



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-016

April 5, 2021

Department of Fisheries, Forestry and Agriculture

Summary:

An access to information request was submitted to the Department of Fisheries, Forestry and Agriculture, seeking access to correspondence between a company and the Department. The Department responded and provided partial access to the records, redacting some information under sections 29, 35(1)(d), and 40. The complainant objected to the redactions and asked that this Office review the redactions and consider whether section 9, the public interest override, should apply to the information. This Office upheld the Department's decision to withhold the majority of information under section 35(1)(d). However, we recommended that information redacted under sections 29, and 40 be released, as well as a portion of the information withheld under section 35(1)(d).

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, ss. 9, 29, 35, 40, 43.

Authorities Relied On:

NL OIPC Reports [A-2016-019](#), [A-2019-026](#).

Other Resources:

[Guidelines for Public Interest Override](#), OIPC, 2015.

I BACKGROUND

- [1] The Complainant submitted an access to information request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) to the Department of Fisheries, Forestry and Agriculture (the “Department”) seeking correspondence between a particular company and the Department. The Department responded providing partial access to the records and withholding some information under section 29 (policy advice and recommendations), section 35 (disclosure harmful to financial or economic interests of a public body), and section 40 (disclosure harmful to personal privacy). The Complainant then 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 Department provided a short initial submission, followed by two additional submissions which were requested by this Office. The positions of the Department will be expanded upon below.

III COMPLAINANT’S POSITION

- [4] The Complainant sought a review of the exceptions applied and argued that the information should be released in the public interest.

IV DECISION

- [5] As noted above, at issue is information redacted pursuant to sections 29, 35, and 40. Further, the Complainant has specifically raised the section 9 public interest override. This override is applicable to any redactions made under sections 29 or 35, but not any information which may be severed pursuant to section 40.

Section 35 – Premature Disclosure of a Proposal or Project

- [6] The information in question relates to a series of proposals from a company concerning a potential project. Most of the redacted information was withheld under section 35(1)(d) as information which, if disclosed, would prematurely reveal a project or proposal or result in undue financial gain or loss to any party. Broadly speaking, section 35(1)(d) appeared to be correctly applied to the records, with several exceptions. Our review of the records identified several passages which were redacted under section 35(1)(d) but contain information already publicly available about the proponent's existing business operations, or existing permits granted to the proponent, or simply do not disclose any specific information about any proposed project. With respect to these passages, we find that section 35(1)(d) does not apply.

Section 29 – Policy Advice and Recommendations

- [7] The Department made one redaction under section 29 (policy advice or recommendations). Upon our review, the information redacted did not appear to constitute policy advice or recommendations – it merely disclosed that the Department was interested in receiving information from the proponent. The Department was asked to provide additional information explaining the redaction. The Department's response did not convince us that the information was policy advice and we therefore find that the use of section 29 in this instance was not authorized.

Section 40 – Personal Privacy

- [8] The Department applied section 40 (disclosure harmful to personal privacy), to the email address and phone number of a member of the company's board of directors. As this Office noted in report A-2016-019, at paragraph 31:

For example, when information appears on a business card, on company or office letterhead, in a professional directory, or on a website, and whether it consists of the names of individuals, their business titles, their business addresses and phone numbers, or their business e-mail addresses, it is generally all considered business information, not personal information. This is so even where an individual operates a business from a home address, without separate business contact information. This kind of distinction is made not only in this province, but in all other Canadian jurisdictions.

[9] This was reiterated in report 2019-026, where a third party argued that personal contact information of past and present employees should be withheld under section 40 (see paragraph 10). However, this Office determined the information was considered to be business contact information and would not be an unreasonable invasion of privacy under section 40 and therefore recommended its disclosure. In the present matter, the email address is a corporate email address, not a personal account, and the phone number is provided in the board member's email signature. Accordingly, we do not find the use of Section 40 in these instances authorized.

Section 9 – Public Interest

[10] Having found that some of the information redacted under section 35(1)(d) does qualify as information which the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project, we must now consider whether, under section 9, the public interest in the disclosure of the information outweighs the reason for the exception.

[11] Section 9, known as the public interest override, is a provision which applies to most of the discretionary exceptions in *ATIPPA, 2015*, as specified in section 9(2). It provides that where the public interest in disclosure of information outweighs the reason for the exception, the exceptions enumerated at section 9(2) cannot apply. In all instances where a public body applies any of those exceptions subject to section 9, the public body must be able to demonstrate that it considered the public interest in disclosure and whether or not section 9 is applicable, regardless of whether the complainant has raised the issue. Notably, the initial submissions from the Department contained no mention of section 9.

[12] This Office asked the Department to provide an additional submission explaining why section 9 did not apply. These second submissions also did not contain sufficient information to confirm that the Department had fully considered the public interest in disclosure under section 9, and merely noted that the Department did not view the proposed project as posing a “risk of significant harm to the environment to the health or safety of the public or a group of people”, which quotes language from section 9(3), which was not at issue. The public interest considerations which the public body must consider related to the override in section

9(1), outlined in paragraph 15 below, are broader than the specific considerations in section 9(3). Section 9(3) is not an override to the exception in *ATIPPA, 2015* but instead regards the obligation of the head of a public body to proactively disclose information, whether within or without the context of an access request, when it is in this narrower conception of the public interest to do so.

[13] Upon reviewing the Department's submission and gathering background information, it appeared that some information responsive to the request was already publicly available. It also became clear that there were some factors weighing in favour of disclosure under section 9. The Department was provided with a list of concerns, and again asked to demonstrate to this Office why section 9 should not apply; as well as to respond to other concerns raised, including an explanation as to the application of section 35(1)(d), as much of the information appeared to be publicly available.

[14] The Department responded and indicated that previously released information was in relation to a different project. We were able to discern from the information in the responsive records that at least some elements did in fact represent a new project or proposal, separate and apart from what was already publicly available. While we accept that the majority of redactions made under section 35(1)(d) were appropriate, we found that some were not.

[15] Our guidance document "Guidelines for Public Interest Override" discusses the application of section 9 and sets out a number of factors to consider, both for and against release. Factors supporting release include public interest in transparency, public interest in the issue, public interest in the specific information, suspicion of wrongdoing by the public body, and presenting a full picture and aiding in public understanding. While not all of these were factors relevant to this request, most were. However, the Department addressed none of these in their submissions.

[16] The Department's submissions did outline the next steps if the proposed project were to move forward, including the environmental assessment process. Ultimately, we have determined that section 9 does not supersede the applied exceptions in this instance for the primary reason that the responsive records do not represent a formal proposal, and we are

satisfied that statutory review mechanisms which would satisfy public interest concerns will be triggered if and when these proposals are formally advanced.

V CONCLUSIONS

[17] Based on our review, we have concluded that section 35(1)(d) applies to some of the information, but not section 40 or section 29. Having reviewed section 9, and the Department's submissions with respect to the public interest override, we have concluded that public interest in the information does not outweigh the purpose for the exception.

[18] While we have determined that the public interest override does not apply, it is concerning that the Department seems to misunderstand section 9. After being asked twice to provide submissions demonstrating that the public interest in releasing did not outweigh the reason for the exception, the Department did not do so, even in its final submission. Instead, the Department only referenced section 9(3). Section 9(3) was never at issue in this request, nor was there any reason for it to be. Rather, submissions were sought regarding section 9(1), which states:

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

- (a) section 28 (local public body confidences);*
- (b) section 29 (policy advice or recommendations);*
- (c) subsection 30 (1) (legal advice);*
- (d) section 32 (confidential evaluations);*
- (e) section 34 (disclosure harmful to intergovernmental relations or negotiations);*
- (f) section 35 (disclosure harmful to the financial or economic interests of a public body);*
- (g) section 36 (disclosure harmful to conservation); and*
- (h) section 38 (disclosure harmful to labour relations interests of public body as employer).*

VI RECOMMENDATIONS

- [19] I recommend that the Department disclose all information redacted under section 29 and section 40, and to disclose some of the information redacted under section 35(1)(d). The information recommended for release is highlighted in an attachment to this report provided only to the Department.
- [20] I recommend the Department continue to withhold the remaining information in accordance with section 35(1)(d).
- [21] As set out in section 49(1)(b) of *ATIPPA, 2015*, the Head of the Department of Fisheries, Forestry, and Agriculture 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.
- [22] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of April 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador