two, the system simply does not work to provide the citizens of our Province with the oversight system they are entitled to expect for senior civil servants. I will be providing more details to support my views in the five-year review provided to the Legislative Administration Committee (LAC) in conjunction with the filing of this annual report filed with the Clerk of the Legislative Assembly or the Speaker of the House. In the meantime, one need only refer to the words of a "designated judge" of the Court of Queen's Bench in the case of [2014] A.N.-B. no 326, 428 N.B.R.(2d) 387, per Ouellette J.) at paragraphs 35 and 37 to provide some support for my views:

> **35** First, for the designated judge, who are the executive staff members, Deputy Ministers and heads of Crown corporations who are required to disclose in the absence of any sort of registry? Who has or has not made his or her annual disclosure? Who enforces the Act if no disclosure is filed? Finally, to mention one more peculiarity, and without claiming to be

exhaustive on the subject, it is not necessary to include in the disclosure property that has been placed in a blind trust, or to have the blind trust approved.

(paragraph 36 omitted)

37 At the risk of repeating myself, I do not have any information on or list of individuals (executive staff members, Deputy Ministers and heads of Crown corporations) who are required to disclose. No one compiles such a list, and there is no process for informing the individuals in question that they have breached the disclosure provisions of the *Conflict of Interest Act*.

LOBBYISTS' REGISTRATION ACT

At the beginning of the fiscal year, on April 1, 2017, I was tasked with the obligation to create and maintain a lobby registry under the *Lobbyists' Registration Act*.

Lobbying is an important part of the democratic process, and when done lawfully it constitutes a legitimate activity in our system of free and open access to government. The purpose of the *Lobbyists' Registration Act* is to foster transparency about those lobbyists who are paid to attempt to influence decisions made by New Brunswick's public office holders. The *Act* mandates the Integrity Commissioner to create and maintain a public registry of these paid lobbyists, such as "consultant lobbyists" and "in-house lobbyists".

With the coming into effect of the *Lobbyists' Registration Act*, for the first time, paid lobbyists must register with the Lobbyist Registry by filing a return with the Commissioner that details who they want to meet with and why. If the Commissioner accepts their return, this information is entered into the registry system, where the information is available to the public. At the end of this fiscal year, there were approximately 115 lobbyists registered with the Lobbyist Registry.

Service New Brunswick (SNB) was responsible for developing the current registry system and all requests for servicing and maintaining the public registry must be addressed to, and are dealt with, by SNB. Since its inception, the registry system required ongoing attention from IT support for the significant technical difficulties which were encountered, far too many to describe in detail in this report. As a result of these difficulties, on two occasions I had to postpone certain statutory deadlines for lobbyists because some problems simply could not be fixed in a timely manner, despite commendable efforts by SNB staff to accommodate our Office.

Upon reflection, I concluded that it was inappropriate for SNB to be responsible for the technical aspects of the registry system as this Office serves as the oversight body for SNB under the *Right to information and Protection of Privacy Act*. The Legislative Administration Committee agreed with my conclusion and has since provided our

Office with funds to create a new lobbyist registry, which is currently under construction. Once completed, the new registry will be accessible from the new Office website.

In determining how the registry system could be improved and what it should look like, this Office has benefited from considerable input from the Office of the Registrar of Lobbyists for Saskatchewan, and I am extremely grateful to Ms. Saundra Arberry for her invaluable and continuing support. The new system to be put in place has some similarities to the Saskatchewan registry, on which stakeholders were widely consulted before it was implemented.

With the new system, we will no longer need to ask SNB to fix or amend the registry as we will be able to make any changes or improvements that we deem necessary of our own accord. Lobbyists will no longer need to register on the SNB system to file a return as they will simply have to log on to our website to do so.

On a final point, I note that the *Lobbyists' Registry Act* does not afford the Commissioner any investigatory powers. As matters now stand, the current registry system is basically a self-reporting honour system and the Commissioner has no power to investigate unreported or suspected lobbying activities or to compel an individual to file a return. This is of concern as, over the past year, this Office attempted to contact a number of individuals who appeared to be engaged in lobbying activities, but who had not filed a return in the registry. We received little to no cooperation in these cases.

If the Province intends for the registry to be a complete and meaningful effort to ensure that all lobbying activities as defined in the *Lobbyists' Registration Act* are reported and made available to the public, I would strongly recommend that the *Act* be amended to provide investigatory powers to the Commissioner.

In October 2017, I had the pleasant task of discussing my mandate under the *Act* and informing the Deputy Ministers and their Executive Assistants on two separate occasions about the new obligations placed on lobbyists as of April 1, 2017. Although public office holders are not legally obligated to report lobbying activities to this Office, I felt it was important for these groups to understand the intent of the new legislation so that they could redirect lobbyists to our Office to inquire if they should file a return (which they may be legally obligated to do if they are engaged in discussions with a Minister or other public office holders in their midst). This is particularly important considering that the *Act* does not provide the Commissioner with any investigatory powers.

Apart from the above endeavors, this Office issued numerous news releases about the registry system and I gave a number of media interviews during the year.

RIGHT TO INFORMATION AND PROTECTION OF PRIVACY ACT

The majority of the investigative work conducted by this Office falls under the access to information and privacy mandates, particularly the *Right to Information and Protection of Privacy Act* (as well as the *Personal Health Information Privacy and Access Act*, which will be discussed in the following section).

The *Right to Information and Protection of Privacy Act,* the public sector access and privacy legislation for the Province, applies to practically all entities that fall under the umbrella of the Provincial government and municipal governments. This includes all Provincial government departments and agencies, public sector educational bodies (public schools and school districts, public community colleges, public universities), public sector health entities (regional health authorities, Ambulance New Brunswick, etc.), and Crown corporations. It also applies to municipalities and local governments and their offices, including police forces, fire departments, etc. Public sector entities that are subject to the *Act* are "public bodies".

The general public exercises its right to seek and receive information from public bodies on a regular basis. If someone who has asked a public body for information is not satisfied with how his or her access request was handled, this triggers the right to complain about the public body's decision to this Office.

The general public is also interested in how public bodies are handling their personal information and have the right to seek assistance from this Office if they have concerns.

In addition to addressing concerns raised by members of the general public on access and privacy matters, this Office is also tasked with rendering decisions on public body requests for additional time to respond to access requests, applications from public bodies to disregard access requests, a public education mandate, and we also provide comments on requests on proposed programs and legislation.

RIGHT TO INFORMATION

As indicated above in the Commissioner's message, this fiscal year was one of many changes for the Office and its mandates, which presented an excellent opportunity to for us to review and tweak our internal processes, including how this Office addresses complaints. The primary goal of this exercise was to make our investigation process as efficient as possible, while still ensuring that our work is thorough and effective in upholding the access and privacy rights of New Brunswickers.

The key change in our investigation process was streamlining the informal resolution process and creating a clear delineation between staff attempting to attain an informal resolution of a matter and, where this is not possible,

a formal review process by the Commissioner. The new process applies to both access complaints and privacy concerns. A flowchart that shows the steps of this investigation process is attached to this Report as **Appendix A.**

All investigation files are first assigned to a staff member with the intent to informally resolve the matter as a matter of course. During this initial phase, the staff member assigned to the file gathers details from both the person who made the complaint and the public body to understand the facts and the applicable provisions of the *Act* that may apply in the circumstances, following which initial findings are prepared on whether the complaint/concern has merit or not. The staff member will then work with both parties to seek an informal resolution of the complaint that is in keeping with the person's rights under the *Act*.

For access to information complaints, an informal resolution is achieved when the person who made the request receives additional records and/or explanations that are satisfactory to resolve the complaint, in keeping with the requirements of the *Act*.

For privacy concerns, an informal resolution is achieved either with the provision of explanations to the complainant as to why his or her concern does not have merit (i.e., where there is no proof that his or her personal information was mishandled by the public body), or why the concern has merit and the steps the public body in question has taken or will be taking to address the situation and the person is satisfied with this outcome to the matter.

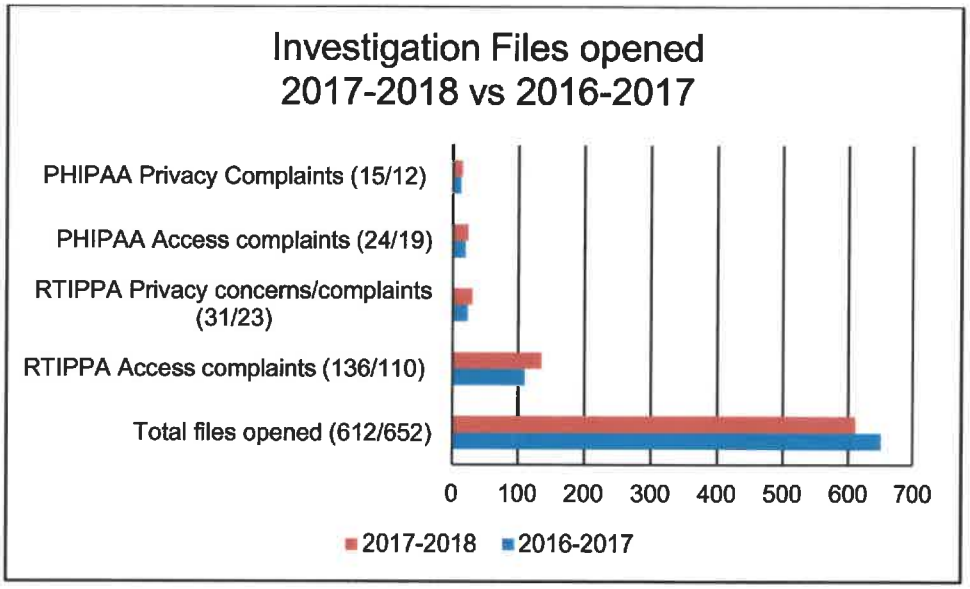
If a matter cannot be informally resolved to the satisfaction of the person who made the complaint and the public body that is the subject of the complaint, in keeping with the requirements of the Act, the matter will be referred to the Commissioner for review and final disposition.

If, on reviewing the outcome of the informal resolution process, the Commissioner is satisfied that the issues identified in the complaint have been addressed in keeping with the requirements of the *Act*, the Commissioner will refuse to conduct a formal investigation and will conclude the complaint by informing the parties of this outcome.

If the Commissioner finds that there are matters that have not been satisfactorily addressed through the informal resolution process, the Commissioner has the authority to conduct a formal investigation. In this case, the Commissioner will advise the parties to the complaint of the launch of the formal investigation and will invite them to make written representations. Formal investigations will usually conclude with a published Report of Findings and recommendations as the Commissioner deems appropriate in the circumstances, unless the matter is otherwise addressed in the interim, in which case the Commissioner may decide to cease an investigation.

In addition to the above changes to the Office's mandates and internal investigative process, it was also another busy year in terms of caseload. The number of total files the Office opened during the last fiscal year decreased in volume overall, but we saw an increase in the number of files requiring investigation. For example, we opened 69 fewer general inquiry files, a decrease of 68%. This is in part due to the changes made to our intake process, where we have stopped assigning a file number to a general inquiry if it is simply for instructions on how to file a complaint with our Office, or how to make a request for access to information. However, the decrease in the number of files opened is not reflective of the amount of work that is coming in, as we have seen the number of

complaint files under both pieces of legislation steadily increasing every year. We have also seen an increase in the time extension applications from public bodies. These increases translate to a higher volume of work overall for the Office, as it is these types of files that require the most time and effort on our part. A snapshot of this is presented below. More detailed statistics of file activity are found in **Appendix B**.



Access

Applicants who are not satisfied with how a public body has handled his or her access request have the right to either file a complaint with this Office or refer the matter to a judge of the Court of Queen's Bench. The vast majority of applicants opt to file complaints with this Office, although some do take the more formal route and go directly to the court.

Under the *Act,* applicants have broad rights to complain about "a decision, an act, or an omission" in a public body's handling of their access request. This can include a public body's failure to respond to a request in keeping with the time limits imposed by the *Act*, the public body's decision to extend its time limit to respond to an access request of its own accord, that the public body did not conduct an adequate search for relevant records or records seem to be missing or unaccounted for in the public body's response, a public body's decision to transfer an access request to a different public body for response, as well a public body's refusal to grant access to any of the requested information under one or more provisions of the *Act*.

Third parties also have complaint rights under the *Act.* A third party is an individual or organization who is not the applicant or a public body. The *Act* includes a process for public bodies to seek and receive a third party's input on the possible disclosure of information that relates to the third party under ss. 34 to 36 of the *Act.* A third party that has been notified by a public body that there is an access request involving information that relates to the individual, or organization, as the case may be, and the public body decides to grant access to that same

information, the individual or organization, as a third party, then has the right to either complain to this Office about the impending disclosure or refer the matter to a judge of the Court of Queen's Bench. Where a public body decides to grant access in these cases, disclosure of the information relating to the third party is placed on hold for 21 days so as to allow the third party time to exercise the right to challenge the decision.

Content complaints

The majority of access complaints received by this Office are about the contents of the public body's response to an access request, including denials of access to requested information and cases where an applicant believes the public body has, or should have, more information than what was accounted for in the public body's response.

A frequent issue that comes up in the complaints filed with this Office is that applicants do not always understand the responses they receive from public bodies. Some public bodies rely on a standard response letter that does not always include helpful explanations about what information exists in the public body's records and/or meaningful reasons as to why access to any of the requested information is being refused.

I take this opportunity to remind all public bodies that it is not sufficient to simply state that access to information is being refused with references to or recitation of the claimed exception provisions of the *Act*. Recognizing that providing meaningful responses to access requests does require more work on the part of public bodies, it is important to keep in mind that where applicants can understand what information is not being provided and helpful explanations as to the reasons why (i.e., why the information at issue falls within a particular exception to disclosure), they may be more likely to know that their access rights have been respected and accordingly less likely to feel the need to file a complaint and seek our assistance to make sense of the response they received.

During this past year, this Office investigated access complaints on a wide variety of subject matters involving all kinds of public bodies, including Provincial departments and agencies, municipalities and police forces, public school districts, public universities, and regional health authorities.

One issue that came up in a number of our investigations this year, which has also been raised consistently in investigations in previous years, is the question of disclosure of contracts entered into between public bodies and third party individuals and organizations.

When considering whether a particular contract can be disclosed under the *Act*, it is imperative that public bodies take into account the fact that the *Act* is premised on the presumption of disclosure of the requested information, subject to the limited and specific exceptions to disclosure found in sections 17 to 33 of the *Act*. The public has the right to request and receive information about the conduct of the public business of public bodies, and this right can only be curtailed where there is lawful authority that either permits or requires the public body to refuse access.

This issue was the subject of three recent court cases and these will be discussed in further detail below.

Another issue that came up in a number of complaint investigations during the year is the question of disclosure of the names of third party officials and employees. Some public bodies (but not all) have taken the position that the names of third party officials and employees that are found in the public body's records are automatically

protected under the s. 21(1) exception, which prohibits disclosure of another person's personal information where doing so would amount to an unreasonable invasion of his or her privacy.

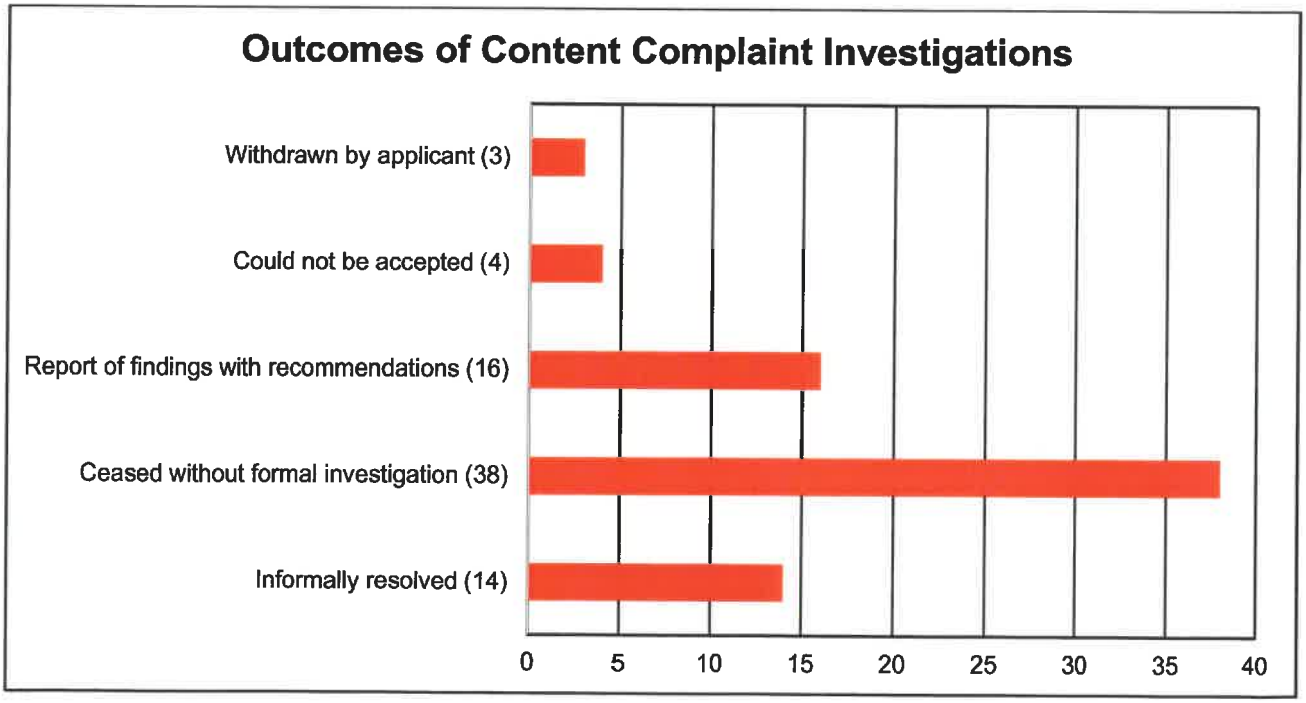
While we can appreciate that public bodies prefer to have set rules about disclosure of certain types of information, in my view, this black and white approach is not supported by the *Act*. When considering whether the name of an official or employee of a third party organization would be an unreasonable invasion of that person's privacy, the public body must consider the nature of the information in question and the person's name as it appears in that context.

For example, where a public body has signed an agreement with a third party, the name of the official or employee of the third party who executes the agreement on behalf of the third party would not result in an unreasonable invasion of his or her privacy in this context, given that he or she was the signing authority for the third party organization.

On the other hand, if the third party employee or official's name appears in the context of a labour dispute, consists of his or her employment history that is not already publicly known, personal health information, the disclosure of information of this nature would give rise to an argument that this could reasonably be considered an unreasonable invasion of privacy. This presumes disclosure even where there would be an invasion of privacy, but it only protects information where it would be deemed an unreasonable invasion.

For these reasons, the question of disclosure of the names of employees and officials of third party organizations must be assessed on a case-by-case basis.

During the 2017-2018 fiscal year, our Office closed 75 content complaints alone. The outcomes of these complaints are presented in the chart below.



No response complaints

If an applicant does not receive a response to an access request within the statutory time limits under s. 11 of the *Act*, he or she has the right to file a complaint with our Office. On receiving a complaint about the public body's failure to respond in a timely fashion, we will contact the public body to determine whether a response was in fact issued, and if not, to determine the cause for the delay and when the public body can rectify the situation by providing a response. Where we are not able to find a relatively quick resolution to a no response complaint, we will conclude our investigation by issuing a Report of Findings and a recommendation to the public body to provide a response as soon as possible.

In some cases, applicants agreed to withdraw no response complaints where the public body issued a response relatively quickly after the complaint was filed. On occasion, the no response complaint was withdrawn and the applicant subsequently filed a complaint about the content of the response where he or she was not satisfied with the public body's response.

Outcomes:

Number of no response complaints: **18**
Number of founded no response complaints: **18**
Number of recommendations issued to ensure the public body issued a response: **5**

Note: In most cases, the public body's response was issued within a couple of weeks after the statutory time limit.

Self-extension complaints

Under s .11(3) of the *Act*, a public body has the option to extend its statutory time limit of 30 days to respond to an access request for up to an additional 30 days (for a total of 60 days) in certain circumstances:

(a) the applicant does not give enough detail to enable the public body to identify a requested record, the applicant does not respond to a request for clarification by the head of the public body as soon as the circumstances permit,
(b) a large number of records is requested or must be searched or responding within the time period set out in subsection (1) would interfere unreasonably with the operations of the public body,
(c) time is needed to notify and receive representations from a third party or to consult with another public body before deciding whether or not to grant access to a record,
(d) a third party refers the matter to a judge of The Court of Queen's Bench of New Brunswick under subsection 65(1) or files a complaint with the Commissioner under paragraph 67(1)(*b*), or
(e) the applicant requests records that relate to a proceeding commenced by a Notice of Action or a Notice of Application.

Where a public body chooses to exercise the option to extend the time limit of its own accord, the public body must notify the applicant of the reason why and when the applicant can expect to receive a response. The applicant has the right to complain to this Office about this decision.

In investigating these complaints, we will seek information from the public body about why it was unable to meet the original 30-day time limit and whether the public body is able to demonstrate that it was entitled to extend the time limit to respond in the circumstances. Where we find that the public body was not entitled to extend the time limit to respond and the public body's response has not yet been issued, we will issue a Report of Findings with a recommendation that the public body provide the applicant with a response as soon as possible.

Outcomes:

Number of self-extension complaints: **5**
Number of founded self-extension complaints: **3**
Number of unfounded self-extension complaints: **1**
Number of withdrawn self-extension complaints: **1**

Third party complaints

As indicated above, third parties who have received notice of a public body's decision to grant access to information that may affect their interests under s. 34, 35, 36 of the *Act* have the right to either file a complaint with this Office about the impending disclosure or to refer the matter to a judge of the Court of Queen's Bench. Third parties have 21 days from receiving notice of the public body's decision to exercise their rights to challenge disclosure, and if they do not, the public body will disclose the information in question to the applicant after the expiration of the 21-day period.

The process followed when we receive a third party complaint is a bit different, as once we receive such a complaint we are tasked with issuing a recommendation regardless of our findings. If we agree with the public body's decision to disclose the information in question, we will recommend to the public body that the disclosure take place, and if we do not agree that the information should be disclosed, we recommend to the public body that disclosure not take place. For this reason, third party complaints are usually concluded with a Report of Findings and accompanying recommendations.

Outcomes:

During the 2017-18 fiscal year, we received **5** third party complaints.
Recommendations to disclose Third Party information: **4**
Ceased: **1**

Time extension applications from public bodies

Under s. 11 of the *Act*, public bodies have 30 days to respond to access requests and, as explained above, have the option to extend its time limit for up to an additional 30 days (for a total of 60 days) in certain circumstances. If a public body finds it is unable to meet the statutory time limits to respond to an access request, it can seek approval from this Office for a further extension of time. Where this Office approves a time extension application, the applicant has no right to complain about the time extension.

When a public body encounters difficulty in meeting its statutory time limit to respond to an access request, as a first step, we encourage the public body to get in touch with the applicant to discuss the situation and anticipated timelines. Where the applicant is kept informed of the status of the request and agrees to allow the public body additional time to respond, the public body may not need to seek our approval for an extension (keeping in mind that the applicant still has the right to complain about a late response in this case).

To assist public bodies gauge whether or not we would consider their application, we created a new time extension application form, which was completed in late March 2018.

Outcomes:

Number of time extension applications received from public bodies: **26**

Granted: **19** — In 19 out of 26 cases, we found that the public body presented sufficient evidence to demonstrate that it merited further time to respond to the access request.

Not granted: **4** — In these cases, we had to reject the time extension applications as the public bodies had not self-extended their time limit to respond within the original 30-day time limit to do so.

Withdrawn by the public body: **2**

Request to disregard applications

There are three grounds that public bodies can rely on to seek the Commissioner's approval to disregard an access request under s. 15, as follows:

(a) would unreasonably interfere with the operations of the public body because of the repetitive or systematic nature of the request or previous requests,
(b) is incomprehensible, frivolous or vexatious, or
(c) is for information already provided to the applicant.

This is a difficult test for a public body to meet, as granting a public body permission to disregard an access request has the effect of removing access rights with respect to the access request(s) in question. Permission to disregard an access request is only granted where a public body is able to present sufficient facts to substantiate at least one of the three grounds listed above.

During the 2017-18 fiscal year, our Office received three applications from public bodies to disregard an access request, which is on par with the average number of applications received in previous years. This demonstrates that public bodies have, to date, very rarely taken the step of seeking the Commissioner's permission to disregard access requests.

Outcomes:

None of the three applications we received during this year were granted.

As part of our review of our internal processes during this year, we developed a more streamlined approach to assessing s. 15 applications as well as a new guidance document that set out the test that public bodies must establish under each ground.

We now ask public bodies to submit a request to disregard application within 7 business days of receiving an access request, and we will render a decision on the public body's application within 5 business days of receiving the public body's application.

It is important for public bodies to note that submitting an application for permission to disregard an access request does not place the processing of the access request in question on hold. Public bodies are to continue processing the access request while waiting for a decision from this Office as they cannot presume that the application will be granted.

Applicants will be notified in the event that we grant the public body's application, as this directly affects their access rights.

Recommendations issued on access complaints

During the 2017-18 fiscal year, this Office issued 28 Reports of Findings with recommendations to public bodies. Under s. 74 of the *Act*, public bodies have 15 days from receipt of the Commissioner's recommendation to inform the applicant (and copy our Office) of their decision.

Failure to notify the applicant of the public body's decision within this time limit, or a refusal to accept the Commissioner's recommendation, triggers appeal rights to a judge of the Court of Queen's Bench under s. 75 of the *Act*.

Note: Recommendations issued by the Commissioner under s. 64.1(1) of the *Act* about how public bodies generally process access requests do not have the same timelines for compliance nor do they trigger appeal rights.

Outcomes:

Recommendations issued to public bodies on access complaints: **28**
Recommendations followed: **17**
Recommendations not followed: **8**
Partially followed: **1**
Deemed refusal: **2**

Recommendations of note

Medicare billing information

Between 2015 and 2017, the former Commissioner's Office received three complaints about the Department of Health's refusal to disclose the total amount of Medicare billings billed by named physicians. The Department's previous practice was to disclose the total amounts billed by each physician, but did not identify each physician by name, but rather by his or her field of practice or specialty. The Department was of the view that disclosing physician names in this context would be an unreasonable invasion of the physicians' privacy, as it would reveal information about their source of income and financial circumstances.

In May 2015, the Province enacted amendments to the *Medical Services Payment Act* that granted the Minister permission to disclose information about physician remuneration for services rendered under the Provincial Medicare system for public reporting purposes; however, despite public commitments that publication of this information was forthcoming and an outstanding recommendation for disclosure from the Auditor General, this did not occur at that time.

The former Commissioner issued Reports of Findings after receiving further complaints on this question in 2016 and 2017 with recommendations to the Department for the disclosure of the total amount of Medicare billings along with the accompanying physician names.

In June 2017, the Department published a list identifying physicians by name and disclosed their respective total amounts of Medicare billings for the previous year in $50,000 ranges.

While the Provinces of British Columbia and Manitoba have been publicly disclosing the amounts of physician remuneration from their respective Medicare systems for several years, decisions from the Ontario and Newfoundland Commissioners' Offices that found that this information must be disclosed in their respective jurisdictions were the subject of appeals before the courts.

Severance payment amounts

We currently have two conflicting decisions from the Court of Queen's Bench on the question of disclosure of severance payment amounts made to public servants and officials.

The first case was an appeal from St. Thomas University's decision not to follow the former Commissioner's recommendation that information about severance payments made to former employees be disclosed, as doing so was not an unreasonable invasion of those individuals' privacy *Hans v. St. Thomas University* (2016 NBQB 49 (CanLII)). In this case, Justice Morrison recognized the need for transparency in how public bodies compensate employees and officials, but his decision focused primarily on the privacy rights afforded under the *Act*. In considering the wording of s. 21(3) of the *Act*, which lists the kinds of information that public bodies must disclose as they would not constitute an unreasonable invasion of privacy, Justice Morrison found that severance payments granted to public servants cannot be considered as "benefits" that flow from the employment relationship and that they also are not "benefits of a discretionary nature" for the purposes of ss. 21(3)(f) and

21(3)(h) of the *Act*. As a result, he found that disclosing this kind of information would be an unreasonable invasion of privacy and thus is not subject to disclosure under the *Act*.

The question of disclosure of severance payments was raised again in the courts when the Department of Health declined to follow the former Commissioner's February 2017 recommendation that the total amount of severance payments granted to a former senior official with the Department be disclosed. While well aware of Justice Morrison's decision and reasoning in the above-noted case, the former Commissioner did not agree that this outcome struck the correct balance between the privacy rights of an outgoing public servant and the need for transparency on the part of the public body in how it compensates individuals in these cases. On appeal, Justice Dionne respectfully considered Justice Morrison's decision and reasoning, but did not find himself bound to follow precedent and ordered the Department of Health to disclose the total amount awarded to this official.

The question of disclosure of exact severance payment amounts remains unresolved at the court level at this time.

Court Cases

A number of court decisions came down over the past year on access to information matters, five of which are summarized below.

Third party financial information in agreements with public bodies

Four of the cases discussed below deal with the disclosure of agreements between public bodies and third parties. In all four of these cases, the public bodies initially disclosed most of the information in the agreements in question; however, there was reluctance on the part the public bodies and, in some cases, the third parties to disclose some of the financial details of these agreements. In two of these cases, the courts upheld the public body's decision to protect some of the financial information at issue, while ordering disclosure in the two other cases.

These cases collectively show how the courts have been approaching and interpreting the exception for third party business interests under s. 22 of the *Act*, as well as the question of confidentiality in the context of agreements with third parties, and whether additional evidence and exceptions to disclosure can be relied upon at the appeal level that was not considered during an investigation by this Office.

Carmont et al v PNB et al (2018 NBQB 53 (CanLII))

This case was an appeal to the Court of Queen's Bench following the Department of Social Development's decision to not accept the former Commissioner's recommendation to disclose in full the six public-private partnership agreements for the operation and management of nursing homes in the Province. The Department objected to the disclosure of certain information in these agreements, including per diems and annual budget amounts allocated by the Department to Shannex, the total number of annual bed days, and the number of full-time equivalent staff employed in each nursing home, following which the applicant appealed the matter to the courts.

On appeal, the third party that operates the nursing homes in question, applied for and was granted intervenor status and presented detailed information and submissions to the court. Justice Clendening found the arguments

presented by the third party with respect to the impact of the disclosure on its business interests compelling, and in the end, upheld the Department's decision to refuse access to this particular information.

Medavie v. PNB (Department of Health) (2018 NBQB 121 (CanLII))

Another access case of note that ended up before the courts this year was the question of disclosure of the recently renewed ambulance services contract that the Province concluded in late 2017. This was the second case of a contractual agreement between the Province and the private sector where the question of the requisite level of transparency that was brought before the courts this year (along with the case discussed above).

As anticipated, the Department received access requests for the newly concluded agreement and undertook the third party notification process under s. 34 of the *Act*. As the Department and the third party (Medavie Health Services New Brunswick Inc.) were not in agreement on the question of disclosure of some of the financial details in this agreement, the third party referred the matter to a judge of the Court of Queen's Bench.

The court's decision in this case was largely in keeping with the court's analysis in the case summarized above. Justice Rideout agreed that the disputed information in the agreement (unit hours, cost per unit and staffed hour, call volume by region, formula and budget costs) fell within the scope of the s. 22(1) exception and thus could not be disclosed to the public under the *Act*, as this is a mandatory exception to disclosure. In arriving at this decision, Justice Rideout took into account the fact that the third party was given assurances of confidentiality for the information in question during its negotiations with the Province and for this reason accepted that this information had been provided to the Province in confidence. Justice Rideout also accepted the third party's submissions that disclosure of this information would cause harm to its competitive position and interfere with its other contractual or other negotiations.

In light of these two recent court decisions about how much information the public is entitled to know about the financial arrangements involved in public-private partnerships, this Office has some concerns about what this means for transparency in how the Province is conducting its business on behalf of the public it serves. In both of these cases, the agreements in question are for the operation and management of nursing homes and operation and management of ambulance services, respectively, both of which are part of health services provided to New Brunswickers, and both cases demonstrate that the public is interested in knowing exactly what has been agreed to and what it means for the public.

Also of concern is where the Province provides assurances of confidentiality about the resulting agreements that are entered into after negotiations with private sector entities. I encourage all public bodies to proceed with caution before providing such assurances, as the terms of a contract cannot override or supersede the transparency obligations placed on public bodies under the *Act*.

The question of confidentiality and contracts was also addressed by the courts in the cases summarized below.

Teed v. Fundy Regional Service Commission et al (2017 NBQB 173 (CanLII))

This case was an appeal of the Fundy Regional Service Commission's decision not to follow the former Commissioner's recommendations to disclose a supply agreement between it and a third party organization. The Regional Service Commission had refused to disclose the portions of the service agreement at issue, stating that

the s. 22(1)(c) exception to disclosure did not permit its release as this could reasonably be expected to harm the third party's business interests.

The former Commissioner found that the Regional Service Commission had not brought forth sufficient evidence and facts to support its reliance on this exception and that the disclosure of the requested service agreement could reasonably be expected to result in harm to the third party's business interests, and for this reason, recommended that the service agreement be disclosed in full.

The Regional Service Commission did not accept this recommendation and the applicant appealed the matter to the courts.

On appeal, the Regional Service Commission maintained its position with respect to the withheld portions of the agreement and, in addition to the s. 22(1)(c) exception, attempted to raise the application of further exceptions to disclosure (s. 22(1)(b) and s. 30 of the *Act*) before the court. Justice Christie did not accept the Regional Service Commission's attempt to raise additional grounds during the appeal process, as they were not relied on in the initial refusal or during the former Commissioner's investigation:

> [7] ... It must be remembered that this is an appeal and not an opportunity to raise new grounds that were not initially raised to justify the refusal to disclose. To allow for an evolving basis on which to deny disclosure produces a moving target as to the point of assessment of the decision. This produces an injustice to those seeking disclosure and complicates a process aimed at fostering an open and responsible government and public service....

Justice Christie also considered the assertion that the agreement was intended to be confidential:

> [14] The affidavit evidence of Fundy [the Regional Service Commission] states, in part, that the parties considered the contents of their agreement confidential. The fact that they have considered it so does not mean it should be protected. The fact that a party *considers* information confidential is irrelevant as it would completely undermine the purposes of the *Act* if such an assertion was, on its own, sufficient to justify keeping an agreement from public access.

In the end, the court upheld the former Commissioner's reasoning and resulting recommendation and ordered disclosure of the agreement in full.

In this case, I was pleased to see a precedent established that would limit a public body's ability to argue different provisions of the *Act* in support of its position that information should be protected than what was initially relied on in the public body's response to the applicant and during a complaint investigation by this Office. It is this Commissioner's view that the appeal process should not be considered as a trial process that opens up a case to cross-examination by the parties, which will often be well beyond the comfort level, if not skill, of most applicants seeking to exercise their rights under the *Act*.

I was also pleased to see the courts address the question of confidentiality with respect to agreements with third parties. This question has been raised in previous complaint investigations by this Office and we have consistently informed parties that public bodies cannot contract out of transparency obligations under the *Act*, for the reasons set out by Justice Christie above.

Balmain v New Brunswick (Tourism, Heritage and Culture) (2018 NBQB 129 (CanLII))

This case was an appeal to the Court of Queen's Bench following the Department of Tourism, Heritage and Culture's decision to not accept the Commissioner's recommendation to disclose licensing information in an agreement between the Province and a third party in taking over operations of the Mactaquac Golf Course, which is owned by the Province and is part of Mactaquac Provincial Park. While the Department had initially disclosed most of the agreement, it refused to grant access to the licensing arrangements with the third party. The Department relied on the s. 30(1)(c) exception to disclosure, claiming that these terms were subject to re-negotiation at a later date and that disclosing them at this point could undermine the Department's future negotiations. The Commissioner was amenable to the argument that the portions of the licensing arrangements that are subject to future renegotiation could be protected at the time, but not the current licensing arrangements, which were recommended to be disclosed.

In Justice Stephenson's decision, he disagreed with the Department's reasoning and ordered that the full terms of the licensing arrangement (and thus all of the withheld information) be disclosed in full.

Again on the question of confidentiality assurances, we noted that this decision made reference to the fact that the agreement did not contain a confidentiality clause as relevant, as the lack of a confidentiality clause means that the Province was free to disclose the agreement without being in violation of the agreement. As stated above, while confidentiality clauses may speak to the intentions of the parties to an agreement, as this Office has been reminding public bodies for years, the inclusion of a confidentiality clause cannot override or prevail over a public body's obligations to disclose certain information under the *Act*.

Jurisdictional question – "office of a municipality"

In the New Brunswick legislation, the *Act* applies not only to municipalities, but also "any office of a municipality, including a municipal police force" (s. 1, definition of "local government body"). New Brunswick is the only Canadian jurisdiction that defines municipally-related entities as an "office", and the *Act* provides no further direction on what was intended to be captured by an "office of a municipality", making this a question of interpretation on a case-by-case basis.

This question was raised in a complaint investigation resulting from the Town of Caraquet's decision to treat AcadieNor Inc. as a separate entity as grounds to refuse access to information about AcadieNor's salary and compensation for its officials, expenses incurred, and operating budget.

Throughout the former Commissioner's investigation, the Town maintained its position that AcadieNor is a separate legal entity from the Town and that the Town had no control over AcadieNor's records. In making a determination on the question of whether AcadieNor can or should be considered as an office of the Town, the former Commissioner looked to the relationship between the Town and AcadieNor, including how AcadieNor was

created, its purposes and the Town's purposes and to what extent these overlap, the Town's connection with AcadieNor's governing board, and whether the Town exercises any control or authority over AcadieNor.

Given the close ties between the Town and AcadieNor, the former Commissioner found that AcadieNor is an office of the Town and recommended that the Town process the access request for information about AcadieNor's operations.

The Town did not accept the recommendation and the applicant appealed the matter to the courts.

Radio-Canada v. Caraquet (2017 NBJ 330 (CanLII))

In hearing this appeal, Justice Ouellette considered the Town's position as well as the former Commissioner's reasoning in arriving at the conclusion that AcadieNor is an office of the Town for the purposes of the *Act*. In the end, the court agreed with the former Commissioner's analysis of the relationship between the Town and AcadieNor as the way to determine whether an entity should be considered an office of a municipality for the purposes of the *Act*, as well as the conclusion that it was in this case.

This decision sets out the factors that are to be taken into account in assessing whether an entity is an office of a municipality, and Justice Ouellette's conclusion provides helpful direction:

> [41] The legislator's intention in its use of the expression "or any office of a municipality" covers all entities in which municipalities have a proximate connection based on common goals, such as AcadieNor Inc., and it must ensure that these entities remain open and transparent to the public eye. [Translation]

With this decision, we now have some precedent in terms of defining an office of a municipality for the purposes of the *Act* and this Office will adopt this test in considering any future complaints we may receive on this jurisdictional question.

PROTECTION OF PRIVACY

Privacy Concerns

Under the *Act*, individuals who have concerns about how public bodies have handled their personal information have the right to contact our Office and to have us look into the matter. We have been calling these files "privacy concerns" up to this point, in the absence of a clearly delineated privacy complaint function under the *Act*. We are pleased to note that the pending amendments to the *Act* address this and create a clear authority for this Office to accept privacy complaints. When these amendments come into force, these files will be called "privacy complaints" under the *Act*.

Privacy concerns we investigated over the year primarily focused on questions of public bodies' collection and disclosure of individuals' personal information.

Outcomes:
Founded concerns (there was an improper collection or disclosure by the public body: **9**
Unfounded concerns (there was no improper collection or disclosure by the public body): **7**
Inconclusive (we were unable to make a determination, based on two differing versions of events): **1**
No jurisdiction (Members of the Legislative Assembly and private companies not subject): **2**
Withdrawn concerns: **1**

In four of the above cases, this Office issued recommendations to the public body involved to improve its practices and procedures to better protect personal information. For the five other founded concerns where we found there was a problem with the public body's handling of personal information that did not result in recommendations, the public body was aware of the issue and had already taken steps to implement appropriate measures to address the situation.

Privacy breaches reported by public bodies

While public bodies are not currently obligated to self-report privacy breaches to this Office, we are pleased to report that a number of them have been doing so on a voluntary basis for several years. We are appreciative of the fact that public bodies have voluntarily done so as an accountability measure, as this demonstrates to the public that they are taking privacy breaches seriously and going above and beyond their statutory obligations in doing so. When a public body self-reports a privacy breach to this Office, we will work with the public body to assist in determining the cause of the breach, the number of individuals affected by the breach, providing guidance in notifying the affected individuals, and in identifying the appropriate corrective measures to be put in place to prevent a similar breach from occurring again in the future.

While also not a requirement under the *Act*, we have been encouraging public bodies, when notifying affected individuals of privacy breaches, to inform them of the right to contact our Office if they have further concerns.

Under the impending amendments to Regulation 2010-111 under the *Act*, public bodies will have mandatory privacy breach reporting requirements, which will include notifying affected individuals and this Office in most cases.

Outcomes:

Number of self-reported breaches: **18**
Recommendations issued: **4**
Closed without recommendations: **13**
Could not accept complaint: **1**

LEGISLATIVE AMENDMENTS TO THE RIGHT TO INFORMATION AND PROTECTION OF PRIVACY ACT

The first legislative review of this *Act* also resulted in a number of proposed amendments that will come into effect on April 1, 2018:

- new timelines for public bodies and the Commissioner's Office:
  - public bodies now have 30 business (not calendar) days to respond to access requests and can self-extend for up to an additional 30 business days of their own accord;
  - our Office has 45 business days to informally resolve access complaints, which can only be extended with the consent of the parties;
  - Commissioner now has 90 business days to investigate a complaint, and can extend the deadline for formal investigations of his own accord.
- mandatory privacy breach investigations and notification:
  - public bodies are required to investigate actual and suspected privacy breaches and keep a registry of breaches and resulting corrective measures;
  - public bodies are required to notify affected individuals (and the Commissioner's Office) if "it is reasonable in the circumstances to believe that the privacy breach creates a risk of significant harm".
- updated provisions for the handling of personal information in the context of integrated services, programs, and activities and written agreement requirements
- additional security arrangements for personal information in public bodies' custody/under their control
- specific authority for this Office to accept privacy complaints
- the *Act* is subject to further legislative reviews every 4 years.

During the legislative review period, the former Commissioner provided input and comments to assist the Province in conducting its review of the *Act*. I also had the opportunity to provide further comments and input on the proposed changes to the accompanying Regulation 2010-111 under the *Act*.

We note that the impending amendments will create additional work for this Office, given the tighter timelines imposed on our Office to affect an informal resolution of access complaints and the new obligation on public bodies to self-report privacy breaches to this Office.

It remains to be seen if the public will be supportive of the lengthier timelines that the amendments afford to public bodies to respond to access requests. Under the current *Act*, public bodies have 30 calendar days to respond to access requests, while the amendments will change this timeline to 30 business days, with the option for public bodies to self-extend for up to an additional 30 business days (for a total of 60 business days, or approximately three months). That being said, this longer time period for public bodies to respond to access requests should reduce the number of self-extension complaints we receive from applicants as well as time extension applications from public bodies.

My staff and I remain committed to adapting and tweaking our processes as much as possible to make every effort to fulfill the mandates that are entrusted to this Office, recognizing that we are subject to budget constraints and staffing resources, as are the other legislative oversight offices in the Province.

PROPOSED CHANGES TO THE RIGHT TO INFORMATION AND PROTECTION OF PRIVACY ACT

Over the last year or so, I have encountered situations as Commissioner which, in my view, call for amendments to the *Act*. What follows are what I believe to be the most important changes that should be considered.

Commissioner's lack of regulation re: appeals

Section 75(2) of the *Act* allows the Commissioner, on his or her own motion, to appeal the public body's decision not to follow the Commissioner's recommendation if the person who made the complaint does not exercise his or her right to appeal. However, the Commissioner's right to appeal must be "in accordance with the regulations", and I note that section 7 of Regulation 2010-111, provides the process to be followed and the Forms to be completed for an appeal by the person who made the request or a third party (Forms 3 or 6 as the case may be), but there is no regulation governing an appeal brought by the Commissioner.

Although it is my view that the absence of such a regulation may not be an impediment to the Commissioner's right of appeal, a regulation should be enacted to eliminate any doubt on this point.

The appeal process and its anomalies

When a public body refuses to follow a recommendation issued by the Commissioner, the person making the request may appeal the decision to the Court of Queen's Bench under s. 75. Regulation 2010-111 provides the user-friendly appeal procedure available to the public and the documents to be used by the Court during the hearing of the appeal. The documents include, amongst others, the reasons invoked by the public body to refuse disclosure to the person making the request and to the Commissioner during the investigation of the complaint filed with our Office.

Recent appeal cases suggest that some judges prefer to treat the appeal process as a trial, by allowing arguments and oral or documentary evidence that were never raised or provided to this Office during a complaint investigation and thus do not form part of the Commissioner's report and resulting recommendations.

Other judges have a different approach and one that, in my view, is in accord with the spirit and intent of the appeal process envisaged by the *Act*.

For example, in *Teed v. Fundy Regional Service Commission et al* (2017 N.B.J. 272 (CanLII)), the Court made it clear that the appeal process is "not an opportunity to raise new grounds that were not initially raised to justify the

refusal to disclose". The Court also stated that "to allow for an evolving basis upon which to deny disclosure produces a moving target as to the point of assessment of the decision".

In my view, the approach in *Teed* is preferable for reasons of fairness to the person who made the request for information and who, following the public body's decision not to follow the Commissioner's recommendations, files an appeal. It is also an approach that recognizes that the Commissioner's recommendations are based on arguments and evidence provided to it by the public body. To allow new arguments and evidence to be presented before the court on an appeal clearly undermines the investigatory process of the Commissioner's Office as contemplated in the *Act*.

All of this is apart from the fact that appellants appearing on an appeal are usually not trained in the law and may be unaware that to ensure a "fair hearing" they would be entitled to be informed in advance of the new grounds to be raised on appeal or new evidence to be adduced and that they may be entitled to cross-examine an affiant or witnesses and to adduce evidence to meet the new grounds or evidence. Briefly put, turning a hearing on appeal into a trial is simply not compatible with the appeal process envisaged by s. 75 of the *Act*.

My view is that the *Act* should be amended to make it clear that it is incumbent upon public bodies to "put their best foot" forward when dealing with our Office on a complaint and that they should generally not expect to be allowed to raise new grounds or present new evidence on appeal. Of course, this might compel public bodies to do more work up front to justify their position but it would be beneficial to all in avoiding unnecessary investigations and reports as well as appeals to the Court.

The absence of a right to ask for intervenor status

The Integrity Commissioner should be specifically allowed to ask for intervenor status before the Court of Queen's Bench or the Court of Appeal in any case where issues are debated involving the Integrity Commissioner's mandate under the *Integrity Commissioner Act*.

PERSONAL HEALTH INFORMATION PRIVACY AND ACCESS ACT

While most of the investigative work under the *Right to Information and Protection of Privacy Act* is on the access side, most of our investigative work under the *Personal Health Information Privacy and Access Act* relates to privacy-related matters, including privacy complaints from individuals who are concerned about how their personal health information has been handled by custodians, and self-reported privacy breaches as reported by custodians. Access complaints are rare, which suggests that most custodians understand that patient information belongs to the patient, and those complaints we do receive are more often about the fees charged by the custodian in providing access to health information.

Privacy complaints

Individuals who are concerned about how a custodian has handled their personal health information have the right to complain to this Office, particularly about whether the custodian has collected, used or disclosed his or her personal health information contrary to this *Act*, or has failed to protect his or her personal health information in a secure manner as required by this *Act*. During this year, this Office investigated 16 privacy complaints.

Outcomes:

Founded concerns (the custodian mishandled personal health information): **4**
Unfounded concerns (the custodian did not mishandle personal health information): **8**
No jurisdiction: **2**
Investigation did not proceed due to no further communication with the complainant: **2**

In three of the above cases where the complaints were founded, this Office issued recommendations to the custodian involved to improve its practices and procedures to better protect personal health information. For the other founded complaint, the custodian was aware of the issue and had already taken steps to implement appropriate measures to address the situation.

Privacy breach notifications reported by Custodians

Most breach notifications reported to this Office come from the largest custodians in the Province, which are the two regional health authorities (Horizon and Vitalité) and the Department of Health. Also, some private sector health care professionals self-report breaches; however, we continue to have concerns that not all private sector custodians are aware of their obligations in this respect given the relatively small number of breaches that have been reported to this Office.

Self-reported breaches generally fall into three categories:

- Human error (the vast majority of self-reported breaches are because of envelope stuffing errors, incorrect fax numbers, failure to properly identify a patient's identity or contact information before sharing health information, etc.)
- Intentional unauthorized access to health information ("snooping" cases)
- Technical or system errors

This year saw a significant change in our internal process for self-reported breaches in the health care sector. Prior practice was to treat every self-reported breach as a matter that required investigation, with an investigation file

opened for each and ongoing follow-ups with custodians. While this was a good practice when the *Act* first came into effect in 2010 to help everyone (including this Office) learn what kinds of privacy breaches occur in the health care sector and how best to address them, as the years went on, the practice of treating each case as a separate investigation and reporting back to custodians on every single breach came to be an administrative burden for this Office, as well as the custodians.

During the 2017-18 fiscal year, our Office had a significant backlog of self-reported privacy breach investigation files involving the two regional health authorities and the Department of Health that, according to the previous practice, needed to be addressed and reported back on to the custodians to conclude these matters. In reviewing the substantive number of files that remained open towards the end of the fiscal year, we noted that these custodians had established excellent practices for identifying and responding to privacy breaches and in nearly all of these cases, the individuals whose information had been affected had been notified about the breach by the custodian and informed of the right to complain about the breach to this Office.

Despite having been notified of privacy breaches and informed of their complaint rights, the affected individuals, in the vast majority of these cases (particularly breaches caused by human or a technical error), had not filed complaints or otherwise contacted this Office after being notified of a breach. In our view, this was the main driver in adapting our internal process.

As many custodians (but not all) are now well aware of their obligations to report privacy breaches under the *Act*, our internal process for addressing self-reported breaches has been simplified. The new process begins with a triage at the intake level to assess the type of breach being reported (for example, misdirected fax or email vs. "snooping" case), whether the affected individuals have been notified, and whether there is cause for concern under the circumstances that may merit further questions from or an investigation by this Office. As the vast majority of self-reported breaches are the result of human error and public sector custodians are well-versed in addressing these cases, most self-reported breaches are now logged in our system for tracking purposes and the custodian is thanked for reporting the matter to our Office.

In the event that a self-reported privacy breach raises additional concerns about notification of the affected individuals, or where there is a large number of affected individuals, the Commissioner has the authority under s.65(2)(b) of the *Act* to conduct an investigation of his own accord.

During the 2017-2018 fiscal year, our Office closed 371 breach notification files.

Outcomes:

Closed with recommendations:	**18**
Closed without recommendations:	**350**
Ceased:	**3**

Access Complaints

We typically do not see a lot of traffic on access complaints from individuals who asked for their own personal health information. Most custodians are well aware of and understand that the personal health information of their patients belong to their patients and that they have the right to have access to this by simply asking for it.

Custodians can only refuse access to someone's own personal health information in very limited circumstances, such as access to the information could reasonably be expected to endanger the health and safety of the individual or another person, or disclosure of the information would reveal personal health information about another person who has not consented to the disclosure.

Most of the access complaints we receive are about the amount of fees custodians are entitled to charge individuals for processing and copying their health records. In most cases, we are able to resolve fee complaints through discussions with and providing guidance to custodians without the need for formal recommendations.

One on-going issue is a misconception that custodians are entitled to charge additional fees when access requests are made by lawyers on behalf of their clients. If a person consents to having another person act on his or her behalf for the purpose of making an access request for his or her own personal health information from a custodian, the custodian is only authorized to charge fees in accordance with what is set out in the *Act*.

Outcomes:

Number of access complaints closed in total: **19**
Number of fee complaints: **6** (recommendations issued and followed in 5 cases)
Number of content complaints: **6** (4 ceased, 2 informally resolved)
Number of no response complaints: **5** (3 informally resolved, 1 recommendation, 1 ceased)
Number we could not accept: **2** (one was filed too early and one was already referred to the Court)

LEGISLATIVE AMENDMENTS TO THE PERSONAL HEALTH INFORMATION PRIVACY AND ACCESS ACT

The first legislative review period of this statute was concluded during this fiscal year and resulted in a number of amendments that came into effect on September 1, 2017. The main changes to the *Act* include:

- updated provisions for the handling of personal health information in the context of integrated services, programs, and activities,

- the introduction of specific provisions for the disclosure of personal health information and data matching provisions for research data centres (i.e., the New Brunswick Institute for Research, Data and Training housed at the University of New Brunswick), and
- longer timelines for custodians to respond to access and correction requests (30 business days, instead of 30 calendar days).

This Office provided input to the Department of Health, which is responsible for the administration of this *Act*, during the legislative review period.

OTHER OFFICE ACTIVITIES

Media

32 media requests were responded to in the Access and Privacy Office this fiscal year. The majority of these were at the end of the former Access to Information and Privacy Commissioner's mandate and the incoming Integrity Commissioner.

Public Education

We gave a training session to the Department of Environment and Local Government in May 2017 to provide guidance on processing right to information requests.

Conferences attended by the Commissioner and staff

- Canadian Ethics Commissioners' Annual national meeting 2017—Quebec, QC
- Canadian Lobbyists Registrars Annual Conference – Regina, SK
- 2017 Canadian Access and Privacy Association's Annual Conference – Ottawa, ON

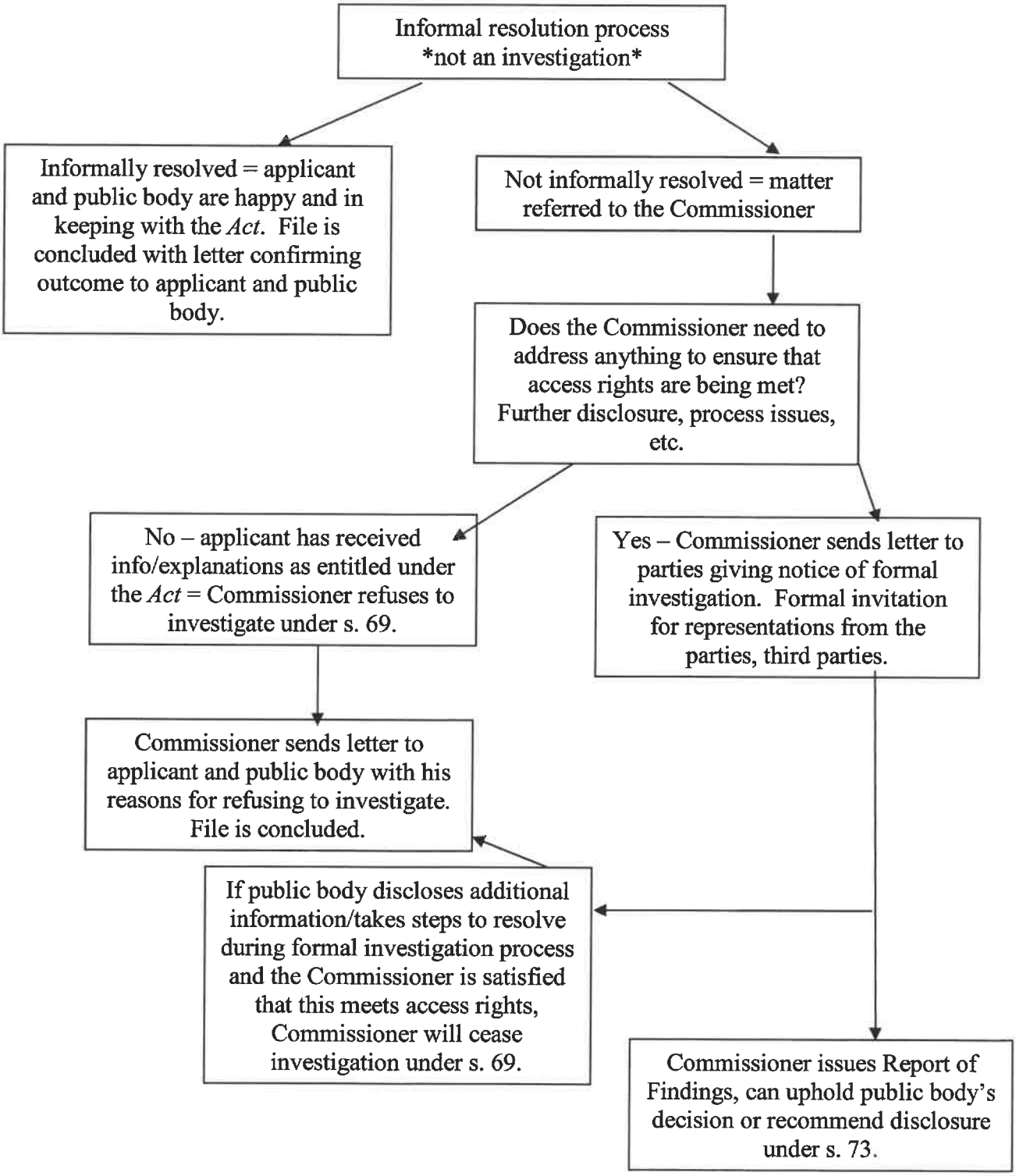
2017-2018 Budget

2017-2018 Budget for Office of the Integrity Commissioner	
Salaries and Benefits	$495,577.05
Office Expenses	$ 51,587.90
Travel Expenses	$ 6,031.58
Rent	$ 52,057.94
Translation	$ 4,522.75
Total Expenditures	**$609,777.22**

Conclusion

The statistics and budget information for the fiscal years 2014-2015, 2015-2016 and 2016-2017 of the former Access to Information and Privacy Commissioner, for which Annual Reports were not filed, are attached as Appendices C, D and E.

Appendix A: Informal Resolution vs. Formal Investigation



Appendix B: Annual Report Statistics - 2017-2018

Access to Information and Protection of Privacy Act				**Opened**	**Closed**
Access Complaints (all)				135	106
Privacy Concerns				24	20
Notifications				15	18
General Inquiries				99	109
Time Extension Applications				29	26
Request to Disregard				3	4
Media				32	32
Advisory					1
Court Inquiry				3	3
Comments				6	5
Proposed Programs				2	2
Proposed Legislation				2	1
				350	**327**
Personal Health Information Privacy and Access Act					
Access Complaints (all)				24	19
Privacy Complaints				15	17
Notification				116	371
General Inquiries				46	61
Time Extension Applications				2	2
Privacy Impact Assessment					1
Public Education				2	
Comments				1	
Proposed Programs				1	2
				207	**473**
Other					
Referrals				45	45
Public Education				1	5
Commissioner's Files				9	21
				55	**71**
			TOTALS:	612	870

Appendix C: Annual Report Basic Statistics - 2014 - 2015

# FILES OPENED: 548	**# FILES CLOSED:** 462

# FILES OPENED BY TYPE		**# FILES CLOSED BY TYPE**	
RTIPPA	309	RTIPPA	279
PHIPPA	173	PHIPPA	97
Commissioner's Files	14	Commissioner's Files	29
Public Education	12	Public Education	20
Referrals	38	Referrals	35
Public advisory	2	Public advisory	2

# FILES OPENED RTIPPA -TYPE		**# FILES OPENED PHIPAA -TYPE**	
General Inquiries	142	General Inquires	69
Comments on legislation or programs	4	Comments on legislation or programs	0
All access complaints	52	All access complaints	2
Privacy concerns	27	Privacy complaints	5
Time Extension Applications	23	Time Extension Applications	0
Privacy Notifications	16	Privacy Notifications	84
Request to Disregard	2	Request to Disregard	0
Court Inquiries	3	Court Inquiries	0
Media inquiries	40	Media inquiries	13

2014-2015 Budget for Office of the Access to Information and Privacy Commissioner	
Salaries and Benefits	$464,346.79
Office Expenses	$ 40,280.10
Travel Expenses	$ 11,753.34
Legal Fees	$ 1,590.15
Rent	$ 48,015.96
Translation	$ 30,671.60
Total Expenditures	**$596,657.94**

Appendix D: Annual Report Basic Statistics - 2015 - 2016

# FILES OPENED: 725	# FILES CLOSED: 697

# FILES OPENED BY TYPE		# FILES CLOSED BY TYPE	
RTIPPA	371	RTIPPA	384
PHIPPA	257	PHIPPA	218
Commissioner's Files	34	Commissioner's Files	27
Public Education	8	Public Education	10
Referrals	54	Referrals	57
Public advisory	1	Public advisory	1

# FILES OPENED RTIPPA -TYPE		# FILES OPENED PHIPAA -TYPE	
General Inquiries	160	General Inquires	54
Comments on legislation or programs	4	Comments on legislation or programs	5
All access complaints	102	All access complaints	7
Privacy concerns	22	Privacy complaints	73
Time Extension Applications	33	Time Extension Applications	0
Privacy Notifications	11	Privacy Notifications	111
Request to Disregard	14	Request to Disregard	0
Court Inquiries	3	Court Inquiries	0
Media inquiries	21	Media inquiries	7
Public Advisory	1	Public Advisory	0

2015-2016 Budget for Office of the Access to Information and Privacy Commissioner	
Salaries and Benefits	$483,471.27
Office Expenses	$ 35,180.17
Travel Expenses	$ 8,062.76
Rent	$ 55,268.65
Translation	$ 17,686.75
Total Expenditures	**$599,669.60**

Appendix E: Annual Report Basic Statistics – 2016 - 2017

# FILES OPENED: 657	**# FILES CLOSED:** 678

# FILES OPENED BY TYPE		**# FILES CLOSED BY TYPE**	
RTIPPA	356	RTIPPA	405
PHIPPA	233	PHIPPA	193
Commissioner's Files	10	Commissioner's Files	21
Public Education	12	Public Education	12
Referrals	45	Referrals	46
Public advisory	1	Public advisory	1

# FILES OPENED RTIPPA -TYPE		**# FILES OPENED PHIPAA -TYPE**	
General Inquiries	162	General Inquires	52
Comments on legislation or programs	3	Comments on legislation or programs	3
All access complaints	110	All access complaints	19
Privacy concerns	23	Privacy complaints	12
Time Extension Applications	21	Time Extension Applications	0
Privacy Notifications	6	Privacy Notifications	145
Request to Disregard	2	Request to Disregard	0
Court Inquiries	5	Court Inquiries	0
Media inquiries	21	Media inquiries	2
Public Advisory	3	Public Advisory	0

2016-2017 Budget for Office of the Access to Information and Privacy Commissioner	
Salaries and Benefits	$503,833.86
Office Expenses	$ 31,581.63
Travel Expenses	$ 9,863.21
Legal Fees	$ 8,439.30
Rent	$ 51,212.30
Translation	$ 17,461.50
Total Expenditures	**$622,391.80**