OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-046

November 23, 2021

Department of Environment and Climate Change

Summary: The Department of Environment and Climate Change received an access request for written submissions that two Third Parties submitted to the province's Standing Fish Price Setting Panel following the release of one of the Panel's written decisions. The Department withheld the records in their entirety, citing sections 35(1)(d) (disclosure harmful to the financial or economic interests of a public body) and 39(1) (disclosure harmful to business interests of a third party). The Complainant made a complaint with this Office, requesting the release of the responsive records. The Commissioner found that the Department did not properly apply sections 35 or 39 and recommended the release of the records. Further, the Commissioner found that the Department did not conduct the required line-by-line review of the responsive records, and recommended that the Department conduct a line-by-line review of responsive records, as appropriate, in the future.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2, sections 7(2), 35(1)(d), 39(1), 40(1), 43(1), 44(4), 47, 49(1)(b) and Schedule A.

Fishing Industry Collective Bargaining Act, RSNL 1990, c F-18 19.2(d), and 19.9(1).

Authorities Relied On: NL OIPC Reports A-2017-013, A-2020-020, and A-2020-022.

Standing Fish Price-Setting Panel Rules and Procedures.

I BACKGROUND

[1] Per section 19.2(d) of the *Fishing Industry Collective Bargaining Act*, the Standing Fish Price Setting Panel (the "Panel") acts as an arbitration panel between fishers and processors (the "Parties") in setting fish prices in the event the Parties cannot reach a consensus on the price of a fish species through collective bargaining. Per section 19.9(1), this arbitration process is mandatory for the Parties in the event they are not able to reach an agreement within the legislative timelines.

[2] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*") to the Department of Environment and Climate Change (the "Department") for the written submissions of both Parties to one of the arbitration hearings that the Panel held.

[3] The Department withheld the written submissions in their entirety. The Department claims that the records fall under two exceptions per sections 35(1)(d) (disclosure harmful to the financial or economic interests of a public body) and 39 (disclosure harmful to business interests of a third party).

[4] During the informal resolution process, this Office recommended to the Department to consult with the Third Parties. The Department confirmed to this Office that it did advise the Third Parties of the Access Request and Complaint, but it has not provided us with any information about the positions of the Third Parties.

[5] 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

[6] Per section 35(1)(d), the Department claims that disclosing the responsive records would have a negative effect on both the Panel's arbitration process and the Parties' collective bargaining process on a go-forward basis. The Department states that there is an inherent

understanding by the Parties that the documents they provide to the Panel will be held in confidence, and that the absence of such an understanding would compromise the Panel's ability to carry out its mandate. The Department believes that if it allows anyone other than the Parties to have access to their financial and operational information,

> *… it would fundamentally subvert the ability of the parties to bargain in good faith with accurate information for fear of it being made public … The very instance of the requested information being released will most likely, on a go forward basis, alter the manner in which these parties not only negotiate but also submit proposals to the Panel*.

[7] Per section 39(1), the Department submits that the responsive records reveal

> *… commercial and financial information of a third party since it relates to buying and selling of merchandise. The records also contain labour relations information relating to the collective bargaining process between two parties*.

[8] The Department further states that there is an "*understood tenet in labour relations*" that the Panel will keep the Parties' submissions confidential. It also points out that the Rules and Procedures state that the Panel hearing is a closed forum.

[9] Finally, the Department submits that releasing the responsive records would cause harm by "*[exposing] the negotiation process, [impacting] their chances of being successful in arbitration hearing and [affecting] future negotiations*". The Department also points to section 39(1)(c)(iv) since the Third Parties prepared the records for the purposes of an arbitration panel:

> *39. (1) The head of a public body shall refuse to disclose to an applicant information*
>
> *…*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *…*
>
> *(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.*

III COMPLAINANT'S POSITION

[10] The Complainant believes that other individuals beside the Third Parties ought to have access to the written submissions.

[11] The Complainant raises a further point that the Panel's written decision, which is publicly available, references both Third Parties' written submissions.

IV ISSUES

[12] This Report will address the following issues:

(i) whether the Department properly withheld all responsive records under section 35(1)(d); and

(ii) whether the Department properly withheld all responsive records under section 39(1).

V DECISION

Section 35(1)(d) (Disclosure harmful to the financial or economic interests of a public body)

[13] The relevant portions of section 35 read as follows:

> *(1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*
>
> *(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party*

[14] This section considers two different harms: "*premature disclosure of a proposal or project*" or "*significant loss or gain to a third party*". If either of these harms are present, the exception applies and the information may be withheld.

[15] The first harm cannot apply to this situation since the Panel has already received the submissions and rendered a decision. Accordingly, this analysis will focus on whether

disclosure of the records could reasonably be expected to result in significant loss or gain to a third party.

[16] There are two main flaws with the Department's position that releasing the records could reasonably be expected to result in significant loss or gain to a third party. First, following the arbitration hearing in question, the Panel released its written decision, which is publicly available. This written decision revealed the substance of the Parties' respective positions that they put into their written submissions. In other words, the subject matter of their collective bargaining is already available to the public. Further, the majority of the Parties' written submissions focus on the merit of their respective arguments, and not on their bargaining tactics.

[17] Second, per section 19.9(1) of the *Fishing Industry Collective Bargaining Act*, the Panel's arbitration process is mandatory for the Parties in the event they are unable to reach an agreement within the legislative timelines. Accordingly, there is no risk that the Parties will not avail of arbitration before the Panel in the future if they do not reach an agreement as to the price of a fish species; it is a statutory requirement.

[18] Accordingly, the Department has not established that section 35(1)(d) applies to the records in question.

Section 39(1) (Disclosure harmful to business interests of a third party)

[19] *ATIPPA, 2015* sets out a three-part test in order for section 39(1) to apply. The relevant portions of the test are as follows:

> *39. (1) The head of a public body shall refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *...*
>
> *(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*;
>
> ...
>
> *(iv) the disclosure of which could reasonably be expected to 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.*

[20] If one of the three parts of this test fails, the entire test fails. In this instance, the Department has the burden of establishing that it meets all three parts of the test per section 43(1) of *ATTIPA, 2015*:

> *43(1) On an investigation of a complaint 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.*

[21] We accept the Department's position that the records contain commercial, financial, and labour relations information of the Third Parties. The Department has met the first part of the test.

[22] With regard to the second part of test, we accept that the Parties did supply these records to the Panel. However, the Department has not met its burden in establishing that the Parties supplied these records, implicitly or explicitly, in confidence. Its claim of an "*understood tenet in labour relations*" of confidentiality, as well as the fact that the Panel's Rules and Procedures call for a closed forum, is not sufficient to establish that the second part of this test has been met.

[23] First, per the Department's burden of proof, it must do more than claim an inherent understanding or an "*understood tenet*". It must substantiate its claim. The Department did not direct this Office to any statutory provisions, case law, or previous reports addressing this particular issue. This Office cannot accept that something is an inherent understanding without reviewing an application of such an understanding (see, for example, Reports A-2017-013, A-2020-020, and A-2020-022).

[24] Second, while the Panel's Rules and Procedures do confirm a closed forum for the hearing, this is not conclusive to determine that the Parties supplied their submissions implicitly in confidence. A closed forum does not equate to document privilege. Further, the Rules and Procedures are silent on any mention of confidentiality, whether before, during, or after the Panel's process.

[25] In fact, one of the Third Parties did make one reference to confidentiality in its written submissions. This Third Party appended a number of attachments to its submissions, but chose to withhold some information in two attachments. The Third Party stated that this was in relation to maintaining the confidentiality of an outside party with whom they conduct business. Accordingly, this Third Party did not supply information to the Panel that it felt the need to hold in confidence.

[26] Third, if the legislature thought that the Panel's process needed to be protected from disclosure then it would have included it in Schedule A of *ATIPPA, 2015*, per section 7(2):

> *7(2) … where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in Schedule A, that provision shall prevail over this Act or a regulation made under it.*

[27] Schedule A does not include any provisions from the *Fishing Industry Collective Bargaining Act*. The legislature has clearly turned its mind to what processes need full protection from disclosure, and included some but not others. Therefore, the standard exceptions in *ATIPPA, 2015* are the only ones that can be considered.

[28] Since the Department has not met the second part of the test, it is therefore unnecessary to consider the third part of the test. However, we will briefly address the Department's position regarding the third part of the test.

[29] With regard to section 39(1)(c)(i), we are not satisfied that the Department has established a reasonable expectation that any harm, much less significant harm, would come to the Parties if it did release the records. We again note that the Panel released a written decision that outlines the Parties' respective positions.

[30] With regard to section 39(1)(c)(iv), we do accept that these submissions reveal information supplied to an arbitrator. However, the Department did not apply this portion of the test in its final response to the Complainant. Further, this character of this dispute is more in relation to commerce than labour relations. Regardless, it is irrelevant since the second part of the test fails.

Line-By-Line Review

[31] While we are not satisfied that the Department has established that any parts of the records fall under sections 35(1)(d) or 39(1), we must comment on the difference between record-level exceptions and information-level exceptions as it relates to the Department's response to this access Request.

[32] As the text of these two exceptions state, sections 35 and 39 apply to "*information*". Certain other exceptions under *ATIPPA, 2015* reference "*records*" and allow public bodies to withhold an entire document if it contains qualifying information. Examples of record-level exceptions include section 27 (cabinet confidences) and section 41(c) (records connected with the investigatory function of a statutory office).

[33] The distinction between information-level and record-level exceptions to access is important, since the legislature clearly intended for public bodies to apply certain exceptions differently. Where an exception applies to "*information*", public bodies must conduct a line-by-line review of the records, and only sever information that qualifies for the exception.

[34] Accordingly, if the Department intends to claim any information-level exceptions to access in the future, it must conduct a line-by-line review of the relevant records.

Other Consideration – Section 40 (Disclosure harmful to personal privacy)

[35] The Department did not address the section 40 (disclosure harmful to personal privacy) exception. However, I would note that some attachments to one of the Party's submissions included email correspondence between the Party and outside associates. In some cases individuals' names are visible. Further to the above analysis, the Department has not established that they should withhold the attachments in their entirety. However, they may

choose to review these portions of the records for any personal information per section 40 and make a determination as to whether disclosure would constitute an unreasonable invasion of privacy.

VI RECOMMENDATIONS

[36] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Environment and Climate Change:

(i) release the records to the Complainant;

(ii) review its access to information policies and procedures, particularly with regard to information-level versus record-level redactions, and implement measures to ensure completion of a line-by-line review and redaction (if the latter is necessary) in the future; and

(iii) notwithstanding the recommendation to release the responsive records, review the records in detail and redact any personal information per section 40 where it determines that disclosure would amount to an unreasonable invasion of privacy.

[37] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Environment and Climate Change 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.

[38] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of November 2021.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador