INFORMATION AND PRIVACY COMMISSIONER'S COMMENTS ON
BILL NO.48
ACT TO AMEND THE
ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT

Current Legislation	Proposed Amendments	Information & Privacy Commissioner's Comments
		I consider this a substantial amendment to the ATIPP Act that would have better been done through a review of the ATIPP Act where all the provisions of the Act could be considered and read together and where consequences of the amendment could be better considered.
Section 5 **Right to information**		
5. (1) A person who makes a request under section 6 has a right of access to any record in the custody of or under the control of a public body, including a record containing personal information about the applicant. (2) The right of access to a record does not extend to information that is excepted from disclosure under this Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record. (3) The right of access to a record is subject to the payment of any fee required by a regulation made under section 68.	**2 The following subsections are added to section 5** "(4) The right of access to a record does not extend to a record created solely for the purpose of (a) briefing a Minister in respect of assuming responsibilities under the *Government Organisation Act* for a department or corporation; (b) briefing a Minister in relation to a sitting of the Legislative Assembly, including briefings prepared to support the Minister for debate of an appropriation bill; and (c) briefing the Premier in respect of forming a new government.	**Proposed section 5(4) and 5(5)** Additional subsections are being proposed to remove the right of access to "briefing" records. I oppose provisions in the ATIPP Act where the right of access is being removed for "classes of records". A former Information and Privacy Commissioner previously commented on this when section 19.1 was added to the ATIPP Act. This section created a new discretionary exception to withhold "workplace harassment" records. In the proposed amendment to section 5, the exception is mandatory and removes briefing records from the application of the ATIPP Act for a period of time. This undermines the spirit of the Act that all government information, regardless of the record in which it is found, is accessible except in very specific and limited exceptions. I am concerned that this proposed amendment, where there is a mandatory requirement to withhold a "record", may conflict with other provisions elsewhere in the Act for the release of certain "information" which may exist in another record as well as the exempted record.

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	(5) Subsection 4 does not apply (a) to a record described in paragraph 4(a), if five or more years have passed since the Minister was appointed as the Minister responsible for the department or corporation; (b) to a record described in paragraph 4(b), if five or more years have passed since the beginning of the sitting in respect of which the record was created; and (c) to a record described in paragraph 4(c), if five or more years have passed since the date on which the new government was formed	If the proposed amendment proceeds, as a minimum I suggest, for clarity, a further subsection which will allow all provisions of the ATIPP Act to apply to grant access to information notwithstanding the information also being contained in "briefing" records.

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Section 15 **Cabinet confidence**		
15.(1) A public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations, or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.	**3**(1) **Subsection 15(1) is replaced with the following** **"**15(1) A public body must refuse to disclose a record to an applicant if the disclosure would reveal a confidence of the Executive Council or any of its committees, including (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees; (b) a record containing advice, analyses, policy options, proposals, recommendations, or requests for directions submitted, or prepared for submission, to the Executive Council or its committees; (c) a record used for or reflecting consultation among Ministers on matters relating to the making of government decisions or the formulation of government policy; and	**Proposed amendments to subsection 15(1) and 15(2)** Two significant proposed amendments are being made to this section: 1. Exceptions to disclosure are being added; 2. The exception is being changed and increased from relating to "information" to relating to the whole "record". Taken together, these proposed changes magnify the application of the section 15 exception. I generally disagree with an exception applying to a "record" instead of "information" contained in a record. I am concerned that exceptions relating to a "record" may not be consistent with section 5(2) that says "…if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record". **A Balance** Ontario and Saskatchewan are the only jurisdictions that have a provision that requires a public body to refuse to disclose a "record" as is being proposed in this case. However, those jurisdictions balance the exception with the right to access by including a provision where a public body shall not refuse to disclose where consent is given by the proper authority for the disclosure. If the proposed amendments to section 15 proceed, I suggest this additional provision to give a right of access where it is deemed appropriate.

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	(d) a record prepared to brief a Minister in relation to matters that (i) are before or are proposed to be brought before the Executive Council or its committees, or (ii) are the subject of Consultations among Ministers relating to the making of government decisions or the formulation of government policy.**"**	Most jurisdictions in Canada also have a general public interest override provision which would override any exception where it is clearly in the public interest to do so. I agree that the competing interests of the right of access balanced against the need to protect sensitive information can be met through this kind of amendment.
(2) Subsection (1) does not apply to (a) **information in** a record that has been in existence for 15 or more years; or (b) **information in** a record of a decision made by the Executive Council or any of its committees on an appeal under an Act; or (c) **information in** a record the purpose of which is to present background information or explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if (i) the decision has been made public, (ii) the decision has been implemented, or (iii) five or more years have passed since the decision was made or considered.	**(2) In subsection 15(2), "information in" is repealed wherever it appears.**	

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Section 16 **Policy advice, recommendations, or draft regulations**		
16.(1) A public body may refuse to disclose to an applicant information that would reveal advice, recommendations, or draft Acts or regulations developed by or for a public body or a Minister.	**4(1) Subsection 16(1) is replaced with the following** "**16(1)** A public body may refuse to disclose information to an applicant if the disclosure would reveal (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a Minister; (b) consultations or deliberations involving officers or employees of a public body or a Minister relating to the making of government decisions or the formulation of government policy; (c) a pending policy or budgetary decision of a public body; (d) the content of a draft Act, a draft regulation or a draft order of a Minister or of the Commissioner in Executive Council; or	**Proposed section 16(1)(b)** One significant change is being made to this section: 1. Exceptions to disclosure are being added. Our scan of Canadian access and privacy legislation indicates the wording "relating to the making of government decisions or the formulation of government policy" has no precedent. I am concerned with this wording because it may conflict with other provisions of the ATIPP Act.

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	(e) the content of a draft audit report prepared by the auditor general or any other prescribed person or body for audit purposes."	**Proposed section 16(1)(e)** I note that Alberta and Newfoundland/Labrador have attached a timeframe to their similar exception "unless no progress has been made on the report for at least 3 years" (Alberta). I agree with this modifier to the proposed amendment in order to be consistent with other provisions in the ATIPP Act which provide for access after a specified period of time.
2) A public body must not refuse to disclose under subsection (1) **(a) any factual material;** (b) a public opinion poll; (c) a statistical survey; (d) an appraisal of the value or condition of property; (e) an economic forecast; (f) an environmental impact statement or similar information; (g) a consumer test report or a report of a test carried out on a product to test equipment of the public body; **(h) a feasibility or technical study, including a cost estimate, relating to a policy or**	**(2) In subsection 16(2)** (a) paragraph (a) is repealed; (b) in paragraph (h), "the final report of" is added immediately before "a feasibility"; (c) in paragraphs (i) and (j), "final" is added immediately before "report"; (d) in the English version, "or" is repealed after the semi-colon at the end of paragraph (l); (e) the period at the end of paragraph (m) is replaced with "; or"; (f) the following new paragraph is added in alphabetical order	**Proposed repeal of section 16(2)(a)** Most jurisdictions have a similar provision to the proposed section 16(2)(a) and none have been repealed. I understand the intent of repealing this provision is because of the difficulty in applying it. In the Alberta Government Manual the following definition has been provided to public bodies: "Factual material" means a cohesive body of facts which are distinct from advice or recommendations. It does not refer to isolated statements of fact, or to the analysis of the factual material. Factual material refers specifically to information that cannot be withheld under section 13(1) and which must be separated from advice or recommendations if those are being withheld. Where factual information is intertwined with advice or recommendations in a manner whereby no reasonable separation can be made, then the information is not factual material for the purposes of section 13(2)(a)." I suggest there may be no reason to remove this paragraph, the understanding of which could be remedied by adding a definition to the ATIPP Act or providing policy guidance.

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project of the public body; **(i) a report on the results of field research undertaken before a policy proposal is formulated;** **(j) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body;** (k) information that the public body has cited publicly as the basis for making a decision or formulating a policy; **(l) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant; or** (m) an instruction or guideline issued to the officers or employees of the public body, or a substantive rule or statement of policy that has been adopted by the public body, for the purpose of interpreting an enactment or administering a program or activity that affects the rights of the applicant.	**"**(n) a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.**"**	