OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-001

January 20, 2014

Department of Health & Community Services

Summary: The Applicant requested from the Department of Health and Community Services (the "Department") records relating to a certain position within the Department and decisions made in relation to that position. The Department denied access to all responsive records pursuant to sections 18(1), 18(2) (cabinet confidences) and 20(1)(a) and (c) (policy advice or recommendations) of the *ATIPPA*. The Commissioner determined that the Department had properly withheld the responsive records in accordance with sections 18(1), 18(2) and 20(1)(a) and (c) of the *ATIPPA*; however, the remaining information despite being minimal had potential meaning and value to the Applicant. Consequently, the Commissioner recommended its release.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, sections 18(1)(a)(viii), 18(1)(d), 18(2)(c), 20(1)(a), and 20(1)(c).

Authorities Cited: Newfoundland and Labrador OIPC Report A-2011-009, Alberta OIPC Orders F2004-026 and F2013-34.

Other Sources: Access to Information and Protection of Privacy Office, *Access to Information Policy and Procedures Manual* (St. John's: Office of Public Engagement, 2013), online:

http://www.atipp.gov.nl.ca/publications/ATIPP_Policy_and_Procedures_Manual.pdf.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") on April 18, 2013 the Applicant submitted three access to information requests to the Department of Health and Community Services (the "Department"). The requests sought disclosure of records as follows:

> *Copy of an Executive Note submitted by* [a named individual] *to the Executive of the Department of Health and Community Services in the month of December 2012 or January 2013 regarding the* [job title] *Position of the NLHBA.*
>
> *Re: plan not to fill the position or other program development initiatives.*

And:

> *Copies of all current and deleted emails that were sent to and received from files that have been written by* [first named individual] *to* [second named individual] *between November 1, 2012 to January 31, 2013 with any reference in the subject or content related to:*
> *body of the following:* [sic]
>
> - [Third named individual's first name]
> - *Recruitment*
> - *Recruitment Office*
> - *Provincial Physician Recruitment*
> - *Provincial Physician Recruitment Coordinator*
> - *Strategy*
> - *Newfoundland and Labrador Health boards Association*
> - [Third named individual's full name]
> - *Position*
> - *Coordinator*
> - *Provincial Office*
> - *Plan*
> - *NLHBA*

And:

> *Copies of all current and deleted emails that were sent to and received from files that have been written by* [second named individual] *to* [first named individual] *between November 1, 2012 to January 31, 2013 with any reference in the subject or content related to:*
> *body of the following:* [sic]
>
> - [Third named individual's first name]
> - *Recruitment*
> - *Recruitment Office*
> - *Provincial Physician Recruitment*
> - *Provincial Physician Recruitment Coordinator*
> - *Strategy*
> - *Newfoundland and Labrador Health boards Association*
> - [Third named individual's full name]
> - *Position*
> - *Coordinator*
> - *Provincial Office*
> - *Plan*
> - *NLHBA*

[2] The Department entered into discussions with the Applicant to determine the objective of the Applicant's request and to determine precisely what information the Applicant was seeking. As a result of these discussions the Applicant and the Department came to an agreement that the requests would be merged into a single comprehensive access request and the search would be expanded if the search for the "executive note" was not successful. This expanded search became necessary and in further discussions with the Applicant, the Department advised that it would be proceeding with same.

[3] The Department responded to the Applicant's access request by letter dated May 17, 2013 denying access to all responsive records pursuant to sections 18(1)(a)(viii), 18(2)(c), 20(1)(a) and 20(1)(c) of the *ATIPPA*.

[4] In a Request for Review dated June 17, 2013, the Applicant asked for a review of the decision of the Department.

[5] The Applicant later requested that the comprehensive access request be reconsidered as three separate requests. The Department agreed to this request and by letter dated July 10, 2013 denied access to all responsive records pursuant to sections 18(1)(a)(viii), 18(2)(c), 20(1)(a) and 20(1)(c) of the *ATIPPA*. Given the relationship between the three requests, this Office decided to continue its review based on the singular Request for Review.

[6] Efforts by an Analyst from this Office to facilitate an informal resolution were unsuccessful and by letters dated November 7, 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

[7] The Department wrote to this Office on November 25, 2013 and requested that this Office proceed with the formal investigation of this matter based upon the information which the Department had previously submitted to this Office on August 1, 2013.

[8] In this earlier correspondence, the Department explains its rationale for each of the exceptions to disclosure which it had claimed. In respect of section 18 the Department states that the relevant records:

> […] *were created during the process of developing or preparing a submission for the Cabinet. Therefore, they are considered supporting Cabinet records.*

[9] The Department relied upon the most recent *Access to Information: Policy and Procedures Manual* (the "Manual") prepared by the ATIPP Office of Public Engagement in relation to its claim of section 20(1)(a). Specifically, the Department points to section 4.2.3 which speaks to the intention of section 20 of the *ATIPPA* as being the protection from disclosure of full and frank discussions on policy issues without excess scrutiny of the deliberation process. Furthermore, the Department relies on previous Reports of the Office relating to section 20 and submits:

> […] *the responsive records, consist of both advice and recommendations* […] *in that they set out opinions and options identified by public officials for the Minister of Health and Community Services specifically pertaining to a suggested course of action in relation to the budgetary process.*

[10] In relation to section 20(1)(c), the Department refers to a similar section in Alberta's *Freedom of Information and Protection of Privacy Act* and Chapter 4.10 of the accompanying *FOIP Guidelines and Practices*. The Department relies upon Order F2004-026 from the Alberta Information and Privacy Commissioner discussing the equivalent provision in Alberta's legislation:

> *With respect to 'consultations or deliberations', in Order 96-006, the former Commissioner said:*
>
> *When I look at section 23 [now 24] as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations*

> *were to be made public. ... I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice. (paragraph 56)*

[11] It is the Department's position that:

> […] *disclosure of the responsive records would reveal both consultations and deliberations of public officials as it pertains to the particular proposals and suggested actions being considered by the Department during the budgetary process.* […] *Thus, the discretion to refuse access to these responsive records was exercised to protect the frank exchange of views between public officials during the policy making process.*

[12] Finally, the Department acknowledges that it conducted a line-by-line review of the records prior to its decision not to release the records in their entirety; however, it was determined that:

> *After completing the redactions in accordance with Sections 18 and 20, it was determined that the remaining information is meaningless.*

Consequently, the Department made the decision, based on past Reports of this Office, to withhold all the responsive records from disclosure.

III APPLICANT'S SUBMISSION

[13] The Applicant provided a formal submission on November 27, 2013. Amongst other things, the Applicant highlights in her submission the importance of a precise date which is linked to the position referred to in the Applicant's submission.

[14] The Applicant submits that section 20 is being used "*to shield the actions of* [an] *administrator*" and points to the variety of avenues through which she has attempted to access the relevant information and the various difficulties she, and others acting on her behalf, have encountered.

[15] In relation to section 18 the Applicant relies on the "substance of deliberations" test which was applicable to section 18 prior to the Bill 29 amendments. The Applicant states:

> *I understand that most jurisdictions in Canada use language which includes the phrase "substance of deliberations." As I understand it, this provision has not yet been interpreted by a court in our province and consequently the OIPC has reviewed interpretations by courts in different jurisdictions across Canada, and in so doing has determined that the interpretation and test offered by O'Connor v. Nova Scotia* […] *is the most appropriate.* […] *J.A. Saunders of the Nova Scotia Court of Appeal characterized the test in this way: "Is it likely that the disclosure of the information would permit the reader to draw accurate information about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption […]" In other words, this exception is not simply a list of categories of records which must not be disclosed.*

[16] The Applicant also raises the issue of duty to assist in her submission and states:

> […] *it is very clear that the Department had put considerable resources and energy into defending their refusal, and none into their 'duty to assist' or discussing what could reasonably be done. Clearly the intention is to 'win' in order to avoid decisions being challenged. In such an environment, communication and transparency is clearly not the goal and the duty to assist, in my experience, does not exist beyond the efforts of the OIPC.*

The Applicant indicates that the Department failed to attempt to develop a working relationship with the Applicant in order to facilitate the access to information process and suggests that the Department failed to enter into additional discussions with the Applicant to refine the process and ensure that any response to be provided was what the Applicant was seeking.

[17] The Applicant also raises concerns regarding whether an actual review of the records occurred prior to any claims of section 18 being applied by the Department and indicates that assurances and verification of same should be provided.

[18] The Applicant submits that the information should be disclosed to her as there is an "absence of disclosure" in that the information which the Applicant is seeking is already known to the Applicant. The Applicant states:

> *As I simply need the date on which a decision was made, not the discussion, arguments nor rationale, a partial document or a letter providing the date requested would be sufficient without placing any jeopardy on any claim of "advice" or "recommendation" inherent in the email*

> *communications listed in my original request. It is of note that the essence of any recommendation has already been demonstrated, the position in question, in reality, has been dissolved for eleven months* […] *Clearly this request is an attempt to access the "date" of a decision made in the past. A date that confirms what has already been decided, announced and publicly implemented.*

[19] Similarly, the Applicant speaks to the absurd situation which results where information which is already known to an applicant is withheld from the applicant under section 30.

[20] The Applicant also states that the withheld information can no longer be considered advice or recommendations as the suggested course of action has been taken and the information now constitutes factual information.

[21] The Applicant submits that email communications may not be protected under the *ATIPPA*:

> *In my case, day to day email communications are not documents that can be protected under 'advise'* [sic] *or 'recommendation' and therefore should be disclosed.* […] *It is important for me to raise the issue of email communications being escalated to documents without due consideration. There is little to support the status of emails in the application of the Act to date.*

[22] The Applicant goes on to state:

> *In my opinion, the act of "blocking" rather than protecting documents is in question here. My case provides an example where government intentionally would not engage in resolution, but rather chose neither to confirm nor deny the existence of a record even after implementation of what is claimed as 'protected'.*

[23] The Applicant also submits that the information being withheld should be released as it contains factual information. She states:

> *In my case, the date a decision was made is factual information rather than advice and deliberations* […] *According to Commissioner Reports* […] *has consistently upheld the release of factual information.* [...] *Further to this, I understand that section 18 is now a mandatory exception to disclosure, and because of this, some jurisdictions in Canada* […] *have empowered Cabinet to consent to the disclosure of records which would otherwise be protected by their equivalent exception.*

[24] Finally, the Applicant indicates that all information, even small portions, could have value and meaning to her. She explains:

> *I believe it is 'reasonable' within the meaning of section 7(2) to sever the information and disclose the rest. In my case, access to a small amount of information, as small an item as "a date" is valuable.*

IV DISCUSSION

[25] The issue of the duty to assist as set out in section 9 of the *ATIPPA* has been raised by the Applicant in her request for review and her formal submission; however, I have been presented with no evidence that would indicate that the Department violated this duty. In fact, the interactions between the Applicant and the Department as discussed in the Background section of this Report indicate to me that the Department did, in fact, abide by its duty to assist by entering into discussions with the Applicant to attempt to determine the exact nature of her request and to attempt to determine how to best respond to the request. Consequently, I will not be examining this issue any further. Likewise, I have seen no indication that the Department raised section 12(2) (refusal to confirm or deny the existence of a record) as suggested by the Applicant and I will also not be examining this issue. Furthermore, all forms of records, including emails, are considered records for the purpose of the *ATIPPA* and in accordance with the definition of "record" as set out in section 2(q) This Office has long accepted emails as records and, in fact, reviews many access requests involving such records.

[26] There are three issues to be discussed in this Report:

(i) whether the Department properly applied section 18(2)(c) of the *ATIPPA* to withhold the responsive records;
(ii) whether the Department properly applied section 20(1)(a) of the *ATIPPA* to withhold the responsive records; and
(iii) whether the Department properly applied section 20(1)(c) of the *ATIPPA* to withhold the responsive records.

(1) Did the Department properly apply section 18(2)(c) (cabinet confidences)?

[27] Section 18 received considerable revision as a result of the recent amendments to the *ATIPPA* and, consequently, the provision now has a very broad scope and application. Furthermore, the substance of deliberations tests referred to by the Applicant is no longer applicable as those words no longer appear in the provision. Section 18 does, in fact, now list categories of records which must not be disclosed. Additionally, the provision now requires a combined reading of many of its subsections in order to be properly interpreted and applied. In this instance, the Department begins its claim with section 18(2)(c) which states:

> *18. (2) The head of a public body shall refuse to disclose to an applicant a Cabinet record, including*
>
> […] *(c) a supporting Cabinet record.*

One must then locate the definition of "supporting cabinet record" which is contained in section 18(1)(d):

> *18. (1) In this section*
>
> *(d) "supporting cabinet record" means a Cabinet record referred to in paragraph (a) which informs the Cabinet process, but which is not an official cabinet record.*

In turn, to apply this section a public body must decide which part of the definition of "cabinet record" as set out in section 18(1)(a) applies to the given records. The Department has claimed section 18(1)(a)(viii):

> *18. (1) In this section*
>
> *(a) "cabinet record" means*
>
> […] *(viii) a record created during the process of developing or preparing a submission for the Cabinet, or*

[28] Following all of this through, in order for section 18 to be applicable to the responsive records the records must have been created during the process of developing or preparing a submission for Cabinet and must also inform the Cabinet process.

[29] I believe it is the latter requirement which slightly limits what, otherwise, would be an extremely broad provision. This requirement prevents records which are transitory or which simply come into existence during the time period surrounding development and preparation of a Cabinet submission from being caught by section 18. With that said, I believe this limitation is minimal, because as the provision currently stands, so long as a record was created during and as a part of the process of developing or preparing a submission to Cabinet and it provides some information to Cabinet or provides information for the submission in some way, regardless of whether it was actually used in a submission, then the record is protected from disclosure.

[30] The Manual developed by the ATIPP Office provides the following example of a supporting cabinet record:

> *...a budget document is created and budget information is taken from the document and is included in an official cabinet record – the original budget document is a supporting cabinet record.*

[31] Given the wide net which section 18(2)(c), in connection with section 18(1)(a)(viii), throws over records, I accept that a large portion of the responsive records must be withheld from disclosure pursuant to section 18(1) and (2).

(2) Did the Department properly apply section 20(1)(a) (policy advice and recommendations)?

[32] Section 20(1)(a) states:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;* […]

[33] Section 20 has been considered by this Office on numerous occasions. Although originally put forward in an earlier Report, in Report A-2011-009 I once again stated the position of this Office in relation to section 20(1)(a):

> *[16] I would like to note that an extensive Review of the case law concerning the interpretation of "advice and recommendations" was done in Report A-2009-007 and will not be repeated here. In that case, I decided as follows:*
>
> 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.*

[34] While section 20(1)(a) was amended by Bill 29, I believe the position which I articulated in the above Report still applies. The amendment to section 20(1)(a) adding the terms "proposals…analyses or policy options" only serves to clarify the type of information which is encompassed within the term "advice". It is clear to me that certain portions of the records in the present case contain suggested courses of action made by public employees on policy related matters and would have fallen under section 20(1)(a) regardless of the amendments

[35] Moreover, these portions of the records also contain proposals and analyses. The Manual defines these types of records as:

> […] *closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.*

Just as the records contain suggested courses of actions, the records also contain information relating to the advantages and disadvantages of those actions. In respect of the Applicant's argument that the information must now be considered factual given that a course of action has been taken, I accept that in certain circumstances advice or recommendations may contain factual material

particularly when the advice or recommendations have already been acted upon. Unfortunately for the Applicant, despite correctly pointing out that section 20(1)(b) requires the disclosure of factual information, in this instance any factual information which appears in the records is contained within records to which section 18 applies and must be withheld. Therefore, I accept that certain portions of the responsive records may be withheld from disclosure pursuant to section 20(1)(a).

(3) Did the Department properly apply section 20(1)(c) (policy advice and recommendations)?

[36] Section 20(1)(c) states:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> > […] *(c) consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister; or*

[37] This provision is the result of the recent amendments to the *ATIPPA* and, consequently, this Office has not previously been presented with the opportunity to discuss and interpret its meaning. The ATIPP Manual provides the following definition of "consultation" and "deliberation":

> *A **deliberation** for the purposes of this exception is a discussion of the reasons for and against a future action by an employee or officer of a public body.*
>
> *Deliberations include information indicating that a decision-maker relied on the knowledge or opinions of particular persons.*
>
> *A **consultation** is a very similar activity where the views of one or more employees are sought about the appropriateness of a specific proposal or potential action.*
>
> *Consultations include correspondence in any form (e.g. discussion, electronic, etc.) between third party advisors and government departments which was conveyed to the public body by a government department as background information to enable the public body to provide advice (e.g. when officials are asked to comment on advice already developed by other officials). Specifically, this may include the "substantive parts of communications that seek an opinion as to the appropriateness of particular proposals respecting a course of actions* [sic] *to be decided, including any background materials that inform the advisors about the matters relative to which advice is being sought, and are thus inextricable* [sic] *interwoven with the questions being asked ("consultations")."*

[38] Given that this provision is new to the *ATIPPA*, when interpreting this provision and attempting to give structure to its meaning as above, jurisprudence from other jurisdictions with similar wording in their legislation were sought out for guidance. Consequently, I accept that Report F2004-026 from the Alberta Commissioner, as cited by the Department, does provide a helpful discussion of consultations and deliberations:

> *[para 56] With respect to 'consultations or deliberations', in Order 96-006, the former Commissioner said*
>
> > *When I look at section 23 [now 24] as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. ... I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of* [the] *responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.*
>
> *[para 57] In Order 99-013, the former Commissioner reiterated that the consultation or deliberation must meet the same criteria as for section 24(1)(a) [then 23(1)(a)] ("advice"), in that the consultation or deliberation must be*
>
> > *(i) sought or expected, or be part of the responsibility of a person by virtue of that person's position,*
> >
> > *(ii) directed toward taking an action, and*
> >
> > *(iii) made to someone who can take or implement the action*

[39] More recently the terms were considered in Alberta Order F2013-34:

> *[para 45] While some of the information that was severed may pass this test, I think section 24(1)(b) of the Act is the more appropriate section for the Public Body to have relied on. The applicability of section 24(1)(b) of the Act is different from that of section 24(1)(a) in that it covers consultations and deliberations rather than just "advice". Therefore, it applies to the process of officers and employees of a public body exchanging ideas to come to a decision. The Adjudicator in Order F2011-018 summarized the applicability of section 24(1)(b) of the Act as follows:*
>
> > *Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the*

> *staff of a member of the Executive Council (which I will refer to as "consultations/deliberations"). A "consultation" occurs when the views of one or more of the persons described in section 24(1)(b) are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order 99-013 at para. 48). The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57). (Order F2011-018 at para 58)*

This position has also been accepted in other jurisdictions across the country.

[40] Consequently, it appears that in order for a record or information in a record to be considered a consultation, a four-part test must be met:

1) The record must contain the views of one of the enumerated categories of persons about the appropriateness of a specific proposal or potential action;
2) The views must be sought or expected, or be part of the responsibility of the enumerated person by virtue of that person's position;
3) The views must be directed toward taking an action; and
4) The views must be made known to someone who can take or implement the action.

Likewise, in order for a record or information in a record to be considered a deliberation, a four-part test must be met:

1) the record must contain a discussion of the reasons for and against a future action between the persons in the enumerated categories;
2) The discussion must be sought or expected, or be part of the responsibility of the enumerated persons involved by virtue of their respective positions;
3) The discussion must be directed toward taking an action; and
4) The discussion must be conveyed to someone who can take or implement the action.

[41] It is clear from the wording of the Applicant's access request that certain of the responsive records would be made by or between officers or employees of a public body. It is also clear from the wording of the request that the records would involve a discussion and views on a potential action or proposal. It appears to me that the responsive records were prepared by persons who were expected to be or who were responsible for putting forward such positions. Likewise, it is clear that the information in the records was provided to a person or persons with the power to implement the action.

[42] Consequently, certain portions of the responsive records may be considered consultations or deliberations in accordance with section 20(1)(c) and the Department may withhold these portions of the records from disclosure.

V CONCLUSION

[43] The Department properly applied section 18(2)(c), in connection with section 18(1)(a)(viii), to withhold certain portions of the responsive records from disclosure.

[44] The Department properly applied section 20(1)(a) to withhold certain portions of the responsive records from disclosure.

[45] The Department properly applied section 20(1)(c) to withhold certain portions of the responsive records from disclosure.

[46] I have concluded that the sections claimed by the Department have been appropriately claimed to protect various portions of the records from disclosure; however, as agreed by the Department, there are certain fragmented portion that remain. In Report A-2010-002, I found that where permissible severing occurs and

> […] *nothing remains, or what remains is so scanty or disconnected that it is meaningless. In such a case, it is not "reasonable" within the meaning of section 7(2) to sever the information and disclose the rest. The public body would therefore be justified in withholding the entire page or the entire document, as the case may be.* […]

[47] In the present matter, the Department determined that what remained in the responsive records after the legitimate severing occurred was scanty and, as a result, decided to withhold the entirety of the records. However, the Applicant has since made it known to this Office that all information related to her access request, no matter how minimal, would have meaning to her and may serve the purpose behind her access request. Having reviewed the records and the evidence presented by the Applicant, I accept that in this instance the minimal information left after valid severing would have value to the Applicant and the purpose for which her access request was made. Therefore, I recommend the release of this information. Fortunately, as indicated earlier the Department has already conducted a line-by-line review in order to determine if any information remained to be disclosed and, consequently, I now accept that this line-by-line review and severing is an appropriate guide for determining what information is to be released.

[48] In respect of the Applicant's claim that some of the information should be released because she believes she already knows this information, I would point out that such a conclusion has only been considered appropriate where clear evidence has been presented to substantiate an applicant's claim of prior knowledge, and the determination is made on a case-by-case basis. Furthermore, where such evidence can be presented, any recommendations for release in this regard would only be made in one of two circumstances: i) where no provision of the *ATIPPA* continues to apply or ii) where it would be in the public body's exercise of discretion to release the information. Where a mandatory exception to disclosure applies to the information the public body must, in any event, withhold the information. In this case, I note that sections 20(1)(a) and 20(1)(c) are discretionary exceptions and while I have found that the Department has met the burden of proof in relation to these provisions, I would encourage the Department to revisit and reconsider its discretion in any instances where information is withheld pursuant only to section 20(1)(a) or section 20(1)(c). This information does appear to be known to the Applicant, so therefore I see no harm in the release of such information.

VI RECOMMENDATIONS

[49] In view of the conclusions I have reached above, under the authority of section 49(1) of the *ATIPPA* I recommend that the Department release to the Applicant the information which was initially considered too scanty and fragmented to have meaning based upon the Applicant's access request. For clarity, that information is contained on pages 5, 8, 12, 34-37, 59-60, 82-83, 105, 127-128, and 152-153 of the responsive records.

[50] Under the 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 final decision of the Department with respect to this Report.

[51] Please note that within 30 days of receiving the 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*.

[52] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20th day of January, 2014.

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