May 23, 2008 **A-2008-008**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2008-008

Department of Innovation, Trade and Rural Development

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records relating to a proposal made to the Department of Innovation, Trade and Rural Development (the "Department") for funding for the continued development of a golf course. The Department allowed access to some of the information contained in the records but denied access to certain information claiming exceptions under sections 18, 20(1), 24(1), 27, and 30(1) of the *ATTIPA*. The Commissioner concluded that the Department could not rely on the exception in section 24 because it had not submitted any evidence or argument in support of its reliance on this exception. Also, the Commissioner found that the Department could deny access to certain information on the basis of section 18 when that information would, if disclosed, permit the reader to draw accurate inferences about Cabinet deliberations. However, the Commissioner determined that much of the information to which the Department denied access on the basis of section 18 should be released to the Applicant. In addition, the Commissioner concluded that certain information could be withheld by the Department on the basis of sections 20(1), 27, and 30(1). Finally, the Commissioner commented on the fact that the Department did not provide a written submission in support of its reliance on the claimed exceptions and recommended that in future Requests for Review the Department either indicate that it is abandoning reliance on a claimed exception or provide a written submission in support of its continued reliance on the exception.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 18, 20, 24, 27, 30, 46, 47, 49, 50, 60, and 64; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5; *Access to Information Act*, R.S.C. 1985, c. A-1, s. 69.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-003, 2005-004, 2005-005, 2006-001, 2007-004, 2007-012, 2007-018, and A-2008-002; British Columbia OIPC Orders 8-1994 and 00-49; *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6444 (B.C.C.A.); *O'Connor v. Nova Scotia*, 2001 NSSC 6 (CanLII); *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII).

Other Sources 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 online at: http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 11 May 2007 to the Department of Innovation, Trade and Rural Development (the "Department"). The request, received by the Department on 16 May 2007, sought disclosure of records as follows:

> *. . . complete file – Including all notes, memos, recommendations, etc., from all govt. depts. it passed through, including all third party information. Proposal to Dept. Innovation Trade & Rural Development. Presented by* [*Name of Company*] *for development (completion) of back 9 holes.*

[2] The Department's Access and Privacy Coordinator (the "Departmental Coordinator") by e-mail dated 18 June 2007 notified the Applicant that he was sorry for the delay in responding to the access request and indicated that the request was "currently undergoing executive review." The Departmental Coordinator further stated that he expected to be able to fax a response to the Applicant by the end of that week at the latest.

[3] The Departmental Coordinator by letter dated 21 June 2007 advised the Applicant that access to the requested records had been granted in part and indicated that certain information had been severed pursuant to the exceptions set out in sections 18, 20(1), 24(1), 27, and 30(1) of the *ATIPPA*.

[4] The Applicant in a Request for Review dated 11 July 2007 and received in this Office on 12 July 2007 asked for a review of the Department's decision to deny access to certain of the information requested.

[5] The Department was advised of the Request for Review by a letter from this Office dated 18 July 2007 and in response the Departmental Coordinator sent a letter dated 30 July 2007 to this Office enclosing the responsive record and stating in part:

> . . .
>
> *I have not included detailed justification for each section severed at this stage. I would like to be able to provide written justification for some sections at a later*

> *stage in the process, however, if I may, once we have narrowed down the contentious areas.*
>
> . . .

[6] The documents forwarded to my Office as an enclosure to the Departmental Coordinator's letter dated 30 July 2007 consisted of 85 numbered pages from the files of the Department. Also, as a result of discussions with an Investigator from my Office, on 16 August 2007 the Departmental Coordinator forwarded an additional 15 pages of records to my Office. These 15 pages were from the files of the Executive Council. These 100 pages constitute the responsive record in this Request for Review.

[7] As part of the informal resolution process established by section 46 of the *ATIPPA*, an Investigator from my Office met with the Departmental Coordinator and the Access and Privacy Coordinator for the Executive Council (the "Executive Council Coordinator") on 28 August 2007. The Executive Council Coordinator was involved because there was a denial of access under the mandatory exception set out in section 18 dealing with Cabinet confidences.

[8] The involvement of the Executive Council Coordinator was a result of directions set out in the *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice. The *Manual* contains specific instructions for public bodies when there are records that may be subject to section 18. These instructions are found at pages 4-9 to 4-10:

> *Public bodies must consult with Cabinet Secretariat in regards to information that may be excepted from disclosure under subsection 18(1). The public body must obtain sign-off from Cabinet Secretariat before the head of the public body responds to an access request.*
>
> . . .
>
> *Notify the Access and Privacy Coordinator, Cabinet Secretariat, that a request has been received for which the release of records may reveal confidences pursuant to section 18(1). Note: All decisions related to applying section 18 to any record must be made in consultation with Cabinet Secretariat.*

. . .

> *The public body should forward any records that may be related to section 18(1) to Cabinet Secretariat for review and confirmation of section 18 information. Cabinet Secretariat will highlight those sections of the records relevant to section 18 and return the highlighted version to the public body for formal sign-off by the head.*

[9] At the meeting on 28 August 2007 the Investigator, at the request of the Executive Council Coordinator, agreed to review the responsive record and provide an indication as to which information should be properly severed in accordance with the exceptions set out in the *ATIPPA* and the case law that has interpreted those exceptions and comparable exceptions in the legislation from other jurisdictions. The Investigator undertook to conduct this review as a means to facilitate an informal resolution of the Request for Review.

[10] The Investigator conducted the requested review of the responsive record and by correspondence dated 11 September 2007 set out an explanation as to which information he believed should be severed. The correspondence and the severed records were delivered to the Executive Council Coordinator on 13 September 2007 and to the Departmental Coordinator on 17 September 2007.

[11] On 18 September 2007 the Investigator received an e-mail from the Executive Council Coordinator acknowledging receipt of the letter and severed documents. The Executive Council Coordinator indicated that she would be setting up a meeting soon to discuss the Investigator's recommendations and that after that meeting she would follow-up with my Office on the Executive Council's decision.

[12] On 10 October 2007 the Investigator e-mailed the Executive Council Coordinator asking when he could expect a decision from her on the recommendations he had made and indicated that he was working within some time constraints. In response, the Executive Council Coordinator e-mailed the Investigator to indicate that she would follow-up the following day with her colleagues on the Investigator's recommendations.

[13] On 12 October 2007 the Investigator received an e-mail from the Executive Council Coordinator indicating that she would require more time to consider the Investigator's recommendations and would be in touch with him very soon. In response, the Investigator e-mailed the Coordinator on the same day and asked if she could provide him with an indication as to when he could anticipate receiving a response. There was no response from the Executive Council Coordinator to this e-mail.

[14] On 5 November 2007 the Investigator e-mailed the Executive Council Coordinator and asked when he could anticipate a response to his letter of 11 September 2007. Again, there was no response to the Investigator's e-mail.

[15] On 20 November 2007 the Investigator sent another e-mail to the Executive Council Coordinator with a copy to the Departmental Coordinator indicating that his e-mail was further to his e-mails of 12 October 2007 and 5 November 2007. The Investigator stated that he had been waiting over two months for a response to his letter of 11 September 2007 and further indicated that if he did not receive a response by 27 November 2007 he would have to assume that there was no prospect of an informal resolution and, pursuant to section 46(2), the matter would proceed to the formal investigation stage. There was no response to this e-mail from either of the two Coordinators.

[16] There not having been any response from the Coordinators, on 29 November 2007 the Applicant and the Departmental Coordinator were sent letters advising that the matter had proceeded to the formal investigation stage and requesting written submissions from the parties by 14 December 2007. Although the Executive Council was not officially a party to the Request for Review, on 29 November 2007 the Investigator sent a courtesy e-mail to the Executive Council Coordinator advising her that the letters had been sent and indicating that 14 December 2007 had been set as the deadline for written submissions. There was no response to this courtesy e-mail.

[17] On Friday, 14 December 2007 the Investigator received a telephone call from the Departmental Coordinator indicating that he had received on that date a letter from the Executive

Council outlining its position on the claim for exception under section 18. The Departmental Coordinator advised that he would be including that letter with his written submission to be sent to my Office. He stated that because he had only received the letter on that day it would now be too late to have the Deputy Minister sign off on the submission and asked whether Monday would be suitable for providing the written submission. The Departmental Coordinator further indicated that his submission would deal with the other exceptions claimed but not with the section 18 exception. In response, the Investigator agreed that in these extenuating circumstances it would be appropriate to accept a late written submission from the Department.

[18] On Monday, 17 December 2007 at 3:34 pm the Investigator received a telephone call from the Departmental Coordinator indicating that the written submission would not be provided on that date as the Deputy Minister was out of town and due to storm conditions would not be in the office until the next day. The Departmental Coordinator asked if the next day would be suitable for providing the written submission and the Investigator indicated that in these most unusual circumstances my Office would accept the late submission.

[19] Inexplicably, my Office never did receive a written submission from the Department.

[20] On 10 January 2008 (about 1 month after the 14 December 2007 deadline), my Office received correspondence from the Executive Council outlining its position on the claim for exception under section 18. I will indicate here that normally my Office does not accept written submissions received after the set deadline. However, in this case the submission deals with a mandatory exception to disclosure which my Office, as a matter of course, considers in deciding whether information should be released.

[21] The Applicant has contacted my Office and indicated that he does not wish to make any written submission beyond that which he had stated in his Request for Review.

II APPLICANT'S SUBMISSION

[22] As I have indicated, the Applicant wishes to rely on the information he provided in his Request for Review form as his written submission. Therefore, I will set out here some of that information in order to put forth the Applicant's position.

[23] The Applicant in his Request for Review stated as follows:

> *I am seeking my complete file including all severed portions. What I received on my initial request was my biography from a ground level employee & my business plan. Both of which I already have.*

[24] The Applicant provided a brief history of his dealings with the provincial government in relation to development funds provided to him and his attempts to obtain additional money for the development of his golf course. He then stated:

> *. . . My information tells me that my file was D.O.A. and, if that was the case, as I am quite sure it was, I want all information that was originally omitted from my request.*
>
> *This will include the recommendations of all departments and personnel attached to my file. I want to know why it was turned down and what recommendations or opinions resulted in this decision.*
>
> *From that point I can correct any flaws and act on recommendations and thus present to private lenders. I am quite sure the province would want this development to proceed and therefore any constructive criticism would be beneficial.*

III PUBLIC BODY'S SUBMISSION

[25] As I have indicated, the Department has chosen not to provide a written submission in support of its position. However, in a letter dated 30 July 2007 enclosing the responsive record the Departmental Coordinator stated as follows:

> *I have not included a detailed justification for each section severed at this stage. I would like to be able to provide written justification for some sections at a later stage in the process, however, if I may, once we have narrowed down the contentious areas. In general, the main areas of concern for our department are:*
>
> > *- to ensure that future negotiations of a similar nature not be prejudiced by the other party's knowledge of the detailed terms of the negotiation and of our strategies and positions with respect to it.*
> > *- to ensure that no information is released that would reveal the substance of deliberations of Cabinet.*
> > *- to ensure that our staff and other advisors continue to feel that they can offer their opinions and advice frankly and fully.*
> > *- to protect information given to us in confidence by third parties where the release of this information may by harmful to their commercial interests.*
> > *- to insure that no personal information is inappropriately released.*

[26] The above comments from the Departmental Coordinator reflect the position stated in his letter dated 21 June 2007 where he advised the Applicant that certain information had been severed pursuant to the exceptions set out in sections 18, 20(1), 24(1), 27, and 30(1) of the *ATIPPA*.

[27] As I have indicated, on 10 January 2008 my Office received correspondence from the Executive Council outlining its position on the claim for exception in section 18. This position is as follows:

> *This letter is in response to an appeal before your office on access to information contained in Cabinet records. Cabinet Secretariat had denied disclosure to these documents in its entirety, as the information contained in the records is statutorily exempted from disclosure pursuant to section 18 of the Access to Information & Protection of Privacy Act (the "Act"). Section 18 prohibits disclosure of information "that would reveal the substance of deliberations of Cabinet". Disclosure of any portion of these records would reveal the substance of deliberations of Cabinet as protected under section 18 of the Act. In addition, during the processing of the original request, other exceptions were applied. Specifically section 30, section 26* [sic], *section 27, and of course, throughout these Cabinet Records, section 20 of the Act.*
>
> *As you may be aware, the original appeal was forwarded to Innovation Trade and Rural Development. Cabinet Secretariat has been requested to supply feedback on the application of section 18 pursuant to the Act. We wish to advise that our initial position remains. The records contained in the file . . . were severed under*

> *section 18 on the basis that they would in fact "reveal the substance of deliberations of Cabinet".*

IV DISCUSSION

[28] Before discussing the issues arising in this Request for Review, I will discuss briefly the burden of proof on a Request for Review as set out in section 64(1) of the *ATIPPA*, which provides as follows:

> *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.*

[29] Therefore, when a public body has denied access to a record and the Applicant has requested a review of that decision by this Office, the public body bears the burden of proving that the applicant has no right of access to the record or part of the record pursuant to section 64(1).

[30] As was discussed in Report 2007-004, the *ATIPPA* does not set out a level or standard of proof that has to be met by a public body in order to prove that an applicant has no right of access to a record under section 64(1). In Report 2007-004, my predecessor adopted the civil standard of proof as the standard to be met by the public body under this section. I agree with my predecessor that this is the appropriate standard of proof on a Request for Review. Therefore, in order for the public body to meet the burden of proof in section 64(1), the public body must prove on a balance of probabilities that the applicant has no right to the record or part of the record.

[31] I will now discuss the issues before me in this Request for Review.

[32] The Department has severed information in the responsive record claiming that it is excepted from disclosure by sections 18, 20(1), 24(1), 27, and 30(1) of the *ATIPPA*. I will now discuss each of the exceptions claimed.

Section 18 (Cabinet confidences)

[33] Section 18 contains a mandatory exception dealing with Cabinet confidences as follows:

> *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.*

[34] The meaning of the word "Cabinet" is set out in section 2(b) as follows:

> *2. In this Act*
>
> *. . .*
>
> *(b) "Cabinet" means the executive council appointed under the Executive Council Act, and includes a committee of the executive council;*
>
> *. . .*

[35] My discussion of section 18 will be in the context of the overall purpose of the *ATIPPA* and the importance of Cabinet confidentiality. In that regard, I will provide a fitting quotation given by Saunders J.A. while discussing a comparable section of the Nova Scotia legislation in *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII). He stated at paragraph 1:

> *[1] This case is about striking a balance: a balance between a citizen's right to know what government is doing and government's right to consider what it might do behind closed doors. It pits the citizen's right to access information relating to the workings of government against the ability of Cabinet to carry out its deliberations in confidence and in private. It calls for an interpretation of an Act that attempts to balance two public rights of perhaps equal importance, the right*

> *of the public to be informed and its right to be governed by elected representatives free to frankly express perhaps unpopular views protected by traditional cabinet confidentiality from captious criticism.*

[36] Section 18 was discussed by my predecessor in Report 2005-004 at paragraphs 19 to 20:

> *[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.*

[37] Also in Report 2005-004 my predecessor commented on background information in Cabinet documents at paragraph 22:

> *[22] . . . 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.*

[38] In Report 2005-004, my predecessor referred to two different possible interpretations of section 18 and discussed an interpretation provided by the British Columbia Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner),* 1998 CanLII 6444 (B.C.C.A.) and another interpretation provided by the Nova Scotia Court of Appeal in

O'Connor v. Nova Scotia, 2001 NSCA 132 (CanLII). In Report 2005-005, my predecessor explicitly adopted the interpretation of the Nova Scotia Court of Appeal in *O'Connor* and set out the test to be used when determining whether a record would reveal the substance of deliberations of Cabinet at paragraph 56:

> *[56] . . . 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 . . .*
>
> [Emphasis in original]

[39] I agree with my predecessor that the test from *O'Connor* is the appropriate one to be applied when determining whether a record would reveal the substance of deliberations of Cabinet. In order to explain how I arrived at the same conclusion as my predecessor, I will discuss the *Aquasource* decision of the British Columbia Court of Appeal and the *O'Connor* decision of the Nova Scotia Court of Appeal.

[40] In *Aquasource*, the British Columbia Court of Appeal discussed the interpretation of section 12(1) of the British Columbia *Freedom of Information and Protection of Privacy Act*, which has wording similar to section 18(1) of the *ATIPPA* and provides as follows:

> *12(1)The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.*

[41] In *Aquasource*, at issue was the interpretation given to the phrase "substance of deliberations" in section 12(1) by the British Columbia Information and Privacy Commissioner in Order No. 8-1994. Donald J.A. summarized the Commissioner's interpretation at paragraph 36 as follows:

36. The phrase of central importance in s.12(1) is "substance of deliberations". This is what the Commissioner said about it:

> *. . .*
>
> *I disagree with the government's interpretation of section 12 in the present case. In my view, the "substance of deliberations" includes records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken. The "substance of deliberations" is what the B.C. Civil Liberties Association described as "the Cabinet thinking out loud", although its scope includes a range of records which would reveal what happened in Cabinet. The operative word is "deliberations." These are meant to remain confidential for stipulated periods of time in accordance with traditions of Cabinet confidentiality and solidarity that the government emphasized in its submission to this inquiry (and which I have every desire to respect). (pp.6-8)*
>
> *However, the Act deals with information that is recorded, and as such I must look to the written record in this case. What is meant to be protected is the "substance" of Cabinet deliberations, meaning recorded information that reveals the oral arguments, pro and con, for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision. I believe that the framers of the legislation would have included a reference to the substance of Cabinet deliberations* ***and records*** *if they had intended to mandate the complete non-disclosure of Cabinet Submissions. According to the government's line of argument, "substance" should be interpreted as the "subject" of deliberations, with any record withheld in its entirety if it so much as hints at the matter about which Cabinet was deliberating. I do not accept this line of reasoning in such an expansive form.*
>
> *. . .*
>
> *Applying the concept of "the substance of deliberations" to Cabinet Submissions is problematic because outsiders, including most government officials, remain unaware of just what went on inside the meetings of Cabinet and its committees. Assumptions about what Cabinet members did and did not read are just that, at least for the record at issue in this inquiry. I do not automatically assume that Cabinet Submissions in all cases reflect the "substance of Cabinet deliberations" without some at least inferential evidence. I agree that disclosure of a record would "reveal" the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substance of those*

> *deliberations (see Ontario Order P-226, a decision of T.A. Wright, then assistant Commissioner, March 26, 1991).*
>
> [Emphasis in original]

[42] In *Aquasource*, Donald J.A. summarized the arguments of Counsel for Aquasource at paragraph 38 as follows:

> *38. The interpretation of s.12(1) for which Aquasource contends is well expressed in Mr. Grant's speaking notes, pertinent excerpts of which are reproduced verbatim below:*
>
> > *41. It is submitted that the phrase "substance of deliberations" on its ordinary and natural interpretation must mean the essence or core content of the deliberations which would be the actual views, opinions, thoughts, ideas and concerns of the members of the cabinet.*
> >
> > . . .
> >
> > *44. The fact that the legislature specifically restricted the obligation not to disclose to "information that would reveal the substance of deliberations of the executive council" suggests that the legislature intended the restriction under section 12(1) to be a narrow one limited to documents that would actually reveal the views of cabinet.*
> >
> > . . .
> >
> > *48. Returning to the language of section 12(1) the phrase "must refuse to disclose to an applicant information that would reveal the substance of deliberations of the executive council" is followed by a clause beginning with the word "including". The word "including" is followed by a list of types of information namely "advice, recommendations, policy consideration or draft legislation or regulations submitted or prepared by submission to" the cabinet. Since these types of information are linked by the word "including" they would be subject to section 12(1) only if they "would reveal the substance of deliberations of the executive council". If a particular document, even if it could be described as being advice, recommendations, policy considerations or draft legislation, it could not properly be said to be included in the category of information that "would reveal the subject of deliberations of the executive council" unless the information contained in the document was such that an applicant upon*

> *reading the document could draw accurate inferences with respect to the substance of cabinet deliberations.*
>
> [Emphasis in original]

[43] Having outlined the position of Counsel for Aquasource as to the correct interpretation of the phrase "substance of deliberation," which was also the interpretation adopted by the British Columbia Commissioner in Order No. 8-1994, Donald J.A. rejected that interpretation by stating at paragraphs 39 to 41:

> *39. I do not accept such a narrow reading of s.12(1). Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted ....". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. An exception to this is found in s.12(2)(c) relating to background explanations or analysis which I will discuss later.*
>
> *40. As I understand Aquasource's argument, only those items listed in s.12(1) are excluded which reveal the thinking of Cabinet. That loads too much on the word "deliberations" and gives too little weight to "substance". Moreover, I agree with the submission of counsel for the Attorney General that Aquasource's interpretation would restrict the application of s.12(1) to records of discussions and resolutions which do not exist. Since the evidence before the Commissioner was that minutes of Cabinet discussions or debates are not taken nor are the individual votes recorded. This is a time-honoured practice based on the constitutional conventions of Cabinet solidarity and collective responsibility . . .*
>
> *41. It is my view that the class of things set out after "including" in s.12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications. I arrive at this conclusion with the assistance of several authorities.*

[44] After a discussion of a number of authorities, Donald J.A. developed a test to be used when determining when information would reveal the "substance of deliberations" by stating at paragraph 48:

> *48 What then is a workable test for s.12(1) questions? The Attorney General argues, and I agree, that the Commissioner took the right approach in another*

case: Inquiry Re: A Request for Access to Records about the Premier's Council on Native Affairs (2 February, 1995), Order No. 33-1995, where he said at p.5 of the decision:

> *The public bodies offered useful descriptions of each type of record at issue in this dispute. A "Cabinet submission" and a Treasury Board Chairman's report contain some information, now severed, that would necessarily be the object of Cabinet's deliberation with respect to "recommendations," "advice," and outlining a suggested course of action. The internal evidence of the language used, the public bodies argue, supports this argument. Furthermore, they argue, "a Cabinet submission, by its nature and content, comes within the ambit of s.12(1)."*
>
> *It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would 'reveal' the substance of Cabinet deliberations [,] because it would permit the drawing of accurate inferences with respect to the deliberations. (Argument for the Public Bodies, pp.9-10)*
>
> *I agree with this general characterization of Cabinet submissions and apply it specifically below.*

From that acceptance there emerges this test: Does the information sought to be disclosed form the basis for Cabinet deliberations?

[Emphasis in original]

[45] My understanding of the decision of Donald J.A. in *Aquasource* is that in his view information would reveal the substance of the deliberations of Cabinet if that information was considered by Cabinet during its deliberations, that is, if it formed the basis of Cabinet deliberations. My understanding of the decision is shared by Associate Chief Justice MacDonald who gave the trial decision in *O'Connor*. He stated in *O'Connor v. Nova Scotia*, 2001 NSSC 6 (CanLII) at paragraph 20:

> *[20] In this context, the word "substance" may allow two potentially conflicting interpretations. It could broaden the meaning of "deliberations" to include all information upon which the deliberations are based. That was the approach taken by the British Columbia Court of Appeal in Aquasource Ltd. v. B.C. (Information and Privacy Commissioner), . . . when interpreting British Columbia's equivalent provision.*

[46] As I have indicated, the Nova Scotia Court of Appeal in the *O'Connor* decision has taken a somewhat different approach to the interpretation of the phrase "substance of deliberations." I now wish to discuss that decision.

[47] At issue in the *O'Connor* decision was the proper interpretation of section 13(1) of the Nova Scotia *Freedom of Information and Protection of Privacy Act*, which has similar wording to section 18(1) of the *ATIPPA* and provides as follows:

> *13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.*

[48] In *O'Connor*, Saunders J.A. in discussing section 13(1) referred to the judgment of Donald J.A. in *Aquasource* and stated at paragraphs 87-88 and 90-91:

> *[87] . . . Instead I will address my remarks to Justice Donald's interpretation of the phrase "substance of deliberations". To lend context to his analysis I must first refer, as did he, to the position taken by counsel representing Aquasource in its demand for production. Its counsel said:*
>
> > *41 It is submitted that the phrase "substance of deliberations" on its ordinary and natural interpretation must mean the essence or core content of the deliberations which would be the actual views, opinions, thoughts, ideas and concerns of the members of the cabinet.*
> >
> > . . .
> >
> > *44 The fact that the legislature specifically restricted the obligation not to disclose "information that would reveal the substance of deliberations of the executive council" suggests that the legislature intended the restriction under section 12(1) to be a narrow one limited to documents that would actually reveal the views of cabinet.*
>
> *[88] Donald, J. A. declined to accept the narrow reading of s. 12(1) urged upon him by Aquasource. I agree with his rejection of that interpretation. Having*

done so, I must respectfully disagree with his stated reasons and, further, with his ultimate conclusion concerning the test to be applied.

. . .

[90] With great respect while I agree that the equivalent of their s. 12(1) ought not to be given the narrow interpretation urged by the Aquasource Corporation in that case, my reasons for coming to that conclusion are different than those expressed by the British Columbia Court of Appeal. In my respectful view, it miscasts the inquiry required in a s. 13(1) analysis to say that:

> *... 'substance of deliberations' refers to the body of information which Cabinet considered (or would consider ...) in making a decision.*

Neither do I read this provision "as widely protecting the confidence of Cabinet communications", as did the Court of Appeal in Aquasource.

[91] To my mind there is no need to give the kind of broad, expansive definition to "substance of deliberations" urged by either the government in the Aquasource case, or by the appellant in a matter before us. Rather than focusing the inquiry on the "kind" or "body" of information, the question that ought to be asked is whether by its disclosure, the substance of Cabinet deliberations would be revealed.

[Emphasis in original]

[49] Saunders J.A. then went on to develop a test for determining when information would reveal the substance of deliberations of Cabinet and stated at paragraph 92:

[92] In my opinion, an earlier decision of the B.C. Privacy Commissioner in another case, referred to by the court in Aquasource, properly describes the approach to be taken whenever a s. 13(1) analysis is triggered. It is the approach I favour and is expressed in this way:

> *... The information is prepared for Cabinet and its committees. It forms the basis for Cabinet deliberation and so its disclosure would reveal the substance of Cabinet deliberations because it would permit the drawing of accurate inferences with respect to those deliberations.*

Thus the question to be asked is this: 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 under s. 13(1).

[Emphasis in original]

[50] Having developed his own test, Saunders J.A. then goes on to reject the test put forth by Donald J.A. in *Aquasource* by stating at paragraph 93:

> *[93] In my respectful opinion, this is a much easier test to apply than that expressed by the court in Aquasource as:*
>
> > *Does the information sought to be disclosed form the basis for Cabinet deliberations?*
>
> *To put the question that way would, in practical terms, be very difficult to answer, or ever prove.*
>
> [Emphasis in original]

[51] As I have indicated, the test developed by Saunders J.A. in *O'Connor* was adopted by my predecessor in Report 2005-005.

[52] Thus, while Donald J.A. in *Aquasource* and Saunders J.A. in *O'Connor* have set forth different tests, both have rejected the interpretation given to the phrase "substance of deliberations" by the British Columbia Information and Privacy Commissioner in *Aquasource* where the Commissioner indicated that the phrase should be interpreted as referring to ". . . records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken." The British Columbia Commissioner had stated that the substance of deliberations is what the B.C. Civil Liberties Association described as "the Cabinet thinking out loud" and then indicated that what is meant to be protected is the substance of Cabinet deliberations, ". . . meaning recorded information that reveals the oral arguments, pro and con, for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision."

[53] Given the rejection by both the British Columbia and Nova Scotia Courts of Appeal of the British Columbia Commissioner's interpretation of the phrase "substance of deliberations," I am persuaded that I also cannot, with the greatest respect, accept this interpretation of that phrase as it appears in section 18 of the *ATIPPA*.

[54] At this point, it is necessary for me to discuss the phrase "including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet" as found in section 18. A discussion of this phrase is important because the different meanings assigned to it by Donald J.A. in *Aquasource* and Saunders J.A. in *O'Connor* form the basis for their developments of the different tests as to the meaning of "substance of deliberations." The noted phrase appears with minor differences in section 12(1) of the British Columbia legislation and in section 13(1) of the Nova Scotia legislation.

[55] In *Aquasource*, Donald J.A. discussing the phrase as found in section 12(1) stated at paragraph 39-41:

> *39. . . . Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted ....". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. . . .*
>
> *40. As I understand Aquasource's argument, only those items listed in s.12(1) are excluded which reveal the thinking of Cabinet. That loads too much on the word "deliberations" and gives too little weight to "substance". Moreover, I agree with the submission of counsel for the Attorney General that Aquasource's interpretation would restrict the application of s.12(1) to records of discussions and resolutions which do not exist. . . .*
>
> *41. It is my view that the class of things set out after "including" in s.12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications. . . .*

[56] As I have indicated, Saunders J.A. gives a different meaning to the phrase as found in section 13(1) of the Nova Scotia *Act*. He discussed it at paragraph 95 as follows:

> *[95] Before leaving the subject of the test to be applied in any s. 13(1) analysis, I wish to comment briefly on the chain or list of words that follow the phrase "substance of deliberations". For ease of reference I will note again the material parts of s. 13(1):*

> *... may refuse to disclose ... information that would reveal the substance of deliberations of the Executive Council or any of its committees, <u>including any advice, recommendations, policy considerations or draft legislation or regulations</u> ...*
>
> *Counsel for the appellant, Province of Nova Scotia, urged us to adopt the approach taken by the B.C. Court of Appeal in Aquasource and find that the additional chain of words I have emphasized should be taken to extend the meaning of "substance of deliberations", thus broadening the protection of confidentiality afforded Cabinet communications. Again, with great respect, I am not inclined to follow the reasoning expressed in Aquasource. Rather, the words add context and are subsumed by the accurate inferences test I have just explained. In my opinion, the words "including any advice, recommendations, policy considerations or draft legislation or regulations" following "substance of deliberations" in s. 13(1) are simply added so as to provide specific examples of "information", thus removing any ambiguity as to whether such things are in fact included. . . .*
>
> [Emphasis in original]

[57] My understanding of the comments of Saunders J.A. is that he interprets the phrase as meaning that the items referred to in the list, that is, "advice, recommendations, policy considerations, or draft legislation," are examples of the type of material that could reveal Cabinet confidences if they meet the test he has expounded. For example, information containing a recommendation would reveal the substance of deliberations if it is likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations. On the other hand, the interpretation of the phrase given by Donald J.A. would mean that if any of the items in the list were used by Cabinet during its discussion of a particular matter then the information in that item would reveal the substance of the deliberations because it forms the basis of a Cabinet decision.

[58] As I have indicated, I agree with my predecessor's adoption of the test formulated by Saunders J.A. as to the meaning of the phrase "substance of deliberations." However, I must now decide if I will adopt also adopt Saunders J.A. interpretation of the phrase "including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet" or whether I will instead adopt the interpretation provided by Donald J.A. in *Aquasource*.

[59] If I were to adopt the approach of Donald J.A. in *Aquasource*, then I would have to accept that any information submitted to Cabinet that contained advice, recommendations, policy considerations or draft legislation would reveal the substance of deliberations. On the other hand, by adopting the approach of Saunders J.A. in *O'Connor* I would be taking the position that the information submitted to Cabinet that contains the advice, recommendations, policy consideration or draft legislation would have to be examined to determine whether or not its disclosure would in fact reveal the substance of deliberations. In deciding which approach to adopt, I am mindful of what Saunders J.A. said in *O'Connor* about striking "a balance between a citizen's right to know what government is doing and government's right to consider what it might do behind closed doors."

[60] In attempting to strike the appropriate balance I have also considered the words of Mr. Justice La Forest in *Carey* where he stated that it is important to keep in mind that Cabinet functions at the highest decision-making level of government but that "[t]he nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important." Furthermore, I am bearing in mind that my predecessor in Report 2005-004 relied on the comments of Mr. Justice La Forest in *Carey* to state that "section 18 of the *ATIPPA* is not meant to act as a 'blanket' exception for all Cabinet records."

[61] Accordingly, I have reached the conclusion that the phrase in question must be interpreted to mean that information submitted to Cabinet that contains "advice, recommendations, policy considerations or draft legislation" will be excepted from disclosure pursuant to section 18 only when that information reveals the "substance of deliberations of Cabinet." Information will not be excepted simply because it contains "advice, recommendations, policy considerations or draft legislation" and was submitted to Cabinet. This is the approach suggested by Saunders J.A. in *O'Connor.* To adopt the approach recommended by Donald J.A. in *Aquasource,* which would except from disclosure information that forms the basis for Cabinet deliberations, would amount to granting a "blanket" exception for all Cabinet records. This blanket approach was rejected by my predecessor in Report 2005-004 and I, likewise, do not wish to adopt that approach.

[62] The approach I have adopted from *O'Connor* will require the following procedure (as outlined by Saunders J.A. in paragraph 94 and quoted by my predecessor in paragraph 32 of Report 2005-004) to be used when determining if information is to be excepted from disclosure by section 18 of the *ATIPPA*:

> *[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.*

[63] To summarize, the test for determining whether information should be excepted from disclosure pursuant to section 18 because it would reveal the substance of deliberations of Cabinet can be stated 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 exception. Furthermore, the phrase in section 18 which reads: "including advice, recommendations, policy consideration or draft legislation or regulations submitted or prepared for submission to the Cabinet," is provided by the legislature as examples of the type of information that could reveal Cabinet confidences if the disclosure of such information would permit the reader to draw accurate inferences about Cabinet deliberations.

[64] I wish to add here that although I have declined to adopt the British Columbia Commissioner's interpretation of the phrase "substance of deliberations" as it appears in section 18 of the *ATIPPA*, I am aware that my predecessor in Report 2007-018 adopted that interpretation for the same phrase as it is found in section 19(1)(c) of the *ATIPPA*, which provides as follows:

> *19. (1) The head of a local public body may refuse to disclose to an applicant information that would reveal*
>
> . . .
>
> *(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.*

[65] I note that the phrase "substance of deliberations" in section 19(1)(c) is not followed by a list of the type of information that could reveal the substances of deliberations as is the same phrase in section 18(1). It is my view that the omission by the legislature of this phrase in section 19(1)(c) and its inclusion in section 18(1) was done deliberately to distinguish the two situations. Section 19(1)(c) deals with the information that may be withheld because it would reveal the substance of the deliberations of a private meeting of a local public body such as that of a Town Council, as was discussed by my predecessor in Report 2007-018. On the other hand, section 18(1) deals with deliberations at the highest level of decision-making in this province. The intent of the legislature, therefore, was to indicate that some information is prohibited from disclosure because it was part of the deliberative process of Cabinet and to point out that the ability of Cabinet to deliberate freely and frankly is of paramount importance.

[66] Thus, I do not believe that there is any inconsistency between the position taken by my predecessor in relation to the operation of section 19(1)(c) and my findings in relation to section 18(1). Given the unique importance of Cabinet confidences in our system of government, I have no hesitation in finding that section 18(1) is intended to shield from disclosure a broader range of information than that which the legislature meant to protect from release by enacting section 19(1)(c) in relation to the private meetings of a local public body.

[67] I wish to make a final comment in relation to my interpretation of section 18 of the *ATIPPA*. The findings I have made represent my efforts to meet the challenge set forth by Saunders J.A. in *O'Connor* to find a "balance between a citizen's right to know what government is doing and government's right to consider what it might do behind closed doors." In attempting to achieve

that balance I have been guided by the comments of judges of two of the highest courts in Canada in their efforts to interpret similar provisions.

[68] Furthermore, I believe that by not enacting a blanket exception for Cabinet documents our legislature has struck a balance between making all public bodies more accountable and allowing Cabinet to carry out its deliberations in confidence and in private. I have therefore interpreted the words of section 18 in the context of the purpose of the *ATIPPA* and my belief as to the balance that our legislature is attempting to achieve. If our legislature had intended that the exception in section 18 should be narrow and that Cabinet needed to operate with more secrecy, then it could have enacted a blanket provision excepting all Cabinet documents from disclosure. It did not. As such, it is my view that the legislature was, quite appropriately, mindful of the fact that more secrecy often leads to less accountability and less transparency.

[69] I think it is important to add here that I am not saying that the Department or the Executive Council cannot withhold information that contains such things as advice, recommendations, and draft legislation. There are other discretionary exceptions (for example, section 20(1)) which may allow such information to be withheld. However, I am stating that such information cannot be withheld using the mandatory exception in section 18 in a "blanket" or all-inclusive fashion.

[70] I will discuss later in this Report which information I have determined to be subject to the exception set out in section 18.

Section 20 (Policy advice or recommendations)

[71] Section 20 sets out an exception to disclosure for information that constitutes advice or recommendations and provides in part 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; . . .

[72] My predecessor discussed section 20 in Report 2005-005 at paragraphs 21 to 22 and 26 to 27 and determined that the use of the phrase "advice and recommendations" in section 20(1)(a) of the *ATIPPA* allows public bodies to protect information that contains a suggested course of action, but not factual information, regardless of where this factual information may be found within the record.

[73] I note here that some of the information in the responsive record is contained in draft documents. In Report A-2008-002, I discussed the exception in section 20(1)(a) in relation to draft documents and stated in paragraph 21 that this exception does not apply to drafts simply because they are drafts and a public body can only withhold those parts of a draft which are actually advice or recommendations.

[74] I also indicated in Report A-2008-002 that it is not sufficient for a public body to make the mere assertion that a document contains advice or recommendations. In order to meet the onus imposed on it by section 64(1) of the *ATIPPA*, a public body must specify which information in a document constitutes advice or recommendations and provide argument and evidence to support its position. In addition, factual and background information do not constitute advice or recommendations and, therefore, as enacted in section 20(2)(a), are not protected from disclosure.

[75] I will discuss later in this Report which information I have determined to be subject to the exception set out in section 20.

Section 24 (Disclosure harmful to the financial or economic interests of a public body)

[76] The Department also relies on the exception to disclosure set out in section 24(1) of the *ATIPPA* which allows a public body to deny disclosure of information that could be harmful to

the financial or economic interests of a public body or the government of the province and provides in part as follows:

> *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:*
>
> *(a) trade secrets of a public body or the government of the province;*
>
> *(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
>
> *(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*
>
> *(d) information the disclosure of which could reasonably be expected to result gain to a third party; and*
>
> *(e) information about negotiations carried on by or for a public body or the government of the province.*

[77] In Report 2005-002 at paragraphs 23 to 25, my predecessor discussed the evidence of expected harm that must be presented by the public body in a claim for exception under section 24(1). I adopted the reasoning of my predecessor in my Report A-2008-002 and indicated that a public body must present evidence that establishes a clear and direct linkage between the disclosure of the information in question and the probable harm to the financial or economic interests of a public body. In order to prove this linkage a public body is required to give an explanation of how or why the alleged harm would result from the disclosure of specific information.

[78] As I have indicated, the Department has not provided my Office with a written submission outlining its position on the exceptions it has claimed. Therefore, there is no indication by the Department as to what harm to financial or economic interests is likely to occur if the

information is disclosed to the Applicant. Nor has there been any attempt to establish a clear and direct linkage between the disclosure of specific information and the alleged harm. Therefore, I must find that the Department has not met the burden imposed upon it by section 64(1) of proving that because of the operation of section 24(1) the Applicant has no right of access to information in the responsive record.

Section 27 (Disclosure harmful to business interests of a third party)

[79] The Department also relies on section 27(1) of the *ATIPPA*, which contains a mandatory exception dealing with information harmful to the business interests of a third party as follows:

> *27. (1) The head of a public body shall refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party;*
>
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[80] In Report 2005-003 at paragraph 38, my predecessor discussed the three-part harms test that must be met in order for the exception set out in section 27 to be applicable. The three parts of the test may be stated as follows:

> (a) disclosure of the information will reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) the information was supplied to the public body in confidence, either implicitly or explicitly; *and*
>
> (c) there is a reasonable expectation that the disclosure of the information would cause one of the four injuries listed in 27(1)(c).

[81] My predecessor also pointed out in Report 2005-003 that all three parts of the test must be met in order for a public body to deny access to information in reliance on section 27(1). If a record fails to meet even one of the three parts, it does not meet the test, and the public body is not entitled to rely on section 27(1) to sever information in the responsive record.

[82] The Departmental Coordinator in his letter dated 30 July 2007 sent to our Office enclosing the responsive record stated:

> . . .
>
> *In general, the main areas of concern for our department are:*
>
> > . . .
> >
> > *- to protect information given to us in confidence by third parties where the release of this information may be harmful to their commercial interests.*
> >
> > . . .

[83] This comment by the Departmental Coordinator appears to be a reference to section 27(1). Ordinarily, without further evidence and argument from a public body by way of a written submission it is not possible for me to make a finding that the three-part test has been met. However, in this case, the Departmental Coordinator has provided an Investigator from my Office with oral submissions regarding the Department's reliance on section 27(1) in relation to certain information contained in the responsive record. I wish to indicate that I would normally

not consider verbal communication to be sufficient proof that an exception is applicable, however, the information by itself was clear enough for me to determine that it was self-evident that I must apply the mandatory exception in section 27. Therefore, having reviewed these verbal submissions with the Investigator I am satisfied that the three-part test has been met in relation to particular information and the Department has properly severed that information pursuant to section 27(1).

[84] I will discuss later in this Report which particular information I have determined to be subject to the exception set out in section 27(1).

Section 30 (Disclosure of personal information)

[85] The Department also relies on section 30 of the *ATIPPA* which deals with the disclosure of personal information as follows:

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*
>
> *(2) Subsection (1) does not apply where*
>
> *(a) the applicant is the individual to whom the information relates;*
>
> *(b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;*
>
> *(c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;*
>
> *(d) an Act or regulation of the province or Canada authorizes the disclosure;*
>
> *(e) the disclosure is for a research or statistical purpose and is in accordance with section 41;*
>
> *(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*

(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

(h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;

(i) public access to the information is provided under the Financial Administration Act;

(j) the information is about expenses incurred by a third party while travelling at the expense of a public body;

(k) the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or

(l) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including

(i) personal information that is supplied in support of the application for the benefit, or

(ii) personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.

[86] Section 2(o) provides a definition of personal information as follow:

(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;

[87] Section 30(1) contains a prohibition against the disclosure of personal information. In Report 2006-001, my predecessor discussed the operation of sections 30(1) and 30(2) and indicated at paragraph 34 that once it has been determined that information fits the definition of personal information, it is subject to the prohibition against disclosure set out in section 30(1), unless that personal information is covered by section 30(2), which establishes a number of specific exemptions to the protection provided by section 30(1).

[88] Therefore, if I find that the responsive record contains personal information as defined in section 2(o), I must then look to section 30(2) to determine if that personal information is covered by one of the paragraphs in that provision and, therefore, exempted from the mandatory non-disclosure rule set out in section 30(1).

[89] I will discuss later in this Report which information I have determined to be subject to the exception set out in section 30(1).

Applicability of Claimed Exceptions

[90] Having discussed the exceptions to disclosure claimed by the Department, I must now determine which of the information in the responsive record is subject to the claimed exceptions. I have already found that the Department is not entitled to rely on section 24 to deny disclosure of information, but is entitled to deny access to certain information pursuant to section 27(1).

[91] For convenience, I have highlighted on a copy of the responsive record to be given to the Department those portions of the documents which should be severed and not disclosed to the Applicant. I will now outline the reasons for my determination as to which information should not be disclosed.

[92] In relation to the first 32 pages of the numbered 85 pages, the Department has severed all the information in these pages and claimed the exception under section 18. These 32 pages consist of what appear to be three drafts of a "Memorandum to Executive Council" prepared by the Department. I find that the Department has not met the onus imposed upon it by section 64(1) to provide evidence that it is likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations. Therefore, the Department is not entitled to rely on section 18 to deny disclosure to any of the information in these 32 pages. However, I find that certain of the information in these pages constitutes advice or recommendations developed by or for a public body and, therefore, pursuant to section 20(1)(a) that information should not be disclosed. In addition, certain of the information is, for the reasons I have already indicated, covered by the exception in section 27(1) and should not be disclosed.

[93] The information on pages 33 to 37 is contained in a document entitled "Briefing Note." The Department has severed a two-word phrase on page 33 and claimed the exception under section 18. I cannot accept that the disclosure of this phrase would permit the reader to draw accurate inferences about Cabinet deliberations and I find that this information should be released.

[94] In relation to pages 34 to 37, the Department has severed information on these pages and claimed the exceptions under sections 18, 20, 24, and 27. I find that the information on page 34 was properly severed pursuant to section 27. In relation to the claim for exception under sections 18, 20, and 24 for the information on page 35, I find that the information was properly severed as advice or recommendations under section 20(1)(a). Regarding the claim for exception under section 18 on page 37, I find that section 18 is not applicable but that disclosure can be denied on the basis of section 20(1)(a).

[95] The information on pages 40 to 43 is contained in a "Briefing Note." I find that the information on page 40 was properly severed pursuant to section 27. In relation to the claim for exception under sections 18, 20, and 24 for the information on page 42, I find that the information contains advice or recommendations developed by or for a public body and was properly severed under section 20(1)(a).

[96] In relation to the information severed in the e-mails on pages 45 and 61, I agree with the Department that this information is not responsive to the Applicant's request and should not be disclosed.

[97] In relation to the information severed in the e-mail on page 59, I find that this was properly severed as personal information of a third party pursuant to section 30(1).

[98] The Department has severed all of the information in a Memorandum on page 77 and claimed the exception under section 18. I find that none of the information in this document would if disclosed permit the reader to draw accurate inferences about Cabinet deliberations. However, I find that the last sentence of the Memorandum contains advice or recommendations developed by or for a public body and, therefore, it should be severed pursuant to section 20(1)(a). The rest of the information should be released.

[99] The Department has severed information in two e-mails on pages 78 and 79 and claimed the exception under section 18. Both e-mails contain suggestions as to what should be included in a proposed document. I find that the information in these e-mails, if disclosed, would not allow the reader to draw accurate inferences about Cabinet deliberations and, therefore, the Department cannot rely on the exception under section 18. However, much of the information in these two e-mails constitutes advice or recommendations developed by or for a public body and, therefore, should not be disclosed pursuant to sections 20(1)(a). It is not necessary to sever the information regarding the sender and recipient of the e-mails, the date, the subject line of the e-mails, or the opening or closing words of the e-mails.

[100] The Department has severed all the information in a document on page 80 labeled "Interdepartmental Considerations" and claimed the exception under section 18. I find that the information in this document would not, if released, permit the reader to draw accurate inferences about Cabinet deliberations. Therefore, the information on this page should be released.

[101] The Department has severed all the information in an e-mail on pages 81 and 82 and claimed the exception under section 18. I find that the information in this document would not, if released, permit the reader to draw accurate inferences about Cabinet deliberations. However, much of the information in the e-mail constitutes advice or recommendations developed by or for a public body and, therefore, the Department can deny disclosure pursuant to section 20(1)(a). It is not necessary to sever the information regarding the sender and recipient of the e-mail, the date or the subject line of the e-mails, or the opening and closing words of the e-mail.

[102] The Department has severed all the information in an e-mail on page 83 and claimed the exception under section 18. I find that the information in this document would not, if released, permit the reader to draw accurate inferences about Cabinet deliberations and, therefore, the Department cannot deny disclosure on the basis of the exception in section 18. However, I find that the second sentence in the e-mail contains advice or recommendations and, therefore, the Department can deny access to that sentence pursuant to section 20(1)(a). The rest of the information in the e-mail should be released to the Applicant.

[103] The Department has severed all the information in an e-mail on page 84 and claimed the exception under section 18. I find that the information in this document would not, if released, permit the reader to draw accurate inferences about Cabinet deliberations and, therefore, the Department cannot deny disclosure on the basis of the exception in section 18. However, I find that certain information in the e-mail constitutes advice or recommendations and, therefore, the Department can deny access to that information pursuant to section 20(1)(a). The information that contains the advice is that portion in the body of the e-mail immediately following the phrase “We could.” The rest of the information in the e-mail should be released to the Applicant.

[104] The Department has severed information in the e-mail on page 85 and claimed the exceptions under sections 27 and 30. I agree with the Department that the severed portions are excepted from disclosure pursuant to the claimed exceptions and this information should not be released.

[105] I will now discuss the information severed in the 15 pages of records forwarded to my Office on 16 August 2007. As I have indicated, these 15 pages are from the files of the Executive Council and all information in those pages has been severed, with an indication on the records

that access is being denied to all information based on the exceptions set out in sections 18, 20, and 24. The severed information is contained in three separate documents, which I will discuss individually. As I have indicated, the Department is not entitled to deny access to information on the basis of section 24. Therefore, denial of access to any information must be on the basis of section 18 or 20. In addition, I have given consideration to information being subject to the mandatory exception in section 27.

[106] The first of the three documents consists of one page and is headed "Cabinet Directive." I have reviewed this document and I find that the information in that document would allow the reader to draw accurate inferences about Cabinet deliberations. Therefore, the Department has properly relied on section 18(1) to deny access to all of the information in this document.

[107] The second document consists of one page entitled "Economic Policy Committee Recommendation" to which is attached another three-page document entitled "Cabinet Secretariat Analysis." My review of the one-page document indicates that it contains information with advice or recommendations developed by or for a public body to which disclosure can be denied pursuant to section 20(1)(a). In addition, I find that advice and recommendations were submitted to a committee of Cabinet and their disclosure would permit the reader to draw accurate inferences about the deliberations of Cabinet. Also, the information contains a policy consideration submitted to a committee of Cabinet, the disclosure of which would permit the reader to draw accurate inferences about Cabinet deliberations. In conclusion, I find that the Department has properly denied access to all the information in this one-page document.

[108] In relation to the attached three-page document entitled "Cabinet Secretariat Analysis," I find that the Department is not entitled to deny access to all the information in this document. Much of the information in the document constitutes background factual information which should be disclosed to the Applicant. However, I find that certain of the information contains advice or recommendations and access to this information can be denied on the basis of section 20(1)(a). This same information containing the advice and recommendations was submitted to a committee of Cabinet and this information, if disclosed, would permit the reader to draw accurate inferences about Cabinet deliberations. As such, it is also excepted from disclosure by

section 18(1). In addition, certain information contains a policy consideration submitted to a committee of Cabinet and would allow the reader to draw accurate inferences about Cabinet deliberations. Also, there is information in the document that is excepted from disclosure by section 27.

[109] The remaining document in the records from the files of the Executive Council is a ten-page document entitled "Memorandum to Executive Council." My review of this document indicates that it contains much factual background information which should be released to the Applicant. However, I find that certain of the information contains advice or recommendations and access to this information can be denied on the basis of section 20(1)(a). This same information containing the advice and recommendations was submitted to Cabinet and would permit the reader to draw accurate inferences about Cabinet deliberations. As such, it is also excepted from disclosure by section 18(1). In addition, certain information contains a number of policy considerations submitted to Cabinet and this information, if disclosed, would permit the reader to draw accurate inferences about Cabinet deliberations. Also, there is information in the document that is excepted from disclosure by section 27.

V CONCLUSION

[110] **The Department is not entitled to rely on the exception set out in section 24. I was compelled to reach this conclusion because of the absence of any evidence or argument from the Department in a written submission. Without such evidence or argument, there was no basis on which I could conclude that section 24 was applicable.**

[111] The Department is entitled to deny access to information on the basis of the exception in section 18 when that information meets the following test: the information must be such that if it is disclosed it would permit the reader to draw accurate inferences about Cabinet deliberations. I have concluded that some, but not all, of the information for which section 18 has been claimed can be withheld.

[112] The Department is entitled to deny access to information on the basis of the exception in section 27. I have reached this conclusion based on the information provided verbally to my Office by the Department and my determination that the information meets the necessary requirements of the three-part test I have adopted in relation to section 27.

[113] The Department is entitled to deny access to certain information based on the prohibition against the disclosure of personal information in section 30(1).

[114] Also, as part of my conclusions, I wish to comment upon the Department's decision not to provide a written submission in support of its reliance on the exceptions claimed. The *ATIPPA* is clear in establishing that the burden of proof is on public bodies to prove that access to information can be denied. **I was surprised not to receive a written submission from the Department to support its claim for the relied upon exceptions. As I have indicated in previous reports: why a public body would rely on an exception, yet remain silent when given an opportunity to support its use, is puzzling to me. The Department in its letter dated 30 July 2007 advised my Office that "I would like to be able to provide written justification for some sections at a later stage in the process." Subsequently, the Department asked for two extensions of the time period for filing its written submission. Yet, curiously, no submission was provided to my Office.**

[115] Therefore, as part of my conclusion, I would suggest that if a public body determines during the review process that a relied upon exception does not apply, then, in keeping with the spirit and intent of the *ATIPPA*, the public body should indicate that this is the case and release the records to which it had originally denied access. **If a public body maintains that such exceptions do apply, then I would expect at least a minimal amount of effort to be expended by that public body in discharging the burden of proof imposed upon it by the *ATIPPA*.**

VI RECOMMENDATIONS

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

1. That the Department release to the Applicant the information I have indicated should be disclosed. For convenience, I have highlighted on a copy of the record provided to the Department which information should **not** be released to the Applicant. All other information should be released.

2. That the Department in future Requests for Review be mindful of the burden of proof imposed upon it by the *ATIPPA* and inform the Applicant and this Office of its intention to abandon reliance upon a claimed exception if it is appropriate to do so. In addition, the Department should endeavour to provide evidence and argument in support of all the exceptions it claims to be applicable.

3. The Department and the Executive Council in future Requests for Review be mindful of the obligation imposed upon my Office by section 46(1) to attempt an informal resolution of Requests for Review and, to that end, both these public bodies should cooperate fully, and in a timely fashion, with my Office to bring about successful resolutions within the spirit and intent of the *ATIPPA.*

[117] 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 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

[118] Please note that within 30 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.*

[119] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of May 2008.

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