

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

**REPORT 2006-004**

**Executive Council – Rural Secretariat**

**Summary:** The Applicant applied under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to a number of records directly associated with a job competition within Executive Council’s Rural Secretariat (the “Secretariat”). The Applicant had been a candidate for this competition but was unsuccessful. The Secretariat disclosed some information to the Applicant, but denied access to other information claiming that it was personal information (section 30(1)). The Secretariat also claimed that some of the information being requested by the Applicant was excluded from the *ATIPPA* in accordance with section 5(1). The Commissioner concluded that the Secretariat had appropriately severed the responsive records and had properly determined that the *ATIPPA* did not apply to some of the records.

**Statutes Cited:** *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(o), 5(1)(g), 8, 30(1), 30(2)(f), 34, 37, 47, 49(2), 50, 60; *Municipal Government Act*, S.N.S. 1998, c. 18, as am, s. 463(2)(d); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 4(1)(g)

**Authorities Cited:** Newfoundland and Labrador OIPC Report 2005-005 (2005); Alberta OIPC Order F2002-012 (2002); Nova Scotia Review Officer Report F1-03-27(M) (2003)

**Other Resources Cited:**

*Concise Oxford English Dictionary* 10<sup>th</sup> Edition, Revised, New York: Oxford University Press (2002); *Access to Information and Protection of Privacy Act* Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September, 2004, available at <http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf>

## I BACKGROUND

[1] The Applicant submitted an access to information request to the Executive Council, Rural Secretariat (the “Secretariat”), dated 24 October 2005, wherein he requested access to detailed information regarding a job competition for a position with the Secretariat. The Applicant had been a candidate for this position but was unsuccessful in getting the job. Specifically, the Applicant requested the following:

- *Names of each and every applicant for the competition*
- *Names of each and every applicant interviewed for the competition*
- *Name of the selected candidate*
- *Names of each and every person who interviewed the selected candidate*
- *Names of each and every person who interviewed candidate [Applicant]*
- *Detailed list of each and every reason why selected candidate was recommended for the position*
- *Detailed list of each and every reason why candidate [Applicant] was not recommended for the position*
- *Names of each and every person who had any involvement whatsoever in the process that recommended the selected candidate for the position and including any and all file notes and comments*
- *Name of person and/or persons to whom the recommendations were made for the selected candidate and to include any and all file notes and comments by the person and/or persons to whom the recommendations were made*
- *Complete detailed all inclusive information of the criteria utilized in the competition*
- *All details of each and every rating category included but not limited to knowledge, ability, personal suitability and interview questions and answers, including notes taken by each and every interviewer and detailed and individual scores assigned to each and every rating category by each and every interviewer for the selected candidate*
- *All details of each and every rating category included but not limited to knowledge, ability, personal suitability and interview questions and answers, including notes taken by each and every interviewer and detailed and individual scores assigned to each and every rating category by each and every interviewer for candidate [Applicant]*
- *All details including each, any and all aspects of involvement by the Assistant Deputy Minister, Rural Secretariat relative the selected candidate and encompassing the inclusive time period from March 09, 2005 to August 26, 2005*
- *All details including each, any and all aspects of involvement by the Assistant Deputy Minister, Rural Secretariat relative candidate [Applicant] and encompassing the inclusive time period from March 09, 2005 to whatever date in the future this action concludes*

- *All details including each, any and all aspects of involvement by the Director, Regional Partnership Development, Rural Secretariat relative the selected candidate and encompassing the inclusive time period from March 09, 2005 to August 26, 2005*
- *All details including each, any and all aspects of involvement by the Director, Regional Partnership Development, Rural Secretariat relative candidate [Applicant] and encompassing the inclusive time period from March 09, 2005 to whatever date in the future this action concludes*
- *All details including each, any and all aspects of involvement by the Manager of Human Resources, Public Services Secretariat relative the selected candidate and encompassing the inclusive time period from March 09, 2005 to August 26, 2005*
- *All details including each, any and all aspects of involvement by the Manager of Human Resources, Public Services Secretariat relative candidate [Applicant] and encompassing the inclusive time period from March 09, 2005 to whatever date in the future this action concludes*

[2] In correspondence dated 22 November 2005, the Secretariat responded to the Applicant's request and provided him with the name of the successful candidate, the names of the interviewers, the names of the individuals involved in the process, the name of the individual to whom the list of recommended candidates was sent, a copy of the Assessment Matrix of the Applicant, a copy of the public advertisement, and a copy of the job analysis worksheet. The Secretariat also provided a brief explanation of the respective involvement of the Assistant Deputy Minister, the Director of Regional Partnership Development and the Manager of Human Resources in this job competition. The Secretariat also advised the Applicant that there was no other information, such as file notes and comments, beyond the matrix form. All information about the other candidates, with the exception of the name of the successful candidate, was withheld in accordance with section 30(1) of the *Access to Information and Protection of Privacy Act* (the "ATIPPA"). The interview questions were withheld in accordance with section 5(1)(g) of the *ATIPPA*.

[3] In correspondence dated 8 December 2005, and received at this Office on 16 December 2005, the Applicant asked that I review this matter and provide an opinion with respect to those records that were withheld. The Secretariat was notified of this Request for Review in correspondence dated 16 December 2005.

[4] Attempts to resolve this Request for Review by informal means were unsuccessful. On 31 January 2006 the Applicant and the Secretariat were notified that the file had been referred to the formal investigation process and they were each given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. Both parties provided written submissions in support of their respective positions.

## II PUBLIC BODY SUBMISSION

[5] The Secretariat submitted that they had provided as much information as was permitted under the legislation. All information about the candidates, other than the Applicant, was considered personal information in accordance with the definition provided in section 2(o) of the *ATIPPA* and, consequently, was withheld in accordance with the mandatory section 30(1).

[6] With respect to the interview questions, the Secretariat argues that they are questions to be used on an examination or test, as per section 5(1)(g), and therefore do not fall under the jurisdiction of the *ATIPPA*. They acknowledge that the questions have already been used, but argue that they may be used again in future competitions:

*The personal information was denied under Section 2(o); the interview questions were denied under Section 5(1)g. It is our position that interview questions are a test. It is also our position that questions from a competition may be used to assess applicants in future competitions for similar positions.*

## III APPLICANT'S SUBMISSION

[7] The Applicant states that in light of several factors he is "...perplexed at what appears to be a lack of depth in the availability of information and records to validate the process in this matter." These factors include the principle of accountability, the wording of sections 34 and 37 of the *ATIPPA*, the fact that the information he is requesting is collected and generated at public expense, and his belief that bureaucrats must be responsible and accountable in order to ensure

that correct decisions are made. The Applicant also comments on the potential for the disclosure of information to cause harm. He argues that in order to prove harm "...there must be a reasonable expectation of probable harm not just an unjustifiable cautious approach to the avoidance of any risk whatsoever and also that the harm must constitute damage or detriment not mere interference or inconvenience."

[8] The Applicant states that by relying on sections 30(1) and 2(o) of the *ATIPPA*, the Secretariat is ignoring section 30(2)(f), particularly in relation to the successful candidate.

[9] With respect to section 5(1)(g), the Applicant disagrees with the Secretariat on the application of this provision. He argues that section 5(1)(g) is meant to prevent a person from gaining access to the questions in advance of an examination or test. As such, the term "that is to be used" should not be substituted for the term "that was used." The Applicant questions the logic of refusing to disclose questions that had already been asked of him, as well as several other individuals, in an interview. In response, the Applicant states that he wishes to expand his access request to include the required answers and his own answers to the questions that were asked in the interview.

[10] The Applicant concludes his submission by referencing the principle of merit within the public service selection process. Based on this principle, the Applicant believes there is discretion within the legislation for the public body to act in good faith and to provide access to the requested information, even though an exception may be relied on.

#### **IV DISCUSSION**

[11] I would first like to address the Applicant's attempt to expand his request to include the required answers and his own answers to the interview questions. The Applicant has filed his Request for Review with this Office in response to his original access to information request dated 24 October 2005. This request set out a detailed list of requested information, portions of which were disclosed by the Secretariat. As a result of an unsuccessful attempt to resolve this matter informally, the parties were asked to forward formal submissions with respect to the

information that was withheld by the Secretariat. The Applicant's submission cannot be used as a forum to expand his access request. If the Applicant wishes to seek access to additional information he may make a request to the appropriate public body in accordance with section 8 of the *ATIPPA*. It is not the mandate of this Office to accept access to information requests on behalf of public bodies and, as such, I will not be issuing any recommendations with respect to this specific matter.

[12] With respect to the information that was withheld, there are two distinct issues. The Secretariat has denied access to the information directly associated with the candidates, other than the Applicant, in accordance with an exception to access. They claim that this information is personal and must be withheld in accordance with section 30(1). The interview questions, on the other hand, have been denied in accordance with section 5(1). This is not an exception to access, but rather a list of records to which the *ATIPPA* does not apply. If I accept that this provision applies to the records at hand, I will have no jurisdiction to recommend their release.

#### Personal Information (Section 30(1))

[13] The Secretariat claims that some of the responsive records are personal information and should be withheld under the mandatory section 30(1):

*30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

[14] Personal information is defined in section 2(o):

#### *2. In this Act*

*(o) "personal information" means recorded information about an identifiable individual, including*

*(i) the individual's name, address or telephone number,*

*(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*

- (iii) *the individual's age, sex, sexual orientation, marital status or family status,*
- (iv) *an identifying number, symbol or other particular assigned to the individual,*
- (v) *the individual's fingerprints, blood type or inheritable characteristics,*
- (vi) *information about the individual's health care status or history, including a physical or mental disability,*
- (vii) *information about the individual's educational, financial, criminal or employment status or history,*
- (viii) *the opinions of a person about the individual, and*
- (ix) *the individual's personal views or opinions;*

[15] I believe that the names and associated information of the candidates other than the Applicant are clearly personal information as defined by section 2(o). As such, I agree with the Secretariat that this information must be withheld in accordance with section 30(1). It is also important to note that section 30(1) is a mandatory provision which obligates a public body to refuse to disclose personal information. Therefore, the Applicant's comment that the Secretariat should exercise discretion and release the information is not relevant to this situation. While discretion does exist in several other exceptions to access, the use of the word "shall" in section 30(1) eliminates any such discretion in this situation.

[16] I would also like to comment on the Applicant's reference to harm. I agree that any potential harm resulting from the disclosure of information must meet a test of probability. The mere possibility of harm does not justify the withholding of information within the context of the *ATIPPA*. I have spoken on this point in previous Reports. However, the fundamental difference here is the absence of a harms test associated with section 30(1). I spoke to this point in my Report 2005-005, at paragraph 77:

*77 It is noted that [section 30(1)] of the ATIPPA does not include a harms test. Unlike some other jurisdictions, there is no test of reasonableness when dealing with the release of personal information. In the absence of any*

*discretion, a public body simply has to determine if information meets the definition set out in section 2(o) and, if so, they must not release it....*

In the absence of a harms test, the argument of probable harm is irrelevant, particularly in light of the mandatory nature of this exception.

[17] Notwithstanding the mandatory nature of section 30(1) and the absence of a harms test, section 30(2) sets out a number of situations where personal information may be disclosed. If either of these situations applies to the responsive records, the public body cannot rely on the personal information exception to deny the Applicant access to the information. The Applicant makes specific reference to section 30(2)(f):

*30. (2) Subsection (1) does not apply where*

*(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;...*

I do not consider information associated directly with the candidates for a job competition to be captured by this provision. The intent of section 30(2)(f) is to allow access to information about a current public sector employee's position and functions. It is not meant to capture information about potential employees. With respect to the successful candidate, I note that the name of this individual was disclosed. I do not accept that more detailed information about the successful candidate's interview and selection process would constitute information about that candidate's position, functions or remuneration.

[18] The Applicant has also argued that sections 34 and 37 of the *ATIPPA* support the availability of information. These sections are as follows:

*34. Where an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body shall make every reasonable effort to ensure that the information is accurate and complete.*

*37. Where a public body uses an individual's personal information to make a decision that directly affects the individual, the public body shall retain that*

*information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.*

It is important to note that sections 34 and 37 appear in Part IV of the *ATIPPA*. Part IV has not yet been proclaimed into force and, consequently, these provisions have no statutory affect and cannot be relied upon to support the Applicant's position. In the interest of clarity, however, I will state that I do not believe these provisions would apply in any event. Part IV of the *ATIPPA* deals with the collection, use and disclosure of personal information by a public body. It does not govern how a public body responds to an access to information request. Specifically, sections 34 and 37 establish an obligation to maintain accurate and complete personal information and an obligation to retain personal information for a minimum amount of time, respectively. These provisions are not meant to determine whether or not information should be released in response to an access request.

#### Application of the *ATIPPA* (Section 5(1))

[19] Section 5(1) of the *ATIPPA* establishes a list of records that are exempt from the application of the legislation. Section 5(1)(g) is relevant to the case at hand:

*5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to*

*(g) a record of a question that is to be used on an examination or test;...*

[20] The Secretariat argues that an interview is a test and, consequently, the questions used in an interview are questions as anticipated by section 5(1)(g). They state that the questions at issue will be used in future to assess candidates for similar positions. The Applicant, however, believes that the term "is to be used" eliminates any question that has already been used from the application of this section. He argues that because he and others have already been asked these questions they no longer qualify for an exemption in accordance with section 5(1)(g). In his submission, the Applicant stated that the term "that is to be used" should not be substituted for the term "that was used."

[21] I will first deal with the issue of whether or not the questions asked in an interview constitute a test. The *Concise Oxford English Dictionary* 10<sup>th</sup> Edition, Revised (New York: Oxford University Press, 2002) defines “test” as “a procedure intended to establish the quality, performance, or reliability of something.” I believe that an interview process is clearly captured by this definition. As such, I believe that the questions to which the Applicant is seeking access to are associated with a test, as anticipated by section 5(1)(g). This is also clearly supported by the *ATIPPA* Policy and Procedures Manual. This Manual is produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice. In describing section 5(1)(g) of the *ATIPPA*, this Manual, on page 1-10, states:

*The Act does not apply to “a record of a question that is to be used on an examination or test.” This exclusion applies to questions to be used now or in the future on an examination or test. The exclusion applies, but is not limited, to questions to be used on examinations or tests given by educational institutions. For example, questions on a driver’s licence test and on a government job competition test would also be excluded from the Act if the questions are currently being used or will be used in the future.*

(Emphasis added)

[22] With respect to the term “that is to be used,” there is no indication in section 5(1)(g) that such a term is meant to restrict a question to a single use. To accept such an interpretation, one must accept that once a question is asked on an examination or test it cannot be used again. While this may seem appealing, I do not believe it is reasonable to expect that questions may not be used more than once. It is my opinion, therefore, that the term “that is to be used” may be interpreted to mean “that was used,” as long as the questions will be used again in the future. This too is supported by the above quoted passage from the *ATIPPA* Policy and Procedures Manual. The Manual specifically states that questions currently being used as well as questions that will be used in the future are excluded from the *ATIPPA*.

[23] Similar conclusions have been reached by the Information and Privacy Commissioner of Alberta and the Review Officer for Nova Scotia. In his Order F2002-012, the Alberta Commissioner agreed that the questions on a previously administered examination were

excluded from Alberta's *Freedom of Information and Protection of Privacy Act*. In that case, an applicant had requested access to a copy of her son's English 10-H final exam questions and answers. In a letter setting out his reasons for his oral decision, the Alberta Commissioner stated that "I find that the questions are clearly going to be used on examinations in the future and therefore fall within section 4(1)(g)...." Section 4(1)(g) of Alberta's *Freedom of Information and Protection of Privacy Act* is, in all material respects, equivalent to section 5(1)(g) of the *ATIPPA*.

[24] In a similar case in Nova Scotia the applicant was an unsuccessful job candidate for a position with the Halifax Regional Police and was seeking access to information, including interview questions. In his Report FI-03-27(M) the Nova Scotia Review Officer concluded that questions used on tests are not subject to the *Municipal Government Act*, as per section 463(2)(d) of that *Act*. Section 463(2)(d) of Nova Scotia's *Municipal Government Act* is, in all material respects, equivalent to section 5(1)(g) of the *ATIPPA*.

[25] In light of my analysis of the language of the section 5(1)(g) of the *ATIPPA*, together with the Alberta and Nova Scotia decisions, I have concluded that the questions used in the interview are excluded from the application of the *ATIPPA*. I have no other choice, therefore, but to conclude that I do not have jurisdiction as it relates to these specific records.

## V CONCLUSION

[26] Having reviewed the responsive records and carefully considered the language of the *ATIPPA*, I have concluded that the Secretariat has appropriately severed the responsive records. I agree that the information about the candidates, other than the Applicant, is clearly their personal information and has been appropriately withheld in accordance with section 30(1). I also agree that the interview questions fall under the authority of section 5(1)(g) and, as such, are not subject to the *ATIPPA*. Having concluded that the *ATIPPA* does not apply to these specific records, I do not have any authority to recommend that they be released.

[27] Having found that the Secretariat acted appropriately, it is not necessary for me to make a recommendation in this circumstance. Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the Secretariat to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60. The Applicant must file this appeal within 30 days after receiving a decision of the head of the Secretariat as per paragraph 28 of this Report.

[28] Under authority of section 50 of the *ATIPPA*, I direct the head of the Secretariat to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the Secretariat's final decision with respect to this Report.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23<sup>rd</sup> day of March 2006.

Philip Wall  
Information and Privacy Commissioner  
Newfoundland and Labrador