



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2023-023

May 4, 2023

### Department of Environment and Climate Change

**Summary:**

The Complainant made an access to information request to the Department of Environment and Climate Change for records related to the appointment of two Vice-Chairpersons to the Labour Relations Board. The Department provided some records, but withheld most documents as cabinet confidences (section 27). The Complainant disagreed and filed a complaint with this Office, also alleging the Department failed in its duty to assist as required by section 13. After review of submissions from both parties, the Commissioner found the Department met its duty to assist and agreed with the Department's application of section 27.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, section 13, 27.

**Authorities Relied On:**

NL OIPC Report [A-2023-017](#).

## BACKGROUND

- [1] The Complainant made an access to information request to the Department of Environment and Climate Change (the “Department”) under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”) on December 5, 2022 for:

*All records pertaining to (i) the pending appointment of additional Vice-Chairperson positions at the Labour Relations Board of Newfoundland and Labrador (the intention to appoint them was stated by the Minister Responsible for Labour in April-May 2022) and (ii) the correspondence filed as COR-2022-338-4*

- [2] The Department responded by providing the Complainant with five pages of records, but withheld 19 pages entirely pursuant to section 27(1)(c) of *ATIPPA, 2015* (cabinet confidences). Dissatisfied with the Department’s decision to withhold records, and believing that the Department had failed in its duty to assist under section 13, the Complainant filed a complaint with this Office.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with Section 44(4).

## PUBLIC BODY’S POSITION

- [4] The Department states the records at issue are cabinet records and thus were properly withheld pursuant to Section 27.

## COMPLAINANT’S POSITION

- [5] It is the Complainant’s position that the Department did not conduct a reasonable search for the requested records and that it applied section 27 in an ‘indiscriminate’ manner.
- [6] The Complainant also states there is a public interest in having the records released and that this could justify their release under section 27(3).

## ISSUES

- [7] The issues to be addressed are as follows:
1. Did the Department correctly apply section 27 to the responsive records?
  2. Did the Department fulfill their duty to assist as required by section 13?

## DECISION

- [8] The relevant portions of *ATIPPA, 2015* are as follows:
- 13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*
- ...
- 27. (1) in this section, “cabinet record” means*
- (c) memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;*
- ...
- (h) a record created during the process of developing or preparing a submission for the Cabinet;*
- (2) The head of a public body shall refuse to disclose to an applicant*
- (a) cabinet record;*
- ...
- (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*

### Duty to Assist

- [9] A public body’s duty to conduct a reasonable search for records responsive to an access to information request is found in section 13 of *ATIPPA, 2015*, quoted above. As noted in our recent report [A-2023-017](#) (which discusses records which are also the subject matter of this report), the standard applied to a search is reasonableness, not perfection. In order for us to assess this, it is important for a public body to provide information on what steps it took in conducting its search.

[10] On March 15, 2022, the Department provided our Office with a timeline of events and steps taken in response to this request:

- *December 5, 2022 - Original Request came into the department.*
- *December 8, 2022 - Acknowledgement letter sent to applicant.*
- *December 8, 2022 - Request for records was sent out to all departmental directors and executive staff. They then place any responsive records into a secure folder on the share drive for me to go through.*
- *December 9, 2022 – Searches were conducted in our computer database system and on shared drives. These searches were conducted by myself as the ATIPP Coordinator.*
- *December 12, 2022 - Requested an extension for the request to the OIPC.*
- *December 30, 2022 - Sent a notice of extension letter to the applicant.*
- *January 16, 2023 - Sent Cabinet checklist to DM and was approved and sent to Cabinet Sec.*
- *January 19, 2023 - Cabinet sec approved the redactions.*
- *January 19, 2023 – Assistant Deputy Minister of Labour approved the ATIPP Request.*
- *January 23, 2023 – Sent to Deputy Minister for Approval*
- *February 1, 2023 – Got email from applicant regarding a countdown to the request due.*
- *(See Annex C)*
- *February 2, 2023 – DM approved the ATIPP Request.*

[11] After review of the above steps and of correspondence between the Complainant and the Department, our office is satisfied that the Department conducted a reasonable search in an “open, accurate and complete manner”, as required by section 13.

## **Section 27**

[12] Section 27 is a mandatory exception to access. However, section 27(3) gives the Clerk of the Executive Council discretion to release records where the public interest in the disclosure of the information outweighs the reason for the exception. In the present case, the Coordinator consulted with Executive Council while processing this request. After reviewing the records, the Clerk concluded that there was no public interest in disclosure and that it would not be appropriate to release them.

[13] As noted above, the Department located 24 pages of responsive records, the first five of which were released to the Complainant in full. At issue is the Department's decision to withhold pages 6 through 24. Pages 10-20 are records recently considered in our report [A-2023-017](#) in which we recommended the public body continue to withhold the pages as a record created for cabinet pursuant to section 27(1)(h). At paragraph 12 of [A-2023-017](#), our Office provided the following analysis of these pages:

*The record withheld pursuant to section 27 is a report prepared for the Minister regarding the recommendation of the two Vice-Chairpersons to the Labour Relations Board. If accepted, the report is submitted to Cabinet to make the appointment. This report clearly meets the definition of a cabinet record pursuant to section 27(1)(h) and must be withheld pursuant to section 27(2)(a) of ATIPPA, 2015. Section 27 is a mandatory exception to access which requires a public body to withhold a cabinet record, though section 27(3) does allow the Clerk of the Executive Council to release a record if it is in the public interest to do so. In the present case, IAC advises that Cabinet Secretariat was consulted when processing the access request and the Clerk of the Executive Council reviewed the records and determined that it would not be appropriate to release them.*

[14] In the complaint at hand, the Department withheld the aforementioned pages as a memorandum (subsection c) rather than as a record created for cabinet (subsection h) as was the case in [A-2023-017](#). Nonetheless, the pages meet the definition of 'cabinet record' under either subsection and our Office maintains they must be withheld.

[15] The remainder of the pages withheld by Executive Council have not been previously reviewed by this Office. Pages 6-9 were withheld as a cabinet record pursuant to section 27(1)(c). This record is a memorandum to the Executive Council by the Minister. This document's clear purpose is to make recommendations to cabinet and this document clearly qualifies as a cabinet record pursuant to section 27(1)(c) and was correctly withheld.

[16] Page 21 is an annex to the records reviewed in A-2023-017 and is properly withheld as a part of a cabinet record.

[17] Pages 22-24 of the responsive records consists of a "Communications Synopsis" which contains recommendations to cabinet regarding the communication of the matters under

consideration. In our view, this document clearly meets the definition of cabinet record as per section 27(1)(c).

## RECOMMENDATIONS

[18] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Environment and Climate Change maintain its position and continue to withhold the records pursuant to section 27.

[19] 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.

[20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4<sup>th</sup> day of May 2023.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador