



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-025

October 22, 2020

House of Assembly

Summary:

The Complainant requested all notes and minutes taken during the meeting of October 23, 2018 of the House of Assembly Management Commission. The House of Assembly responded that minutes did not exist, and that notes were withheld under section 41 of the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) (disclosure of House of Assembly service and statutory office records). The Complainant filed a complaint with our Office. The Commissioner accepted the House of Assembly’s conclusion that minutes did not exist. The Commissioner also concluded that section 41 prohibited the disclosure of the notes, and recommended that the House of Assembly continue to withhold them.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, section 41.
[House of Assembly Accountability, Integrity and Administration Act](#), ss.19, 20, 21.1;

Authorities Relied On:

NL OIPC Guidance on [Policy Advice and Recommendations](#); OIPC Report [A-2019-010](#).
House of Assembly Management Commission [Policy and Procedures Manual](#).

I BACKGROUND

[1] The House of Assembly (“the House”) received an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) for

*...all notes and minutes taken during the meeting of October 24th, 2018 of the Management Commission and Bruce Chaulk, Commissioner of Legislative Standards.*¹

The House of Assembly responded that the information was withheld under section 41(b) of *ATIPPA, 2015*. The Complainant filed a complaint with this Office.

[2] 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

[3] The House states that because the meeting of October 23, 2018 was simply a technical briefing to the members of the House of Assembly Management Commission on the process followed by the Commissioner for Legislative Standards, and there was no discussion or decision, no minutes of the meeting were taken. Therefore, the requested minutes do not exist.

[4] The House also states that there were no handouts or, for example, a PowerPoint presentation, distributed at the meeting, and therefore such potentially responsive records do not exist.

[5] The House states that there are some personal notes that were taken by some members of the Management Commission attending the briefing. The House states that because those are not records that are “*required by law to be disclosed or placed in the minutes*” section 41(b) of *ATIPPA, 2015* requires that they be withheld.

¹ The meeting in question actually took place on October 23, 2018, and will be referred to as such throughout this Report. This discrepancy does not affect the processing of the access request or any of our findings.

III COMPLAINANT'S POSITION

- [6] The Complainant argues that the meeting was not a technical briefing but an *in camera* meeting, as stated publicly by other members of the House.
- [7] The Complainant also states that he is informed that, contrary to the assertions of the House, there was discussion of the report, and that his name was mentioned.
- [8] The Complainant states that if there are no minutes of the meeting, then that was contrary to the *House of Assembly Accountability, Integrity and Administration Act* (the “*Accountability Act*”), and this should be made public.
- [9] The Complainant also states that if the Speaker of the House or others are giving false information about the meeting, then that should be stated in our Report.

IV ISSUES

- [10] The issues to be determined in this Report are:
1. Whether there exist minutes of the meeting of October 23, 2018 or personal notes taken by individuals at that meeting;
 2. Whether any such minutes or personal notes are required to be withheld under section 41 of the *ATIPPA, 2015*;
 3. Whether any of the other issues raised by the Complainant are within our jurisdiction and necessary to decide.

V DECISION

- [11] The *Accountability Act* establishes the Management Commission as the body responsible for overseeing the financial and administrative policies and procedures of the House of Assembly and statutory offices. The Management Commission is a non-partisan body composed of members of the House of Assembly and the Clerk of the House, in accordance with section 18 of the *Accountability Act*.

[12] In section 19 the *Accountability Act* places great emphasis on accessibility, transparency and the recording of deliberations:

19. (1) *All proceedings of the commission excepting*

- (a) *personnel matters relating to officers and employees of the House of Assembly, political staff as defined in paragraph 2(1)(e) of the Conflict of Interest Act, 1995 and statutory offices;*
- (b) *legal matters, including actual or potential litigation;*
- (c) *matters protected by privacy and data protection laws; and*
- (d) *budget deliberations involving the preparation of the annual estimates of expenditure of the House of Assembly and the statutory offices*

shall be open to the public.

- (2) *Where a matter referred to in subsection (1) is raised, the speaker shall clear the public from the place of the meeting and the commission shall proceed to discuss the matter in private.*
- (3) *The commission shall adopt rules with respect to the circulation and preparation of agendas and briefing material to members of the commission and for the orderly conduct of business of the commission.*
- (4) *The substance of all decisions of the commission, including the decisions made following debate on matters in private referred to in subsection (1) shall be recorded and shall form a part of the public record.*
- (5) *A copy of the minutes containing the substance of all decisions of the commission made at each meeting shall, following approval by the commission at its next meeting, be*
 - (a) *tabled in the House of Assembly by the speaker no later than 5 days after that approval if the House of Assembly is sitting or, if it is not sitting, then not later than 5 days after it next sits;*
 - (b) *provided by the clerk to each member within 15 days of their approval by the commission; and*
 - (c) *placed by the clerk on a website maintained for the House of Assembly for inspection by the public.*
- (6) *All public meetings of the commission may be electronically accessed by the media in accordance with the methods and equipment existing in the House of Assembly.*

(7) *Recordings of the proceedings of the commission shall be made and transcribed by the Hansard office and the broadcast centre of the House of Assembly, in the same manner as are proceedings of the House of Assembly.*

[13] In section 21.1 the *Accountability Act* further establishes a duty to document “all advice, deliberations, decisions and recommendations of the Management Commission”:

21.1 The commission, officers and staff of the House of Assembly service shall be responsible and accountable for ensuring that all advice, deliberations, decisions and recommendations of the commission that result from formal or informal meetings of the members of the commission are properly documented in accordance with the Records Management Policy of the House of Assembly.

[14] In addition to the *Accountability Act*, and subordinate to it, there is a Management Commission Policy and Procedures Manual, which sets out in greater detail the policies and procedures which the Management Commission follows in carrying out its obligations under the *Accountability Act*.

[15] The Manual describes three kinds of gatherings of the Management Commission. There are regular meetings of the Commission, which are open to the public, are recorded, broadcast, and transcribed, and for which minutes, a transcript and briefing materials are subsequently posted on the House of Assembly website.

[16] There are also *in camera* meetings of the Management Commission, which are limited to certain subjects such as legal, personnel and other confidential matters in accordance with the exceptions in section 19(1)(a–d) of the *Accountability Act*. Such meetings are not open to the public, recorded, or transcribed, and there are no minutes, but the substance of any decisions taken by the Commission at such meetings must be recorded and reported at the next public (regular) meeting of the Commission. Briefing materials for *in camera* meetings are confidential and are not made available to the public.

[17] Third, there are technical briefings to the Management Commission, which the Manual describes as follows:

At the discretion of the Chair, technical briefings can be provided to the Commission in advance of a regular meeting to provide additional information that will assist members in deliberating and making a decision on a matter. Except for in camera issues (as identified in the Act), no discussion or decisions on the issue can take place at the technical briefing.

[18] From the evidence provided to this Office, we have confirmed the following facts. The Commissioner for Legislative Standards had, prior to the meeting of October 23, 2018, conducted an investigation into alleged misconduct of certain members of the House of Assembly, and following his investigation he had prepared a report, which in accordance with the Commissioner's statutory mandate was to be tabled in the House of Assembly.

[19] The Clerk of the House, in response to the request for records from the Coordinator, confirmed that there had been a request from some members of the Management Commission for a briefing on the processes followed by the Commissioner for Legislative Standards. The Clerk sent an e-mail to all members of the Management Commission, scheduling the meeting as a technical briefing. It should be noted that there was also a technical briefing for all other members of the House, scheduled for the following day. It is clear from these communications that the briefing was to be about process only, and that the Commissioner would not answer questions specific to the content of his report.

[20] We are satisfied that the meeting of October 23, 2018 with the Commissioner for Legislative Standards was called as a technical briefing, to give members of the Management Commission a better understanding of the processes followed by the Commissioner in his investigation, in advance of the tabling of his report. We are also satisfied that, in accordance with the Management Commission Policy and Procedures Manual, no discussion of the issues dealt with in the report took place, and no decisions of any kind were made. The House of Assembly states that for this reason, no minutes were taken.

[21] The Complainant argues that the *Accountability Act* requires that minutes be taken at all meetings of the Management Commission. However, what the *Accountability Act* explicitly requires, in section 19(1) is that "proceedings" of the Management Commission be open to the public; in section 19(5) that minutes of the "substance of decisions" be tabled and posted;

and in section 19(7) that audio recordings of “proceedings” be transcribed. In addition, the *Accountability Act* in section 21.1 requires that “all advice, deliberations, decisions and recommendations of the Management Commission” be documented. The Policy and Procedures Manual provides that minutes must be taken at regular meetings, and that a record must be kept of decisions made in *in camera* meetings. Neither the *Accountability Act* nor the Manual explicitly state whether there are to be minutes taken at a technical briefing, or whether a technical briefing is to be recorded.

[22] The term “proceeding” is not defined in the *Accountability Act*. The Oxford English Dictionary defines it as “an event or series of activities involving a set procedure” such as a court proceeding or other type of legal proceeding. In the present context the proceedings of the Management Commission are the formal activities or actions undertaken by that body in accordance with its statutory mandate and responsibilities.

[23] The term “deliberation” is also not defined in the *Accountability Act*, but the Oxford English Dictionary defines it as “long and careful consideration or discussion”. In the present context, the term refers to discussion or debate among the members of the Management Commission leading to decisions of the Commission.

[24] A reasonable interpretation of the *Accountability Act* and the Manual is that the technical briefing in question was not a “proceeding of the Commission” within the meaning of section 19 of that *Act*, nor a “meeting of the Commission” (whether regular or *in camera*) within the meaning of the Policy. Rather, it was a “briefing to the Management Commission” by the Commissioner for Legislative Standards. Our review of the documentation provided to us confirms that there were no decisions made by the Management Commission at the briefing, and that there was no “deliberation” within the meaning of section 21.1 of that *Act*, by the members of the Management Commission at the briefing, on any issue, whether dealt with in the Commissioner’s investigation or otherwise. Therefore neither the *Accountability Act* nor the Policy and Procedures Manual required that there be minutes taken or recordings made.

[25] The House of Assembly, in processing the Complainant’s access request, conducted a search for records and determined that there were no minutes. The response of the House of

Assembly to the Complainant, that no minutes of the meeting of October 23, 2018 exist, is a reasonable response.

[26] The House of Assembly conducted a search for other records relating to that meeting, and it found that there were no other materials, such as briefing notes or a PowerPoint presentation, provided by the Commissioner for Legislative Standards to the participants. We conclude that this was a reasonable search.

[27] However, the House of Assembly found that some members of the Management Commission present at the technical briefing did take some personal notes, and that those notes are records that are responsive to the Complainant's request. Those notes have been provided to our Office for review.

[28] The House of Assembly takes the position that the personal notes kept by individuals present at the meeting do not fall into the category of records that are "*required by law to be disclosed or placed in the minutes*" as described in section 41(b) of *ATIPPA, 2015*. Section 41 deals with records of the House of Assembly and statutory offices, and reads:

41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information

- (a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;*
- (b) that is advice or a recommendation given to the Speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; or*
- (c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.*

[29] Section 41(b) is a prohibition against the disclosure of advice or a recommendation given to the Management Commission. The only exception to that prohibition is for advice, or a recommendation, given to the Management Commission, that is "required by law" to be

disclosed or placed in the Commission minutes. As we have seen, requirements for the disclosure of certain kinds of information are contained in the *Accountability Act*, in sections 19 and 21.1, and these requirements are expanded upon in the Policy Manual.

[30] These are not records of deliberations of, or decisions of, the Management Commission. If they were, then the *Accountability Act* would require that they be disclosed. The evidence provided to our Office, however, indicates that although there may have been some discussion during the technical briefing, in the form of questions and answers, there were no deliberations or decisions. Furthermore, any discussion that took place was about the details of the process followed. It was not about the contents of the Commissioner's report. Therefore those records are not required by the *Accountability Act* to be disclosed.

[31] The argument of the House of Assembly is that the personal notes must be withheld because the advice provided by the Commissioner for Legislative Standards at the technical briefing does not fall into the category of information that must be disclosed. As that is the only exception to the mandatory prohibition in section 41(b) of the *ATIPA, 2015*, the House of Assembly argues that such information must be withheld.

[32] "Advice" or "recommendations" are terms that have a broad and detailed definition in the access to information legislation of this and other jurisdictions (see our Guidance on Advice and Recommendations and the cases referred to there). This Office's review of the personal notes in question shows that a portion of the contents falls into the category of "advice" given to the members of the Management Commission about the process used by the Commissioner of Legislative Standards. The remainder of the information in the notes consists of factual information.

[33] We agree that the information that consists of advice must be withheld under section 41(b). However, we have also concluded that some of the information in the notes does not consist of either advice or a recommendation, and therefore section 41(b) does not apply to it. The House of Assembly did not conduct a line by line review of the information to determine whether some information ought to be disclosed.

[34] The meeting of October 23, 2018 was a briefing to the Management Commission from a statutory office, the Commissioner for Legislative Standards, about an investigation conducted by that office. Although the notes in question were taken by members of the Management Commission, not by the Commissioner for Legislative Standards, they nevertheless are records that contain information “connected with the investigatory functions of that office” within the meaning of section 41(c). The information in the notes consists not only of a high-level overview of how the office of the Commissioner for Legislative Standards conducts investigations generally, but includes comments on the specifics of how this particular investigation was conducted. It therefore is closely tied to the Commissioner’s investigatory functions. Therefore the notes fall not only under section 41(b) but also under section 41(c).

[35] Unlike most exceptions to access in *ATIPPA, 2015*, section 41(c) does not except “information” from disclosure. Rather it is a record-level exception, which applies to exclude from disclosure the entire record to which it applies. As with the rest of section 41, section 41(c) applies to records in the custody or control of the statutory offices, and also to other public bodies – in the present case, the House of Assembly. Because it excepts the entire record from disclosure, no line by line review is necessary.

[36] The House of Assembly did not claim section 41(c) as a basis for withholding the notes. However, this Office has taken the position that we have a responsibility to ensure that information that is covered by a mandatory exception is appropriately withheld. Report A-2019-010 expressed this in the following way:

[10] Normally, a public body cannot introduce a new exception for disclosure after it has made its final response to the applicant. Where exceptions to disclosure are discretionary, the public body will be deemed to have already considered all possible exceptions and, if an exception has not been applied, to have elected not to apply it. However, the present issue is that of a mandatory exception to disclosure, which imparts on a public body a statutory obligation not to release a record. This Office shares the responsibility of ensuring that any information protected by a mandatory exception is appropriately withheld, whether or not the public body has invoked the exception at the time of its response to an applicant. Therefore, submissions regarding mandatory exceptions will always be considered throughout the course of our investigation.

For a further discussion of the differences between mandatory and discretionary exceptions, please see Report 2005-005.

[37] We note that if this had been a briefing by anyone other than a statutory office, section 41(c) would not apply, and the House of Assembly would only be able to withhold part of the record. In the present case we are satisfied that section 41(c) applies to all of the notes, and that it is appropriate that this mandatory exception to access be applied, even though the public body did not initially claim it. Our Office has consulted with the House of Assembly and obtained its agreement with this approach. We therefore find that the notes must be withheld in their entirety.

[38] The Complainant has raised a number of other arguments arising from statements that have been made by other individuals at different times. For example, the Complainant provided an e-mail to him from the Speaker of the House stating, among other things, that the meeting of the Management Commission was an “*in camera*” session. That statement, however, was made in a different context, and was not made to this Office as a considered response to our investigation. Although we have considered that evidence, it does not affect our conclusion that the meeting was not an *in camera* meeting, but was a technical briefing, nor our conclusion that the records in question may not be disclosed.

[39] The Complainant asserts that false statements about him were made during the course of the meeting of October 23, 2018, and that the Minister of Justice, in a subsequent media interview, has confirmed that those statements were made. However, it is not the role of this Office to determine whether such statements were made, except so far as that determination might be necessary to decide whether certain records exist, or should be disclosed. In the present case, our role is to determine whether the exceptions to access in section 41 of the *ATIPPA, 2015* apply to the responsive records. Whether or not statements were made about the Complainant in the meeting of October 23, 2018 does not affect our conclusion about whether the records should be disclosed.

[40] For the sake of completeness, we must also state that our conclusion that no minutes of the meeting of October 23, 2018 exist, neither supports nor contradicts the Complainant’s

assertion that minutes ought to have been kept. We have found that the explanation provided by the House of Assembly is a reasonable explanation of why no minutes were kept, and that is sufficient for our Office to conclude that a reasonable search for records has been conducted. However, it is not necessary, for the purposes of our investigation, to provide an authoritative interpretation of any provision of the *Accountability Act*, such as whether minutes ought to have been kept.

[41] In summary, it is the conclusion of this Office that no minutes of the meeting of October 23, 2018 exist, and that personal notes taken by individuals at the meeting do not fall into any category of records that are required by law to be disclosed, and therefore, under section 41 of the *ATIPPA, 2015*, they must be withheld.

VI RECOMMENDATIONS

[42] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the House of Assembly continue to withhold the personal notes taken by individuals in attendance at the meeting of the Management Commission of October 23, 2018.

[43] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the House of Assembly 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.

[44] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of October, 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador