OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

January 31, 2018

Municipal Legislation Review
Department of Municipal Affairs and Environment
4th Floor, West Block, Confederation Building
P.O. Box 8700
St. John's, NL
A1B 4J6

Sent by email: MuniLegislativeReview@gov.nl.ca

To Whom It May Concern:

Re: Submission of the Office of the Information & Privacy Commissioner to the Municipal Legislation Review

At the request of Commissioner Donovan Molloy, Q.C., I offer the following comments on behalf of the Office of the Information and Privacy Commissioner (OIPC) on topics of interest to this Office pertaining to municipal legislation in the Province.

Internet Voting

On April 18, 2017 Commissioner Molloy wrote to Municipalities Newfoundland and Labrador (copied to Minister Joyce and former St. John's Mayor O'Keefe) to indicate a need for caution regarding any future contemplation of a legislative amendment to allow internet voting (letter attached). While internet voting is employed in some Canadian municipalities, there has been little independent assessment of the security of such systems. Assessments presently available have been considered by the Canadian Parliamentary Special Committee on Electoral Reform in its Report from December 2016, in which it was concluded that internet voting was not yet considered secure enough to recommend, due to issues with voter authentication and security. We take this opportunity to reiterate those concerns, and recommend against any amendment to facilitate the introduction of internet voting at the municipal or provincial level at this time. We would be pleased to participate in a more in-depth discussion of the challenges with this issue if government were determined to explore it further.

Amendment to Section 215 of the *Municipalities Act, 1999*

Recommendation 71 and 72 of the *ATIPPA* Review Committee's Report proposed the development of a public disclosure standard for municipal governance "that takes reasonable account of the importance of personal privacy, but does not subordinate good

municipal governance to it." The issue of course is that any such public disclosure standard must be consistent with the *ATIPPA, 2015*, so as a result the Committee also recommended placement of the disclosure standard within the *Municipalities Act, 1999* and that that provision be made to prevail over the *ATIPPA, 2015*.

A representative of the Office of the Information and Privacy Commissioner participated in a Municipal Working Group, which was convened in 2015 around the time of the review of the *ATIPPA* chaired by former Premier and Chief Justice Clyde Wells. While a number of items were proposed for addition to section 215 of the *Municipalities Act, 1999*, it is not clear whether the Working Group was in consensus on these items or whether any conclusions had been reached in terms of proposing an amendment. We recommend revisiting these discussions with a view to arriving at appropriate recommendations for legislative amendment.

One of the challenges in stating that a record be disclosed on a categorical basis, rather than on its content, is the fact that citizens, in submitting information to municipalities, sometimes provide more information than necessary, or in some cases the situation may demand more information than usual. In such cases, mandating disclosure by category of records can result in disclosure of personal information causing harm or distress. While we support greater routine disclosure of many such records at the municipal level, it might be beneficial, through regulation, to itemize particular data elements slated for public disclosure, in addition to the type of record. That way, if, for example, a development application contained personal information about the intended occupant's disability, which necessitated that a renovation be undertaken, such personal information could be excluded from the required disclosure, and the disclosure could be limited to certain standard data points more typically found in development applications.

Since 2015 significant progress has occurred in the municipal sector through the development of new resources and outreach efforts by the ATIPP Office and the OIPC, but due to the extensive demands and limited resources available, municipal governments continue to encounter difficulties with *ATIPPA, 2015*. Further discussion is recommended in order to consider potential legislative amendments to facilitate greater clarity for municipalities and access to information applicants about the kinds of records, and the contents of such records, which can routinely be made available.

Privileged or Private Meetings of Municipal Councils

It has been said that municipal government is closest to the people – water and sewer, roads, recreational facilities and the like are essential parts of our daily lives, and the staff and elected officials who strive (or struggle) to maintain these services face a daunting task each day. In doing so, our elected officials must debate the issues and make decisions for the public good. While elected officials may have the best of intentions, there can be serious disagreements as to the best course of action to benefit the public. Cut taxes or raise taxes? Spend money or cut services? Approve or reject a development application? Most choices have financial implications or quality of life impacts for individual residents or the entire community, and decisions made by elected officials can be quite significant to those who are impacted.

For that reason, it is essential to maximize transparency so that citizens can evaluate how those decisions are made. They need to be able to see that there is a fair process, that all of the relevant factors are considered, and that their elected representatives are carrying out their roles effectively. Those needs are fulfilled, in part, through the requirement that meetings of municipal councils are, by default, open to the public. Municipal councils are not like the provincial or federal cabinet, which meets in secret. They are more akin to the elected members of the legislature where everyone gets a vote, and the debate is public and on the record.

Despite this, we recognize there are circumstances where it is necessary that certain topics be discussed and debated away from the public eye. Current municipal legislation permits these types of meetings, including section 213 of the *Municipalities Act, 1999*:

> *213. (1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.*

When is it appropriate to hold a privileged meeting? The Municipal Council Handbook issued by the Department of Municipal Affairs lists, at section 4.3, a number of circumstances in which it might be appropriate to hold a privileged meeting. Some of these are clear, such as discussions of human resources matters or matters relating to litigation. Others are difficult to interpret in terms of what information is included. The Handbook also indicates that a privileged meeting is intended to be an exception to the rule of open, public meetings.

What records should be kept of the proceedings of a privileged meeting? The municipal laws of the Province are largely silent on this. This issue is part of the larger Duty to Document discussion initiated during the 2014 review of the *ATIPPA*. Starting at page 309 of the Committee's Report is a detailed discussion on the Duty to Document. At the municipal level, for the purposes of this subject, the issue is simply whether there can be a process to ensure that privileged meetings only cover those topics that must be discussed in such a forum, and that decisions made at such meetings are not put into force unless they are ratified at a public meeting. Unless there is a record of the proceedings of the privileged meeting, there is no way to ensure that municipal governments are not using privileged meetings excessively or for broader purposes than necessary.

The *Municipalities Act, 1999*, the *City of Corner Brook Act* and the *City of Mount Pearl Act* all contain a provision regarding privileged meetings (which is absent from the *City of St. John's Act*), which states that a decision made at a privileged meeting is not valid until it is ratified at a public meeting. None of the *Acts* specify the procedure for ratification, however the Handbook in section 4.3 says that minutes of privileged meetings should be kept and that these should be subject to a vote of ratification in the public meeting.

Although the *City of St. John's Act* itself does not limit the purposes for which a privileged meeting may be held, or require that decisions at a privileged meeting must be ratified at a public meeting, the City has a Freedom of Information By-law which stipulates:

1.1 Only matters of a personnel or legal nature, intergovernmental matters where discussion at a public meeting would be prejudicial to the interests of the citizens of the City or the Province and recommendations of the Payment Review Board shall be placed on the agenda for Special Meetings of Council; and discussions of these matters shall be confined to Special Meetings of Council.

The by-law also says that in the event of a dispute about the interpretation of this by-law that a majority vote at a public meeting of Council shall determine the agenda. Section 31(2) of the *City of St. John's Act* says that the City's by-laws, upon publication, are effective as if incorporated into the *Act* itself.

Although it is useful to have some standard to go by, such as policy guidance in the Municipal Council Handbook or in a municipal by-law, there is currently no mechanism available to ensure that Council business is not being carried out in privileged meetings that should be conducted in a public meeting.

These considerations are at the heart of local democracy. While we can hope that municipal councils will adhere to bylaws and policy guidance regarding private meetings, citizens have no way of knowing if they are in fact doing so. Furthermore, the *ATIPPA, 2015* may or may not be of use to citizens who wish to ensure that councils are acting appropriately. Section 28(1)(c) of the *ATIPPA, 2015* contains an exception to the right of access allowing a local public body to refuse to disclose to an applicant "information that would reveal the substance of deliberations of a meeting ... where an Act authorizes the holding of a meeting in the absence of the public".

The sole exception to this is due to the Freedom of Information By-law at the City of St. John's, which has the force of law because of section 31(2) of the *City of St. John's Act*. That by-law places limitations on the subject matter which may be discussed at a closed meeting, and therefore section 28(1)(c) of *ATIPPA, 2015* would only protect information relating to the matters described in the by-law. The City's move to establish such a requirement is positive, but how does the City police itself in this regard, and how are citizens to know whether the City is following its own rules?

Other jurisdictions in Canada address this issue in different ways. For example, in Nova Scotia's *Municipal Government Act*, council meetings are required to be open to the public, but they may meet in a closed session only to discuss matters relating to specific topics described in the law, such as personnel matters, labour relations, to protect solicitor-client privilege, etc. Any meeting or part of a meeting that is not public is also subject to certain requirements. Section 22(4) of that legislation says that for any such meeting or part of a meeting, a "a record which is open to the public shall be made, noting the fact that council met in private, the type of matter that was discussed, as set out in subsection (2) and the date, but no other information."

There are other models as well. Ontario's *Municipal Act* allows discussion of certain matters in a closed meeting, similar to the law in Nova Scotia, however it also includes a provision in section 239.1 stating that anyone may request that an investigator appointed under the *Act*, or if none was appointed, that the provincial Ombudsman investigate, to determine whether

a municipality has complied with the law in conducting a private meeting. The primary purpose of this would be to ensure that the meeting only deals with the types of subject matter allowed to be discussed in such a meeting. This is intended to ensure that municipalities do not address matters in a private meeting that should be discussed at a public meeting.

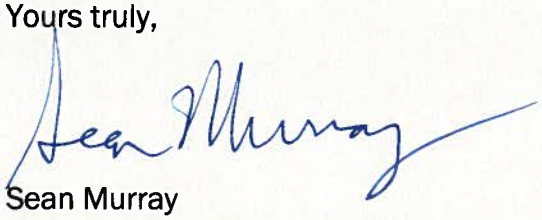
In this Province, the laws governing the use of private or closed meetings by municipalities are not sufficiently restrictive of the types of subject matter that can be discussed in those meetings. In the only case where some restrictions are applied, as set out in the Freedom of Information By-law of the City of St. John's, it would be difficult for citizens to confirm that the law is being followed. Under the *Municipalities Act*, the *City of Corner Brook Act* and the *City of Mount Pearl Act* the only mechanism intended to ensure that private or closed meetings are appropriate is through the requirement that decisions made at a private meeting be ratified at a public meeting. Even presuming that councils are diligent in doing so, this does nothing to prevent deliberations from occurring in private meetings, including all aspects of the decision making process shy of a motion and vote, which should be done in a public meeting of council.

In an era in which transparency and accountability are core values and acknowledged cornerstones of democracy, it is now incumbent upon us to consider whether we can do things differently. Through more in-depth study and research, perhaps an approach can be identified which will ensure that municipal councils operate as transparently as possible, with as few restrictions as practicable, and furthermore that a means be established to ensure that municipalities can be challenged if it is believed that they have overused or misused closed or private meetings.

Our current legislative model errs on the side of keeping things behind closed doors, with few if any means available to challenge a municipality suspected of overusing closed or private meetings. The current legislative review offers an opportunity to find a better way.

Thank you for inviting submissions in relation to the Municipal Legislation Review. Please contact me at your convenience should you wish to discuss any of the foregoing.

Yours truly,



Sean Murray
Director of Research and Quality Assurance

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

April 18, 2017

Municipalities Newfoundland and Labrador
P.O Box 908
St. John's, NL A1A 5J3

Attention: Craig Pollett

Dear Sir:

Re: Electronic Voting

In 2014, your organization resolved as follows:

> *Therefore Be It Resolved that Municipalities Newfoundland and Labrador lobby the Provincial Government to modify the Municipal Elections Act to allow municipalities the option of offering electronic voting for municipal elections.*

A news article yesterday addressed efforts by the City of St. John's in regards to electronic voting (http://vocm.com/news/st-johns-looking-into-online-voting/).

Electronic voting can have significant benefits, however those benefits can be negated if critical concerns are not addressed in designing and implementing the system. In particular, computer security experts have warned against internet voting, and the Parliamentary Committee on Electoral Reform has recently concluded as follows:

> *The Committee heard significant testimony (and received submissions), particularly from experts in technology, that the secrecy and integrity of an online ballot cannot be guaranteed to a sufficient degree to warrant widespread implementation in federal elections. The Committee agrees.*

As the *Access to Information and Protection of Privacy Act, 2015* requires that we advocate in the interests of privacy, the purpose of this letter is to identify the need to ensure that voter privacy and ballot secrecy are amongst the paramount considerations in any move towards electronic voting by your organization or its members.

As legislative change is likely necessary to authorize an electronic voting system, I am copying Minister Joyce as the OIPC should be provided with the opportunity to comment upon any such legislation pursuant to section 112 of the *ATIPPA, 2015*.

Regards,

Donovan F. Molloy, Q.C.
Information and Privacy Commissioner

cc Hon. Minister Eddie Joyce, Dept. Municipal Affairs & Environment
Mayor Dennis O'Keefe, City of St. John's

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