

**NEWFOUNDLAND AND LABRADOR**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**REPORT 2005-002**

**Executive Council**

**Summary:** The Applicant applied under the *Access to Information and Protection of Privacy Act (ATIPPA)* for access to records relating to polls conducted on the Atlantic Accord and/or offshore oil revenues within a specified time frame. Executive Council withheld these records in their entirety invoking sections 23(1) and 24(1) of the *ATIPPA*. Executive Council claimed that release of this information would harm this Province's relations with the Government of Canada and would harm the financial and economic interests of the Province. The Commissioner found that neither of these exceptions applied to the majority of information in the responsive records and he recommended that the records be disclosed to the Applicant, with the exception of a single page.

**Statutes Cited:** *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss. 3, 7, 20(1), 20(2)(b) and (c), 23(1), 24(1), 64(1); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13(2)(b)

**Authorities Cited:** Canada (Information Commissioner) v. Canada (Prime Minister), (1993) 1 F.C. 427, 1992 CarswellNat 185 (eC); Nova Scotia Review Officer Reports: F1-04-44; Canada Packers Inc. v. Canada (Minister of Agriculture), (1988) 53 D.L.R. (4<sup>th</sup>) 246, 1988 CarswellNat 667 (F.C.A) (eC); Chesal v. Nova Scotia (Attorney General), (2003) NSCA 124, 2003 CarswellNS 396 (eC); Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner), (1998) 164 D.L.R. (4<sup>th</sup>) 129, 1998 CarswellOnt 3445 (Ont. C.A.) (eC); Saskatchewan OIPC Reports: 2004-005

## I BACKGROUND

- [1] The Applicant submitted an access to information request to the Executive Council, wherein he requested the following:

*I am requesting all polls conducted by or on behalf of Executive Council referencing the Atlantic Accord and/or offshore oil revenues between Jan. 19, 2004 and Jan. 18, 2005.*

- [2] Executive Council replied in correspondence dated 24 February 2005, stating in part:

*Access to this information has been refused in accordance with the following exceptions to disclosure, as specified in the Access to Information and Protection of Privacy Act (the Act):*

*23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*

*(a) harm the conduct by the government of the province of relations between that government and the following [or] their agencies:*

*(i) the government of Canada or a province,*

- [3] In subsequent correspondence, Executive Council also invoked section 24(1):

*“The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy...”.*

- [4] On 25 February 2005 the Applicant filed a Request for Review with this Office, under the *Access to Information and Protection of Privacy Act (ATIPPA)*. The Applicant asked me to recommend to Executive Council that the responsive records be released as per his original request. Executive Council was notified of this Request for Review in correspondence dated 28 February 2005, and was asked to provide the appropriate documentation and a complete copy of the responsive records for our review. An unsevered copy of the records was received at this Office on 16 March 2005.

- [5] Attempts to resolve this Request for Review by informal means were unsuccessful and on 18 April 2005 the Applicant and Executive Council were notified that the file had been referred to the formal investigation process. In response, both parties provided written submissions in support of their respective positions.

## II EXECUTIVE COUNCIL SUBMISSION

[6] In its written submission, Executive Council reiterated its commitment to the access and privacy legislation and to openness and transparency. It highlights the fact that it has released several documents in accordance with the *ATIPPA* since its proclamation on 17 January 2005.

[7] With respect to the current request, Executive Council pointed out that the legislation which would give effect to the new Atlantic Accord Arrangement has not yet been passed in Parliament. It also indicates that once passed, this new arrangement will result in significant financial gains for the Province.

[8] In support of its claim of harm, Executive Council makes several general comments:

*In our view, the release of the polling information which has been requested under ATIPP could serve to impair the Province's relationship with the Government of Canada and, in turn, jeopardize the timely passage of the legislation...*

*It is clear, in our view, that there is a reasonable prospect of the release of this polling information impacting the timeliness of the federal legislation being passed which, in turn, would cause harm to the financial interests of the province.*

*...there is also specific information in the polling documents which, if released, could serve to impair the Province's relationship with the Government of Canada and other provincial governments.*

[9] In its submission, Executive Council also invoked another exception (see paragraph 3). In light of the significant financial gains associated with the new Atlantic Accord Arrangement, Executive Council is claiming that the responsive records should be withheld under authority of section 24 (disclosure harmful to the financial or economic interests of a public body).

### III APPLICANT'S SUBMISSION

[10] The Applicant maintains that public opinion polls should be available to the public. In support of this position he submitted a Federal Court decision and a Nova Scotia Review Officer decision which deal with the specific issues in this Review.

[11] The Applicant points out that the Federal Court decision [Canada (Information Commissioner) v. Canada (Prime Minister), (1993) 1 F.C. 427, 1992 CarswellNat 185 (eC)] "...involves the public's right to access polling information that a government is worried could adversely affect intergovernmental relations. The Federal Court ruled that such polling information should be released." The Applicant, therefore, is claiming that polling information should not be withheld on the basis of section 23 (disclosure harmful to intergovernmental relations or negotiations).

[12] With respect to the decision of the Nova Scotia Review Officer (Report F1-04-44, dated 2 November 2004), the Applicant points out that this report does not support a claim that release of polling information could harm the economic or financial interests of government. The Applicant states, in part:

*...it is also my understanding that the province may attempt to further withhold this information under Section 24, on the basis that it could be harmful to the economic interests of Newfoundland and Labrador.*

*I would direct you to Nova Scotia report F1-04-44 (copy attached) which specifically and directly deals with this point.*

*The Nova Scotia review officer in his 2004 case sided with the applicant, who sought polling information but was initially denied on the basis that it could harm the economic or financial interests of the government.*

[13] The Applicant also claims that section 20(2)(b) of the ATIPPA specifically excludes public opinion polls from being withheld:

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

*(b) a public opinion poll;*

[14] In further support of his claim, the Applicant indicates that other jurisdictions have similar laws requiring the release of “statistical surveys.” By way of example, he references section 13(2)(b) in Ontario’s equivalent legislation.

#### IV DISCUSSION

[15] Section 3 of the *ATIPPA* sets forth the purposes of the *Act*:

*3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*

- (a) giving the public a right of access to records;*
- (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
- (c) specifying limited exceptions to the right of access;*
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
- (e) providing for an independent review of decisions made by public bodies under this Act.*

*(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[16] Section 7 establishes a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions:

*7. (1) A person who makes a request under section 8 has a right of access to a record in the custody 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 exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*

*(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[17] Section 23(1) is a discretionary exception which establishes a reasonable expectation of harm to intergovernmental relations or negotiations:

*23. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*

*(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*

*(i) the government of Canada or a province,*

*(ii) the council of a local government body,*

*(iii) the government of a foreign state, or*

*(iv) an international organization of states; or*

*(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*

[18] Section 24(1) is a discretionary exception which establishes a reasonable expectation of harm to the financial or economic interests of a public body:

*24. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:*

*(a) trade secrets of a public body or the government of the province;*

*(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*

*(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*

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

*(e) information about negotiations carried on by or for a public body or the government of the province.*

[19] In accordance with section 64(1) the burden of proof rests with the public body:

*64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*

[20] Sections 23(1) and 24(1) authorize a public body to refuse access to a record, but they do not require a public body to refuse such access. It is not my intent, nor my mandate, to recommend that a public body exercise its discretion and release records it is authorized to withhold. The purpose of this review is to determine if the records in question fall within the exception and, if so, the exercise of discretion remains in the purview of the public body. If not, the Applicant's submission will be deemed to be well-founded and appropriate recommendations will be made.

[21] As such, I must first look to the test of harm and determine if any or all of the records would lead to harm as anticipated by sections 23(1) and 24(1) and as articulated by Executive Council. The Federal Court of Appeal in *Canada Packers Inc. v. Canada (Minister of Agriculture)*, (1988) 53 D.L.R. (4<sup>th</sup>) 246, 1988 CarswellNat 667 (F.C.A) (eC) at paragraphs 19 and 20, has said:

*19 What governs, I believe, in each of the three alternatives in paras. (c) and (d) is not the final verb ("result in", "prejudice" or "interfere with") but the initial verb, which is the same in each case, viz. "could reasonably be expected to." This implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not. It is tempting to analogize this phrasing to the reasonable foreseeability test in tort, although of course its application is not premised on the existence of a tort.*

*20 However, I believe the temptation to carry through the tort analogy should be resisted, particularly if Wagon Mound (No. 2), supra, is thought of as opening the door to liability for the mere possibility of foreseeable damage, as opposed to its probability. The words-in-total-context approach to statutory interpretation which this Court has followed in *Lor-Wes Contracting Ltd. v. R.* (1985), [1986] 1 F.C. 346, 85 D.T.C. 5310, [1985] 2 C.T.C. 79, (sub nom. *Lor-Wes Contracting Ltd. v. Minister of National Revenue*) 60 N.R. 321, and *Cashin v. Cdn. Broadcasting Corp.* (1988), 86 N.R. 24, 88 C.L.L.C. 17, 019 (Fed. C.A.) requires that we view the statutory language in these paragraphs in their total context, which must here mean particularly in light of the purpose of the Act as set out in section 2. **Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that***

*government information should be available to the public and that exceptions to the public's right of access should be "limited and specific." With such a mandate, I believe one must interpret the exceptions to access in paras. (c) and (d) to require a reasonable expectation of probable harm.*

(Emphasis added)

[22] In considering a request for public opinion polls on the subject of national unity and constitutional reform, Rothstein, J. of the Federal Court considered similar issues in Canada (Information Commissioner) v. Canada (Prime Minister), (1993) 1 F.C. 427, 1992 CarswellNat 185 (eC). Rothstein, J. at paragraphs 119 and 121 stated:

*119 The jurisprudence indicates that the Government or party seeking to maintain confidentiality must demonstrate its case clearly and directly. The Act itself, in subs. 2(1), states that exemptions from disclosure must be limited and specific. By inference I think it is clear that a general approach to justifying confidentiality is not envisaged.*

*121 In order to distinguish between confidentiality justified by the Act and that resulting from an overly cautious approach, specific detailed evidence is required.*

[23] Rothstein, J. goes on to state at paragraphs 122 and 128:

*122 Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The court must be given an explanation of how or why the harm alleged would result from disclosure of specific information.*

*128 ...the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiable cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.*

[24] More recently, the Nova Scotia Court of Appeal in Chesal v. Nova Scotia (Attorney General), (2003) NSCA 124, 2003 CarswellNS 396 (eC) at paragraph 38, said that "...the legislators, in requiring 'a reasonable expectation of harm', must have intended that there be more than a possibility of harm to warrant refusal to disclose a record."



[25] The language in the *ATIPPA*, like other access and privacy statutes in Canada, creates a bias in favour of disclosure. By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it. Furthermore, the legislation places the burden squarely on the head of a public body to prove that any information that is withheld is done so appropriately and in accordance with the legislation. The jurisprudence cited above clearly supports this concept. In dealing specifically with the issue of harm, Courts have set the bar higher than a mere possibility of harm.

[26] After reviewing the responsive records in detail, I cannot conclude that release of the majority of this information would in any way harm the relationship between this Province and the Government of Canada, nor harm the financial or economic interests of the Province. I do, however, accept that the release of the information on page five would meet the test of probable harm and may be withheld. With the exception of page five, I believe that any attempt to withhold this information is based on a speculative belief that if disclosed these records “could” cause harm which, as indicated, falls short of the test of probable harm.

[27] Having reviewed the records in consideration of the *ATIPPA* and relevant case law, I then considered the submission of Executive Council in support of its claim of harm. With all due respect, this submission does not demonstrate a clear and specific expectation of probable harm. The submission is quite general and alleges, for example, that release of the information “...could serve to impair the Province’s relationship with the Government of Canada...” “...jeopardize the timely passage of the legislation to give effect to the new Atlantic Accord Arrangement,” and “...would cause harm to the financial interests of the province.” This language does not provide a clear link between the release of the information and the harm alleged. Rothstein, J., in *Canada (Information Commissioner)*, at paragraph 170, comments on this point:

*170 In the absence of detailed and understandable explanations as to how and why release of each of the 182 pages which were referred to only*

*generally could reasonably be expected to cause harm, the Government, in my view, has failed to discharge the burden placed on it by s. 48 of the Act.*

[28] The Ontario Court of Appeal has also dealt with this issue. In *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)*, (1998) 164 D.L.R. (4<sup>th</sup>) 129, 1998 CarswellOnt 3445 (Ont. C.A.) (eC) the Appeal Court considered the evidence necessary to determine a reasonable expectation of harm. In overturning the decision of the Divisional Court, Labrosse, J.A. said:

26     ...*If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm.*

[29] In considering the similar language in the *ATIPPA*, I believe that the minimum test to be applied in this situation is clearly one of *probable* harm. I find the evidence before me neither detailed nor convincing so as to lead one to the conclusion that release of the records would result in such harm. As such, the burden of proof as mandated by section 64(1) of the *ATIPPA* has not been met.

[30] In further support of my conclusions, I will briefly address other issues I believe to be pertinent to this Review. At issue in this particular case is the extent to which the information being sought is already in the public domain. Public opinion polls, by their very nature, involve a certain level of public involvement. A series of standardized questions are disclosed to a significant number of randomly chosen members of the public. The Nova Scotia Review Officer, in his report F1-04-44, dated 2 November 2004, spoke clearly on this point:

*I disagree with the PSC that questions posed by the polling company contain sensitive information that should not be disclosed. The questions are already in the public domain. They are known to at least the approximately 500 people who the PSC says were polled. In a much different matter, but in the same vein, in R. v. Van Seters, the judge held that a tape viewed by everyone in a court room was now in the public domain [R. v. Seters (1996) O.J. No. 5385 (Q.L.), 31 O.R. (3<sup>rd</sup>) 19 (Gen. Div.)]. These questions have been read by many*

*more people than would fill a court room. In my view there can be no reason under the Act to deny them to the Applicant or to anyone else.*

[31] It is also noteworthy to quote the Information and Privacy Commissioner of Saskatchewan. In his report 2004-005, dated 23 September 2004 he said, in part:

*I am encouraged that the Saskatchewan government routinely produces reports on public opinion surveys undertaken with public resources. The fact that this information becomes publicly accessible without the necessity of an access request under the Act is very positive from the perspective of greater transparency.*

[32] I believe it is evident from these two comments that public opinion polls are “public” documents and do not invite the same level of confidentiality as one would expect from other internal documents. Such polls deal with public issues and are supported by public funds. I simply cannot accept that such information would adversely affect either the intergovernmental relations or the economic interests of this Province.

[33] In his submission, the Applicant references section 20(2)(b) (see paragraph 13) and in so doing, states that the *ATIPPA* specifically prevents the withholding of public opinion polls. It is important to note here that section 20(2) is in specific reference to section 20(1), which states:

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

*(a) advice or recommendations developed by or for a public body or a minister; or*

*(b) draft legislation or regulations.*

[34] Section 20(2)(b), therefore, specifically excludes public opinion polls from the discretionary exception of “policy advice or recommendations.” As such, it is not a general exclusionary provision as indicated by the Applicant. Notwithstanding the fact that this reference to public opinion polls appears only in section 20, I do believe that the legislators, in approving section 20(2)(b), acknowledged and accepted the public nature of such polls. Such an acknowledgement lends support to the release of this type of information in a more general sense.

[35] The Applicant also references section 13(2) of Ontario's *Freedom of Information and Protection of Privacy Act*. This provision parallels this Province's section 20 in that it specifically excludes identified types of information from the advice and recommendations exception. There is, however, an important difference between the two sections. While section 13(2) of Ontario's statute excludes statistical surveys from the exception (13(2)(b)), there is no reference to public opinion polls. In Newfoundland and Labrador's statute statistical surveys are also excluded (20(2)(c)), but government went one step further by specifically excluding public opinion polls (20(2)(b)). I believe this explicit reference to public opinion polls in this Province's legislation (particularly in light of the absence of such explicit language in some other jurisdictions) lends further support to the idea that the legislators in this Province intended that public opinion polls be normally treated as public documents.

## V CONCLUSION

[36] Having thoroughly reviewed the responsive records and considered the jurisprudence in this area, I have concluded that the disclosure of the majority of information in these records could not reasonably be expected to harm the relations between this Province and the government of Canada. Similarly, I have concluded that such disclosure could not reasonably be expected to harm the financial or economic interests of the Province. The only exception to this conclusion is the information contained on page five of the records.

[37] Public opinion polls are meant to gauge how the public feels on a particular issue, which in turn may assist government in determining a course of action. I see nothing in the questions, answers and analysis in this particular polling information which would reveal highly sensitive strategies that could damage intergovernmental relations or have an economic impact on the Province. The information was gathered from a significant number of randomly chosen citizens and deals with issues well-known to the public.

[38] I believe that Executive Council's position is based on the mere *possibility* of harm, as opposed to the more stringent test of *probable* harm. Consequently, the minimum test as anticipated by the legislation, and supported by the case law, has not been met and the records should be

released. While Executive Council's cautious approach may be well-intentioned, I believe that the principles of openness and accountability inherent in the legislation do not support the withholding of information based solely on any possibility for harm.

## **VI RECOMMENDATIONS**

[39] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that Executive Council provide the Applicant with a copy of the responsive records identified in paragraph 1, with the exception of the information on page five. I find that the information on page five has been properly withheld.

[40] Under authority of section 50 of the *ATIPPA*, I direct the head of Executive Council to respond to these recommendations within 15 days after receiving this report.

[41] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3<sup>rd</sup> day of June, 2005.

Philip Wall  
Information and Privacy Commissioner  
Newfoundland and Labrador