OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-020

September 16, 2020

Intergovernmental and Indigenous Affairs Secretariat

Summary: The Intergovernmental and Indigenous Affairs Secretariat (IIAS) received an access request for records, referenced in a published document, which the requester believed would be in the custody of the IIAS. IIAS provided some records which it had determined were publicly available, stated that it did not have custody of some others, and refused to disclose the rest on the ground that disclosure would harm the business interests of the Third Party under section 39 of the *Access to Information and Protection of Privacy Act ("ATIPPA, 2015").* The Complainant filed a complaint with this Office, arguing that IIAS had not shown that the records were not publicly available, and that it was unlikely that the section 39 test could be met. The Commissioner found that while it could not be presumed that the withheld records were publicly available, IIAS had not provided sufficient evidence to meet the burden of proof under section 39. The Commissioner also concluded that IIAS should not be permitted to claim additional exceptions during this Office's investigation, and recommended that the records be disclosed. The Commissioner also recommended that IIAS review its access to information procedures.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, sections 39 and 17.

Authorities Relied On: NL OIPC Reports 2005-005, A-2017-013, A-2019-021; Guidelines for Responding to an Access Complaint; SK OIPC Report F-2006-002; PEI OIPC Order FI-17-011; AB OIPC Order F2010-036.

File #:0005-124-20-003

I BACKGROUND

[1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*" or "the *Act*") to the Intergovernmental and Indigenous Affairs Secretariat ("IIAS" or "the Secretariat") for 57 records which the Complainant believed were in the custody or control of IIAS.

[2] IIAS responded to the request by stating that 36 of them were not in the custody of IIAS; that IIAS had determined 5 others to be publicly available and therefore provided those records to the Complainant; and that the 16 remaining records were withheld from disclosure on the basis of section 39 of the *Act* (disclosure harmful to the business interests of a third party).

[3] The Complainant filed a complaint with our Office. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[4] IIAS states that it was aware that some of the requested records were publicly available, and therefore provided them to the Complainant. IIAS notes it is not denying access to any record based on section 22 of the *Act.*

[5] IIAS states that it was unable find any indication that the 16 withheld records were publicly available, and through consultation with the Third Party was able to confirm that they were, in fact, records commissioned by the Third Party.

[6] IIAS argues that the 16 records that were refused may be similar to articles that are published by academics, but notwithstanding any such similarity, the 16 records are more like privately commissioned consultants' reports, meant for the use of the person that commissioned the consultant. They are therefore the proprietary information of the third party that commissioned them.

[7] IIAS states that the records in question were provided to the former federal Department of Indian and Northern Affairs Canada ("INAC") in confidence. Some of those records were also supplied directly, in confidence, to the Government of Newfoundland and Labrador by the Third Party; others were acquired from a federal government agency.

[8] IIAS states that its departmental solicitor was consulted, and it was confirmed that the provincial government had received these records in confidence from the former federal Department of INAC.

[9] IIAS states that there is conflict between different organizations in land claim negotiations, as well as existing litigation. The Third Party has advised IIAS that all records should be withheld under section 39 of the *Act*, as the release of records would harm ongoing negotiations and litigation.

[10] IIAS argues that all three parts of the test in section 39 have been met. The records are the technical information of the Third Party. Second, the records were supplied directly or implicitly in confidence. Third, it is probable that disclosure could result in similar information not being supplied to the public body in future; that disclosure would harm significantly the negotiating position of the Third Party; that disclosure would result in undue financial loss to the Third Party or gain to others.

[11] IIAS also argues that it had the right to claim additional exceptions at the complaint stage, namely, sections 34 and 35.

III COMPLAINANT'S POSITION

[12] The Complainant argues that it appeared unlikely that section 39 would be applicable. In particular, section 39(1)(b) requires that the information was supplied implicitly or explicitly in confidence. However, the Complainant argues that the records requested are largely academic articles and other materials that would not typically be considered confidential. As such, the exception to disclosure in section 39 would not apply.

IV ISSUES

[13] During the course of our investigation and in review of the submissions received from IIAS, the following issues were identified:

1. Whether IIAS has provided sufficient evidence to support the claim that any or all of the withheld responsive records are not publicly available;

2. Whether IIAS has provided sufficient evidence to meet all three parts of the test required for the application of section 39 (disclosure harmful to the business interests of a third party) to the withheld responsive records;

3. Whether IIAS has the right to claim, at the complaint stage, additional exceptions to access that were not claimed in the final response to the Complainant;

4. Whether IIAS has provided sufficient evidence to support the application of section 35(1)(d) (premature disclosure of a proposal); section 35(1)(g) (prejudice to financial or economic interests of government); or section 35(1)(h) (injury to the ability of government to manage the economy);

5. Whether IIAS has provided sufficient evidence to support the application of section 34(1)(b) (reveal information received in confidence from a government).

V DECISION

[14] Some additional background information is required. The access request was made in the context of conflicts over land claims made to the federal government by different indigenous organizations, in which the government of the province has an interest.

[15] All of the records requested by the Complainant are among those listed in "Supplementary Records" toward the end of a main document submitted by one organization (which will be referred to throughout this Report as the "Third Party") to the former Department of Indian

and Northern Affairs Canada ("INAC"). The main document, which is a 700-page bound volume, was not only submitted to INAC, but was published and is available online, and also in various libraries in paper format. It appears that some Appendices to the document may not be available online but are available in the print version.

[16] The records requested by the Complainant, in their form and content, appear to be scholarly research reports, written by one or more authors, containing assessments of historical and demographic records that may relate to land claim issues. On review, the 16 withheld records, and some of the others, contain statements to the effect that they are the results of research commissioned by the Third Party.

Public Availability

[17] The records that are being withheld are very similar to the records that have been disclosed. They all appear to be research papers on Labrador history and demographics, and are referenced in footnotes to the main Third Party document. Their appearance gave rise to the submission, by the Complainant, questioning whether all of the requested records might be presumed to be public.

[18] IIAS has stated that while it has determined that some of the requested records are publicly available, it has found no evidence that the 16 withheld records fall into that category.

[19] IIAS also notes that it is not in fact refusing access to the records on the basis that they are publicly available, under section 22 of the *Act*. However, IIAS appears to have made a reasonable effort to determine this question.

[20] We recognize the difficulty of attempting to prove a negative statement. We conclude that the withheld records cannot be presumed to be publicly available based simply on their similarity to scholarly research papers. Therefore we must examine whether section 39 applies to the records.

Section 39 (Business Interests of a Third Party)

[21] Section 39 of the *Act* reads as follows:

> *39. (1) The head of a public body shall refuse to disclose to an applicant information*
> *(a) that would reveal*
> *(i) trade secrets of a third party, or*
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party;*
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
> *(c) the disclosure of which could reasonably be expected to*
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> *(iii) result in undue financial loss or gain to any person, or*
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[22] Section 39 is a mandatory exception to the right of access under *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied, and the public body or third party relying on the exception bears the burden of proof pursuant to section 43. Failure to meet any part of the test will result in disclosure of the requested records.

[23] Section 39 is most often claimed by a third party that has filed a complaint with this Office after receiving a notification, under section 19 of the *Act*, that the public body intends to disclose information of the third party. In the present case, IIAS consulted with the Third Party, but issued no section 19 notification because it did not intend to disclose the information.

Section 39(1)(a) – Technical Information of a Third Party

[24] The first issue is whether, under section 39(1)(a)(ii) the records are "technical information of a third party" as claimed by IIAS – first, whether it constitutes technical information, and secondly, whether a third party possesses a proprietary interest in the information. Included in the IIAS submission was a copy of a letter from the Third Party involved in this matter, stating

that the Third Party contracted with the writers for the reports that comprise the 16 withheld records, and that the records are the "technical information of" the Third Party.

[25] The phrase "technical information" is not defined in *ATIPPA, 2015.* However, Report F-2006-002 of the Saskatchewan OIPC, and reports from other jurisdictions cited on page 1 above, define technical information in similar legislative provisions in the following way:

> *Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in a field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in this section [Order P454].*

[26] A review of the disputed records leads us to the conclusion that they are studies in history and demographics, and do not fit into the category of technical information. Therefore, while the Third Party, having commissioned the research, may have a proprietary interest in the information contained in these records, they have not been shown to fit within a category of business information that the legislature has chosen to protect, and so the first part of the three part test has not been met.

[27] In many cases, where our Office has determined that one part of the three part test has not been met, there is no need to address any remaining part of the test, and it has been our practice not to do so. However, given the extent of the arguments put forward on all three parts of the test in this instance, we have decided to address them.

Section 39(1)(b) (Supplied in Confidence)

[28] The second issue is whether, as claimed by IIAS, the withheld records were "supplied in confidence" within the meaning of section 39(1)(b). The submissions of IIAS and the letter from the Third Party both state that these records were provided in confidence to the federal government in relation to land claim assessments, and to the province (IIAS) either directly in confidence, or indirectly and implicitly in confidence, for the same purpose.

[29] However, an assertion that something was provided in confidence is not always, by itself, determinative. There needs to be some evidence that, at the time a record was provided, it was considered by the provider or the recipient, or both, to be confidential. Alternatively, there needs to be some evidence of the context that would support a conclusion that the record was communicated with a reasonable expectation of confidence that it would not be disclosed (see, for example, Report A-2017-013).

[30] In the present case, we might reasonably conclude from the context that the purpose of submitting these documents to the federal government appears to be to persuade, not just the government, but the world at large, of the legitimacy of a claim. Certainly the fact that the main document was widely circulated and is available, online and in libraries, would appear to weigh against confidentiality.

[31] There is an additional aspect to the present case, where IIAS has submitted that the withheld records were supplied in confidence to the federal government, and were provided to the province by the federal government, not by the Third Party. Section 39(1)(b) requires that the information be supplied in confidence to the public body that has custody of it and to which the access request was made. To succeed, there must be some evidence that the information was supplied in confidence, not only to the federal government, but to IIAS.

[32] IIAS has written a lengthy response to this Office's specific request for evidence in support of the proposition that the records were supplied in confidence. In its response IIAS notes that the Third Party, in its letter to IIAS, states that the records were supplied to the federal government in confidence. However, that letter was not written at the time the records were provided. It was written only after the access request, in response to a query from IIAS about the applicability of the three part test. There is nothing in that letter to indicate the circumstances under which the records were provided to the federal government, or the conditions on which they might have been provided, to show that there was any stipulation of confidentiality when the records were initially supplied.

[33] IIAS states that the 16 withheld records were not supplied to IIAS by the Third Party. Rather, IIAS states that those records were acquired from IIAS's Justice Department solicitor,

who had in turn acquired them from the federal government. IIAS states that the federal government transferred the 16 records to the provincial Justice Department on condition that they be held in confidence. IIAS states that Justice in turn supplied the records to IIAS on the condition that they be held in confidence.

[34] The above statements, as plausible as they might seem, are not evidence. This is not an issue of truthfulness, or even of credibility. *ATIPPA, 2015* requires, in section 43, that the public body refusing access to a record bears the burden of proving that the applicant has no right to it. Otherwise, under section 8, the applicant has a right to the record. To meet the burden of proof, the public body must support its assertions with evidence of things that were actually observed, said or done. What IIAS has provided is not evidence, but argument. And argument alone is not sufficient to meet the burden of proof.

[35] Because IIAS has not met the burden of proving that section 39(1)(b) applies, the second part of the three-part test has not been met.

Section 39(1)(c) (Reasonable Expectation of Harm)

[36] The third part of the three-part test, under section 39(1)(c), requires that the claimant provide an assessment of the harm to be expected from the disclosure. Both the IIAS submissions and the Third Party letter referenced section 39(1)(c)(i) – that the disclosure could interfere significantly with the negotiating position of the Third Party. It is clear that the Third Party is actively involved in negotiations with the federal and provincial governments, and we understand the nature of this argument. However, the argument needs evidence to support it, answering the question: how, exactly, will disclosure of any or all of the content of each of the records be likely to harm the negotiating position of one party or assist the other?

[37] In its submissions IIAS has provided a lengthy analysis of the Third Party's interests, the background of conflicting claims and the possibility that competitors may be able to use the evidence supporting the Third Party's claim to diminish that claim and to advance their own claims and negotiating position. IIAS states that the records in question are that kind of

information, and that the Third Party has provided it only to the federal and provincial governments, not to its competitors.

[38] The difficulty with the argument put forward by IIAS is, again, not that it is not plausible, but that it is not supported by evidence. The idea that competitors may be able to use certain kinds of information to "harm significantly the competitive position or interfere significantly with the negotiating position" of a party is well understood. However, there must be at least some evidence that links the stated harm to the disclosure of the specific information at issue, and shows how that harm is foreseeable.

[39] IIAS has given examples of how the information in some of the withheld records may relate to the ongoing land claims involving the Third Party. However, IIAS has not explained how disclosure of that information would lead to harm. In particular, it is not clear how information that is used and put forward by one party, in support of its position, could subsequently be used by another party to undermine that position.

[40] IIAS has also argued that there could be financial harm to a party whose asserted rights have been diminished by disclosures, in that resource developers might be less likely to conclude favourable Impact and Benefits Agreements with that party. While this argument is not unreasonable, it assumes what must be proved, namely that the disclosure will somehow diminish the Third Party's rights.

[41] Both the IIAS submissions and the Third Party's e-mail also referenced section 39(1)(c)(ii) – that the disclosure will result in similar information no longer being supplied to the public body. As with the other provisions of section 39, evidence is needed to support the argument. It appears that these reports were commissioned, and provided to the federal and provincial governments, to provide evidence in support of the Third Party's land claim positions. It is not evident why it would not be in the Third Party's interests to continue to supply such information to the federal or provincial governments, in support of its claim, regardless of whether other parties might come to possess the same information.

[42] Overall, the evidence is lacking to support all three parts of the three-part test. Therefore the section 39 test has not been met, and the records cannot be withheld on that basis.

Claiming Additional Exceptions

[43] The long-standing position of our Office, going back to Report 2005-005 (Labrador and Aboriginal Affairs) is that it is normally inappropriate to claim additional exceptions at a late stage in the complaint process. The complaint received by this Office from an applicant is, necessarily, a complaint about the decision to refuse access made by the public body in its final response to the applicant's access request. Pursuant to section 17 of the *Act,* where access to any information is refused, the public body's final response must contain "...the reasons for the refusal and the provision of this *Act* on which the refusal is based." That decision, and the reasons for it, as claimed by the public body at the time of its response to the applicant, are what this Office is required to investigate.

[44] This is particularly so in the case where the refusal is based on discretionary exceptions to access. In the case of discretionary exceptions, as Report 2005-005 stated, it should be presumed, and an applicant is entitled to expect, that a final response from a public body to the applicant is the result of the consideration of all applicable exceptions:

> *Discretionary exceptions, on the other hand, provide a statutory "option" rather than an obligation. Even though a public body may not release the information, they have the option of exercising their discretion and releasing the material. In my opinion, if the public body did not invoke a specific discretionary exception in its original denial to the Applicant, it is reasonable to assume that they considered the exception, reviewed all relevant factors and decided that it was appropriate to release the information to the Applicant.*

[45] Another significant consideration here is that no effort was made to notify the applicant of the public body's subsequent decision to claim additional exceptions. Section 13 of the *Act* requires a public body to respond to an applicant without delay, in an open, accurate and complete manner. This means it has a duty to identify and consider all exceptions and to provide a complete response within the statutory time limits. The final response is what gives the applicant a right to file a complaint with this Office, or to seek relief from the courts, and *ATIPPA, 2015* requires that the final response be both accurate and complete. A failure to

identify and consider all applicable exceptions and notify the applicant of the exceptions claimed until late in the complaint process is therefore an interference with the applicant's rights.

[46] There may be occasions when, through exceptional circumstances, inexperience or inadvertence, a public body may be justified in claiming additional exceptions that were not set out in its final response to an applicant. At the very least, however, we would expect that this would be done in a reasonable time, and be fully communicated to the applicant as soon as possible. Our Guidelines for Responding to an Access Complaint state:

> *Normally, all exceptions claimed should be claimed at the time a response to the access request is provided to the Applicant. Should a Public Body wish to invoke any additional discretionary exceptions under the ATIPPA, 2015, it must inform the Applicant and this Office of its intention to do so within 10 business days of receipt of correspondence from this Office notifying the Public Body that the Applicant has filed a Complaint. Any discretionary exceptions claimed after this period will not be considered by this Office.*

[47] In the present case, it was long after the date that IIAS was notified of the complaint by our Office, that IIAS first advised that in addition to section 39, it intended to claim sections 34 and 35 in support of its decision to withhold the records. It appears that the Complainant was never notified of these additional exceptions. While a portion of the delay in responding to our Office is undoubtedly due to the Covid-19 restrictions that affected all government offices, the final response of IIAS to the access request was issued long before the Covid-19 restrictions took effect. There is no evidence, and no reason to suppose, that IIAS would have been unable to consider the section 34 and 35 exceptions, in addition to section 39, in its initial assessment and processing of the request, and claim those exceptions in its final response to the Complainant.

[48] Both sections 34 and 35 are discretionary exceptions. IIAS has not justified the claiming of these exceptions at such a late stage in the proceedings. Therefore it is our conclusion that those additional exceptions claimed by IIAS will not be considered.

The Obligation to Respond to Our Office

[49] Any failure by a public body to respond to requests or questions from our Office means further delays in providing to the Complainant information to which the Complainant has a right of access. Our Office had very little engagement from the Secretariat for several months during the course of this complaint investigation. While IIAS did provide this Office with substantial submissions in late June and in August, there was a complete failure to reply to our detailed and repeated requests for information in April, May and June. The Secretariat only provided our Office with the records and submissions when sent a formal requirement to produce under section 97 of the *Act*. It is true that Departments and agencies of government and other public bodies have had a difficult time during the past six months, as did our Office, maintaining minimal operational requirements because of the Covid-19 restrictions. However, even considering the pandemic restrictions, it took an unreasonably long time for IIAS to respond, to produce the requested records and background information and its submissions.

[50] A year ago this Office issued Report A-2019-021, which involved IIAS and commented at some length on the processes adopted by the Secretariat that resulted in unacceptable delays in responding to access requests. In that Report our Office recommended, in part, that IIAS:

> *2. review its access to information process in detail to determine the causes of delays, and implement measures to reduce or eliminate such delays, including (a) staff resources tasked with dealing with access to information requests, and (b) the length of time devoted to consultations;*
>
> *3. comply in future with the statutory duties imposed upon it by sections 13 and 16 of the Act, to respond to an applicant in an open, accurate and complete manner, without delay, and in any event within the statutory deadlines, including keeping the applicant informed, maintaining open communication throughout the process, and providing the applicant with the necessary information so they can exercise their rights under the Act, including the right to file a complaint regarding a deemed refusal*.

[51] In conclusion, we find that the evidence provided by the Secretariat falls short of what is needed to satisfy the burden of proof in section 39, and that the Secretariat is not entitled to claim additional discretionary exceptions to access. Therefore the requested records cannot be withheld from the Complainant.

VI RECOMMENDATIONS

[52] Under the authority of section 47 of *the Access to Information and Protection of Privacy Act, 2015*, I recommend that the Intergovernmental and Indigenous Affairs Secretariat:

1. disclose the withheld records to the Complainant;
2. review the findings in Report A-2019-021 and the recommendations made in it.

[53] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Intergovernmental and Indigenous Affairs Secretariat 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.

[54] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of September, 2020.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador