May 30, 2008 **A-2008-010**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2008-010

Newfoundland and Labrador Liquor Corporation

Summary: The Applicant applied to the Newfoundland and Labrador Liquor Corporation ("NLC") for access to information concerning the move of a liquor store from one location to another. NLC released some records, but denied access to 6 pages in their entirety, claiming sections 18 and 20 of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA"*). The six pages consisted of a Memorandum to Executive Council and an e-mail exchange that contained much of the same information contained in the Memorandum. The Commissioner found that NLC had failed to appropriately sever the documents and had instead applied Sections 18 and 20 as blanket exceptions to both documents. With respect to section 18, the Commissioner applied the *O'Connor* test and stated that NLC could only 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. With respect to section 20, the Commissioner stated that this exception is intended to allow public bodies to protect a suggested course of action, and not merely factual information. The Commissioner also noted that section 20 only protects *information* within a record that would reveal advice and recommendations; the entire record is not protected. If other information in the record is not advice or recommendations, then it cannot be withheld on the basis of section 20. Notwithstanding these conclusions, the Commissioner found that NLC was not entitled to rely on section 20 as it has not discharged the burden of proof imposed upon it by section 64 of the *ATIPPA.*

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2, 18, 20, 47, 49, 50 and 64.

Authorities Cited: *Carey v. Ontario* [1986] 2 S.C.R. 637*; O'Connor v. Nova Scotia*, 2001 NSCA 132; Newfoundland and Labrador OIPC Reports 2005-004, 2005-005, A-2008-004; Ontario OIPC Order PO-2028; Alberta OIPC Order 97-007.

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 to the Newfoundland and Labrador Liquor Corporation ("NLC") dated 20 October 2007, wherein he requested access to the following:

> *For year 2007 to date*
> *Details of move from Liquor Store in Labrador Mall to other location in Labrador West.*
> *Please provide copies of correspondence, tenders, quotes and new lease amounts, Leasehold Imp. And other related costs for new location to be made 2007 or 2008* [sic]

[2] By correspondence dated 20 November 2007, NLC informed the Applicant that access to the record had been granted in part, while access to the remainder of the record was being denied in accordance with sections 18 and 20 of the *ATIPPA*. As a result, the Applicant filed a Request for Review with this Office on 27 November 2007. The portion of the record to which access was denied included a Memorandum to Executive Council (the "Memorandum") and an e-mail exchange between a government employee and an NLC official that discussed the information contained in the Memorandum. These records were withheld in their entirety, and comprise six pages.

[3] I note here that while the Access to Information Request was submitted to the Newfoundland and Labrador Liquor Corporation as the public body, the province's *ATIPPA Policy and Procedures Manual* (the "*Manual*") (produced by the Access to Information and Protection of Privacy Coordinating Office of the Provincial Department of Justice) states as follows:

> *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 signoff from Cabinet Secretariat before the head of the public body responds to an access request.*

[4] Attempts to resolve this Request for Review by informal means were unsuccessful. On 27 March 2008, the Applicant and NLC were advised that the file had been referred to the formal investigation process and they were both given the opportunity to provide written submissions to this Office under section 47 of the *ATIPPA.*

[5] In the present case, NLC was initially prepared to release all of the records, but after consultation with Cabinet Secretariat, and upon its recommendation, denied access to the Memorandum and the e-mail exchange. As such, NLC did not provide any submission to this Office justifying the application of sections 18 and 20. Cabinet Secretariat also declined to provide a written submission to this Office.

III APPLICANT'S SUBMISSION

[6] The Applicant provided a short submission wherein he argued that while Cabinet documents may enjoy a high level of confidentiality, once they are released outside Cabinet (i.e. in this case to the NLC), they lose this protection and can no longer be considered confidential. Although the Applicant did not specify exactly what documents he considered "Cabinet documents," I think it is fair to assume that a Memorandum to Executive Council might be considered a "Cabinet document," as referred to by the Applicant.

IV DISCUSSION

Cabinet Confidences (Section 18)

[7] The argument put forth by the Applicant is directed to NLC's reliance on section 18 to withhold portions of the responsive record. Section 18 states 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.*

[8] It is important to note that section 18 does not refer to "Cabinet documents," and this term is also not used elsewhere in the *ATIPPA.* Further, section 18 makes no comment with respect to the confidentiality of any class of documents, Cabinet or otherwise. In fact, this section only protects *information* which, if disclosed, would reveal the substance of deliberations of Cabinet. In theory, this type of information could be found in any type of document, and while the information therein may be protected, the documents themselves are not. Therefore, I would like to make it clear that by accepting, in this case, that the Memorandum likely falls into the category of documents that the Applicant has termed "Cabinet documents," I am in no way suggesting that section 18 automatically applies to documents (or information therein) that might reasonably be considered "Cabinet documents." Information in "Cabinet documents," like any other information, is subject to disclosure unless an exception provided for in the *ATIPPA* applies.

[9] As well, whether records that might be considered "Cabinet documents" are released outside of Cabinet and the effect this may or may not have on the level of confidentiality they enjoy is not the issue. For the purposes of an access to information request, the issue is whether the information requested reveals the substance of deliberations of Cabinet. If so, section 18 applies and the information (regardless of what it consists of or where it came from or who else has had access to it) must not be disclosed to an Applicant. To do otherwise would be contrary to the *ATIPPA*. Therefore, I cannot agree with the Applicant's argument in this regard.

[10] As alluded to above, section 18(1) is a mandatory exception. If information is deemed to fall within this exception, a public body is required to withhold the relevant record (where all the

information within that record falls within the exception) or sever the information from a document to be released.

[11] La Forest J specifically considered "Cabinet Confidences" in *Carey v. Ontario* [1986] 2 S.C.R. 637, and at paragraph 79 stated as follows:

> *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.*

[12] As my predecessor stated in Report 2005-004:

> *[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.*

I agree with this conclusion, and will apply this rationale in the present case.

[13] In Report 2005-004, my predecessor dealt extensively with the section 18 exception. More recently, in Report A-2008-008, I also discussed section 18 at length. In order to invite protection under this provision, information must be shown to reveal the substance of deliberations of Cabinet. At paragraph 31 of Report 2005-004 the issue of "substance of deliberations" was discussed and the test set out by the Nova Scotia Court of Appeal in *O'Connor v. Nova Scotia,* 2001 NSCA 132 was accepted. The test, which I also adopted in Report A-2008-008, is set out in *O'Connor* as follows:

> *[56] …Is it likely that the disclosure of the information would permit the reader to draw <u>accurate</u> 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]

[14] Also in Report A-2008-008, I decided that "advice, recommendations, policy considerations or draft legislation or regulations" as set out in section 18 should be interpreted as follows:

> *[61] …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.*

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

Policy Advice or Recommendations (Section 20)

[16] As noted in several previous reports, section 20(1) is a discretionary exception which allows a public body to withhold policy advice or recommendations, but does not *require* a public body to refuse such access. If the records in question fall within the exception, the exercise of discretion remains with the public body. I cannot recommend that a public body exercise its discretion and release records it is authorized to withhold. If the records do not fall within the exception, however, the public body cannot rely on it to withhold information from the Applicant. As such, appropriate recommendations will be made.

[17] Section 20(1) states 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.*

[18] It is important at this point to also discuss the context of section 20 and exactly what it is meant to protect. Again, I would refer to the *Manual*, at section 4.2.3:

> *Section 20 is intended to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny, while allowing information to be released which would not cause real harm.*

[19] The definition of "advice and recommendations" has been considered in several previous Reports, most notably in Report 2005-005, at paragraphs 19 to 54. I will reiterate some of the major points of this Report below.

[20] In this Report, my predecessor referred to Ontario Order PO-2028 (upheld by the Ontario Superior Court of Justice (Divisional Court) at 2004 CarswellOnt 189 (eC), and the Ontario Court of Appeal at 2005 CarswellOnt 4553 (eC)), where Ontario's Assistant Information and Privacy Commissioner stated:

> *In previous orders, this office has found that the words 'advice' and 'recommendations' have similar meanings, and that in order to qualify as 'advice or recommendations' in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993].*
> ….…..
>
> *To summarize, the Ministry's position that 'advice' should be broadly defined to include 'information, notification, cautions, or views where these relate to a government decision-making process' flies in the face of a long line of jurisprudence from this office defining the term 'advice and recommendations' that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.*
>
> *A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word 'advice' in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice.* ***It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit***

> ***the free flow of expertise and professional assistance within the deliberative process of government.***
>
> *[Emphasis added]*

[21] In Order 97-007, the Information and Privacy Commissioner for Alberta stated:

> *Advice must contain more than mere factual information, and must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. A factual summary of events, without more, is not sufficient.*

[22] When interpreting section 20(1)(a), we must also consider section 20(2)(a). This section clearly, and without qualification, states that factual material **shall** not be withheld under this exception. Therefore, I think it is very clear that "advice and recommendations," as used in section 20(1)(a), does not include factual information.

[23] The issue of appropriate severing was also discussed in Report 2005-005. In this Report, the record at issue was a ministerial briefing note, which had been withheld in its entirety. Briefing notes tend to be standardized and include several sections including: Title, Issue, Anticipated Questions, Key Messages or Suggested Responses, Other Suggested Responses, and Background. Occasionally, these briefing notes will have other sections such as a Media Response, an Appendix and/or a section on Recent Developments.

[24] At paragraph 32 of Report 2005-005, my predecessor stated:

> *[32]…..it is important that public bodies avoid applying any exceptions to a record based on its title or location. This is an easy trap to fall into and public bodies must be careful to review all records on a line-by-line basis and to only sever that information which clearly falls within the exception. As indicated in Section 3.11 of the ATIPPA Policy and Procedures Manual, "A careful review of the information contained in a record is required in order to determine whether or not an exception to disclosure applies. It is usually not possible to make this determination merely on the basis of the title, type, classification or format of a record." It appears obvious from the pattern of severance in the records partially released to the Applicant on 1 September 2005 that the Department in this case applied a class test and*

> *failed to do an appropriate line-by-line review. In my view, a briefing note does not enjoy blanket protection.*

[25] As noted in Report 2005-005, the language of section 20(1) supports this conclusion. To briefly summarize, section 20(1) provides a public body with the discretion to refuse to disclose *information* that would reveal advice or recommendations, as opposed to a *record* containing information. Information is facts or data that would be contained within a record and is not necessarily the entire record. Therefore, by deliberately choosing to use the word "information" the legislators chose to protect only those portions of a record constituting advice or recommendations. Notwithstanding that a record may contain information that invites protection under this section, if other information within that record is not advice or recommendations it should be released. In other words, the record should be appropriately severed. Only if the entire record is comprised of "advice or recommendations" can the entire record be withheld.

[26] This issue of appropriate severance is fully supported by the purposes of the legislation as specified in section 3, and the general right of access as specified in section 7. This point is fully explored in Report 2005-005, at paragraphs 35 to 38, and need not be repeated here.

[27] 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.*

After a review of the relevant case law, I am convinced, as was my predecessor, that this is the correct interpretation.

Burden of Proof (Section 64)

[28] Notwithstanding my analysis of sections 18 and 20, a discussion of the burden of proof is warranted in this case.

[29] In the present case, as the public body was initially inclined to release the entire record to the Applicant, it did not make a submission to this Office. Cabinet Secretariat, which had to be consulted with respect to the release of information that might be considered "Cabinet confidences" decided that two of the records should be withheld, in their entirety, on the basis of sections 18 and 20. However, Cabinet Secretariat, despite being invited to do so, also declined to make a submission in support of its position. In light of the fact that no evidence supporting the use of the claimed exceptions was presented to this Office, I would like to take this opportunity to refer Cabinet Secretariat to Section 64(1) of the *ATIPPA*:

> *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.*

[30] Clearly, the *ATIPPA* places the onus on the public body claiming an exception to prove that it is applicable in a particular case. **Public bodies should, at the very least, make an attempt to defend or explain the applicability of the exceptions it has claimed. This is a basic requirement of the Act, necessary for meaningful participation in the review process and necessary to achieve the stated purposes of the *ATIPPA* as set out in section 3. Applicants who request a review also expect public bodies to apply exceptions appropriately and to justify the use of those exceptions. This has certainly not been the case here. The two documents at issue were withheld in their entirety on the basis of sections 18 and 20 with no further explanation or rationale provided. As such, the burden of proof, as mandated by section 64, has not been met.**

Applicability of Claimed Exceptions

[31] **As the public body has failed to discharge the onus of proof imposed upon it by the *ATIPPA*, it is not entitled to rely on section 20 to withhold any of the information.**

[32] Despite the fact that the public body has also failed to discharge the burden of proof with respect to section 18, I am of the opinion that due to the mandatory nature of this exception, I must consider its applicability. The application of mandatory exceptions must be examined on

their merits, even in the absence of express evidence from the public body, as disclosure of information to which a mandatory section properly applies would be a contravention of the *ATIPPA.* This is not the case with discretionary exceptions such as section 20.

[33] One of the records at issue in the present case is a "Memorandum to Executive Council." This memo is, similar to a briefing note, divided into several sections and in this case has been withheld in its entirety. The Memorandum contains information with respect to the move of the liquor store from one location to another. For the purpose of section 18, the type of information contained in the record or the nature of the record itself is irrelevant. If information contained within the record would enable one to draw accurate inferences about Cabinet deliberations, then that information must be withheld. It this case, it is my opinion that the majority of the information contained in the Memorandum would enable one to draw such inferences. This information would necessarily have to be discussed and debated by Cabinet when it made the decision that was required in this situation; it would have formed the basis for Cabinet's decision. Therefore, it is my opinion that the majority of the information contained in the Memorandum was properly withheld under section 18.

[34] However, having said that, there is additional information contained in the Memorandum that does not allow one to draw accurate inferences about the substance of Cabinet deliberations, and should therefore be released. The information that is recommended for release is highlighted on a copy of the record that has been provided to NLC along with this Report.

[35] The second record at issue is the e-mail exchange that discusses the information set out in the Memorandum, and it too has been withheld in its entirety. To the extent that the e-mail exchange discusses or expands upon information contained in the Memorandum, it is my opinion that section 18 has been correctly applied, and NLC has appropriately refused access under this section. As determined above, this information would allow one to draw accurate inferences about the substance of Cabinet deliberations, and it matters not the type of document in which this information is contained.

[36] However, there are some issues raised and questions asked in the e-mail that are not addressed or discussed in the Memorandum. This information cannot be withheld under section 18. Unlike the Memorandum which is addressed to Executive Council, thus raising the *prima facie* presumption that it was prepared for or considered by Cabinet, the e-mail exchange is not addressed to Cabinet or a specific Cabinet member. There is also nothing in the e-mail that indicates that this additional information would be presented to Cabinet. If there is uncertainty that particular information was ever presented to Cabinet, it is impossible, without the benefit of any argument or evidence on this issue from Cabinet Secretariat, to determine that disclosing it would allow one to draw accurate inferences about the substance of deliberations of Cabinet. Cabinet can hardly deliberate on something that was never put before it.

[37] As there is no evidence before me that this additional information was ever put before or considered by Cabinet when it made the decision that was required in this case, I cannot accept that it would reveal the substance of deliberations of Cabinet. Therefore, it is my opinion that this additional information should be released. This information is highlighted on a copy of the record that has been provided to NLC along with this Report.

V CONCLUSION

[38] NLC is entitled to rely on section 18 where the information, if disclosed, 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.

[39] **NLC is not entitled to rely on section 20 to deny access to the information as it has not discharged the burden imposed upon it by section 64 of the *ATIPPA*.**

VI RECOMMENDATIONS

[40] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that NLC provide the Applicant with an appropriately severed copy of that portion of the responsive record identified as a Memorandum to Executive Council and an e-mail exchange between an NLC official and a government official. The information that I have recommended for release has been highlighted on a copy of the record provided to NLC with this Report.

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

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

[43] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30th day of May, 2008.

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