NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2006-011

Town of Stephenville

Summary: The Applicant applied to the Town of Stephenville (the "Town") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to an environmental report completed in response to major flooding in the Town that occurred in September of 2005. The Town denied access to the report citing sections 20 (policy advice or recommendations) and 24 (disclosure harmful to the financial or economic interest of a public body) of the *ATIPPA*. The Town also denied access to two sections of the report entitled "Recommendations" and "Costing," claiming that the Applicant had previously been given a copy of these sections. The Commissioner concluded that neither of the exceptions applied and recommended that the report be disclosed, with the exception of Appendix D. Although not claimed by the Town, Appendix D contains considerable personal information and the Commissioner recommended that it not be disclosed. The Commissioner also agreed that the Town need not provide those sections already released to the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(o), 3, 13, 20(1), 24(1), 30(1), 47, 49(1), 50, 60, 64(1); *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165, s. 17(1); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13(1); *Access to Information Act*, R.S. 1985, c. A-1, ss. 2, 20(1); *Privacy Act*, R.S. 1985, c. P-21, s. 22(1)(b)

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-002 (2005) and 2005-005 (2005); Alberta OIPC Order 97-007 (1997); Ontario OIPC Order PO-2028 (2002); *Canada Packers Inc. v. Canada (Minister of Agriculture)*, (1988) 53 D.L.R. (4th) 246, 1988 CarswellNat 667 (F.C.A) (eC); *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, 2002 CarswellNat 1357 (eC); British Columbia OIPC Order 02-50 (2002)

Other Resources Cited:

Access to Information and Protection of Privacy Act Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf

I BACKGROUND

[1] The Applicant submitted an access to information request to the Town of Stephenville (the "Town"), dated 15 March 2006, wherein he requested access to the following:

> *Copy of the environmental report that was done in the fall of 2005 for the Town of Stephenville in the flood area.*

[2] In correspondence dated 11 April 2006 the Town informed the Applicant that the record being requested was a draft document entitled "Petroleum Contaminated Soil Investigation" (hereinafter referred to as the "report" or the "responsive record") and was prepared to develop advice and recommendations for the Town. The Town advised the Applicant that access to the record was being denied in accordance with sections 20(1) and 24(1)(d) of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA"*). Notwithstanding its claim that the report was in draft form and would not be released, the Town acknowledged that two sections of the report, entitled "Recommendations" and "Costing," had previously been released to the Applicant. As such, the Town refused to provide these specific sections in accordance with section 13 of the *ATIPPA.*

[3] The Applicant filed a Request for Review with this Office on 21 April 2006, asking that I review the decision of the Town to refuse access to the responsive record. The Town was notified of this Request for Review in correspondence dated 21 April 2006, and was asked to provide the appropriate documentation and a complete copy of the responsive record for my review. An unsevered copy of the record was received at this Office on 9 May 2006.

[4] Attempts to resolve this Request for Review by informal means were unsuccessful. On 18 May 2006 the Applicant and the Town were notified that the file had been referred to the formal investigation process and they were each given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. The Applicant provided a written submission in support of his position. The Town did not provide a written submission in response to our letter of 18 May 2006. I acknowledge, however, that the Town had earlier

provided additional information for my consideration in response to the initial letter of notification sent by this Office on 21 April 2006.

[5] During the course of this investigation the Town released to the Applicant the "Conclusions" section of the report, in addition to the previously released sections.

II APPLICANT'S SUBMISSION

[6] The Applicant maintains that during a general meeting in the fall of 2005 with the residents of the Stephenville flood area, a representative of the Emergency Measures Organization indicated that an environmental report would be completed and it would be available to the public. In December of 2005 the residents were told that all studies were completed. However, the Applicant has indicated that after several requests to various provincial and municipal officials he has been unable to secure a copy of the report. The Applicant does confirm that he was given "…excerpts from the environmental study identifying several hydrocarbon spills and costing for clean up." The Applicant also argues that an official with the Town informed him that there was nothing in the report to be concerned with, yet still refused to release a copy.

[7] The Applicant expresses concern over the potential adverse health effects of any contamination caused by the flooding. He believes there is a risk that these contaminants will not be removed, thereby creating future health risks. As such, the Applicant feels that he has a right to the information contained in the report.

III DISCUSSION

[8] I would first note that section 64(1) of the *ATIPPA* places the burden clearly in the hands of the public body in proving that the Applicant has no right to any record being withheld:

> *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.*

[9] For ease of reference I have divided the discussion into the following four sections:

- Policy Advice or Recommendations (Section 20)
- Harm to Financial or Economic Interests of a Public Body (Section 24)
- Personal Information (Section 30)
- Repetitive or Incomprehensible Request (Section 13)

Policy Advice or Recommendations (Section 20)

[10] Section 20(1) is a discretionary exception which allows a public body to withhold policy advice or recommendations:

> *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.*

[11] In claiming section 20(1) the Town is relying on its assertion that the responsive record is a draft report. The Town maintains that the report is preliminary and identifies the need for a more in-depth assessment and further testing. As such, the report was meant to provide recommendations for further analysis and in that regard was not definitive.

[12] Relying on the ordinary meaning of the term "draft" in this context, one would conclude that a final version is still forthcoming. Labeling a document as a draft clearly means that it has not yet become final, in anticipation of possible revisions and/or approval by an individual or group of individuals. I take issue with the assertion that the record in this case is a draft report. Of particular interest is the fact that the cover page of the document clearly identifies it as a "Final Report…" I simply do not accept that a document expressly identified as a final report is in fact a draft report. In addition, there is no reference whatsoever within the material that this is a draft document. The fact that a report may identify the need for further studies and additional testing

does not render that report a draft. It simply concludes that more analysis is necessary, which in turn may lead to another report. There is no indication that the initial report will be amended in any way as a result of future analyses and reporting.

[13] I would also note, however, that even if I had determined that the record was a draft document it would not have invited the protection of section 20(1) based solely on that fact. I acknowledge that draft legislation and regulations are specifically protected by section 20(1)(b), but the responsive record does not fit within this category of records. When determining the applicability of section 20(1)(a), I would look to the definition of the term "advice or recommendations." I dealt extensively with this issue in my Report 2005-005:

> *20 The application of section 20(1) turns in part on the definition of "advice" and "recommendations." Given that neither of these terms is defined in the ATIPPA, I have relied on the definitions used by Information and Privacy Commissioners in other jurisdictions and supported by the Courts. In his Order 97-007, dealing with ministerial briefing notes, the Information and Privacy Commissioner for Alberta stated that "Advice must contain more than mere factual information, and must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. A factual summary of events, without more, is not sufficient."*
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> *21 The Office of the Information and Privacy Commissioner for Ontario has also dealt extensively with the definition of advice and recommendations. In Order PO-2028, ordering the Ministry of Northern Development and Mines to release information under the headings of "Potential Issues" and "Funding Options," the Assistant Commissioner stated:*
>
> > *In previous orders, this office has found that the words 'advice' and 'recommendations' have similar meanings, and that in order to qualify as 'advice or recommendations' in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993].*
>
> *22 Section 13(1) of Ontario's Freedom of Information and Protection of Privacy Act is, in all material respects, equivalent to section 20(1) of Newfoundland and Labrador's ATIPPA. Ontario's Assistant Commissioner went on to state:*

> *To summarize, the Ministry's position that 'advice' should be broadly defined to include 'information, notification, cautions, or views where these relate to a government decision-making process' flies in the face of a long line of jurisprudence from this office defining the term 'advice and recommendations' that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.*
>
> *A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word 'advice' in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice.* ***It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.***
>
> *(Emphasis added)*

[14] I do not believe that the majority of information contained in the responsive record would constitute advice or recommendations as anticipated by section 20(1) of the *ATIPPA.* I would consider this information to be factual, background and analytical in nature and, as such, it does not invite the protection of section 20(1). I acknowledge that the responsive record does contain information that could be considered advice and recommendations, but I note that all of this information is contained in the section entitled "Recommendations." This section of the report was released to the Applicant in December of 2005. I find it ironic that the Town has released the Recommendations section of the report, together with the Conclusions and the Costing, yet is now withholding the remainder of the report based on it being advice or recommendations. While I am encouraged by the Town's earlier decision to release this information, I must question their logic in withholding all other sections of the report.

Harm to Financial or Economic Interests of a Public Body (Section 24)

[15] Section 24(1) is a discretionary exception which establishes a reasonable expectation of harm to the financial or economic interests of a public body. The Town has specifically referenced section 24(1)(d):

> *24.* (1) *The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:*
>
> > *(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party; ...*

[16] The application of section 24(1) relies on a reasonable expectation of harm test. I have discussed this issue in previous reports and have concluded that any claim of harm under access to information legislation must meet a test of probability. The mere possibility of harm does not meet the test anticipated by the legislation and, as such, does not invite the protection of the legislation. In my Report 2005-002 I established that this concept has been clearly supported by the Courts:

> 21 *As such, I must first look to the test of harm and determine if any or all of the records would lead to harm as anticipated by sections 23(1) and 24(1) and as articulated by Executive Council. The Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture), (1988) 53 D.L.R. (4th) 246, 1988 CarswellNat 667 (F.C.A) (eC) at paragraphs 19 and 20, has said:*
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> > *19 What governs, I believe, in each of the three alternatives in paras. (c) and (d) is not the final verb ("result in", "prejudice" or "interfere with") but the initial verb, which is the same in each case, viz.* ***"could reasonably be expected to."*** *This implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not. It is tempting to analogize this phrasing to the reasonable foreseeability test in tort, although of course its application is not premised on the existence of a tort.*
> >
> > *20 However, I believe the temptation to carry through the tort analogy should be resisted, particularly if Wagon Mound (No. 2), supra, is thought of as opening the door to liability for the mere possibility of foreseeable damage, as opposed to its probability. The words-in-total-context approach to statutory interpretation which this Court has followed in Lor-Wes Contracting Ltd. v. R. (1985), [1986] 1 F.C. 346, 85 D.T.C. 5310, [1985] 2 C.T.C. 79, (sub nom. Lor-Wes Contracting Ltd. v. Minister of National Revenue) 60 N.R. 321, and Cashin v. Cdn. Broadcasting Corp. (1988), 86 N.R. 24, 88 C.L.L.C. 17, 019 (Fed. C.A.) requires that we view the statutory language in*

> *these paragraphs in their total context, which must here mean particularly in light of the purpose of the Act as set out in section 2.* ***Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that government information should be available to the public and that exceptions to the public's right of access should be "limited and specific." With such a mandate, I believe one must interpret the exceptions to access in paras. (c) and (d) to require a reasonable expectation of probable harm.***
>
> (*Emphasis added)*

[17] The Information and Privacy Commissioner of British Columbia has spoken extensively on the use of a reasonable expectation of harm test. In Order 02-50 he adopted the conclusion of the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, 2002 CarswellNat 1357. At paragraph 58 Gonthier J. stated that "[t]here must be a clear and direct connection between the disclosure of specific information and the injury that is alleged." While the Supreme Court of Canada reached this conclusion in the *Lavigne* case in the context of section 22(1)(b) of the federal *Privacy Act*, I believe it is quite pertinent to the case at hand and is an appropriate standard to apply when determining whether or not a reasonable expectation of harm exists in the context of an exception under the *ATIPPA.*

[18] In dealing specifically with the potential harm to the financial or economic interests of a public body, the British Columbia Commissioner in his Order 02-50 referenced a number of Court cases, including *Canada Packers Inc.* On reviewing the pertinent case law he summarized as follows:

> *137 Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the*

> *contemplated harm to be reasonably expected to result from disclosure of the information.…There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.*

Section 17(1) of British Columbia's *Freedom of Information and Protection of Privacy Act* is, in all material respects, equivalent to section 24(1) of the *ATIPPA*.

[19] In light of the burden of proof mandated by section 64 of the *ATIPPA*, and the extensive body of case law, it is the responsibility of the Town to clearly show a reasonable expectation of probable harm through the presentation of detailed and convincing evidence. The *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice, also supports this concept. In describing section 24(1) of the *ATIPPA*, this Manual, on page 4-21, states:

> *The fact that information belongs to one of the categories listed in paragraphs 24(1)(a) to (e) is not sufficient in itself to establish that it meets the harms test set out in subsection 24(1). Although there is a presumption that the disclosure of information in these categories would harm the financial or economic interests of a public body,* ***the head of the public body must have detailed and convincing evidence of harm in order to apply the exception****.*
>
> (Emphasis added)

[20] With all due respect, the Town has provided virtually no evidence to support their claim of harm, let alone detailed and convincing evidence. The Town has made a brief reference to ongoing negotiations and has argued that releasing the report would be premature and inconclusive. Such statements, in the absence of any supporting evidence, are at best speculative. After thoroughly reviewing the material before me I cannot conclude that the release of the responsive record would in any way lead to a reasonable expectation of harm, as anticipated by section 24(1) in general or section 24(1)(d) in particular. As previously indicated, the Town has already released the conclusions and the recommendations of the report. I fail to see how the details leading to these conclusion and recommendations would harm the financial or economic interests of the Town, while the conclusions and recommendations themselves would not.

[21] In releasing the conclusions and recommendations of the report to the Applicant, the Town has revealed the presence of petroleum hydrocarbon contaminated soil in specific geographical locations within the municipality of Stephenville. They have also revealed that further testing and analysis has been recommended. While the Town may be sensitive to the damage created by the flooding and its effect on the residents of Stephenville, including potential compensation, I do not believe that such sensitivity constitutes a reasonable expectation of financial or economic harm. I do believe that the Town is genuinely interested in protecting its economic interests, and rightly so, but I simply do not accept that their concern warrants the withholding of this particular report.

Personal Information (Section 30)

[22] Section 30(1) of the *ATIPPA* is a mandatory exception that protects personal information:

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

[23] Personal information is defined in section 2(o):

> *2. In this Act*
>
> *(o) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, address or telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*

> *(vi) information about the individual's health care status or history, including a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, criminal or employment status or history,*
>
> *(viii) the opinions of a person about the individual, and*
>
> *(ix) the individual's personal views or opinions;*

[24] I note that a portion of the responsive record, identified as Appendix D, contains a significant amount of personal information, including names, addresses and telephone numbers. While the Town did not claim section 30(1), I believe that the mandatory nature of this exception compels me to recommend that Appendix D be severed in its entirety from the responsive record before it is released to the Applicant.

Repetitive or Incomprehensible Request (Section 13)

[25] Section 13 of the *ATIPPA* allows a public body to refuse access to a record that has been previously provided to an applicant:

> *13. The head of a public body may refuse to disclose a record or part of a record where the request is repetitive or incomprehensible or is for information already provided to the applicant.*

[26] The Applicant has confirmed that he has received a portion of the record, identified as pages 12 to 16. As such, the Town has appropriately applied section 13 as it relates to these 5 pages and there is no obligation to provide additional copies to the Applicant.

IV CONCLUSION

[27] Having thoroughly reviewed the responsive record, I do not consider the information contained therein to be advice or recommendations, with the exception of the recommendations section of the report. As I have indicated, this section, along with other sections, has already been

released to the Applicant and, as such, is no longer subject to the protection of the *ATIPPA*. I have also rejected the Town's claim that the report is in draft form, particularly in light of the report being identified on its cover as a "Final Report." To identify a document as a draft simply because it recommends further testing misinterprets the concept of "draft." Moreover, even if a document is in draft form, it does not necessarily invite the protection of section 20(1). The only exception to this would be draft legislation or regulations which is specifically protected under section 20(1)(b). I find, therefore, that section 20(1) does not apply to the record being requested by the Applicant.

[28] With respect to the Town's claim of financial or economic harm, I have spent considerable time discussing the concept of "reasonable expectation of harm." After a thorough review of the jurisprudence in this area and the comprehensive analysis of my counterpart in British Columbia, I have placed considerable responsibility on the public body to provide clear and convincing evidence of harm in the context of access to information legislation. I also require such evidence to show a probability of harm and not merely a possibility. I believe this distinction to be important and to be in line with the overall purpose of the *ATIPPA*, as set out in section 3. I have concluded that no such evidence has been presented in the case at hand and, furthermore, a review of the responsive record does not provide any indication that harm to the Town's financial or economic interest would result from its release. I find, therefore, that section 24(1)(d) also does not apply to the record being requested by the Applicant.

[29] With respect to section 13 of the *ATIPPA*, I have concluded that the Town has appropriately refused access to portions of the record that have previously been released to the Applicant.

[30] In addition to sections 20(1), 24(1)(d) and 13, I considered the application of section 30 (personal information). While the Town did not engage this exception, I did identify personal information in Appendix D of the report. Given the mandatory nature of this section, together with the amount of personal information in this portion of the report, I have concluded that Appendix D should be withheld in its entirety.

V RECOMMENDATION

[31] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Town of Stephenville provide the Applicant with a copy of the responsive record, identified as the "Petroleum Contaminated Soil Investigation," with the exception of Appendix D. While there is no obligation to do so, the Town may withhold pages 12 to 16 of the responsive record, as this information has already been provided to the Applicant.

[32] Under authority of section 50 of the *ATIPPA*, I direct the head of the Town of Stephenville to write to this Office and to the Applicant within 15 days after receiving this Commissioner's Report to indicate the Town's final decision with respect to this Report.

[33] Please note that within 30 days of receiving a decision of the Town under section 50, the Applicant may appeal that decision to the Supreme Court Trial Division in accordance with section 60 of the *ATIPPA*.

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of July 2006.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador