OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2011-009

June 1, 2011

Department of Health and Community Services

Summary: The Applicant made a request for information under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") to the Department of Health and Community Services (the "Department") for access to records relating to a Review of the air ambulance program. The Department withheld some information under section 20(1) of the *ATIPPA*. The Commissioner found that the Department had appropriately applied section 20(1) with respect to information concerning the air ambulance program. However, with respect to information about the Review itself, the Commissioner found that section 20(1) did not apply. The Commissioner recommended that this information be released to the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, ss. 20(1), 64(1).

Authorities Cited: Newfoundland and Labrador OIPC Report A-2009-003, A-2009-007.

File #: 0005-074-10-006

I BACKGROUND

[1] In accordance with the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*" or "*Act*") the Applicant submitted an access to information request on April 15, 2010 to the Department of Health and Community Services (the "Department"), in which she requested disclosure of records, as follows:

> *I am writing to request general information from the Department of Health and Community Services in regard to the report on air ambulance services in Newfoundland and Labrador (as per your departmental press release of March 25)*
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> *I am requesting records regarding:*
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> 1) *The cost of the report;*
> 2) *The date the report was commissioned;*
> 3) *The specific wording of what the consultant was asked to Review;*
> 4) *Whether or not there were any terms of reference or requested outcomes of the report and if so, details of those terms/requested outcomes;*
> 5) *Whether or not there was any communication between the Department of Health and Community Services and the Grenfell-Labrador Labrador-Grenfell Regional Health Authority in the writing of the report or after the report was written and if so, what those communications were.*

[2] On May 5, 2010, the Department wrote to Applicant to let her know that some of the records she requested may be subject to section 27 (Business Interest of a Third Party), and thus, the Department had notified the third parties in accordance with section 28. As a result, the Department exercised its right to extend the time limit for responding to the Applicant's request and notified the Applicant that she could contact this Office if she felt the time extension was inappropriate.

[3] On May 17, 2010, the Applicant submitted a Request for Review to this Office in writing. She stated as follows:

> *The department has specified Section 27 as their reason for withholding the records I have requested, but clearly the three part test for exclusion under this clause has not been met […]*
> *Also the department has extended the time on my request until June 19 because of third party notification, but as section 27 does not apply thus the extension should also not apply.*

[4] Upon receipt of this Request for Review, an Investigator from this Office contacted the Applicant and advised that the Department had not yet refused to provide access to the records, it was merely

notifying third parties who may be affected should section 27 apply to the requested records. If, after this time extension expired, a satisfactory response was not provided by the Department, then the Request for Review could proceed. Therefore, it was decided to hold the Request for Review in abeyance until a decision had been made with respect to the release of the requested records.

[5] The Department provided the records on August 27, 2010. A large number of records were provided, and all questions posed by the Applicant were answered. However, the Applicant took issue with severing done on two pages in accordance with section 20 (advice and recommendations). As a result, she then contacted this Office on September 8, 2010 to advise that she wanted to re-activate her Request for Review (originally sent to this Office on May 17, 2010). It is the severing done under section 20 that is the subject of this Report.

II HEALTH AND COMMUNITY SERVICES' SUBMISSION

[6] The Department takes issue with the processing of this Request for Review by this Office. It states as follows:

> *[…] The Department is in receipt of a "Request for Review or Investigation of Complaint" submitted to your office on July 15, 2010 and signed by the Applicant. The request is clearly for an investigation with respect to the extension of time required to respond to the Applicant's request. The Applicant stated that the resolution she was seeking as : 'I would like the information sent to me. On July 19 it will be a month late.' The Department is also in receipt of a letter from the OPIC dated August 31, 2010 in which it was advised that the 'matter has been resolved to the Applicant's satisfaction and the file is now closed.'*
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> *When Department officials inquired about receipt of a copy of the new request for Review as per subsection 45 (3) of the Act, a one line email from the Applicant dated November 26, 2010 was provided. We note that the OPIC website clearly states in bold that it will not accept requests for Review or complaints by email.*
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> *The Information in response to the Applicant's request was released on August 27, 2010. The 60 day period in which to file a complaint as set out in the Act has expired unless the Commissioner has allowed a longer period of time to file the complaint, in which case the Department would have expected to receive notification of the extension.*
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> *The appropriate notice of the complaint has never been provided to the Department. As of the date the Applicant's Request for Review was filed with the OIPC, the issues about which she presently complains were not yet in existence. The legislated time frame in which the Applicant had to file a complaint has expired. Nevertheless, as the Department is aware that the Applicant has a concern, we provide the following formal submission.*

[7] The Department then continued with its submission in respect of the severing done under section 20. The Department submits that the severed information is properly considered advice under section 20(1)(a) of the *ATIPPA* as it is an expression of opinion on policy-related matters. The Department states that assessment of the air ambulance program is an ongoing process, and the decision to make changes to the air ambulance program was only one step in the process that included an assessment of the program and a determination of the changes that should be implemented. Thus, the Department sees the severed information as applicable not only to the specific decision to move the aircraft from St. Anthony but also to the air ambulance program generally.

[8] Further, the Department argues that the severed information may also be considered recommendations as they "implicitly suggest a recommended course of action for Government to take when assessing the air ambulance service", which will ultimately be accepted or rejected, and the Department views it as such. The Department states that when this information was provided to Government, they were still in the process of determining how the announced changes would be implemented. The air ambulance service was moved from St. Anthony to Happy Valley-Goose Bay on June 4, 2010.

III APPLICANT'S SUBMISSION

[9] The Applicant provided no formal submission.

IV DISCUSSION

[10] I would first like to address the Department's submission with respect to the procedural issues it identified. First, as discussed above, this Request for Review was submitted, in the regular form, on May 17, 2010. This Request for Review was related to an access request received by the Department on April 20, 2010. The Department advised the Applicant on May 5, 2010 that section 27 was applicable to the records, as such, third parties had to be notified in accordance with section 28 of the *ATIPPA*. Therefore, the Department notified the Applicant that it was extending the time to respond to her access request beyond the legislated 30 day time period to June 19, 2010. It also notified her that if she felt the time extension was inappropriate, she could contact this Office.

[11] At that time, the Applicant was under the misunderstanding that the Department was refusing to disclose records under section 27. She believed the requirements of section 27 were not met, and as such, she felt the extension should also not apply. Therefore, in her Request for Review, submitted to this Office on May 17, 2010, she sought prompt and full disclosure of the requested records. An Investigator from this Office then contacted the Applicant and informed her that a decision to withhold records had not yet been made; as the Department thought that section 27 might apply, it was required to notify any affected third parties. It was then decided that this Request for Review would be held in abeyance pending the actual decision to release records or not. At that time, if the Applicant was not satisfied with the Department's decision, the Request for Review could be reactivated. This decision was made to avoid the necessity of filing another Request for Review should the Applicant be dissatisfied with the Department's response. The Department was not, at that time, notified of the Applicant's May 17, 2010 Request for Review, nor of the decision to defer such a Review in order to await a response from the Department.

[12] In the meantime, the Department did not respond to the Applicant's request by June 19, 2010, and on July 15, 2010, the Applicant submitted a complaint to this Office about the length of time the Department was taking to respond to her access request. This is the Complaint referred to by the Department in its submission, and was a separate file, solely in relation to the delayed response from the Department. The records were provided to the Applicant on August 27, 2010, and as a result, the Applicant decided to discontinue this Complaint. Therefore, a letter was sent to the Department by this Office indicating that this matter had been resolved and the file was closed.

[13] Once the Applicant had a chance to Review the records that were sent to her, she contacted this Office on September 8, 2010 and indicated her disagreement with the severing on two pages of the responsive record, and stated that she wanted to reactivate the May 17, 2010 Request for Review. On September 9, 2010, a letter, enclosing the May 17, 2010 Request for Review, was sent to the Department from this Office. This letter advised that the May 17, 2010 Request for Review had been held in abeyance by this Office, and that a time extension Complaint in conjunction with this matter had also been filed by the Applicant but had since been resolved. The letter was delivered by courier and signed for by an employee in the Department. The Department responded to this Office by letter dated the very next day, enclosing the documents requested by this Office. It is clear that the Department did receive appropriate notice of the Request for Review, and that this Request for Review

was not initiated by e-mail. The e-mail of November 26, 2010 referred to by the Department was a clarification of the Applicant's issue with the responsive record. It is also clear that at the time the Request for Review was reactivated, the 60 day time limit in which to file a Request for Review with this Office had not expired.

[14] There is clearly some confusion in the Department with respect to this file and it has apparently gotten it mixed up with a time extension complaint filed by the same Applicant in connection with the same access request. I note that since this file has been opened, approximately one year ago, there has been some turn over in access and privacy coordinators at the Department dealing with this file, perhaps contributing to the confusion.

[15] Turning now to an examination of the appropriateness of the use of section 20 to withhold a portion of the responsive record, section 20 reads as follows:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
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> *(a) advice or recommendations developed by or for a public body or a minister; or*
> *(b) draft legislation or regulations.*
>
> *(2) The head of a public body shall not refuse to disclose under subsection (1)*
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> *(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.*
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> *(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.*

[16] I would like to note that an extensive Review of the case law concerning the interpretation of "advice and recommendations" was done in Report A-2009-007 and will not be repeated here. In that case, I decided as follows:

> 1. *The statement by my predecessor in Report 2005-005 that "the use of the terms 'advice' and 'recommendations' [. . .] is meant to allow public bodies to protect a suggested course of action" does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than "a suggested course of action."*
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> 2. *The term "advice or recommendations" must be understood in light of the context and purpose of the ATIPPA. Section 3(1) provides that one of the purposes of the ATIPPA is to give "the public a right of access to records" with "limited exceptions to the right of access."*
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> 3. *The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.*
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> 4. *Neither "advice" nor "recommendations" encompasses factual material.*

[17] Section 64(1) sets out the burden of proof on a Request for Review as follows:

> *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.*

[18] The Department has provided a detailed submission and has commented on each severed paragraph specifically. The severed information comprises comments with respect to the conduct of the Review of the air ambulance program and about to the program itself.

[19] While I accept that the assessment of the air ambulance program is an on-going process, clearly the Review of the program is completed. I accept therefore, that the opinions expressed in these paragraphs that relate to the program itself constitute advice, as they are expressions of advice on a

policy–related matter. Further, it is my opinion that some of these comments can also be considered "advice" as they are clearly a "suggested course of action", which will either be accepted or rejected by the Department as it continues to assess the air ambulance program.

[20] With respect to the comments offered regarding the Review itself, this was a discrete event that looked at issues surrounding the air ambulance program. The terms of reference of the Review were set some time ago and the Review has since been completed. Therefore, comments offered after its conclusion about how the Review should or should not have been conducted cannot be considered "recommendations" nor can they be considered a suggested course of action which could be accepted or rejected by the public body, as there is no longer a decision to be made with respect to the terms of reference of the Review or its scope. Even the broader term "advice" is forward-looking in orientation. While an ongoing assessment of the air ambulance program is indeed a forward-looking exercise, the Review process had ended at the time these comments were offered, and they are simply opinions or feedback after the fact. Had these comments been offered while the Review was being set up, or perhaps even while it was still ongoing, then my findings might be different.

V CONCLUSION

[21] With respect to the procedures followed in this case, notice of the Request for Review was provided to the Department on September 9, 2010, well within the 60 day statutory time limit, as records were not provided to the Applicant until August 27, 2010. The e-mail of November 26, 2010 that was provided to the Department was a clarification of the Request for Review. The procedures followed in this case were appropriate, but even if there had been a minor procedural irregularity, this Office would be quite reluctant to allow such an irregularity to impede an Applicant's right of access to records. I believe the Department also recognized the importance of the right of access when, despite its concerns about the procedures followed, it continued to participate in the formal Review process and provide a detailed submission for this Office to consider.

[22] It is my finding that section 20 is indeed applicable to some of the severed information contained in the record, and as such, it has been appropriately withheld. This information consists of comments made with respect to the air ambulance program itself.

[23] However, with respect to comments made regarding the scope and process of the Review, I find that section 20 does not apply and this information should be released. I have indicated my recommendations for release in yellow highlighting on a copy of the record that is to be provided to the Department along with a copy of this report.

VI RECOMMENDATIONS

[24] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Department release the information highlighted in yellow on the copy of the record that is being provided to the Department with this Report.

[25] Under authority of section 50 of the *ATIPPA* I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Report to indicate its final decision with respect to this Report.

[26] Please note that within 30 days of receiving a decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1st day of June, 2011.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador