April 3, 2009 **A-2009-005**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2009-005

Department of Labrador and Aboriginal Affairs

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to the briefing notes of the Department of Labrador and Aboriginal Affairs (the "Department") which were prepared for the House of Assembly, 46th General Assembly - First Session 2008. The Department granted access to a portion of the records and severed other portions citing section 20 of the *ATIPPA*. The Commissioner found that some information was appropriately severed under section 20; however, section 20 was not applicable to most of the information for which it was claimed. A large portion of the severed information was factual information as provided for under section 20(2)(a) and other severed information did not reveal advice and recommendations. Therefore, it was found that this information could not be withheld under section 20(1)(a). The Commissioner recommended release of all information that had not previously been disclosed to the Applicant with the exception of the information protected from release by section 20(1)(a).

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 20(1), 20(2)(a), and 46.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-005, A-2008-012, A-2008-010; *Nova Scotia (Department of Community Services) (Re)*, 2001 CanLII 7052; Ontario OIPC Order PO-2028; Alberta OIPC Order 97-007.

I BACKGROUND

[1] In accordance with the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 3 September 2008 to the Department of Labrador and Aboriginal Affairs (the "Department"), wherein she sought the disclosure of records as follows:

> *I am requesting under the Access to Information Act a copy of the Labrador Affairs briefing notes prepared for the House of Assembly, 46th General Assembly - First Session - 2008. This is also referred to as the minister's House of Assembly briefing book.*

[2] The Department, by correspondence dated 14 October 2008, advised the Applicant that access to the requested records had been granted; however, a portion of the information contained in the records was severed in accordance with section 20(1)(a) of the *ATIPPA* (advice or recommendations).

[3] In a Request for Review dated 28 October 2008 and received in this Office on 31 October 2008 the Applicant asked that this Office review the records to determine whether additional information should be released. The responsive record consists of six briefing notes. This type of record is standardized in its format and is intended to assist a Minister of the Crown in anticipating and answering questions that may be asked in the House of Assembly while it is in session.

[4] The Department failed to respond to this Office in any meaningful way during the informal resolution process from 1 December 2008 to 6 February 2009 and even after a response was received from the Department, attempts to resolve this matter by informal means were not successful. By letters dated 16 February 2009 both the Applicant and the Department were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47 of the *ATIPPA*.

II PUBLIC BODY'S SUBMISSION

[5] The Department did not provide a written submission during the formal investigation; however, the Department has confirmed to this Office that the position which it put forward in its correspondence dated 5 February 2009 remains the opinion of the Department for the purpose of formal investigation. In that correspondence, in support of its reliance on section 20, the Department states:

> *...the information contained in the Anticipated Questions would reveal advice to the Minister. You will appreciate that the provision of advice to a Minister of the Crown can take varied forms, including the format of "Anticipated Questions" and "Suggested Responses". The Deputy Minister and senior officials engaged in this exercise often provide advice and recommended courses of action in this format. That said, it is acknowledged that it is possible that in some cases, "Anticipated Questions" will not constitute advice within the meaning of section 20.*
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> *Even though the information that is severed is referred to as an "Anticipated Question", the information develops potential and strategic policy issues for the Minister and is not a recitation of factual material.*

[6] The Department also cites *Nova Scotia (Department of Community Services) (Re)*, 2001 CanLII 7052 in support of its position that the "Q&As" may be policy advice and can be appropriately withheld.

[7] The Department also refers to Report 2005-005 in which my predecessor stated at paragraph 33 in relation to information severed from Departmental briefing notes:

> *[33]…I have agreed that some of the information is policy advice or recommendation.*

[8] The Department has maintained that the severed information is "strictly advice".

III APPLICANT'S SUBMISSION

[9] The Applicant, in a letter dated 17 February 2009, stated that it is difficult for her to "speculate on what particular information is contained in the documentation, other than they are questions which may be asked […] in the House of Assembly or by media." The Applicant notes that she is dissatisfied with the amount of information that had been severed.

[10] The Applicant has encouraged this Office to "make every attempt and explore every avenue available under the legislation to ensure the spirit of openness and accountability is maintained and public debate and scrutiny is protected. If more information can be released, government has an obligation to supply that information".

IV DISCUSSION

Preliminary Matter of Delay

[11] I would first like to address the issue of delay in the handling of this matter. As noted, the Applicant filed the above-noted Request for Review on 28 October 2008. Therefore, it has now been over four months since the request was filed. The responsive record was received at this Office on 3 November 2008; however, the Department's ATIPP Coordinator was away for a period of ten days following receipt of the responsive record by this Office. The Investigator spoke with the Department's ATIPP Coordinator on 1 December 2008 to discuss the file and to make suggestions with respect to the release of additional information. The Coordinator indicated that he would consider the Investigator's comments and suggestions and get back to the Investigator.

[12] On 5 January 2009 the Investigator contacted the Coordinator by telephone to determine whether there had been any progress with respect to the suggestions posed during the 1 December telephone call. The Coordinator stated that he was waiting for a reply from the Department to a proposal he had prepared in response to the 1 December telephone call. The

Coordinator stated that he would follow-up and would be in contact with the Investigator once he had done so.

[13] The Investigator e-mailed the Coordinator on 12 January 2009 and again on 27 January 2009 asking for an update on the status of the Coordinator's proposal. On those same days, the Investigator received an e-mail from the Coordinator stating that he was still waiting for a reply from the Department.

[14] The Investigator again e-mailed the Coordinator on 4 February 2009 asking for a response to the suggestions made in the 1 December telephone call and stating that if nothing was forthcoming by 9 February 2009 the matter would be referred to the formal investigation stage. On 6 February 2009 the Investigator received a letter, by fax, from the Department which provided the Department's response to the Investigator's suggestions.

[15] As discussed in Report A-2008-012, the informal resolution process is an integral part of a Request for Review. Participation in this informal resolution process by the Department was very minimal, and then only at the constant urging of this Office. I believe it is important to reiterate my comments to this effect in Report A-2008-012:

> *[17]…the public body must not only be prepared to answer an applicant's questions directly, but also to respond to each request for review with a willingness to engage in a meaningful discussion with the assigned investigator from this Office. The informal resolution process, provided for in section 46 of the Act, is essentially a form of mediation, and is critical.* (…)*However, the informal process requires that someone must be authorized and prepared to put the necessary time and effort into discussing with the investigator the reasons for the decision to withhold information, based on a reasoned and thoughtful application of the relevant provisions of the Act.*

Difficulties were experienced in terms of the Department's timeliness in responding to the informal resolution process and it is for this reason that I feel it is necessary to point out the value of this process yet again.

[16] It must be acknowledged, however, that not every matter has the potential for informal resolution. Where a public body has determined that its position in relation to the records will not change, the public body has an implied obligation to communicate same to this Office at the earliest opportunity so that the matter can move forward. Furthermore, the *ATIPPA* contains several statutory time frames, including a time frame for informal resolution of thirty days. In the past, this Office has not rigidly enforced this time frame where there are indications of progress toward informal resolution, where there is a clear willingness to work towards that goal, and where additional time is needed simply to explore various approaches and proposals for informal resolution. Where, as indicated above, the position of a public body will not change, none of these factors apply and the potential for informal resolution is low. In such cases, I expect that public bodies will advise this Office accordingly within the thirty day period.

[17] In this case the Department was faced with a Request for Review involving one discretionary exception being applied to a small amount of information. I can think of no reason why the Department could not have responded to the Investigator within a shorter period of time to indicate that it was maintaining its position on the records. I take no issue with the delay caused by the ten day absence of the Coordinator; contingencies such at this will inevitably happen in these matters and this Office has and will continue to allow for short but unavoidable delays. Rather, issue is taken with the fact that it took over two months from the first discussion regarding informal resolution until the date on which this Office was informed that the Department's position would not change. Delays such as this hamper the ability of this Office to resolve matters in a timely fashion.

Section 20 (Policy advice or recommendations)

[18] Section 20(1) and section 20(2)(a) of the *ATIPPA* state as follows:

> *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.

(2) The head of a public body shall not refuse to disclose under subsection (1)

(a) factual material;

[19] As noted in several previous reports, section 20(1) is discretionary and, therefore, it does not *require* a public body to refuse access to a record. If the record in question falls within the exceptions set out in section 20(1)(a) or (b), the exercise of discretion to withhold the record is well within the authority of the public body; however, if the record does not fall within the exceptions, release of the record will be recommended by this Office.

[20] The Department has claimed an exception under section 20(1)(a).

[21] The definition of "advice and recommendations" has been considered in several previous Reports from this Office, recently in Report A-2008-010 and notably in Report 2005-005. While it is not necessary to repeat the entire analyses of these Reports, I will reiterate some of the major points below.

[22] According to Ontario Order PO-2028 and Alberta Order 97-007, both of which were referred to in Report 2005-005 and Report A-2008-010, in order for section 20(1)(a) to apply, the advice must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

[23] Also as a result of the above-mentioned Orders, it is now well established that factual information does not constitute advice or recommendations and must be disclosed. In line with this point, section 20(2)(a) clearly states that "factual material" is not included as advice or recommendations and that this material *shall not* be withheld from disclosure under section 20(1).

[24] In this case, the Department has explained that it is withholding information on the basis that the information contained in the "Anticipated Questions" sections of the records develops potential and strategic policy issues for the Minister and its disclosure would reveal advice to the

Minister. The Department argues that the severed information is, therefore, not factual information as contemplated by section 20(2)(a).

[25] The authority of a public body to withhold briefing notes was addressed in Report 2005-005 from this Office and, for the most part, need not be duplicated here; however, paragraphs 40-42 of that Report bear repeating:

> *[40] This description of section 20 is consistent with the definition of advice and recommendations referenced earlier in this Report. There is a clear understanding that advice or recommendations in the context of access to information legislation is directly associated with the policy-making process within government. It is entirely reasonable to assume that such a process would involve some form of deliberation meant to generate discussion and consideration and, ultimately, a decision. In the absence of these essential elements I do not believe that information would invite the protection of section 20(1).* ***For example, a list of potential questions that may be asked of a Minister in the House of Assembly does not form part of a deliberative process for the purpose of considering and adopting government policy. It is simply a series of possible questions that may be asked. I do not believe that section 20(1) is meant to protect this type of innocuous information, the release of which would not lead to the "excessive scrutiny" of a deliberative process as described by governments own policy and procedures manual.*** *That is not to say that a potential question put forward as an option to a Minister may never reveal important information, but I present that this would be the exception rather than the rule.*
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> *[41] After reviewing the responsive records in detail, I agree that some of the information clearly falls within the definition of advice or recommendations as referenced in section 20(1) and, indeed, the Applicant has acknowledged and accepted this point. It is equally clear, however, that a significant portion of the information being withheld by the Department is purely factual in nature and should be released.* ***Section 20(1) specifically restricts the exception to access to information that is advice or recommendations, regardless of the context or location of the information within a particular document.*** *This specificity is greatly emphasized by the extensive list of exclusions found in section 20(2), including factual material.*
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> *[42]* ***If the legislators had intended the location of information within a briefing note to be a determinative factor they would have said so in the legislation. They did not. They would have also qualified the term "factual material" as it appears in section 20(2). They did not.*** *When considered in the context of the overall purpose of the legislation, as specified in section 3, I am convinced that the legislators intended that exceptions be interpreted narrowly*

> *with as much information as possible being released, and I see nothing in section 20 that would support otherwise.*
>
> [Emphasis added]

[26] In Report 2005-005, the conclusion was as follows:

> *[27] ...it is quite clear that the use of the terms "advice and recommendations" used in section 20(1) of the ATIPPA is meant to allow public bodies to protect a suggested course of action, and not merely factual information, regardless of where this factual information may be found within the record.*

It is interesting to note that Report 2005-005 addressed this same issue in respect of this very same Department. After a review of the relevant case law, I am convinced that the above conclusion was, and continues to be, the correct interpretation of section 20 of the *ATIPPA*.

[27] All factual material and other information to which section 20 does not apply within the responsive record have been identified and, for the reasons I have stated above, I am recommending that it be released to the Applicant.

V CONCLUSION

[28] With respect to section 20(1)(a), I have found that portions of the records are clearly factual and, therefore, the release of this information has been recommended under section 20(2)(a). Also, section 20(1)(a) has been claimed for information that does not, in my opinion, reveal advice or recommendations and, therefore, I have also recommended the release of this information. However, where it is clear on a review of the responsive records and the formal submissions of the parties that information in the responsive record will reveal advice and recommendations, then the Department may rely on section 20(1)(a) to withhold information.

VI RECOMMENDATIONS

[29] Under authority of section 49(1) of the *ATIPPA*, I hereby make the following recommendations:

1. I recommend that the Department release to the Applicant all of the information that has been highlighted in pink on a copy of the responsive record that has been provided to the Department along with this Report.

2. I recommend that the Department review its overall approach to compliance with the *ATIPPA*, specifically its capacity to promptly respond to this Office during the informal resolution process.

[30] Under authority of section 50 of the *ATIPPA* I direct the head of the Department to write to this Office and to the Applicant within fifteen days after receiving this Report to indicate its final decision with respect to this Report.

[31] Please note that within thirty days of receiving a decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of April, 2009.

E.P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador