



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2022-016

August 29, 2022

Department of Education

Summary:

The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* to the Department of Education for a report outlining a process for the integration of the Newfoundland and Labrador English School District into the Department. The Department denied access to the report, on the ground that the report was a cabinet record within the meaning of section 27(1)(h) of the Act (cabinet confidences). The Complainant filed a complaint with this Office. The Commissioner concluded that the report is a cabinet record falling within the exception at section 27(1)(h), that the Clerk of the Executive Council has decided under section 27(3) that the public interest did not justify disclosure, and that, therefore, the Department was required to withhold the record.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, section 27.

Authorities Relied On:

NL OIPC Report [A-2022-014](#).

BACKGROUND

- [1] The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) to the Department of Education (the “*Department*”) for a report outlining a process for the integration of the Newfoundland and Labrador English School District (“*NLESD*”) into the Department. The Department denied access to the report, on the ground that the report was a cabinet record within the meaning of section 27(1) of the *Act*. 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*.

PUBLIC BODY’S POSITION

- [3] The Department, in response to the complaint, provided a submission giving background information and context for the report and documenting its reasons for concluding that the report is a cabinet record. We will refer to that submission as necessary in the “*Decision*” section, below.

DECISION

- [4] The sole issue for determination is whether or not the responsive record at issue is a “cabinet record” within the meaning of section 27(1) of the *Act* and must therefore be withheld.
- [5] The responsive record is a consultant’s report entitled *Report to the Minister on the Consolidation of the Newfoundland and Labrador English School District with the Department of Education* (the “*Report*”). The Department refused access on the ground that the Report is a cabinet record within the meaning of section 27(1)(h) which reads as follows:

27.(1) In this section, “cabinet record” means

...

(h) a record created during the process of developing or preparing a submission for the Cabinet;

...

[6] If the record is found to fall within the category described in section 27(1)(h) it must be withheld in its entirety, pursuant to section 27(2):

(2) *The head of a public body shall refuse to disclose to an applicant*

(a) *a cabinet record;*

[7] The Department, in its submissions to our Office in response to the complaint, states that:

The Minister of Education engaged consultants to do an analysis on the integration of the Newfoundland and Labrador English School District (NLESD) with the Department of Education. The report was used to inform a presentation to Cabinet regarding the transition of the NLESD under the Department of Education.

[8] The chronology of events supports this submission: the Government of Newfoundland and Labrador announced its decision to integrate the NLESD into the Department in the budget deliberations in May 2021 and the Report itself, delivered in September 2021, references that decision.

[9] The content of the Report also reflects this. It is not a report assessing whether the NLESD should be absorbed into the Department – that decision had already been made. Rather, the Report is an analysis of how the integration could be accomplished, with reference to goals, organizational structure, efficiencies and savings, and so on.

[10] Actions taken by the Government of Newfoundland and Labrador since the Report was drafted appear to be consistent with the recommendations in the Report. An amendment to the *Schools Act* dissolving the NLESD board of trustees was given Royal Assent on November 4, 2021. Interim trustees and a transition team were appointed in November 2021. The transition team completed its work of executive restructuring and a new integration team has taken over effective June 2022.

[11] While the Report deals with the steps to be taken to implement a decision that has already been taken by Cabinet, it is normal in this type of process for there to be multiple levels of Cabinet decision-making – first consideration of the broad policy decision, and then consideration of a number of steps required to implement that decision. Although we cannot, of course, describe the recommendations in the Report, we can confirm that while some of the detailed recommendations in the Report might be within the authority of the Minister, the major recommendations are matters that would require Cabinet approval.

[12] The Department has also provided our Office with documentation confirming that a presentation to Cabinet was subsequently made, which incorporated the contents of the Report.

[13] The Department has also provided our Office with documentation dated May 27, 2022 related to the present access request. It includes a form, signed by the Deputy Minister and sent to Cabinet Secretariat along with the responsive records, requesting that the Clerk of the Executive Council review the access request and the exercise of the public interest discretion under section 27(3). That provision reads:

(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

[14] It is a common practice for government departments and agencies, when considering the application of section 27 to a record, to consult with Cabinet Secretariat in this way. In the present case, we are informed by the Department that the Clerk of the Executive Council reviewed the information withheld in accordance with section 27 of the Act, agreed with the use of Section 27, and was satisfied that the information does not meet the test for disclosure under subsection 27(3) of the Act.

[15] All of the information we have before us is consistent with the explanation that the Report was commissioned for the purpose of, and was used in the creation of, a submission to

Cabinet. We therefore conclude that the Department has met the burden of proving that section 27(1)(h) applies to the record. As section 27 is a record-level exception, the Report must therefore be withheld in its entirety.

[16] The Department has also demonstrated that the Clerk of the Executive Council has exercised her discretion under section 27(3) to review the record and determine whether the public interest justifies its disclosure. The Clerk has concluded that the public interest does not justify disclosure, and our Office has no further role to play in that regard.

[17] We therefore conclude that the Department is required to continue to withhold the Report.

RECOMMENDATIONS

[18] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Education continue to withhold the record in its entirety.

[19] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Education must give written notice of his or her decision with respect to this recommendation to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of August 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador