OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-019

November 28, 2013

Premier's Office

Summary: The Applicant requested from the Premier's Office records relating to improvements to search and rescue operations. The Premier's Office denied access to all responsive records pursuant to sections 23(1)(a)(i), (iii) and (iv) (disclosure harmful to intergovernmental relations or negotiations) of the *ATIPPA*. The Commissioner determined that the Premier's Office had improperly withheld the responsive records. Consequently, the Commissioner recommended that the responsive records be released less any unresponsive information contained within.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, sections 23(1)(a)(i), (iii), (iv) and 64(1).

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-005 and A-2008-012.

File #: 0005-092-13-003

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on May 31, 2013 to the Premier's Office. The request sought disclosure of records as follows:

> *During the CETA negotiations, the NL government negotiated with the federal government by requesting improvements to search and rescue.*
>
> *Request copies of all the correspondence to and from the federal government including the list of improvements to SAR, sought by the provincial government, as well as all the offers to improve SAR, put forth by the federal government, and any concessions or agreements by the provincial government in exchange for any proposed improvements to search and rescue.*

[2] The response from the Premier's Office to the access request was due on July 4, 2013; however the Premier's Office extended the time for responding to the access request for an additional 30 days to August 1, 2013 pursuant to section 16(1)(d).

[3] The Premier's Office responded to the Applicant's access request by letter dated July 31, 2013 and denied access to all responsive records pursuant to sections 23(1)(a)(i), (iii) and (iv).

[4] In a Request for Review dated August 9, 2013 and received in this Office on the same date, the Applicant asked for a review of this matter.

[5] Efforts by an Analyst from this Office to facilitate an informal resolution were unsuccessful and by letters dated October 9, 2013 the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.

II PUBLIC BODY'S SUBMISSION

[6] The Premier's Office declined to provide a formal submission and, instead, relied on the information which it had provided to this Office during the informal resolution process.

[7] It is the position of the Premier's Office that the records:

> …[R]*eveal the substance of ongoing negotiations between the Governments of Newfoundland and Labrador and Canada in relation to the Government of Canada's negotiation with the European Union to establish terms for a Comprehensive Economic and Trade Agreement (CETA). The release of these records would cause significant harm to the province's position regarding ongoing CETA negotiations should they become public.*

III APPLICANT'S SUBMISSION

[8] The Applicant provided a formal submission on October 23, 2013. In his submission, the Applicant submits:

> *When I look at the prospect of the disclosure of my request somehow harming the conduct of the government and for that reason being denied, I am puzzled when I juxtapose that with what was voluntarily disclosed to the public by the government, without any apparent concern.*
>
> *This leads me to believe that the distinction between what they have previously disclosed and what they now refuse to disclose is a false dichotomy, one which was created by the Department so as to refuse disclosure.*
>
> *With regard to the improvements to search and rescue, the NL government has been quite vocal and specific on numerous occasions in the media and in the legislature when it comes to criticism of the federal government and what improvements they would like to see.*
>
> *The provincial government also likes to publicly indicate and take credit for how vocal they are being on the issue of search and rescue and how they are continuously putting pressure on the federal government for these changes or improvements: every chance they get. There is certainly no sense of secrecy regarding these discussions.*

[9] The Applicant then provides specific examples of instances where search and rescue was discussed publicly:

> *The Premier released to the public that she had raised the issue of improvements to search and rescue at a recent Premier's conference.*
>
> *The Premier released to the public that she had raised the issue when she recently met for the first time with the newly appointed federal minister responsible for Newfoundland and Labrador.*
>
> *The Premier released correspondence between itself and the federal National Search and Rescue Secretariat during the federal Quadrennial review on search and rescue. This included their position on what improvements they would like to see.*

[…]

The premier has publicly accused the federal government of trying to strong arm them into making concessions for the CETA negotiations as a quid pro quo for the loan guarantee for Muskrat Falls. The premier went so far as to disclose a specific issue of relaxing the minimum processing requirements.

The premier also accused the federal government of breaching the province's confidence during the negotiations and colluding with other provinces, behind the NL government's back.

The Premier stated publicly that the federal government had compromised the provinces position by sharing information with a third party and leaving them out of conversations.

The premier revealed that the Prime Minister of Canada raised the issue of minimum processing requirements many times, urging her to scrap them because 'the Europeans are demanding it as a term of CETA'.

The premier herself openly criticized the federal government and the negotiations, stating she had little confidence in the process and questioned the integrity of the process.

[10] The Applicant also addresses the current state of CETA negotiations and points out that a deal has been reached in this regard and indicates that the Premier has publicly spoken on this fact. The Applicant submits that as a result the circumstances can "no longer be categorized as ongoing negotiations".

[11] The Applicant concludes:

In closing, I am not suggesting in my rationale for disclosure, that my reasoning and facts should have any implications other than as it relates to this specific case. I assume that each such complaint is judged on its own merits, on a case by case basis. I am not arguing that if the Premier decided to publicly and voluntarily disclose bits and pieces of information then this should necessarily open the floodgates.

I am saying however that there should be some consistency shown in disclosure and not just a display by the government of cherry picking certain parts in a manner that can be perceived as politically expedient or politically advantageous.

The information I am seeking is within the same genre of information that has already been released within the context of the CETA negotiations. It is also information that has already been released within other separate contexts.

There has been a plethora of related information that has been readily released by the NL government. The information and discussion have oft times been acrimonious and critical.

IV DISCUSSION

[12] The only issue to be discussed in this Report is whether the Premier's Office properly applied section 23(1)(a)(i), (iii) and/or (iv) of the *ATIPPA* to withhold the responsive records.

(1) Did the Premier's Office properly apply sections 23 (1)(a)(i), (iii) or (iv) (disclosure harmful to intergovernmental relations or negotiations)?

[13] Section 23(1)(a) of the *ATIPPA* is a discretionary exception which allows a public body to withhold information that could reasonably be expected to harm intergovernmental relations or negotiations. The section states:

> *23. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> (a) *harm the conduct by the government of the province of relations between that government and the following or their agencies:*
>
> *(i) the government of Canada or a province,*
> *(ii) the council of a local government body,*
> *(iii) the government of a foreign state,*
> *(iv) an international organization of states, or*
> *(v) the Nunatsiavut Government; or* […]

[14] I addressed section 23(1)(a) in Report 2007-005:

> *[34]* […] *As I indicated earlier in this Report, in order to accept the application of section 23(1)(a), I expect detailed and convincing evidence of a reasonable expectation of probable harm. This is particularly important in the context of section 3 of the ATIPPA. By providing a specific right of access and by making that right subject only to limited and specific exceptions, the Legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it.*

[15] Section 23 is also discussed in Report A-2008-012:

> *[32] Section 23 is composed of two quite distinct and different types of provisions, and I will deal with the application of each of them in turn. The first, section 23(1)(a), refers to a reasonable expectation of harm to the conduct of relations between (in the present case) the Department and a local government body. I have previously held that to justify a refusal under this heading, a body must show, first of all, a clear link between the proposed disclosure and some specific kind of identifiable harm. Second, the body must show that the harm in question is not merely possible, but probable. (See NL OIPC Report 2006-006.)*

[16] I went on in Report A-2008-012 to discuss some of the types of harm that are contemplated in relation to section 23:

> *[34]* […] *The Department has not offered any evidence or reasons in support of the proposition that the disclosure of facts surrounding the investigation or the reasons for it, the results obtained and conclusions reached would cause harm of any kind to the conduct of relations between the Department and the Town. It is not clear how the disclosure of any of this particular information would damage the trust between the Department and the Municipality.*
>
> *[35] It may occasionally be the case that a disclosure of this sort may cause embarrassment or awkwardness to town officials, but without convincing evidence it cannot be concluded that this in itself constitutes harm to the relationship with the Department.*[…]
>
> *[36] It is sometimes argued that investigation details and results must be kept confidential, because the effect of such disclosure would be that people would be unwilling to cooperate with future investigations. First of all, in the present case as in many others, there is no actual evidence that such is the case. Furthermore, such a consequence is not always logically necessary. In reality, whenever this Department, under its statutory mandate, has cause to initiate such an investigation and exercises its authority to do so, a local government body has no legal choice but to cooperate. It is also in the best interests of a town and its resident taxpayers that it does so, because the town thereby benefits from the objectivity and expertise of the Department and from the support, assistance and direction that the Department provides. For these reasons, I conclude that it is highly unlikely that disclosure of the details and results of investigations such as the present one would have the result of prejudicing the cooperation of local governments in future investigations. As a result, the Department has not met the burden on it to justify the application of section 23(1)(a), and I conclude that the severed portions cannot be withheld on that basis.*

[17] The current position of the Premier's Office provides only general statements which allude to harm to the province's negotiating position in relation to "on-going CETA negotiations"; however, no detailed evidence of this harm is provided nor is there any evidence that such harm is anything more than a possibility rather than a probability. There is no mention of any other type of harm occurring, nor is any evidence of any other harm presented.

[18] I do not believe it can be logically concluded, without further detailed evidence, that the release of this information will harm the province's negotiating position in relation to CETA negotiations. It is clear from the wording of the Applicant's access request that the responsive records had a connection to CETA negotiations and the specific details of these negotiations have not been made public. However, since the time at which this matter was referred to the formal investigation stage,

the province has publicly announced that an agreement-in-principle has been reached in relation to CETA.

[19] Section 64 of the *ATIPPA* states:

> *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.*

[20] Consequently, given that the burden is on the Premier's Office to prove that there is no right of access to the records and no such evidence has been presented, I cannot assume that the disclosure of the responsive records could damage negotiating positions or hamper the ability of the parties to reach a final agreement or impede a consensus. Consequently, I cannot conclude that the disclosure of this information could reasonably be expected to harm the conduct of relations between the provincial and federal government or any of the parties to the negotiations. As a result, I do not accept that section 23(1)(a)(i), (iii) and (iv) apply to protect the records from disclosure.

V CONCLUSION

[21] The Premier's Office has improperly withheld the responsive records.

VI RECOMMENDATIONS

[22] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the Premier's Office release to the Applicant the records that were withheld under section 23(1)(a)(i), (iii) and (iv) less any unresponsive information contained in the records. Specifically, I recommend that the following information be released:

All opening and closing salutations in all correspondence	
Page 1	Release in its entirety
Page 2	Release in its entirety less points 1-4 & 6
Page 12	Release in its entirety

Page 13	Release in its entirety
Page 16	Release 4th paragraph
Page 22	Release 1st full paragraph
Page 24	Release 1st full paragraph
Page 26	Release 1st full paragraph
Page 28	Release 1st full paragraph
Page 30	Release 5th paragraph
Page 33	Release 2nd full paragraph
Page 34	Release 5th full paragraph; Release 6th paragraph
Page 35	Release 1st paragraph
Page 36	Release 4th paragraph
Page 38	Release in its entirety

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

[24] Please note that within 30 days of receiving the decision of the Premier's Office 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.

[25] Dated at St. John's, in the Province of Newfoundland and Labrador, this 28th day of November, 2013.

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