OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

June 29, 2009 A-2009-007

REPORT A-2009-007

Department of Environment and Conservation

Summary: The Applicant applied under the Access to Information and Protection of Privacy Act (the "ATIPPA") to the Department of Environment and Conservation (the "Department") for access to all correspondence and communications during a specified time period between the Department and the Newfoundland and Labrador Liquor Corporation dealing with the Multi-Materials Stewardship Board's beverage container recycling system. The Department granted access to some of the records responsive to the request but denied access to other records on the basis of section 20(1) (policy advice or recommendations), section 22(1) (disclosure harmful to law enforcement) and section 30(1) (disclosure of personal information). The Commissioner determined that the Department was entitled to deny access to a small portion of the responsive record on the basis of the exception to disclosure set out in section 20(1)(a). The Commissioner recommended release of all the other information in the responsive record.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as amended, ss. 2(o), 20, 22, 30(1), and 64(1); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. s. 13(1) *Access to Information Act*, R.S.C. 1985, c A-1.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-005, A-2008-002 and A-2009-003; Ontario (Minister of Transport) v. Cropley (2006), 202 O.A.C 379 and 3340901 Canada Inc. v. Canada (Minister of Industry), [2002] 1 F.C 421.

I BACKGROUND

[1] [1] In accordance with the Access to Information and Protection of Privacy Act (the "ATIPPA") the Applicant submitted an access to information request to the Department of Environment and Conservation (the "Department") on 24 July 2008, seeking disclosure of records as follows:

> *All correspondence, memos, email, and records between the Department of Environment and Conservation and the Newfoundland and Labrador Liquor Corporation that focus on or deal with the MMSB's [Multi-Materials Stewardship Board's] beverage container recycling system between January 1, 2005 and today's date.*

[2] I note here that the Multi-Materials Stewardship Board (the "MMSB") is a Crown agency of the Government of Newfoundland and Labrador, reporting to the Minister of Environment and Conservation. It was established to develop, implement and manage waste diversion and recycling programs on a province-wide basis.

[3] The Department responded to the Applicant's request in correspondence dated 29 August 2008 by stating that the request had been granted in part but that access to certain information in the 9 pages of the responsive record had been denied on the basis of section 20, section 22 and section 30.

[4] In a Request for Review received in this Office on 8 September 2008 the Applicant asked for a review of the decision of the Department with respect to the access request.

[5] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 25 March 2009 the Applicant and the Department were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the ATIPPA. As part of the formal investigation process the parties were given the opportunity to provide written submissions to this Office pursuant to section 47. Neither the Department nor the Applicant provided this Office with a written submission.

IV DISCUSSION

[6] The issues to be decided are:

1. Whether section 20 of the *ATIPPA* is applicable to any information in the responsive record;
2. Whether section 22 of the *ATIPPA* is applicable to any information in the responsive record; and
3. Whether section 30 of the *ATIPPA* is applicable to any information in the responsive record.

1. Is section 20 of the *ATIPPA* applicable to any information in the responsive record?

[7] Section 20 of the *ATIPPA* allows a public body to deny access to information that would reveal advice or recommendations or would reveal draft legislation or regulations. It provides in part as follows:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
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> *(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;*
>
> *. . .*
>
> *(k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;*

[8] In Report 2005-005, my predecessor discussed section 20 in paragraphs 21, 26, and 27 as follows:

> *[21] The Office of the Information and Privacy Commissioner for Ontario has also dealt extensively with the definition of advice and recommendations. In Order PO-2028, . . . the Assistant Commissioner stated:*

> *In previous orders, this office has found that the words 'advice' and 'recommendations' have similar meanings, and that in order to qualify as 'advice or recommendations' in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993].*

> . . .
>
> *[26] It is also important to note that "advice" is also defined in Appendix 3 of the ATIPPA Policy and Procedures Manual. This Manual is produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice. Advice is defined as an "Expression of opinion on policy related matters. Includes proposals, recommendations, analysis, policy options and draft legislation or regulations."*
>
> *[27] In my opinion, 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. This is supported and clarified by the legislation in section 20(2)(a).*
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> [Emphasis added]

[9] My predecessor in Report 2005-005 also referred to the Ontario Court of Appeal decision in *Ontario (Ministry of Transportation) v. Cropley* (2006), 202 O.A.C 379 which discussed the meaning of the phrase "advice or recommendations" as found in section 13(1) of the Ontario *Freedom of Information and Protection of Privacy Act*, which in all material aspects is equivalent to section 20(1) of the *ATIPPA*. He stated at paragraph 24:

> *[24] . . . In Ontario (Ministry of Transportation) v. Cropley, . . . Juriansz J.A., at paragraphs 27 and 28, said:*
>
> > *27 The most fundamental principle of interpretation is that words must be understood in light of the context and purpose of the whole statute…*
> >
> > *28 In my view, the meaning of 'advice' urged by the Ministry would not be consonant with this statement of purpose. The public's right to*

> *information would be severely diminished because much communication within government institutions would fall within the broad meaning of 'advice', and s. 13(1) would not be a limited and specific exemption. I conclude, in the words of the Divisional Court that 'the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose, and is reasonable.'*

[10] The Ontario Court of Appeal in *Cropley* also stated in relation to the Ontario Information and Privacy Commissioner's interpretation of the phrase "advice or recommendations" at paragraphs 23 to 25:

> *23 Relying on these definitions, the Commissioner submits that dictionaries define "advice" and "recommendation" in terms of each other. In fact, in Thomson v. Canada (Department of Agriculture), [1992] 1 S.C.R. 385 (S.C.C.), at 399, the Supreme Court of Canada, in a different statutory context, held that "The simple term "recommendations" should be given its ordinary meaning. Recommendations ordinarily mean the offering of advice."*
>
> *24 I accept that in ordinary usage, "advice" can mean communication in the nature of a recommendation regarding a decision, as well as simply information or intelligence.*
>
> *25 The Commissioner submits, correctly in my view, that the principle of interpretation to be applied is the associated words rule. The rule is explained in R. Sullivan, Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworth's, 2002) at 173:*
>
> > *The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms...Often the terms are restricted to the scope of their broadest common denominator.*

[11] The Ontario Court of Appeal in *Cropley* further stated at paragraphs 29 to 30:

> *29 In any event, the Commissioner's interpretation leaves room for "advice" and "recommendations" to have distinct meanings, though she did not draw one. A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It was unnecessary for her to draw a distinction between the two words to deal with the issues raised* [sic] *this case.*

> *30 I find the Commissioner's interpretation of the exemption in s. 13(1) to be reasonable.*

[12] An interpretation of the meaning of the phrase "advice or recommendations" was also given by the Federal Court of Appeal in *3340901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C 421, where the Court in discussing the meaning of that phrase as found in section 21(1)(a) of the federal *Access to Information Act*, which in all material aspects is equivalent to section 20(1) of the *ATIPPA*, stated at paragraphs 48 to 52:

> *48 The appellants argue that the Judge erred in law in treating certain of the records in question as containing "advice" for the purpose of para. 21(1)(a). It will be convenient to deal separately with the different categories of document that are alleged to contain advice. However, counsel for the appellants submitted that, with respect to all the documents, the Court should ascribe a meaning to "advice" that is consistent with the statutory context in which the word is used.*
>
> *49 In other words, because "advice" appears in a paragraph limiting the right of access to government records, it should be given a narrow meaning in accordance with the provision in subs. 2(1) that exemptions from the right of access "should be limited and specific." It is irrelevant that, in other contexts, including every-day speech, "advice" is capable of a broader connotation.*
>
> *50 I certainly have no difficulty with this proposition as a matter of general principle. However, an examination of the statutory context in which the word "advice" is used is not altogether helpful to the appellants. For example, by exempting "advice or recommendations" from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter; otherwise it would be redundant.*
>
> *51 In addition, the exemption must be interpreted in light of its purposes, namely, removing impediments to the free and frank flow of communications within government departments and ensuring that the decision-making process is not subject to the kind of intense outside scrutiny that would undermine the ability of government to discharge its essential functions . . . .*
>
> *52 On the basis of these considerations, I would include within the word "advice" an expression of opinion on policy-related matters, but exclude information of a largely factual nature, even though the verb "advise" is sometimes used in ordinary speech in respect of a communication that is neither normative nor in the nature of an opinion. Thus, a police officer may say that she advised the suspect of his legal rights or, when the person in custody asked her the time, the officer advised him that it was two o'clock.*

[13] The Federal Court of Appeal continued its analysis of the meaning of the phrase "advice or recommendations" at paragraphs 61 to 64:

> *61 . . . It was argued that a public official is not giving "advice" when she simply identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.*
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> *62 I do not agree. First, in insisting that advice must urge a specific course of action, counsel seems to be equating "advice" with "recommendations," even though, by using both words in para. 21(1)(a), Parliament clearly indicated that records that do not contain "recommendations" may still fall within the exemption.*
>
> *63 Second, a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue implicitly contains the writer's view of what the Minister should do, how the Minister should view a matter, or what are the parameters within which a decision should be made. All are normative in nature and are an integral part of an institutional decision-making process. They cannot be characterized as merely informing the Minister of matters that are largely factual in nature . . .*

[14] Having reviewed the discussions of the phrase "advice or recommendations" in my predecessor's Report 2005-005, in the Ontario Court of Appeal decision in *Copley*, and in the Federal Court of Appeal decision in *3340901 Canada Inc. v. Canada (Minister of Industry)*, I have reached the following conclusions on the meaning of the phrase "advice or recommendations" found in section 20(1)(a):

1. The statement by my predecessor in Report 2005-005 that "the use of the terms 'advice' and 'recommendations' . . . is meant to allow public bodies to protect a suggested course of action" does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than "a suggested course of action."

2. The term "advice or recommendations" must be understood in light of the context and purpose of the *ATIPPA*. Section 3(1) provides that one of the purposes of the *ATIPPA* is to give "the public a right of access to records" with "limited exceptions to the right of access."

3. The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.

4. Neither "advice" nor "recommendations" encompasses factual material.

[15] I now wish to discuss the burden of proof in a situation where a public body claims that information is excepted from disclosure by section 20(1)(a)

[16] Section 64(1) sets out the burden of proof on a Request for Review 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.*

[17] In Report A-2009-003 at paragraph 23, I discussed the burden of proof where the exception in section 20(1)(a) has been claimed as follows:

> *[23] In the absence of evidence to discharge the burden of proof, it is only in the clearest circumstances that section 20 can be claimed. That is, it is only where it is clear to me, on its face, that the information reveals a suggested course of action that will ultimately be accepted or rejected that I will not recommend the release or* [sic] *information. There are many instances where the application of section 20 is not clear. . . .*

[18] I will note here that the Department has not provided a written submission in this matter and, therefore, there is an "absence of evidence to discharge the burden of proof." As a result, I have been put in the position that I can only find that section 20(1)(a) is applicable in the "clearest circumstances" where it is clear to me on its face that the information reveals advice or recommendations. In those circumstances where the application of section 20(1)(a) is not clear, absent any submission or explanation from the Department, I will have to find that it is not applicable.

[19] The Department has claimed the exception set out in section 20(1)(a) for information contained in a letter dated 14 February 2008 sent by the President and CEO of the Newfoundland and Labrador Liquor Corporation to the Minister of Environment and Conservation (found at pages 1-2 of the responsive record). Specifically, the exception is claimed for information found in paragraphs 1, 4, 5, and 6 on page 1 of the letter. My review of this information leads me to the conclusion that none of the information contains a suggested course of action that could be accepted or rejected by its recipient, nor does the information contain an expression of opinion on policy-related matters. As such, the information does not constitute advice or recommendations in accordance with the exception set out in section 20(1)(a) and the Department is not entitled to rely on that exception to deny access to the information in these paragraphs.

[20] The Department has also claimed the section 20(1)(a) exception for information contained in the body of an e-mail (found on page 3 of the responsive record) dated 4 July 2007 sent by the President and CEO of the Newfoundland and Labrador Liquor Corporation to three recipients: the Minister of Environment and Conservation, the Chair and Chief Executive Officer of the MMSB, and the Deputy Minister of Environment and Conservation. The e-mail contains the President and CEO's recollection of what was discussed at a meeting he had earlier that day with the three recipients. The e-mail has been released to the Applicant with certain information severed in the body of the e-mail. I note that some of the severed information is also found in the previously discussed letter dated 14 February 2008 sent by the same individual.

[21] After a review of that e-mail, I have concluded that the severed information does not contain advice or recommendations. It does contain reference to the developing of advice and recommendations but does not contain a suggested course of action or an expression of opinion on policy-related matters such that section 20(1)(a) would be applicable. Consequently, the Department is not entitled to rely on that exception to deny access to the information in the e-mail.

[22] The Department is also relying on the exception in section 20(1)(a) to deny access to certain information in the body of an e-mail dated 15 July 2008 sent by the Chair and Chief Executive Officer of the MMSB in which he comments on what transpired in the previously discussed meeting held on 4 July

2007 involving him, the President and CEO of the Newfoundland and Labrador Liquor Corporation, the Minister of Environment and Conservation, and the Deputy Minister of Environment and Conservation. This e-mail is found on page 4 of the responsive record.

[23] My review of the severed information in the e-mail of the Chair and Chief Executive Officer of the MMSB leads me to the conclusion that this information does not constitute one of the "clearest circumstances" that would allow for the exception in section 20(1)(a) to be applicable. The Department has not presented any evidence or submission to discharge the burden of proving that the exception in section 20(1)(a) is applicable to deny access to the severed information. Perhaps with some further explanation or argument I might have been persuaded that some of the information does constitute advice or recommendations, however, at present I cannot conclude that this is the case.

[24] My review of the severed information in paragraph 3 of the e-mail sent by the Chair and Chief Executive Officer of the MMSB indicates that paragraph (k) of section 20(2) of the *ATIPPA* is applicable. Section 20(2) sets out a number of circumstances for which a public body is not entitled to refuse disclosure under section 20(1). Paragraph (k) of section 20(2) provides that access shall not be refused to:

> *(k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;*

[25] It is my view that the effect of paragraph (k) is that if I were to find that there was advice or recommendations regarding a proposed change to a program set out in the e-mail sent by the Chair and Chief Executive Officer of the MMSB, then I would conclude, based on the information in paragraph 3 of the e-mail, that such advice or recommendations had been rejected by the public body. Accordingly, the Department is not entitled to deny access to any of the severed information in the 15 July 2008 e-mail sent by the Chair and Chief Executive Officer of the MMSB.

[26] The Department has claimed the exceptions in section 20(1)(a) and 20(1)(b) for portions of the information in a three-page Briefing Note found on pages 7 to 9 of the responsive record. The Briefing Note is dated 6 February 2007 and was prepared by the Chair and CEO of the MMSB.

[27] The Department has claimed the exception found in section 20(1)(a) for the second full paragraph in the Briefing Note on page 8. Upon review of the information in this paragraph I conclude that this is one of the "clearest circumstances" in which section 20(1)(a) can be claimed in accordance with my comments in Report A-2009-003. The information clearly contains an expression of opinion on policy-related matters. As such, this information constitutes advice or recommendations within the meaning of section 20(1)(a) and the Department is entitled to deny access to this information.

[28] On page 8 of the responsive record the Department has claimed the exception to disclosure set out in section 20(1)(b) in relation to the information found in paragraph 4. The exception in section 20(1)(b) allows a public body to refuse to disclose to an Applicant information that would reveal draft legislation or regulations. I have reviewed the severed information in paragraph 4 and note that the information contains a reference to the already enacted *Waste Management Regulations*. However, there is no information in paragraph 4 that would constitute draft legislation or draft regulations or any information that would reveal anything concerning draft legislation or draft regulations. As a result, the Department is not entitled to rely on the exception in section 20(1)(b) to deny access to the information in paragraph 4 on page 8 of the responsive record.

[29] The Department has severed information in the Briefing Note found in the single paragraph on page 9 of the responsive record, claiming that the information is excepted from disclosure by section 20(1)(a). My review of this severed information convinces me that this is also one of the "clearest circumstances" in which section 20(1)(a) can be claimed in accordance with my comments in Report A-2009-003. It is clear to me that the information on its face reveals a suggested course of action that will ultimately be accepted or rejected. Therefore, the Department is entitled to rely on section 20(1)(a) to deny access to the information severed on page 9 of the responsive record.

2. Is section 22 of the *ATIPPA* applicable to any information in the responsive record?

[30] Section 22 allows a public body to deny access to information the disclosure of which could be harmful to law enforcement. It provides in part as follows:

> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> . . .
>
> *(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;*

[31] The Department is relying on paragraph (l) of section 22(1) to deny access to a five digit number that is handwritten on page 1 of the responsive record, which contains the first page of a letter dated 14 February 2008 sent by the President and CEO of the Newfoundland and Labrador Liquor Commission to the Minister of Environment and Conservation. This appears to be a file number which is recorded as part of the stamp on the letter indicating that it was received in the Minister's Office on 15 February 2008. The Department has provided no evidence or explanation as to how the disclosure of this number to the Applicant could reasonably be expected to reveal any arrangements for the security of property or a system. As a result, I am compelled to find that the Department is not entitled to rely on paragraph (l) of section 22(1) to deny access to the severed number.

3. Is section 30 of the *ATIPPA* applicable to any information in the responsive record?

[32] Section 30 contains a mandatory exception to the disclosure of personal information as follows:

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

[33] Personal information is defined in section 2(o) of the *ATIPPA* as follows:

> *(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;

[34] The Department has claimed the exception set out in section 30(1) for the information contained in the first two lines of the body of an e-mail (found on page 3 of the responsive record) dated 4 July 2007 sent by the President and CEO of the Newfoundland and Labrador Liquor Commission, to three recipients: the Minister of Environment and Conservation, the Chair and Chief Executive Officer of the MMSB, and the Deputy Minister of Environment and Conservation. As indicated previously, the e-mail contains the author's recollection of what was discussed at a meeting he had earlier that day with the three recipients. The e-mail has been released to the Applicant with certain information severed, including the first two lines in the body. I have reviewed the information for which the Department has claimed the exception in section 30(1) and I find that it does not contain personal information. Therefore, the Department is not entitled to deny access to this information.

V CONCLUSION

[35] My conclusion in this matter is that the Department is entitled to rely on the exception set out in section 20(1)(a) to deny access to the severed information in the second full paragraph on page 8 and in the single paragraph on page 9 of the responsive record. However, I conclude that the Department is not entitled to rely on this exception in relation to any of the other severed information for which it is claimed.

[36] It is also my conclusion that the Department is not entitled to rely on the claimed exceptions in section 20(1)(b), section 22(1) or section 30(1) to deny access to any of the information in the responsive record.

[37] As part of my conclusion I also wish to address the failure of the Department to provide a written submission. In Report A-2008-002, I stated at paragraph 100:

> *100] . . . 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 disappointed to see that little attempt was made by the Secretariat to support its claim for most of the relied upon exceptions. Why a public body would rely on an exception, yet remain silent when given an opportunity to support its use, is puzzling to me. I would suggest that if a public body determines during the review process that a relied upon exception does not apply, then it would reflect the spirit and intent of the ATIPPA to indicate that this is the case and to 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.*

[38] Similarly, in this matter I am disappointed and puzzled with regard to the Department's failure to make any effort by way of a submission to support its reliance on the exceptions claimed.

VI RECOMMENDATIONS

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

1. That the Department release to the Applicant all the information in the responsive record with the exception of the information found in the second full paragraph on page 8 of the responsive record and in the single paragraph on page 9. The information which the Department is entitled to withhold is highlighted on a copy of the responsive record that has been provided to the Department along with this Report.

2. That the Department in future access requests be mindful of the burden of proof imposed upon it by the *ATIPPA* and not claim an exception to disclosure for which it is not prepared to provide support by evidence and argument.

[40] Under authority of section 50 of the *ATIPPA* I direct the head of the Department to write to this Office and the Applicant within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[41] 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*.

[42] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of June 2009.

Ed P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador