



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-015

June 14, 2017

Department of Natural Resources

Summary:

The Applicant made a request to the Department of Natural Resources for reports relating to the commercial viability of Wabush Mines. The Department refused to disclose the reports, relying on section 29 (policy advice and recommendations) and on section 35(1)(d), (f) and (g) (disclosure harmful to the financial or economic interests of a public body). The Applicant filed a complaint with this Office. The Commissioner found that pursuant to section 35(1)(f), the Department was entitled to refuse to disclose the records, and also that section 9 (public interest) did not apply to override that exemption in the present circumstances.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#),
SNL 2015, c. A 1.2, ss.9, 29, 35.

Other Resources:

OIPC [Guidelines for Public Interest Override](#);
[Access to Information Policy and Procedures Manual](#)

I BACKGROUND

- [1] The Applicant made a request to the Department of Natural Resources (“the Department”) under the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*” or “the Act”) for reports commissioned by the Department relating to the commercial viability of Wabush Mines. The Department located three such reports, one of which, written in 2006, was provided to the Applicant.
- [2] The Department acknowledged possession of two other reports (Reports A and B), produced in 2016, but refused to disclose either of them, first on the ground that the reports constituted policy advice or recommendations under paragraph 29(1)(a) of the *ATIPPA, 2015*, and secondly on the ground that disclosure would be harmful to the financial interests of government or a third party under paragraphs 35(1)(d), (f) and (g) of the *ATIPPA, 2015*.
- [3] As the Applicant’s complaint to this Office could not be resolved informally it was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Submissions were received from the Department and the Complainant.

II THE DEPARTMENT’S POSITION

- [4] The Department maintains that the 2016 reports were commissioned by the government for the purpose of assessing the future viability of the Wabush Mines, and as such constitute policy advice and recommendations under section 29 of the *ATIPPA, 2015*.
- [5] The Department also argues that the situation at Wabush Mines continues to develop. Therefore disclosure, at this time, of the information in the reports would cause harm to the government or significant loss or gain to a third party, within the meaning of paragraphs 35(1)(d), 35(1)(f) and 35(1)(g) of the *ATIPPA, 2015*. The harm claimed includes prematurely disclosing information that will be used to evaluate possible proposals or projects, interference with negotiations and revealing information relating to other mineral reserves.

III COMPLAINANT'S POSITION

- [6] The Complainant argues that the Department cannot refuse disclosure under section 29 if the reports contain information referred to in paragraphs 29(2)(a) (factual material), 29(2)(d) (appraisals), 29(2)(e) (environmental impact statements), 29(2)(h) (feasibility or technical studies) or 29(2)(i) (reports on the results of field research).
- [7] The Complainant also argues that the provisions of section 35 claimed by the Department cannot apply, because the government is not the owner of the property at Wabush Mines, and therefore its financial or economic interests are not affected.

IV DECISION

- [8] Wabush Mines has been a presence in western Labrador for over 50 years. It began producing iron ore in 1965, but the mine was permanently closed in 2014. The company is currently under protection from its creditors under the federal *Companies' Creditors Arrangements Act* (the "CCAA") in proceedings in which the assets of a company may be sold to satisfy debts owing to its creditors. It has been widely reported that there have been a number of offers to purchase company assets under those proceedings, but few details have been made public.
- [9] Some factors impacting the viability of Wabush Mines are publicly known, including the significant issue of the high manganese content of its iron ore. The 2006 report released to the Applicant discusses this issue in detail. The internet is also a source of substantial commentary on this issue.
- [10] The Department first argues that it is entitled to withhold the reports under section 29 of the *ATIPPA, 2015*:

29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;*

- (b) *the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made by the head within 65 business days of delivery of the report; or*
- (c) *draft legislation or regulations.*

(2) The head of a public body shall not refuse to disclose under subsection (1)

- (a) factual material;*
- (b) a public opinion poll;*
- (c) a statistical survey;*
- (d) an appraisal;*
- (e) an environmental impact statement or similar information;*
- (f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;*
- (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 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 an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body;*
- (k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;*
- (l) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or*
- (m) 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.*

(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

[11] The Department provided this Office with the 2006 report and the two 2016 reports. I am satisfied that the 2016 reports were specifically commissioned by the government. They were created by persons who have recognized expertise in the field of the exploitation and

development of mineral resources. They were commissioned in part to inform the government's negotiating position with prospective purchasers of Wabush Mines.

- [12] Report A is an analysis of the potential commercial viability of Wabush Mines. The conclusions are simply the author's opinions on that subject. Even if the report could be construed as falling within section 29(1)(a), the bulk of the report contains material that cannot be withheld pursuant to section 29(2) of the *ATIPPA, 2015*. In terms of the required approach to these matters, I note that the ATIPP Manual states:

Background methodology, data, analyses, questions, and factual information of all reports, studies or information in the scope of subsection 29(2) must not be withheld under subsection 29(1).

- [13] Similarly, Report B constitutes a review of the potential viability of the resumption of mining operations at Wabush Mines. The conclusions are simply the author's opinions on that subject. Even if it could be construed as falling within section 29(1)(a), the bulk of the report is material that cannot be withheld pursuant to section 29(2) of the *ATIPPA, 2015*. Furthermore, any very limited information which might come under section 29(1)(a) would also qualify to be withheld under section 35, which I will discuss next.

- [14] The Department also maintains that the entirety of the 2016 reports should be withheld pursuant to section 35(1)(d),(f) and (g):

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

...

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

...

(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body;

[15] I will begin by considering the application of 35(1)(g). Obviously, there are competing interests involved with respect to the resolution of these bankruptcy proceedings. Prospective purchasers naturally wish to obtain any assets at the lowest possible price, whereas the creditors would wish to secure the highest possible price. People in the town of Wabush, and in the province as a whole, desire an outcome that restores employment in western Labrador. The government of the province, and in particular the Department, will have an interest in the outcome, and may well become involved in discussions with the purchasers regarding regulatory or environmental issues, tax concessions, public infrastructure investment, direct investment, or any number of things. Generally, the government has an ongoing responsibility to promote and facilitate economic development while ensuring that environmental protection requirements are met.

[16] On the above basis, I conclude that the government has economic interests in the outcome of the Wabush Mines closure and the CCAA proceedings, and therefore section 35(1)(g) must be considered in relation to these reports.

[17] Accepting that the government has a financial or economic interest in the disposition and future of Wabush Mines does not mean that all of the contents of the 2016 reports may be withheld. Throughout the 2016 reports, the authors arrive at conclusions about how certain information impacts the viability of Wabush Mines. This information could reasonably be expected to prejudice the financial or economic interest of the government of the province or the Department if disclosed at this time. Only those portions of the 2016 reports may be withheld pursuant to section 35(1)(g).

[18] The same analysis applies with respect to section 35(1)(d) in terms of disclosure that could reasonably be expected to result in significant loss or gain to a third party. It would be premature to release the authors' conclusions about how the information in the 2016 reports impacts the viability of Wabush Mines while the CCAA proceedings are ongoing. Only those portions of the 2016 reports may be withheld pursuant to section 35(1)(d).

[19] As noted above, section 29 has very limited, if any application here. Section 35(1)(d) and 35(1)(g) only apply to the conclusions arrived at in the 2016 reports. I must therefore turn to consideration of section 35(1)(f).

[20] The Department initially provided insufficient evidence in its written submissions with respect to any of the exceptions it relied upon. In the absence of evidence and bearing in mind that public bodies have the burden of proof, a lack of sufficient evidence requires that I recommend the disclosure of records. Simple assertions about the reasons why records were created are not sufficient to prove their purpose.

[21] However, the Department ultimately provided this Office with written evidence confirming that:

- the decision to requisition the 2016 reports was based in part on an identified need for additional information to assist the government with ongoing and future negotiations with proponents seeking to purchase Wabush Mines;
- the contents of the 2016 reports included *considerations* relevant to the government's negotiating position with proponents seeking to purchase Wabush Mines.

[22] Unlike sections 35(d) and (g), which require a public body to provide evidence of the harms described in those provisions, section 35(1)(f) is categorical in nature. This means that if I can conclude that information is of the kind described in that provision, then it may be withheld without any need to prove that harm will result from disclosure. The Department may therefore withhold the entirety of the 2016 reports pursuant to section 35(1)(f) because the reports in their entirety constitute *considerations* that may impact upon government's ongoing and future negotiations.

[23] Finally, the Department was asked to consider whether the relevant provisions of the "public interest override" in section 9 applied:

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public

interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

[24] The Department responded that in applying the above exceptions it had considered the effect of section 9, and had concluded that the public interest would be best served by not disclosing any of the information. While government is entrusted to make decisions regarding the expenditure of public funds, it must also be held accountable for those decisions. Accountability, in the form of prospectively informing the public of conclusions regarding the viability of Wabush Mines, could cause economic prejudice to the province. While negotiations are ongoing, nothing in the information before me or in the submissions of the parties has “clearly demonstrated” that the public interest in disclosure of the 2016 reports outweighs the reasons for withholding them at this time. Accountability in a retrospective sense may possibly be achieved in part by the release of the 2016 reports after the conclusion of negotiations resulting in the purchase of Wabash Mines.

[25] For all of the foregoing reasons I conclude that the Department is entitled to withhold the entirety of the 2016 reports in accordance with section 35(1)(f). The public announcement¹ on June 13, 2017 of an asset purchase agreement does not require reconsideration of this conclusion. The agreement² is subject to a number of conditions, including conditions that involve negotiations between the parties and the Department. Additionally, if those conditions are not satisfied, the assets of Wabush Mines will not be transferred pursuant to that agreement and negotiations with other potential purchasers will likely occur.

¹ <http://www.releases.gov.nl.ca/releases/2017/nr/0613n06.aspx>

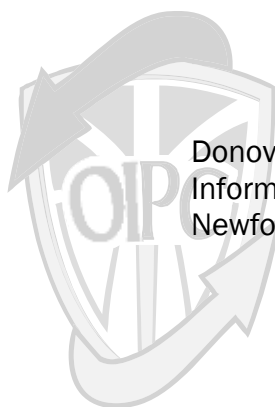
² <http://cfcanda.fticonsulting.com/bloomlake/docs/R-4-Asset%20Purchase%20Agreement.pdf>

VI RECOMMENDATIONS

[26] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Natural Resources continue to withhold the entirety of the 2016 reports.

[27] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Natural Resources must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report (in this case the Applicant) within 10 business days of receiving this Report.

[28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of June, 2017.



Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador