June 27, 2005 **2005-004**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2005-004

Executive Council

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (*ATIPPA*) for access to records relating to polls conducted within a specified time frame. Executive Council withheld these records in their entirety, invoking section 18(1) (Cabinet confidences) of the *ATIPPA*. Executive Council claimed that the records in question containing a total of eight polls had been provided to Cabinet, and by virtue of this were protected from disclosure. The Commissioner found that Executive Council had interpreted section 18 too broadly, and recommended that the majority of the records be released, with the exception of some small portions which he felt could reveal the substance of Cabinet deliberations.

Statutes Cited: *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss. 3, 7, 18, 20, 64; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13.

Authorities Cited: Carey v. Ontario [1986] 2 S.C.R. 637; O'Connor v. Nova Scotia, 2001 NSSC 6; Aquasource Ltd. v. B.C. (Information and Privacy Commissioner), [1998] B.C.J. No. 1927; Jablonkski v. Manitoba (Minister of Justice) [1999] M.J. No. 348; R. v. Seters (1996) O.J. No. 5385 (Q.L.), 31 O.R. (3rd) 19 (Gen. Div.); Canada (Information Commissioner) v. Canada (Prime Minister), (1993) 1 F.C. 427, 1992 CarswellNat 185 (eC); O'Connor v. Nova Scotia, 2001 NSCA132; Newfoundland and Labrador OIPC Report 2005-002; Nova Scotia Review Officer Report F1-04-44; Saskatchewan OIPC Report 2004-005; Ontario OIPC Order PO-1726.

I BACKGROUND

[1] The Applicant submitted an access to information request to Executive Council, dated 18 January 2005, wherein he requested the following:

> *I am requesting a list of polls conducted by or on behalf of Executive Council between Nov. 6, 2003 and the present.*

[2] Executive Council, in correspondence dated 23 February 2005, provided the Applicant with a list of 12 polls, organized by date (month and year) and by the organization hired to conduct the poll. No other information was provided. In a supplementary request dated 24 February 2005, the Applicant advised Executive Council that he was requesting the list of polls identified by topic, and not pollster.

[3] Executive Council replied to this supplementary request in correspondence dated 10 March 2005, stating in part:

> *In our letter to you dated February 24, 2005 we advised access is denied to the* [*two*] *January, 2005 polls referencing Atlantic Accord. As you know, this matter is now under review by the Office of the Information and Privacy Commissioner.*
>
> *I am pleased to provide you with copies of the August 2004 and November 2004 polls conducted by Corporate Research Associates. However, access to information contained within the eight polls conducted between December, 2003 and August, 2004 has been refused in accordance with the following exceptions to disclosure, as specified in the Access to Information and Protection of Privacy Act (the Act):*
>
> > *18. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to Cabinet.*

[4] On 29 March 2005 Executive Council amended their March 10 correspondence to the Applicant. They acknowledged that one of the eight polls referenced in their earlier correspondence (February of 2004 by Corporate Research and Associates) had been incorrectly withheld. This

poll was subsequently released to the Applicant. However, they also identified an additional poll, conducted in February of 2004 by Ryan Research and Communication, and indicated that this poll was also being withheld under section 18(1).

[5] At issue in this review, therefore, are the eight polls denied on the basis of section 18(1). The two Atlantic Accord polls (which were combined into one research report) were dealt with in our Report 2005-002, while the other three polls were fully disclosed to the Applicant. The aforementioned eight polls that were withheld were identified by date and pollster:

1. December, 2003 Ryan Research & Communications
2. January, 2004 Ryan Research & Communications
3. February, 2004 Ryan Research & Communications
4. April, 2004 Ryan Research & Communications
5. April 23, 2004 Ryan Research & Communications
6. April 27, 2004 Ryan Research & Communications
7. June, 2004 Ryan Research & Communications
8. August, 2004 Ryan Research & Communications

[6] On 15 March the Applicant filed a Request for Review with this Office, under the *Access to Information and Protection of Privacy Act* (*ATIPPA*). The Applicant asked me to recommend to Executive Council that the responsive records be released in their entirety. Executive Council was notified of this Request for Review in correspondence dated 15 March 2005, and was asked to provide the appropriate documentation and a complete copy of the responsive records for our review. An unsevered copy of the records was received at this Office on 29 March 2005. I should note that even though the Applicant was originally seeking a list of polls, both parties agreed that the content of the polls was at issue and proceeded on that basis.

[7] Attempts to resolve this Request for Review by informal means were unsuccessful and on 12 April 2005 the Applicant and Executive Council were notified that the file had been referred to the formal investigation process. In response, both parties provided written submissions in support of their respective positions.

II EXECUTIVE COUNCIL SUBMISSION

[8] On 19 April 2005 Executive Council submitted correspondence in support of its decision to withhold the records in question. Executive Council takes the position that "for eight of the polls in question, section 18(1) has been cited. In each case, the polling information was provided to Cabinet and therefore the polls are Cabinet documents," and "to release the polls in question would be inconsistent with the relevant mandatory section of the legislation pertaining to Cabinet records."

[9] Furthermore, Executive Council states:

> *The concern we have in releasing this polling information, given that they are Cabinet records, is that we would be making a decision to release current Cabinet records (less than 20 years old) in the face of the statutory direction that they be withheld subject only to the stated exceptions, longevity and fact-specific appeals under an Act. […] In our view, release of these documents would clearly be inconsistent with the Act, which is in accordance with the principle of Cabinet confidentiality, and the release of such Cabinet records was clearly not the intent of Government when this Act was proclaimed.*

[10] As such, Executive Council has interpreted section 18 as being a rule requiring the non-disclosure of all Cabinet records unless there is a specific exception to this rule, as can be found only in section 18(2).

III APPLICANT'S SUBMISSION

[11] The Applicant submits that public opinion polls are different than other types of records associated with the Cabinet process:

> *There is a difference between records which would reveal the deliberations of cabinet – i.e. advice given to ministers or the minutes of meetings – and records which are purely informational or statistical in nature, and which therefore should be released.*

[12] The Applicant also references section 20(2)(b) of the *ATIPPA* by claiming that this section specifically excludes public opinion polls from being withheld:

> *20. (2) The head of a public body shall not refuse to disclose under subsection (1)*
>
> *(b) a public opinion poll;*

[13] In further support of his claim, the Applicant indicates that other jurisdictions have similar laws requiring the release of "statistical surveys." By way of example, he references section 13(2)(b) in Ontario's equivalent legislation.

IV DISCUSSION

[14] Section 3 of the *ATIPPA* sets forth the purposes of the *Act*:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
>
> *(c) specifying limited exceptions to the right of access;*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[15] Section 7 establishes a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions:

> *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[16] Section 18 is a mandatory exception. If a record is deemed to fall within this exception, a public body is required to withhold the relevant record or sever it from a document to be released:

> 18. *(1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet.*
>
> *(2) Subsection (1) does not apply to*
>
> *(a) information in a record that has been in existence for 20 years or more; or*
>
> *(b) information in a record of a decision made by Cabinet on an appeal under an Act.*

[17] In accordance with section 64(1) the burden of proof rests with the public body:

> *64. (1) On a review of or appeal 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.*

[18] Section 18(2) establishes two situations where information is deemed not to be protected by section 18(1). Neither of these situations applies to the records at issue in this report. The question to be answered, therefore, is whether or not the information, or portions of the information, would reveal the substance of deliberations of Cabinet. If the answer is yes then the public body must not disclose that information. If the answer is no the Applicant is entitled to the information.

[19] It has been observed by La Forest, J in *Carey v. Ontario [1986] 2 S.C.R. 637* at paragraph 79 that the Ontario equivalent of the *ATIPPA* section 18, as with the other exceptions in the *ATIPPA*, is essentially grounded in protection of the public interest. In particular, he states that:

> *Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important.*

[20] La Forest, J confirms my view that section 18 of the *ATIPPA* is not meant to act as a "blanket" exception for all Cabinet records. On the one hand, it must be acknowledged that Cabinet secrecy is an important and essential element of parliamentary democracy, but on the other hand this secrecy should be extended only as far as is necessary to protect the ability of Cabinet to deliberate confidentially on sensitive matters. If the disclosure of a record (or part of a record) would not reveal the substance of Cabinet deliberations, then section 18 cannot be applied.

[21] For the purpose of this review, then, it is essential to begin with the key language of section 18(1), which is "substance of deliberations." As Chief Justice McDonald asked in *O'Connor v. Nova Scotia, 2001 NSSC 6* [upheld on appeal to the NSCA], "while … it is safe to presume that Cabinet's actual deliberations are confidential, does the reference to 'substance' broaden or limit that which is to be protected?" McDonald reviews two approaches to this question, one being found in *Aquasource Ltd. v. B.C. (Information and Privacy Commissioner), [1998] B.C.J. No. 1927*, in which the public body argued in reference to a record it wished to withhold: "it is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberations [,] because it would permit the drawing of accurate inferences with respect to the deliberations." Donald, J.A. stated that he agreed with this characterization and applied it.

[22] The other, more recent, perspective is outlined by McDonald himself in *O'Connor* in which he says "on the other hand, 'substance' could refer to Cabinet's actual deliberation process. In other

words, only that information touching on the actual deliberations would be protected. This view would significantly limit the s. 13(1) exception in favour of more Government disclosure." McDonald says at paragraph 24 that "a distinction must be made between advice (which is protected) and mere factual information (which must be disclosed)." In stating this, McDonald follows Clearwater, J. in *Jablonski v. Manitoba (Minister of Justice) [1999] M.J. No. 348* who notes with reference to a similar "advice and recommendations" exemption that "the purpose of this exemption is [to] promote open and candid discussion and advice internally within the government with respect to the deliberative and decision-making process." I would tend to agree, and also conclude that records which form background information should be released, if the release of such records could not reasonably be expected to harm the promotion of open and candid discussion and advice internally within the government with respect to the deliberative and decision-making process.

[23] In *O'Connor* at paragraph 26, MacDonald, J. says that "advice is part of the deliberation process. It deserves s. 13(1) protection. The facts upon which the advice is based need not be protected." Guided by this perspective, and in the context of section 3(1)(c) of the *ATIPPA*, exceptions to access of Cabinet records must be limited to information that would reveal the substance of deliberations of Cabinet. Cabinet records which do not reveal the substance of deliberations must therefore be released.

[24] I believe that it would be valuable at this point to briefly discuss the nature of public opinion polls in general. It is worth considering whether disclosure of a set of public opinion polls would, in fact, "reveal the substance of deliberations" of Cabinet. As I put forth in my Report 2005-002, "public opinion polls, by their very nature, involve a certain level of public involvement. A series of standardized questions are disclosed to a significant number of randomly chosen members of the public." I should also quote once more the Nova Scotia Review Officer, from his report F1-04-44, dated 2 November 2004:

> *I disagree with the PSC that questions posed by the polling company contain sensitive information that should not be disclosed. The questions are already in the public domain. They are known to at least the approximately 500 people who the PSC says were polled. In a much different matter, but in the*

> *same vein, in R. v. Van Seters, the judge held that a tape viewed by everyone in a court room was now in the public domain [R. v. Seters (1996) O.J. No. 5385 (Q.L.), 31 O.R. (3rd) 19 (Gen. Div.)]. These questions have been read by many more people than would fill a court room. In my view there can be no reason under the Act to deny them to the Applicant or to anyone else.*

It is arguable, based on the above comments, that the polling questions themselves are already in the public domain, and have thus already been "revealed."

[25] Section 20(2)(b) of the *ATIPPA* specifically excludes public opinion polls from the following exception:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> > *(a) advice or recommendations developed by or for a public body or a minister, or*
> >
> > *(b) draft legislation or regulations.*

Although this provision only appears in section 20 and not in section 18, I believe that the legislators, in approving section 20(2)(b), acknowledged and accepted the public nature of such polls. Even though this point is not directly related to the issue of determining whether a disclosure would reveal the substance of deliberations of Cabinet, nevertheless such an acknowledgement lends support to the release of this type of information in a more general sense. Consequently, I do not accept Executive Council's submission that release of this type of information "…was clearly not the intent of Government when this Act was proclaimed."

[26] I should also note, as I did in my Report 2005-002, the position of the Privacy Commissioner of Saskatchewan, as indicated in his report 2004-005, dated September 2004, in which he said:

> *I am encouraged that the Saskatchewan government routinely produces reports on public opinion surveys undertaken with public resources. The fact that this information becomes publicly accessible without the necessity of an access request under the Act is very positive from the perspective of greater transparency.*

[27] In a further point on polls, Rothstein, J. in *Canada (Information Commissioner) v. Canada (Prime Minister) (1993) 1 F.C. 427* ordered the release of public opinion polls which were commissioned by the federal government in relation to national unity and constitutional reform, at a time when national unity was considered to be facing a significant test. The federal government had relied on section 14 of the federal access legislation, under which it was alleged that the disclosure of the polls "could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs," including "strategy or tactics to be adopted by the Government." In paragraphs 143 & 144 of his decision, Rothstein, J. noted that "Mr. Gagnier [who supported the government's position], in cross examination, admitted that the confidential record did not contain strategic or tactical information and that the inferences that others might draw from the information about the Government strategy would be inconclusive." Rothstein added, "without reference to the information itself and an explanation of how release of specific pages or questions would disclose, directly or indirectly, Government strategy, or otherwise harm the Government, I cannot conclude that the evidence on this point is anything more than speculative."

[28] Is a poll "advice or recommendations," or is it background information? This issue was discussed by Ontario Commissioner Tom Michenson in order PO-1726, in which a requester sought access from the Minister of Education and Training to "any polls, focus groups or other opinion research conducted by the government in the last year on education-related issues, plus the cost." Some records were released, but eight records consisting of focus group results submitted by three polling firms were withheld. In defending its decision to sever the eight focus group records, the Ministry explained:

> *It is standard practice in the consulting profession to conduct focus groups as a means of gathering research on a project. A focus group is used as a tool of 'market analysis.' Focus groups are not intended to be ends in themselves, but rather are indicators of the public's opinion on a certain issue. When a company or the government hires a consultant to conduct a focus group, the purpose is to obtain advice or recommendations that can be used to streamline, modify, create or revamp policy.*

The Ministry further submitted that:

> *It is the Ministry's position that the consultant's records on the focus groups reveal, on their face, advice or recommendations to the government pursuant to section 13(1) of the Act. They represent more than mere reportage. But in the alternative, the Ministry also relies on the IPC's ruling that a record may be exempt if it would reveal advice or recommendations by inference, even though it is not itself advisory in nature (Orders P-233, M-280). Either on their face or by inference, the records at issue indeed, reveal advice or recommendations by consultants retained by the government for their expertise and skill. Certainly, in the public sector, expressed feelings of the public on a specific issue (on which a great deal of policy work has already taken place) has a direct and meaningful impact on the formulation and direction of the government's policy.*

The requester in PO-1726 replied as follows:

> *… My experience is that polling companies offer, not advice, but analysis and interpretation of their work that simply makes it easier to understand. Still, I acknowledge that it's possible the reports prepared by the polling companies contain advice or recommendations that stem out of the results of that research. This part of the report may fall under the exception.*
>
> *However, the actual data from the polling, and the actual responses of the focus group members cited in the reports are, I submit, a completely different matter.*
>
> *That information is simply the neutral outcome of methodically, perhaps, scientifically, conducted research. It is a measure, whether accurate or not, or public opinion. As countless pundits have commented over the decades, polls, focus groups and other opinion research can be interpreted in any number of ways, depending on the biases of those doing the interpretation. The raw data remains just that – an attempt at representing the facts, without the subjective analysis. Therefore, it can't be exempted.*

[29] In PO-1726, Michinson determined that:

> *Having reviewed the eight records, as well as the other 16 records disclosed to the appellant, I find that, with certain exceptions which I will discuss below, these eight records do not contain advice or recommendations as those terms are used in section 13(1), and most of the contents of these records do not qualify for exemption.*

> *It is obvious that members of the public are not public servants, employees or consultants retained by the Ministry. Input to the government by members of the public on issues canvassed by the focus group session, although arguably helpful in the formulation of government policy, does not constitute advice or recommendations for the purpose of section 13(1).*
>
> *The eight focus group reports are essentially factual in nature, and most of their content does not contain or reveal 'a suggested course of action which will ultimately be accepted or rejected during the deliberative process'. The Ministry has disclosed other focus group reports in their entirety, and I do not accept that this type or record, simply by its very nature, qualifies for exemption under section 13(1). I also find that the value-added work of a polling firm in summarizing, analyzing and interpreting the results of focus group sessions would not constitute advice or recommendations. In order to fall within the scope of section 13(1), in my view, the consultant would have to take the further step of applying that analysis in the form of actual advice, recommendations or suggested courses of action to be taken by the client Ministry.*
>
> (emphasis mine)

[30] Michinson concludes his analysis of the records in relation to Ontario's section 13(1) by explaining that some portions of the records should be severed. These portions are found under headings such as "strategic conclusions," "recommendations," "suggested course of action," "summary," or "conclusions." The parts of the records in these sections which he supports severing are those parts of the records which "…outline the consultant's suggested specific course of action and proposed changes to the Ministry's communications and advertising strategy."

[31] Saunders, J.A. of the Nova Scotia Court of Appeal, in *O'Connor v. Nova Scotia, 2001 NSCA 132*, sets out what he feels is an appropriate test when determining whether a record would reveal the substance of deliberations of Cabinet. He notes that the court in *Aquasource* proposed the question: "Does the information sought to be disclosed form the basis of Cabinet deliberations?" (underlining his). Saunders says in paragraph 92 that "to put the question in that way would, in practical terms, be very difficult to answer, or ever prove." For this reason, Saunders sets a new test, as follows:

> *Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption …*

[32] Saunders further elaborates on his approach as follows:

> *Whenever an application for information is filed, the head of the public body, or the Review Officer, or a reviewing court, must examine the information to see if the test I have described, is satisfied. Among other questions, the examiner will want to know: how the information is labeled or characterized by government, what it purports to be or do, and what, in fact, it is or does. However, no government can hide behind labels. The description or heading attached to the document will not be determinative. The hyperbole accompanying speeches or press releases will not be decisive. There is no shortcut to inspecting the information for what it really is and then conducting the required analysis under s. 13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet deliberations. The Review Officer must always be wary of such traps before embarking upon the necessary inquiry.*

V CONCLUSION

[33] The idea that one might use polling results such as these to accurately infer the subject of Cabinet deliberations is highly questionable. It is impossible for me to know whether Cabinet discussed any of these polling results in any detail, or whether they were influenced by the results. This is not to say that at no time and under no circumstances could a poll, or information within a polling document, reveal the substance of Cabinet deliberations. I must therefore point out that this report is written solely with reference to these particular records. Any future Requests for Review filed with this Office in relation to Cabinet records will be considered on their own merits. Indeed, I don't hesitate in commenting that the majority of Cabinet records would likely be included in the exempt status.

[34] In this instance, at best, one might be able to speculate as to the subject of Cabinet deliberations, but the substance of those deliberations would be known only within the confines of the Cabinet and staff who would normally be privy to such material. In the case of the polls at issue, I have reviewed the documents carefully, and I do not believe that the vast majority of the information

would meet the test set out by Saunders, namely, that the material, if released, would likely permit the reader to draw accurate inferences about Cabinet deliberations." For this reason, I believe the majority of the information in the records at issue, with exceptions noted below, should be released to the applicant.

[35] Some sections are justifiably subject to severance. The December 2003 poll, as well as the January, February, April, April 23, April 27 polls each contain a section entitled "recommendations." These sections should be severed, as they involve advice and recommendations to government, and these should be withheld. Neither the June 2004 poll nor the August 2004 poll contain sections entitled "recommendations." The August 2004 poll should be released in its entirety. There are a few sentences within the body of the June 2004 poll analysis which I believe constitute advice or recommendations, and these sentences should be severed. I will include a copy of these recommended severances along with a copy of this report to Executive Council.

[36] Quite simply, section 18 of the *ATIPPA* cannot be treated as a "blanket" exception to disclosure. It specifically states that only those items which would reveal the substance of deliberations of Cabinet can be severed from the record, and it gives examples of what such items might be, such as advice and recommendations. Section 18 is worded similarly to other comparable sections in access legislation across Canada, and case law generally does not support the broader interpretation that all Cabinet records are protected from disclosure on principle.

[37] Just because a given record is appended to a Cabinet document, does not mean that disclosure of that document would reveal the substance of deliberations of Cabinet. It is clear that Executive Council has taken the position that section 18 is a "blanket" exception because no evidence was presented in its April 19, 2005 submission of any line-by-line analysis to determine whether the polls would reveal the substance of deliberations. In fact, Executive Council appears to have simply applied the 20 year rule specified in section 18(2). This 20 year rule, however, applies to Cabinet documents that *would* reveal the substance of deliberations, and is not meant to create a blanket exception for *all* records associated with the Cabinet process. If the information does not meet the substance of deliberations test the fact that the records are less than 20 years old is

irrelevant. Even information about the sample size of the survey and the margin of error in each survey is being withheld. In my view, even the most casual observer would be forced to disagree, which leads me to conclude that this exception has been misinterpreted and misapplied by Executive Council.

VI RECOMMENDATIONS

[38] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that Executive Council provide the Applicant with a copy of the responsive polls, with the exception of those portions I have indicated above as being appropriate for severance. I have indicated the foregoing in a copy of the records which I am forwarding to Executive Council with this report.

[39] Under authority of section 50 of the *ATIPPA*, I direct the head of Executive Council to respond to these recommendations within 15 days after receiving this report.

[40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27th day of June, 2005.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador