Newfoundland Labrador

Government of Newfoundland and Labrador
Department of Justice and Public Safety

December 13, 2018

[redacted]

Dear [redacted]:

Re: Your request for access to information under Part II of the Access to Information and Protection of Privacy Act [JPS/222/2018]

On November 26, 2018, the Department of Justice and Public Safety (JPS) received your request for access to the following records:

> **"In September 2016, the Federal Department of Justice (Human Rights Law Section) wrote to all relevant provincial and territorial ministries regarding Canada's possible accession to the Optional Protocol to the United Nations Convention against Torture (OPCAT). In doing so, Justice Canada distributed a discussion paper on the legal implications of Canada's accession to this UN instrument. It also sought the views of the relevant ministries regarding the potential challenges of acceding to the OPCAT. I would be very grateful to you if you could please provide me with a copy of your response to Justice Canada."**

Please be advised that a decision has been made by the Deputy Minister of JPS to provide access to the requested information, which is enclosed.

Please be advised that you may ask the Information and Privacy Commissioner to review the processing of your access request as set out in section 42 of the Act (a copy of this section of the Act has been enclosed for your reference). A request to the Commissioner must be made in writing within 15 business days of the date of this letter or within a longer period that may be allowed by the Commissioner.

The appeal may be addressed to the Information and Privacy Commissioner as follows:

Office of the Information and Privacy Commissioner
2 Canada Drive
P. O. Box 13004, Stn. A
St. John's, NL. A1B 3V8

Telephone: (709) 729-6309
Toll-Free: 1-877-729-6309

Facsimile: (709) 729-6500

You may also appeal directly to the Supreme Court Trial Division within 15 business days after you receive the decision of the public body, pursuant to section 52 of the *Act* (a copy of this section of the Act has been enclosed for your reference).

Please be advised that responsive records will be published following a 72 hour period after the response is sent electronically to you or five business days in the case where records are mailed to you. It is the goal to have the responsive records posted to the Completed Access to Information Requests website within one business day following the applicable period of time. Please note that requests for personal information will not be posted online.

If you have any questions please contact me by telephone at 709-729-7128, or by email at sonjaelgohary@gov.nl.ca.

Sincerely,

Sonja El-Gohary
ATIPP Coordinator

Access or correction complaint

42. (1) A person who makes a request under this Act for access to a record or for correction of personal information may file a complaint with the commissioner respecting a decision, act or failure to act of the head of the public body that relates to the request.

(2) A complaint under subsection (1) shall be filed in writing not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16 (2).

(3) A third party informed under section 19 of a decision of the head of a public body to grant access to a record or part of a record in response to a request may file a complaint with the commissioner respecting that decision.

(4) A complaint under subsection (3) shall be filed in writing not later than 15 business days after the third party is informed of the decision of the head of the public body.

(5) The commissioner may allow a longer time period for the filing of a complaint under this section.

(6) A person or third party who has appealed directly to the Trial Division under subsection 52 (1) or 53 (1) shall not file a complaint with the commissioner.

(7) The commissioner shall refuse to investigate a complaint where an appeal has been commenced in the Trial Division.

(8) A complaint shall not be filed under this section with respect to

(a) a request that is disregarded under section 21 ;

(b) a decision respecting an extension of time under section 23 ;

(c) a variation of a procedure under section 24 ; or

(d) an estimate of costs or a decision not to waive a cost under section 26 .

(9) The commissioner shall provide a copy of the complaint to the head of the public body concerned.

Direct appeal to Trial Division by an applicant

52. (1) Where an applicant has made a request to a public body for access to a record or correction of personal information and has not filed a complaint with the commissioner under section 42 , the applicant may appeal the decision, act or failure to act of the head of the public body that relates to the request directly to the Trial Division.

(2) An appeal shall be commenced under subsection (1) not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16 (2).

(3) Where an applicant has filed a complaint with the commissioner under section 42 and the commissioner has refused to investigate the complaint, the applicant may commence an appeal in the Trial Division of the decision, act or failure to act of the head of the public body that relates to the request for access to a record or for correction of personal information.

(4) An appeal shall be commenced under subsection (3) not later than 15 business days after the applicant is notified of the commissioner's refusal under subsection 45 (2).

Newfoundland Labrador

Government of Newfoundland and Labrador
Department of Justice and Public Safety
Office of the Deputy Minister

December 15, 2016

Mr. Graham Flack
Deputy Minister, Canadian Heritage
Les Terrasses de la Chaudière
25 Eddy Street, Room 12A14
Gatineau, QC K1A 0M5

Dear Mr. Flack:

To commence the Government of Canada's consultation on its possible accession to the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OP-CAT), a Discussion Paper was forwarded to jurisdictions in September 2016. This Paper included a List of Consultation Questions to gather initial internal responses on existing monitoring mechanisms and preliminary views of jurisdictions on Canada's becoming a State Party to the OP-CAT.

While we enclose the Government of Newfoundland and Labrador's initial technical review, we note that accession would require legislative and policy amendment and have resource implications for the province. Additionally as responsibility for "places of detention" spans several departments of the Government of Newfoundland and Labrador extensive consultation amongst departments would be essential. As a consequence, further review and Cabinet direction would be required regarding any changes required to support accession.

As a province, we recognize the importance of the protection of human rights and will await further communication from Canada to assist with its analysis on possible accession.

Sincerely,

Heather Jacobs

Heather M. Jacobs, QC
Deputy Minister and
Deputy Attorney General (A)

c. Susan Marrie, Solicitor, Department of Justice and Public Safety

REPLY TO THE LIST OF CONSULTATION QUESTIONS (Dec. 14/16 NL)

Please respond to the following questions, in writing, by December 16, 2016. The analysis which follows this list is intended to assist FPT jurisdictions in responding to the questions. The responses to these questions will be considered in determining the extent of changes to domestic law and policy that might be required in order to comply with the OP-CAT.

1. Bearing in mind the definition provided in Article 4 of the OP-CAT, what are the places of detention under the responsibility of your department or within your jurisdiction?

- Correctional Centers (5)
- Police Stations:
  - RCMP Lock-ups (approximately 35)
  - RNC Lock-ups (1, Lab West)
  - Corrections Lock-up (2, St. John's and Corner Brook, Detention Centers)
  - Youth Detention Centre (1, St. John's, Parade St.)
- Youth Secure Custody Facility (1, Whitbourne-NL Youth Centre)
- Youth Open Custody Group Homes (2, St. John's: John Howard Society Home for Youth; Corner Brook: Loretta Bartlett Home for Youth)
- Holding cells in court houses
- Transport vehicles used to transport detainees
- Psychiatric Hospital (1)
- Psychiatric Units in Hospitals (4)
- Hospitals under the Communicable Diseases Act
- Units designated as suitable if person in an isolated community is certified under the - Mental Health Act and cannot be brought immediately to a hospital (nursing station, medical clinic etc. note, cannot be a jail)
- Certain units in nursing homes
- Medical units in hospitals when a person who has been certified requires inpatient medical treatment
- Youth residential treatment centre upon proclamation of the *Secure Withdrawal Management Act* for youth with addictions
- John Howard Society operated Houses (Howard House – St. John's and Westbridge House – Stephenville) – houses male inmates on Temporary Absence
- Stella Burry Society – (Emmanuel House – St. John's) - houses female inmates on Temporary Absence

2. What bodies, if any, currently exist to monitor the treatment of persons deprived of their liberty? (e.g. Ombudsman, Correctional Investigator of Canada, police or military complaints commissions, NGO, special advocates, monitoring boards, human rights commission)

- Office of the Citizens' Representative
- Public Complaints Commission (police)
- Child and Youth Advocate (youth detention centers, youth open custody)
- MHA's and judges under Prisons Act
- Accreditation process for psychiatric institutions, hospitals and nursing homes
- Mental Health Care and Treatment Review Board.

3. Do existing monitoring bodies comply with the requirements of Articles 18-23 of the OP-CAT? In particular:

   a) Are the bodies independent of government?

      i. Are they established by legislation?
      ii. How are the members appointed, and by whom? For how long are members appointed?
      iii. To whom do the bodies report?
      iv. What are the qualifications of the members appointed? Do they have expertise in oversight of conditions of detention?
      v. How are the bodies financed? Are they sufficiently financed?

      Both the Office of the Citizen's Representative (OCR) and the Child and Youth Advocate are independent of government. They are appointed by the LGinC and report directly to the House of Assembly. The term of office is 6 years. Removal or suspension of the Child and Youth Advocate is by majority vote of members of the House of Assembly because of incapacity to act, neglect of duty or misconduct, the Citizen's Representative may be removed or suspended in the same way for cause. Hospital accreditation systems are independent of government.

      (MHCTA s. 55-73) Members of the Mental Health Care and Treatment Review Board are independent of government and established by the *Mental Health Care and Treatment Act.* Members are appointed by, and therefore report to, the Minister of Health and Community Services for three-year terms. Members consist of physicians; lawyers; and public representatives ideally with lived experience of mental health and addictions issues. Members would have expertise in the oversight of conditions of detention as they would become very familiar with the *Mental Health Care and Treatment Act.* The Review Board is financed through the Department of Health and Community Services.

   b) Do existing monitoring bodies cover all places of detention under your responsibility or jurisdiction? If not, what places would be left out?

      Yes. The OCR is involved with Adult Custody and the Office of the Child and Youth Advocate is involved with Youth Custody.

   c) Do existing bodies have the power to regularly examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, their protection against ill-treatment? Are the bodies specifically mandated to conduct regular and preventive visits (as opposed to visits in response to an individual complaint)?

      All existing mechanisms (except the Public Complaints Commission which is completely complaint driven) have the power to regularly examine in some capacity, but they do not have the specific mandate of preventative visits. They are for the most part complaint driven. Preventative visits are not specifically mandated but are not prohibited.

      Citizen's Representative Act s.15
      Child and Youth Advocate Act s. 15
      Mental Health Care and Treatment Act (MHCTA) s. 55

c) Are there any restrictions on accessing places of detention and their installations and facilities? Can existing bodies conduct unannounced visits?

The legislation is silent with respect to the issue of restrictions on accessing places of detention and their installations and facilities, or on conducting unannounced visits. The Office of the Citizens' Representative and the Child Youth Advocate however shall not conduct an investigation where the Minister of Justice certifies that it is contrary to the public interest.

Citizens' Representative Act s.20
Child and Youth Advocate Act s.15.2

e) Do existing bodies have access to information concerning the number of persons deprived of their liberty; the number of places of detention; their location; and information concerning the treatment and conditions of detention of persons deprived of their liberty? What restrictions, if any, apply?

Yes each mechanism has access to info on places within their mandate.

However, if personal health information is being released, then the *Personal Health Information Act (*PHIA) would apply. For example, if a body was seeking information regarding the treatment received by a particular individual, as that information would constitute personal health information, disclosure would not be permitted in the circumstances contemplated.

Citizen's Representative Act s.31
Child and Youth Advocate Act s.21

f) Are existing bodies authorized to privately interview detainees, and others who may wish to provide information?

The Citizen's Representative shall interview detainees in private. The Child and Youth Advocate and the Mental Health Care and Treatment Review Board may interview detainees in private.

Citizen's Representative Act s.27
MHCTA s. 70(2)

g) Can existing bodies choose the places they want to visit and the persons they want to interview?

A judge, magistrate or MHA may visit a prison, the Public Complaints Commission is complaint driven, the Child and Youth Advocate may visit places of detention for children and the Office of the Citizen's Representative may visit all places of detention except those within the mandate of the Child and Youth Advocate.

No, the Mental Health Care and Treatment Review Board may not.

Prisons Act s.13
Citizen's Representative Act s. 15, 17 & 23; s.19(f)

h) Do existing bodies have the power to make recommendations to the relevant authorities with the aim of improving the conditions and the treatment of detainees?

The following mechanisms may make recommendations to relevant authorities regarding conditions and treatment of detainees:

- Public Complaints Commissioner (s19 of *Royal Newfoundland Constabulary Act, 1992*)
- Citizens Representative (s 37 of the *Citizens Representative Act*)
- Child and Youth Advocate (s 15 *Child and Youth Advocate Act*)
- *Mental Health Care and Treatment Act (*The Review Board may make recommendations to the Department of Health and Community Services; however, there is no requirement for the department to implement those recommendations.)

i) Do existing bodies have the power to submit proposals and observations concerning existing or draft legislation dealing with the treatment and conditions of detention of persons deprived of their liberty?

The Child and Youth Advocate, the Office of the Citizen's Representative and the Chair of the Mental Health Care and Treatment Review Board may submit proposals and observations on existing legislation but the approval of the Clerk of the Executive Council would be required for a public body to seek their comment on draft legislation.

j) Do existing bodies have the necessary authority to protect information they obtain in confidence from third parties? Are there any exceptions or circumstances under which confidentiality may be waived and, if so, which ones?

The Office of the Citizen's Representative has a statutory duty of secrecy in the exercise of its duties but may disclose in a report information necessary to establish grounds for conclusions and recommendations. Evidence received by the Citizen's Representative in the course of an investigation is not admissible in a Court or inquiry.

The Child Youth Advocate shall not include the name of a child or youth in a report without consent. Section 13 of the *Child and Youth Advocate Act* addresses confidentiality of information.

All custodians under the *Personal Health Information Act* are required to maintain confidentiality of personal health information. There are mandatory and discretionary exemptions to that duty.

Citizens Representative Act s.13 & 34
Child and Youth Advocate s.13 and 29
Personal Health Information Act (PHIA) s. 37-47

k) What privileges and immunities, if any, do members of existing bodies have in the course of performing their duties? Most importantly, do they have immunity from legal proceedings, and from being compelled to testify in court, for actions or matters related to the exercise of their functions? Are there any exceptions, or situations where a privilege or immunity may be waived? Would it make sense for the same privileges and immunities to apply to NPM members, or would changes be required?

Yes the Citizen's Representative and the Child Youth Advocate have immunity from legal proceedings and from being compelled to testify in court, for actions or matters related to the exercise of their functions.

Citizens Representative Act s.41, 42
Child Youth Advocate s.26, 27
Mental Health Care and Treatment Act s. 7 & 52

l) Are annual reports issued and made public?

All existing mechanisms issue recommendations and annual reports however they are not geared to reports on places of detention even though such places could be dealt with generally or specifically in the report.

Citizens Representative Act s. 43 and 44
Child Youth Advocate s. 28 & 29
Mental Health Care and Treatment Act (Review Board) s. 60

m) Are existing bodies prevented from publicly disclosing the findings of their visits, i.e. are observations to be shared confidentially with the authorities?

No, the citizen's Representative and the Child Youth Advocate can publish reports in the public interest or in the interest of a person, in addition to their reports to the House of Assembly.

Citizens Representative Act s.44
Child Youth Advocate Act s. 29

4. Please answer the questions under the section on privacy and access to information at pages 31-33.

Amendments to the *Access to Information and Protection of Privacy Act 2015* may be required. As well, there would be no authority under PHIA to release personal health information without the consent of the individual or where required by another statute.

5. If Canada acceded to the OP-CAT, what would be the preference of your department/jurisdiction in terms of an NPM model? Would the preference be for a single body (new or existing) or multiple bodies (new or existing)? If the preference is for multiple NPMs, would there be a mechanism to assist with coordination? Does your jurisdiction have a preliminary sense of which body or bodies would be designated or established, and for what places of detention? Were potential NPMs consulted and, if so, were they favourable to taking on this new role?

It is premature to answer this question at this time. Much consultation would be required across departments and agencies to find the best fit for NL. Resourcing needed and what resources are currently available, and capacity to grow would need to be evaluated.

6. In order to comply with the OP-CAT, does your department or jurisdiction envisage the necessity to amend legislation, regulations or policies? If so, which ones? For example, amendments might be required to legislation governing existing oversight bodies, legislation on privacy and/or access to information, and/or policies regulating a particular institution. Does your department or jurisdiction envisage the need for new legislation or policies?

Existing mechanisms do not fully comply with the requirements of the protocol - 'regular visitation' being the most problematic requirement. It appears reasonable to consider different types of mechanisms for youth and adult correctional facilities, as well as prisons and hospitals.

Where personal health information is to be disclosed, unless the disclosure falls under s. 37-47, amendments to PHIA may be required.

7. Would additional resources be required (i.e. financial and human resources) to meet OP-CAT obligations in your jurisdiction?

   If there were extensions of current mandates there would clearly be cost implications.

8. If Canada acceded to the OP-CAT, does your jurisdiction have any views of whether measures should be put in place to ensure coordination between federal and provincial/territorial NPMs?

   Coordination would be important and necessary to ensure consistency of approach and efficient use of resources.

9. The federal government plans to consult a wide range of stakeholders on Canada's potential accession to the OP-CAT (in particular, whether they are supportive or not), and on possible NPM options at the federal level. These include Aboriginal governments which may have responsibility or shared responsibility over places of detention in First Nations and Inuit communities, civil society, and Aboriginal groups. Does your jurisdiction have any recommendation on Aboriginal governments, Aboriginal groups, or civil society organizations to include in the consultations? Would your jurisdiction like to be part of those consultations? Does your jurisdiction plan on conducting its own stakeholder consultations with respect to the establishment of NPMs?

   Provincial Corrections does not have any Aboriginal operated homes as is the case with the John Howard Society. We do work closely with Aboriginal organizations. The process for Aboriginal Consultation on these topics will need to be further discussed. If there are consultations to occur, it would be important for us to be a part of it.

10. Please feel free to communicate any other information or concern.

    These responses are preliminary and are given in the context of the accompanying covering letter from the Government of Newfoundland and Labrador.

11. What kinds of health and social care institutions, other than psychiatric hospitals or psychiatric units in hospitals, exist in your jurisdiction where individuals can be deprived of their liberty, even if only temporarily? What oversight bodies, if any, exist to monitor treatment in these places?

    These are included in the answers to question #1 and #2.

12. In the criminal/corrections context, are there places of detention or imprisonment where individuals have freedom to leave the place under certain conditions? Please indicate what oversight bodies, if any, exist to monitor treatment in these places.

Our Correctional Centres have a Temporary Absences Program that allows approved inmates to be absent from the facility for specific reasons including humanitarian, rehabilitative, or medical, with conditions to be followed.

In some instances inmates can receive a Temporary Absence to reside at houses operated by John Howard Society (Howard House – St. John's and Westbridge House – Stephenville) and Stella Burry Society – (Emmanuel House – St. John's). These agencies supervise and monitor inmates in their care. They are responsible to established boards as well as to Corrections.