OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-014

August 2, 2022

Department of Finance

Summary: Two Complainants made three access to information requests under the *Access to Information and Protection of Privacy Act, 2015*, to the Department of Finance for copies of the Rothschild & Co. report and associated correspondence. The Department declined to provide the records citing sections 27 (cabinet confidences), 29 (policy advice and recommendations), 35 (disclosure harmful to the financial or economic interests of a public body), 38 (disclosure harmful to labour relations interests of public body as employer), and 40 (disclosure harmful to personal privacy). The Complainants disagreed with this decision and made complaints to this Office. The Commissioner determined that the records fit the exception under section 27, and as such, the Department was correct in withholding the records in their entirety.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, sections 7, 27, 29, 35, 38, 40, 43, 44, and 97.

Authorities Relied On: NL OIPC Reports A-2022-010 and A-2022-011.

Other Resources: Government of Newfoundland and Labrador. (Dec 14, 2021) Provincial Government Engages Outside Firm to Undertake Review of Provincial Assets: Minister Coady Available to the Media.

Government of Newfoundland and Labrador. (April 2, 2022) Provincial Government Receives Review of Province's Asset Portfolio from Rothschild & Co.

0005-066-22-038/039/040

BACKGROUND

[1] On July 16, 2020, the Government of Newfoundland and Labrador issued a request for proposals ("RFP") seeking "Strategic Advisory Services for a Review of the Provincial Asset Portfolio". There were two contacts listed for the RFP, one of which was the Assistant Secretary to Cabinet. The RFP closed on August 19, 2021.

[2] On December 14, 2021, the Minister of Finance issued a press release notifying the public that the Government of Newfoundland and Labrador had retained the firm Rothschild & Co. to "provide the province with an independent, strategic review of all assets and consideration of potential opportunities. This will inform how government might optimize assets for the benefit of all Newfoundlanders and Labradorians*."*

[3] On April 4, 2022, the Department of Finance issued another press release indicating that the report had been received. It further noted that:

> *The contents of the report include a significant amount of commercially sensitive information. Consequently, it would be irresponsible for government to release the report. Commercially sensitive information can create value for third parties at the expense of Newfoundlanders and Labradorians. We would not want to harm the competitive or financial position of the province or diminish the potential value of this information by disclosing it to outside parties.*

[4] The Department of Finance received three related access to information requests from two different applicants under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*" or the "*Act*") for the following records:

a. A copy of the Rothschild & Co. report, and
b. Correspondence (email texts, letter etc.) between Department Officials and Rothschild & Co. for the period of March 4 to April 4 (inclusive)

[5] The Department refused to provide the requested records, citing sections 27 (cabinet confidences), 29 (policy advice and recommendations), 35 (disclosure harmful to the financial

or economic interests of a public body), 38 (disclosure harmful to labour relations interests of public body as employer), and 40 (disclosure harmful to personal privacy).

[6] The two Complainants did not agree with this assessment and filed complaints with this Office.

[7] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY'S POSITION

[8] The Department of Finance cited a number of exceptions under *ATIPPA, 2015* in its decision to withhold the records in their entirety (as noted above). It put particular emphasis on section 27, as this is a record-level exception due to the high level of confidentiality afforded to cabinet records and decisions of Cabinet and, if accepted, would operate to withhold the entirety of the responsive records.

COMPLAINANTS' POSITION

[9] Both Complainants in this matter argued that the public should have the right to review the records as the report had been commissioned by the Government of Newfoundland and Labrador and paid for with public funds. Additionally, as the report is a review of public assets and the potential future of those assets, the Complainants argue that the public interest in the report is very high and should weigh in favour of release.

ISSUES

[10] The issues to be addressed in this report include:

a. Has the Department appropriately applied section 27?
b. In the alternative, has the Department appropriately applied sections 29, 35, 38 and 40?

DECISION

[11] Prior to providing an assessment on the Department of Finance's application of the exceptions noted above, it is necessary to first address the Department's reluctance to provide the responsive records to this office for review during our investigation.

[12] Division 3 of *ATIPPA, 2015* governs access to information complaints and this Office's rights and responsibilities thereto. Section 44(2) requires the parties to a complaint to make representations to the Commissioner within 10 business days of receiving notification of a complaint. It was clearly stated in our letter notifying the Department of the complaints that its representations must include both a copy of any records provided to the applicant, and an unredacted copy of all records responsive to the requests.

[13] Section 97 of the *Act* specifically speaks to the powers of the Commissioner to compel the production of documents. In particular, section 97(3) grants the Commissioner power to require a public body to provide "any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information."

[14] The Department of Finance, in its initial submissions, purported to require that the investigator assigned to this matter attend at the Department's office to review the records in person and refused to provide a copy.

[15] In order for this Office to fulfill its statutory duties under *ATIPPA, 2015* it is essential that we are provided with the responsive records for review. Not being able to review the records, or only being able to review them in a limited capacity, greatly reduces this Office's ability to determine if the exceptions applied to any given record are appropriate. As noted in two of this Office's latest reports (A-2022-010 and A-2022-011) without the ability for this Office to review the records, it becomes extremely difficult to conclude that a public body has met its burden of proof under section 43 of the *Act.* If we are not satisfied that the public body has discharged its burden, our only option is to make a recommendation to release records, even if we have not seen the records.

[16] The Department did ultimately provide the records for our review, and in many situations we would not mention the matter in a report given that it had been resolved to our satisfaction; however, in the course of discussions, the Department made the argument that we did not need to see the record at all. This is a significant issue that needs to be addressed. The Department of Finance, in this case, provided a letter that it received from the Clerk of the Executive Council verifying that the report was developed as part of the cabinet decision-making process and was considered by Cabinet and formed the basis for deliberations. This was held, by the Department, to be sufficient for the Department to conclude that the section 27 exception applied and, moreover, was held to be sufficient for the OIPC to confirm the validity of the exception. It was also asserted by the Department that the letter meant that examination of the documents by this Office was not required. We disagreed with this in two respects.

[17] First, assurances alone are not sufficient for a public body to discharge its burden of proof. Section 43 of *ATIPPA, 2015* establishes that the burden of proof to demonstrate that an exception to access applies rests with the public body. When a public body refuses access to an applicant, it identifies the exception that applies when making that decision. In the case of a complaint, the contention that the exception applies is contested and subject to oversight by this Office. It is at this point that the burden applies. If, at this juncture, a simple repeat of the assurance is held to be sufficient, then the oversight role has no meaning.

[18] The means by which a public body must discharge its burden of proof related to the cabinet confidences exception was considered during the 2014 Statutory Review of the *ATIPPA* which was mandated to review the statute that had been notoriously amended by Bill 29 in 2012. The Committee discussed how Bill 29 had significantly broadened the cabinet confidences provision from the original *ATIPPA*. Originally, for the exception to apply, a test needed to be met to determine if a document revealed the "substance of deliberations" of Cabinet. This was the basis of a harms-based exception, and revealing the substance of deliberations was the harm against which the exception protected. Bill 29, however, transformed the exception from a harms-based exception into a class-based exception and provided a list of document types that were excepted. All that was required for the public body to establish that the exception applied was for the Clerk to certify that a document fit into one or the other of these

classes. The Bill 29 provision stated that the Clerk's certification was sufficient to meet the burden of proof and the Commissioner could not compel the documents in order to conduct a review. In its report, the Statutory Review Committee noted that, on this subject, the strongest complaints it received from stakeholders and the public focused on the Clerk's ability to certify records and the Commissioner's inability to review the documents. The Committee appreciated that the substance of deliberations test, which has been endlessly debated in Canada and elsewhere (though most commonly related to the court's ability to review documents) is not necessarily helpful, commenting that:

> *Having to apply a substance of deliberations test to every record in respect of which Cabinet confidence is claimed would be a waste of time and increase costs unnecessarily for all those records that are so obviously Cabinet confidences as to be beyond rational challenge. It may be a small list but certain types of records are so clearly Cabinet confidential that it is unnecessary to have endless arguments as to whether disclosure could reveal the substance of Cabinet deliberations or as to whether the public interest would be harmed by their disclosure. Subject to one proviso, listing such documents and exempting them from disclosure would save time and money, and contribute to a more efficient and user-friendly access regime.*

The Committee, however, immediately continued, in bold text: "**That one proviso is that the Commissioner would have the unrestricted right to have all records of Cabinet, bar none, produced, to verify that the exemption is valid.**" The Committee went on to provide legislative language as part of a draft Bill that it provided, which was ultimately enacted by the House of Assembly, unanimously.

[19] However, it may reasonably be asked what the purpose of the Commissioner's review of the document itself could be with a class-based approach, if not to apply some form of substance of deliberations test. One answer to this question is to confirm the *specific* exception applied. In the present instance, the Department claimed the exception in section 27(1)(h): "a record created during the process of developing or preparing a submission for Cabinet". However, if it were a different type of cabinet record, the implications for access could be significant. The document could instead be one that fits in the class described by 27(1)(d) "a discussion paper, policy analysis, proposal advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material".

The implication is that if this exception, rather than the former, applied to the record then the public body would be obliged to release the factual or background material. This was very clearly envisioned by the Statutory Review Committee, which wrote:

> *the factual material included in these records should not be accorded absolute protection from disclosure. Officials … acting in good faith, could express all the factual material in a separate section of the document that could be easily severed for release on request … Factual material should be protected from disclosure only if it is shown that disclosure would reveal the substance of Cabinet deliberations".*

For this reason, among others, there is an important role that the Commissioner's review of the record plays, underlining the importance of the provision of the document. As discussed in greater detail below, examination of the documents themselves was vital to the determination of whether the exception applied.

[20] This notion is inherent in the purpose of the *Act* in establishing an oversight body with the authority to compel records. If assurances were sufficient, then the assurance made by the public body to the complainant would be sufficient and repeated assurances to an oversight body would serve no purpose. Oftentimes, a complainant, not being able to see the records, simply wants to know that a trusted impartial and experienced party has reviewed the records and concurs with the application of the exception. This helps build trust in the system. I can hardly tell a complainant that I also believe the exception applies unless I have seen some evidence that it applies. If all I can offer is the same assurance which was made to the complainant was also made to me, that is hardly oversight. The assertion that reviewing the records is unnecessary, and that this Office should rely on assurances provided by public body officials, undermines the effectiveness and integrity of the oversight functions of this Office.

[21] Second, in the present case, the section 27 exception is the broad record level exception in question, i.e. the kind of exception that involves withholding the entire document. However, numerous other exceptions were claimed that were information-level exceptions, i.e. the kind of exception that involves a line-by-line examination and redaction only of the specific information to which the exception applies. It may have been the case that we ultimately concluded that section 27 did not apply and needed to do a detailed assessment on the

application of the numerous other exceptions that were claimed. That would require a detailed and lengthy analysis. The investigation process commonly involves examination of the records by the analyst leading the file, in the first instance, and then by the analyst's manager, sometimes by a director responsible for quality control, and also by the Commissioner himself. This would not have been feasible under the proposed arrangement by the Department.

[22] As mentioned, the Department ultimately did provide the records for our review at our offices, but the notion expressed during our discussions about this matter - that we did not need to see them at all - is why this commentary is warranted. This idea is one that has been a feature of government responses by other departments in recent months, as discussed in A-2022-010 and A-2022-011. In these instances, the Department of Justice and Public Safety and the Office of Women and Gender Equality, respectively, declined to provide records for our review where they had claimed the solicitor-client exception in section 30. While this Office's ability to compel the production of such documents was recently denied by the Supreme Court of Newfoundland and Labrador, and is presently subject to appeal, the public bodies not only did not provide them but also declined to provide any other form of evidence. Instead, they have maintained that assurances alone are sufficient to discharge the burden of proof. As above, the notion that assurances can discharge the burden of proof is an insidious idea that undermines the notion of oversight and the purpose of this Office as established in section 3 of *ATIPPA, 2015*. In those investigations, unlike the present one, we were unable to review the documents or any other evidence and were faced with no other options than to recommend release. We were alarmed to see this idea emerging in the context of this investigation, in relation to another exception, with a history of opaqueness going back to Bill 29. It is for this reason that I have commented on it at such length in this Report.

Section 27 – Cabinet Confidences

[23] The primary issue in this matter is the classification of the records as cabinet confidences under sections 27(1)(h) and 27(2)(a) of *ATIPPA, 2015*, which state:

> *27. (1) In this section, "cabinet record" means*
>
> *(h) a record created during the process of developing or preparing a submission for the Cabinet; and*
>
> *(2) The head of a public body shall refuse to disclose to an applicant*
>
> *(a) a cabinet record; or*

[24] The following evidence was provided in support of the classification of the records as cabinet records:

a. A note from the Clerk of the Executive Council with respect to their decision to not apply section 27(3) of *ATIPPA, 2015*, in which they express the opinion that the records are cabinet records and provide evidence of same;
b. A letter from the Clerk of the Executive Council confirming that the records had been placed on the cabinet agenda and discussed in cabinet, and
c. The RFP for this report, which listed the Assistant Secretary to Cabinet as one of two RFP contacts, which supports the assertion that the records had always been meant to be cabinet records.

[25] A review of the actual records also supports the assertion that the records are in fact cabinet records. The character of the records is such that only Cabinet would have the authority to make decisions based on the contents. Additionally, a confidentiality clause in the records suggests they were created for the purpose of high-level deliberations and recognized the sensitivity of the information contained therein.

[26] Therefore, the Department of Finance has appropriately classified the records as cabinet confidences and it is entitled to withhold them in their entirety, as section 27 is a record level

exception. Given that the records may be withheld in their entirety, it is not necessary to assess the other exceptions which have been claimed.

[27] The Complainants suggested that there was a public interest in the release of the documents. The cabinet confidences exception in section 27 contains its own public interest override that operates in two unique ways: first, it can be exercised only by the Clerk, even though she is not the head of the public body in question; and second, while the exercise of the section 9 public interest override which applies to discretionary exception is reviewable by this Office, to determine if has been "reasonably demonstrated" that the public interest in disclosure is greater than the reason for the exception, in the case of section 27 it is the Clerk alone who must be satisfied that this threshold has been met. In the present case, the Clerk provided to the Department an assurance that she had considered a number of topics related to the public interest. She did not provide detail on this consideration – but she does not need to. The Department provided this letter to us, and it is sufficient for us to conclude that the Clerk's responsibilities to consider the public interest override have been discharged and further comments on the application of the override from this Office are not required.

[28] However, I would like to make a comment about the public interest as it relates to this matter considering the term more broadly than the operation of the override in section 27. The media and social media discourse on this matter has revealed that the public has a great deal of interest in this report. This is not surprising, because the public policy consequences are very broad. This report was commissioned on the recommendation of the Premier's Economic Recovery Team ("PERT"). It is relevant to note that the PERT report was one that the public had visibility into: there were well-publicized engagements during the process and the report itself, with numerous high level policy implications, was released to the public. It is therefore not surprising that the Complainants, and many others in the province, would expect to also be able to see the present report, in particular because, as with the PERT and other recent examples such as the Premier's Task Force on Health Reform ("Health Accord NL"), it was publicly announced that Rothschild & Co. was engaged to do this work. If the public could see those reports, then why not this one?

[29] There is a significant difference between what is in the public's interest and what is of interest to the public. Although it is the Clerk's sole discretion to determine the section 27 application of the public interest override, my review of the document to understand its character led me to agree with her. Not only is the public interest in disclosure not sufficient to be greater than the harm against which the cabinet confidences exception applies, but release of this information – at the record level – would be harmful to the public interest in an absolute sense by disclosing information that is sensitive to the value of our publicly-owned assets.

[30] There remains, however, public interest in the consideration of the public policy choices that these documents put forward to Cabinet. The Westminster system of government, which involves open parliamentary debate on certain matters, and completely confidential debate on others, is designed to manage exactly such situations as these. The Premier and Minister of Finance have said that there will be a forum for open debate of these choices at the appropriate juncture. One way or another, many of the choices which will need to be made will be debated in the House of Assembly through the budget process and/or some other statutory process. There may also be other ways in which the government engages the public. The accountability for how the public is engaged in these questions will rest with the provincial government in the coming months and years. At this juncture, my role is to confirm that the records in question fall into the category of those for which it is appropriate to retain within the shroud of secrecy that the cabinet confidence – not just an exception in *ATIPPA, 2015* but also a constitutional convention – exists. My examination of the documents concludes that it does.

[31] All of this said, these nuances are complex. Even though it was obvious to me immediately upon looking at it that the character of the report was that of a cabinet document, this was not necessarily the case before I saw it. And the Complainants and members of the public have obviously not had the chance to review it to come to that conclusion. Moreover, the nuances of which kind of documents should be made public, and which not, are not necessarily intuitive to the public. The government may wish to make this clear from the outset when considering commissioning reports that are inevitably going to lead to confidential

cabinet decision-making, such as this one, rather than the kind that are designed from the outset to contribute to public discourse, such as the PERT report or Health Accord NL report.

RECOMMENDATIONS

[32] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Finance continue to withhold the records in their entirety.

[33] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Finance 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.

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of August 2022.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador