



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

Report A-2019-007

February 14, 2019

## Department of Municipal Affairs and Environment

### Summary:

The Department of Municipal Affairs and Environment (the “Department”) received an access request seeking disclosure of all correspondence, information, analysis and recommendations involving the Minister or provided to the Minister in making the decision to accept the Environmental Impact Statement of Grieg NL for its Placentia Bay aquaculture project. The Department released some information but withheld other information relying on sections 27(2)(b) (Cabinet confidences), 29(1)(a) (Policy advice or recommendations) and section 40 (Disclosure harmful to personal privacy). The Commissioner found that the Department properly applied the cited exceptions and recommended the Department continue to withhold records.

### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 27 and 29.

### Authorities Relied On:

OIPC NL Report [A-2008-008](#); ON OIPC Order [PO-3833](#); [Access to Information: Policy and Procedures Manual, October 2017](#)

## I BACKGROUND

- [1] The Department of Municipal Affairs and Environment (the “Department”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) seeking disclosure as follows:

*Our request is focused on the August 28, 2018 decision by Municipal Affairs and Environment Minister Andrew Parsons to accept the environmental impact statement of Grieg NL for its Placentia Bay aquaculture project (Reg. 1834). Specifically we are requesting access to all correspondence, information, analysis, and recommendations involving the minister or provided to the minister for consideration in making this decision.*

- [2] The Department responded, providing access to some of the responsive records while withholding other information relying on sections 27(2)(b) (Cabinet confidences), 29(1)(a) (Policy advice or recommendations) and section 40 (Disclosure harmful to personal privacy) of the *ATIPPA, 2015*. The Complainant asked the Commissioner to review that decision. The information withheld based on section 40 is not at issue in this Report.
- [3] As informal resolution was unsuccessful, the matter proceeded to formal investigation pursuant to section 44(4) of the *ATIPPA, 2015*.

## II PUBLIC BODY’S POSITION

- [4] The records being withheld by the Department include a number of slides in a PowerPoint presentation, “Placentia Bay Atlantic Salmon Aquaculture Project, Environmental Impacts Statement (EIS) Public & Agency Review, Environmental Assessment Division, July 25, 2018” and the majority of a Memorandum to Minister Andrew Parsons, “Recommendation concerning the acceptability of the EIS for the Placentia Bay Atlantic Salmon Aquaculture Project”. The redacted slides contain some of the content from the Memorandum. The Department withheld this information on the basis of sections 27(2)(b) and 29(1)(a) of the *ATIPPA, 2015*. The Department also withheld a small amount of information on the basis of section 29(1)(a) in Annex E “Summary of Public Submissions and Environmental Assessment Committee Considerations.”

- [5] The Department's position is that the purpose of developing the Memorandum was for the information and briefing of the Minister.
- [6] The Department stated that, pursuant to section 67 of the *Environmental Protection Act* ("EPA"), once an ("EIS") is completed and no further work is required, the Minister recommends to Cabinet whether the undertaking should be released subject to terms and conditions, or alternatively, that the undertaking not be permitted to proceed.
- [7] The Memorandum was submitted to the Minister on the acceptability of the EIS prior to August 28, 2018. The Memorandum was developed by government officials to inform the Minister of the Environmental Assessment Committee ("EAC") analysis of the EIS and recommendations on terms and conditions that could be applied if the project was approved for release.
- [8] While the Department did not categorize the Memorandum as a "cabinet record" as per the definition under section 27(1) of the *ATIPPA, 2015*, the Department stated that the Memorandum did inform the content of the subsequent Cabinet submission prepared and presented on the issue. It was determined, in consultation with Cabinet Secretariat, that releasing the Memorandum would reveal the substance of deliberations of Cabinet and thus the majority of the Memorandum was withheld based on section 27(2)(b).
- [9] The Department has provided this Office with more details regarding the linkages between the Memorandum and the Cabinet Submission.
- [10] The Department advised that the Clerk of the Executive Council was consulted once the Department made its decision to withhold the records based on section 27(2)(b). The Department stated that the Clerk examined and considered all information withheld in accordance with section 27 of the *ATIPPA, 2015*, and approved the use of section 27. The Department indicates that, notwithstanding its conclusion that the information was required to be withheld under section 27(2)(b), the Clerk considered whether it was appropriate to disclose the information in accordance with section 27(3), but determined that the public interest in disclosure of the information did not outweigh the reason for the exception.

[11] The Department withheld some information in Annex E based solely on section 29(1)(a) of the *ATIPPA, 2015* explaining that the information withheld outlines the recommendations of the EAC regarding the acceptability of the EIS and the release of the project. The information also outlines advice provided for use by the Minister from numerous members of the EAC that highlight considerations for the deliberation of the Minister.

[12] The Department reviewed some of the redactions and released all references to terms and conditions that were directed by Cabinet and thus made public. The Department also released a small amount of information originally redacted under section 29(1)(a) through the informal resolution process.

### III COMPLAINANT'S POSITION

[13] The Complainant believes that the committee review of the EIS is an integral part of the public environmental assessment process and does not constitute advice to the Minister, but rather is advice and analysis intended for the public.

[14] The Complainant believes that the redactions are overly broad and that they do not satisfy the purpose of the *ATIPPA, 2015*.

[15] The Complainant believes that the requested information is in the public interest and that the public interest in disclosure outweighs the reasons for the exception. The Complainant states that the review committee is a publicly appointed body being asked to study a public document that is an integral part of a public process. The Complainant states that withholding the analysis and recommendation of the committee obscures the transparency of the process, denies citizens the opportunity to fully participate in public decision-making, and allows elected officials to remain unaccountable for their actions.

[16] The Complainant feels the redactions are overly broad and that the Department has not provided sufficient explanation. The Complainant states that the Department did not provide sufficient context in its response letter regarding the exceptions claimed and how the redacted information met the exceptions.

[17] The Complainant does not feel the Department's decision is consistent with the purpose of the Part X of the EPA and therefore should be subject to the public interest override provided by the *ATIPPA, 2015*. The Complainant states that the purpose of Part X of the EPA is to

*a) protect the environment and quality of life of the people of the province; and*

*b) facilitate the wise management of the natural resources of the province, through the institution of environmental assessment procedures before and after the commencement of an undertaking that may be potentially damaging to the environment.*

[18] The Complainant feels that the Department's refusal to release the Committee's analysis and conclusion as to whether the EIS complied with the guidelines issued to the proponent is not consistent with the spirit and purpose of the EPA.

[19] The Complainant believes that the Minister's decision to accept the EIS and Cabinet's subsequent decision to release the project from further environmental assessment run counter to the vast majority of public input. The Complainant feels that the legislation does not give the Minister the discretion to accept an EIA that he has determined to be deficient. The Complainant feels that the decision making process lacks transparency and that the public does not have the information needed to hold the Minister accountable if he has overstepped his jurisdiction.

[20] The Complainant feels that there is a precedent set for the release of the information requested. The Complainant states that a response to a previous access request was released with only four pages redacted and included the full unredacted memorandum prepared by the then Deputy Minister and the analysis of the Screening Review Coordinator. The recommendation was for the project to proceed to a full environmental assessment and this recommendation contradicted the position of the then Minister of Environment and Conservation. The Complainant states that the current request was for identical information, however, the information was treated differently and was redacted.

[21] The Complainant believes the Department is now using the *ATIPPA, 2015* to limit access to information. The Complainant believes the Department's decision does not conform with

the purpose of the *ATIPPA, 2015*, that includes the facilitation of democracy through ensuring that citizens have the information required to participate in the democratic process.

[22] The Complainant states that the EAC must make recommendations to the Minister indicating whether the EIS is deficient or whether or not undertakings may be released. The Complainant argues that although the recommendations of the committee likely became the subject of Cabinet deliberations, simply knowing the determination of the committee would not allow anyone to draw specific inferences about Cabinet discussions.

[23] The Complainant feels that disclosure of the withheld information is appropriate and warranted in this case.

#### IV DECISION

[24] Section 27(2)(b) of the *ATIPPA, 2015* states:

*27(2) The head of a public body shall refuse to disclose to an applicant*

*(a) a cabinet record; or*

*(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.*

[25] The *ATIPP Policy and Procedure Manual* states, in part, at page 79:

*The “substance of deliberations” test has been interpreted as protecting information the disclosure of which would allow a reader to draw accurate inferences about Cabinet deliberations. The head of a public body should consider how the information is labeled or characterized by government, what it purports to be or do, and what, in fact, it is or does. A description or heading attached to the document or information in question will not be determinative.*

[26] Report A-2008-008 contains a detailed review of an earlier version of the cabinet confidences provision and states the test to be used in determining whether information would reveal the substance of deliberations as follows:

*[62] The approach I have adopted from O’Connor will require the following procedure (as outlined by Saunders J.A. in paragraph 94 and quoted by my predecessor in paragraph 32 of Report 2005-004) to be used when*

determining if information is to be excepted from disclosure by section 18 of the ATIPPA:

[32] Saunders further elaborates on his approach as follows:

*Whenever an application for information is filed, the head of the public body, or the Review Officer, or a reviewing court, must examine the information to see if the test I have described, is satisfied. Among other questions, the examiner will want to know: how the information is labeled or characterized by government, what it purports to be or do, and what, in fact, it is or does. However, no government can hide behind labels. The description or heading attached to the document will not be determinative. The hyperbole accompanying speeches or press releases will not be decisive. There is no shortcut to inspecting the information for what it really is and then conducting the required analysis under s. 13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet deliberations. The Review Officer must always be wary of such traps before embarking upon the necessary inquiry.*

[63] To summarize, the test for determining whether information should be excepted from disclosure pursuant to section 18 because it would reveal the substance of deliberations of Cabinet can be stated as follows: Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exception. Furthermore, the phrase in section 18 which reads: “including advice, recommendations, policy consideration or draft legislation or regulations submitted or prepared for submission to the Cabinet,” is provided by the legislature as examples of the type of information that could reveal Cabinet confidences if the disclosure of such information would permit the reader to draw accurate inferences about Cabinet deliberations.

[27] Other jurisdictions have similar provisions. Section 12 of Ontario’s *Freedom of Information and Protection of Privacy Act* states: “A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including...” In order to meet the requirements of that section, the institution must provide sufficient evidence to establish the linkage between the content of the records and the substance of Cabinet deliberations, as described in Ontario Order PO-3844:

[12] *The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an*

*Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).*

*[13] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.*

*[14] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.*

[28] As stated in Report A-2008-008 this exception to access is intended to strike a balance between accountability and allowing the Cabinet to deliberate in private. In rejecting the BC interpretation, the Report states:

*[68] ... I believe that by not enacting a blanket exception for Cabinet documents our legislature has struck a balance between making all public bodies more accountable and allowing Cabinet to carry out its deliberations in confidence and in private. I have therefore interpreted the words of section 18 in the context of the purpose of the ATIPPA and my belief as to the balance that our legislature is attempting to achieve. If our legislature had intended that the exception in section 18 should be narrow and that Cabinet needed to operate with more secrecy, then it could have enacted a blanket provision excepting all Cabinet documents from disclosure. It did not. As such, it is my view that the legislature was, quite appropriately, mindful of the fact that more secrecy often leads to less accountability and less transparency.*

[29] Since the issuance of that Report, the *ATIPPA, 2015* was amended to include a blanket exception for all records that meet the definition of Cabinet Record, however the definition is not as broad as it was in the intervening Bill 29 period.

[30] Under section 27(2) of the *ATIPPA, 2015*, the definition of Cabinet Record is not at issue, because the Department's claim is that although the record is not a Cabinet Record as defined in 27(1), the information it withheld meets the "substance of deliberations" test set out in 27(2). In asserting its claim, the Department has provided sufficient information to allow this Office to understand how the Memorandum was developed and used.



[31] I am satisfied that while the Memorandum was prepared for the Minister, it also informed the content of the Cabinet submission. Based on the further explanations provided by the Department, I am satisfied that if the Memorandum is disclosed it would reveal the substance of deliberations of Cabinet. I am satisfied that the Department has provided enough linkage to establish that the Memorandum fits within the exception claimed and must be withheld. As the information in the PowerPoint slides contains the same information as in the Memorandum, they too must be withheld.

[32] Furthermore, the Department has confirmed that the Clerk of Executive Council reviewed the information under section 27(3) to determine if the information could be released notwithstanding that it would reveal the substance of deliberations due to a public interest in the disclosure of this information. The Clerk determined that the information is required to be withheld in accordance with section 27 and that the public interest does not outweigh the reason for the exception.

[33] As I have determined that the Memorandum and PowerPoint slides must be withheld under section 27(2)(b) I need not consider the Department's position that the records can also be withheld under section 29(1)(a) of the *ATIPPA, 2015*.

[34] The Department withheld a small amount of information in Annex E under section 29(1)(a). Section 29 of the *ATIPPA, 2015* states:

*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;*

[35] Through the informal resolution process, the Department agreed to release further information. I am satisfied that all remaining redactions in this area are properly withheld under section 29(1)(a) of the *ATPPA, 2015*.

## V CONCLUSIONS

[36] The Department applied the exceptions to the records in accordance with the *ATIPPA, 2015*.

## VI RECOMMENDATIONS

[37] I recommend that the Department continue to withhold the pages of the Memorandum and the PowerPoint slides already withheld. I also recommend the Department maintain the remaining redactions under section 29(1)(a) in Annex E.

[38] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department 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 within 10 business days of receiving this Report.

[39] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14<sup>th</sup> day of February, 2019.

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