February 9, 2009 **A-2009-003**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2009-003

Executive Council

Summary: The Applicant requested information with respect to a review of the Inland Fisheries and Wildlife Enforcement Program. Executive Council (the "Department") granted access to a portion of the record, and severed other portions in accordance with sections 18, 20, 22, 23 and 30 of the *ATIPPA*. The Commissioner found that some information was appropriately severed under sections 18 and 20. However, the Commissioner found that section 20 was not applicable to most of the information for which it was claimed. Despite the fact that the record contained preliminary findings, this alone was not a sufficient reason to withhold information under section 20. A large portion of the record was factual and must be released under section 20(2)(a), while other information did not reveal advice and recommendations and therefore could not be withheld under section 20(1)(a). The Commissioner also found that section 22(1)(a) was not applicable, as the information for which it was claimed was not a "law enforcement" matter. Section 22(1)(e) was also not applicable because again, there was no "law enforcement" matter, nor, on its face, was there any "intelligence information" at issue and the Department failed to show otherwise. Section 23(1)(b) was not applicable to the information for which it had been claimed, as the Department failed to show the information had been received in confidence. The Commissioner also found that the Department failed to participate meaningfully in the informal resolution process by not responding to inquiries from the Commissioner's Office in a timely manner, despite repeated attempts by the Office to solicit their involvement.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 3, 9, 20, 22, 23, 30, 46(2), 47, 49, 50, 60, and 64.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-004, 2006-006, 2007-003, A-2008-008, A-2008-010 and A-2008-012; *O'Connor v. Nova Scotia*, 2001 NSCA 132, *Ontario (Community Safety and Correctional Services) v. Information and Privacy Commissioner*, 2007 CanLII 46174.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 18 April 2008 to Executive Council (the "Department"), wherein he sought disclosure of records as follows:

> *I am requesting under the Access to Information Act information related to* [author's name] *review of the Inland Fisheries and Wildlife Enforcement Program. This request includes:*
>
> *- the budgeted amount of the review.*
> *- travel and entertainment expenses by* [the author]
> *- all documentation related to this review*

[2] The Department, by correspondence dated 30 June 2008, advised the Applicant that access to the requested records had been granted in part. However, a considerable amount of the information contained in the records was severed in accordance with section 18 (Cabinet Confidences), section 20 (advice and recommendations) section 22 (Disclosure harmful to law enforcement), section 23 (Disclosure harmful to intergovernmental relations or negotiations) and section 30 (Disclosure of personal information). Some information was also considered "not responsive" and was therefore not provided to the Applicant on that basis.

[3] In a Request for Review dated 2 July 2008 and received in this Office on the same day, the Applicant asked that this Office review the records to determine whether additional information should be released. The record consists of two letters to the Premier from the person performing the review outlining preliminary findings, e-mails and letters between government employees, briefing notes, and various other similar documents.

[4] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 29 October 2008 both 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, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II APPLICANT'S SUBMISSION

[5] The Applicant, in a letter dated 29 October 2008 stated that it is difficult for him to "speculate on what information is contained in the documentation due to the vast amounts that have been severed". However, he emphasized the length of time the file had been ongoing. The Applicant notes that he granted the Department an extension of time in which to respond to his initial access request, hoping that this would allow sufficient time to locate all of the responsive record. When the Department's response to him came more than two months after he submitted his initial request for information, the Applicant was dissatisfied with the lack of a detailed response and also with the amount of information that had been severed.

[6] As noted, he filed a Request for Review on 2 July 2008, and it has now been seven months since the request was filed. He believes that he has been very accommodating during this process, yet still feels that the Department has not been forthcoming. The Applicant also encourages this Office to "make every attempt and explore every avenue available under the legislation to ensure the spirit of openness and accountability is maintained and public debate and scrutiny is protected. If more information can be released, government has an obligation to supply that information".

III PUBLIC BODY'S SUBMISSION

[7] The Department provided a submission with respect to their position. In support of its reliance on section 20, the Department states that the letters to the Premier from the person performing the review provides "preliminary findings, and in no way constitutes his final plan or proposal. To date, it remains the case that a final report has yet to be received, reviewed or approved." As such, the Department believes it is inappropriate to release the preliminary findings as one cannot know with certainty how the thoughts and recommendations of the person undertaking the review will evolve as he completes his report. The department states that section 20(2)(f) "clearly refers to the disclosure of a final report, thereby resulting in a clear differentiation within the Act between preliminary or draft reports and final reports" and that

section 20(2)(k) "references a requirement for the head of a public body to have approved or rejected a plan or proposal."

[8] With respect to its reliance on section 22, the Department states that this section is not exclusive to harm and does not have a harms test inherent. As an example, it cites section 22(1)(a) which specifies that information may be withheld it would disclose information about a law enforcement matter. The Department states "[a]s the Inland Fisheries Enforcement Program undertake law enforcement duties, this is clearly a law enforcement matter." The Department also cites *Ontario (Community Safety and Correctional Services) v. Information and Privacy Commissioner*, 2007 CanLII 46171 in support of the premise that the definition of "law enforcement matter" does not always require a specific on-going investigation or proceeding. Therefore, the Department maintains their reliance on section 22(1)(a).

[9] Finally, with respect to section 23, the Department states that section 23(1)(b) is applicable as the information was received in confidence. Section 23(1)(b) does not require a determination of harm.

IV DISCUSSION

Preliminary Matter of Delay and Duty to Assist

[10] I would first like to address the issue of delay in the handling of this matter. As stated by the Applicant, it has been seven months since this Request for Review arrived at this Office on July 2, 2008. The record was received at this Office on 15 July 2008, and reviewed by an Investigator. The Investigator then met with the Department's ATIPP Coordinator on 22 July to discuss the file and make suggestions with respect to the release of additional information. The Investigator posed several questions to the Coordinator, who stated she would look into them and get back to the Investigator.

[11] Between 22 July and 18 August 2008, the Coordinator for the Department left for another position and was replaced by a new Coordinator. On 18 August, the Investigator contacted the

new Coordinator and explained her position with respect to the redactions and asked whether the new Coordinator was in a position to answer the questions posed to the other Coordinator. She was not, but stated she would follow up and get back to the Investigator.

[12] On 4 September, the Investigator contacted the Coordinator by e-mail to determine whether there had been any progress with respect to the questions posed back in the 22 July meeting. There was no response to this e-mail and on 11 September, the Investigator followed up the e-mail with a voice mail.

[13] There was still no response from the Coordinator. Following a phone call from the Applicant inquiring as to the status of the file, the Investigator again e-mailed the Coordinator on 26 September asking for a response to the questions posed in the 22 July meeting and stating that if nothing was forthcoming, the matter would be referred to the formal investigation stage. That same day, the Investigator received a letter, by e-mail, from the Department. While the letter addressed the questions, it did not offer any clear answers or information.

[14] On 29 September 2008, the Investigator left another voice mail for the Coordinator to discuss the contents of the letter. On 30 September the Investigator spoke with the Coordinator to reiterate and further explain her opinion with respect to the redactions and the sections that had been claimed to support the redactions. The Investigator asked the Coordinator to consider this and let her know the Department's position by 6 October 2008.

[15] The following day, 1 October 2008, the Coordinator called the Investigator and asked for further details with respect to the Investigator's position. She asked if the Investigator could go through the record and highlight the information she proposed for release. The Investigator agreed to do so as part of her efforts to resolve this matter informally, and a copy of the record, clearly showing the information suggested for release was sent to the Coordinator on 3 October 2008 by Express Post. This was accompanied by a lengthy letter outlining the reasons behind the suggestions and asking for a decision with respect to how the Department would like to proceed (release additional information or go to the formal stage) no later than 20 October 2008.

[16] Prior to this deadline, the Coordinator telephoned the Investigator to ask for an extension of time in which to respond, as there had been an absence in the Department and therefore, the Department could not respond within the specified time period. The Investigator agreed to extend the time to 24 October 2008. On 22 October, the Coordinator called the Investigator to ask for yet another extension, this time due to medical reasons. Again, the Investigator agreed to extend the time to end of day, 28 October 2008, failing which the matter would proceed to the formal stage. No response was received from the Department and on 29 October, the Investigator sent correspondence to both parties to notify them that the matter has been referred to the formal investigative stage.

[17] As discussed in Report A-2008-012, the informal resolution process is an integral part of a Request for Review. In that Report, I stated as follows:

> *[8]…Under Part V of the Act, as part of the formal review process, the Applicant and the public body are given an opportunity to make written submissions on the matters in dispute. In the usual case, however, there is first an informal review process, consisting of communications between the parties and this Office, which can serve to narrow the issues. The fuller explanations provided by the public body for withholding specific documents or items of information can be discussed with the Applicant. Even though the Applicant cannot see the information that has been severed, the investigator can discuss it in general terms with the Applicant, and explain the justifications for the severing that have been provided by the public body. Such a discussion will often result in an Applicant's conceding that certain information has been properly withheld. Alternatively, it can sometimes result in the agreement of the public body to reverse its decision on a particular item and disclose that information. In many cases the issues giving rise to a Request for Review can be completely resolved in this way, without the matter ever being referred to the formal process. In other cases, the informal discussions can at least enable the parties to focus on the underlying issues and on the reasons advanced by the public body for its decisions to withhold information, in order to make useful written submissions, if it should prove necessary to move to the formal review stage.*

[18] Participation in this informal resolution process by the Department was very minimal and then, it was only at the constant urging of this Office. I feel it is important to reiterate my comments to this effect in Report A-2008-012:

> *[17]…the public body must not only be prepared to answer an applicant's questions directly, but also to respond to each request for review with a willingness to engage in a meaningful discussion with the assigned investigator from this Office. The informal resolution process, provided for in section 46 of the Act, is essentially a form of mediation, and is critical. Parties who can be assisted to reach agreement, rather than having a solution imposed on them by an adjudicator, tend to be much more satisfied with the result. Informal resolution is also likely to get to the practical root of a dispute more quickly. Three-quarters of the requests for review received by this Office are resolved by this method, often in only a few weeks. By contrast, most of the reviews that go through the formal process end up taking three months or more to complete. However, the informal process requires that someone must be authorized and prepared to put the necessary time and effort into discussing with the investigator the reasons for the decision to withhold information, based on a reasoned and thoughtful application of the relevant provisions of the Act.*

Difficulties were experienced in this regard in terms of the Department's efforts to participate in the informal resolution process. It is for this reason that I feel it is necessary to point out the value of this process yet again.

Exceptions Claimed: Section 20

[19] The vast majority of information is redacted under section 20(1)(a). This section 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.*

[20] It is my position that in order for information to constitute "advice or recommendations" and thus be appropriately withheld under section 20(1)(a), it must reveal a suggested course of action that will ultimately be accepted or rejected by a public body. This section was most recently explored in Report A-2008-010 (paragraphs 16 to 27) and need not be repeated here.

[21] In this case, the public body explained that it is withholding information on the basis that the record does not contain a final report, or final conclusions. They argue that the record contains only preliminary findings as no final report had been received or approved. The Department referred to sections 20(2)(f) and 20(2)(k) in support of its position that only final, approved reports are contemplated by section 20(2) for release. Section 20(2) states as follows:

> *20 (2) The head of a public body shall not refuse to disclose under subsection (1)*
>
> *(a) factual material;*
>
> *(b) a public opinion poll;*
>
> *(c) a statistical survey;*
>
> *(d) an appraisal;*
>
> *(e) an environmental impact statement or similar information;*
>
> *(f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;*
>
> *(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;*
>
> *(h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;*
>
> *(i) a report on the results of field research undertaken before a policy proposal is formulated;*
>
> *(j) a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body;*
>
> *(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;*
>
> *(l) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or*
>
> *(m) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.*

[22] It is true that the record consists of preliminary findings, however, nowhere in section 20 is there an exception whereby documents or information can be withheld simply because they are preliminary or draft documents. Section 20(1)(a) excepts from disclosure information that would reveal advice or recommendations. Section 20(2) then lists a number of types of reports that must be disclosed in full, despite the fact that they might reveal advice and recommendations. A report's status as "preliminary" or "final" is only of relevance in section 20(2)(f); approval or rejection is only a concern in section 20(2)(k). None of the other subsections that reference a report make these distinctions between final and draft and approved or not. However, if a record does not fall under section 20(2) (which mandates disclosure in full), then we must go back to section 20(1)(a), wherein regardless of the type of record, only **information within that record** that reveals "advice and recommendations" can be withheld. As such, if a record does not come under section 20(2), it must be reviewed on a line by line basis to determine what information therein reveals "advice and recommendations" and is therefore subject to the exception.

[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 information. There are many instances where the application of section 20 is not clear. A review of the record clearly shows that some of the information that has been withheld is factual information. Factual information must be released in accordance with section 20(2)(a). In other cases, the information is not "advice and recommendations", and thus, cannot be withheld under section 20.

Section 22

[24] The Department has claimed section 22 for some portions of the record. This section states 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*

(a) interfere with, disclose information about or harm a law enforcement matter;

(b) prejudice the defence of Canada or of a foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;

(c) reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement;

(d) reveal the identity of a confidential source of law enforcement information or reveal information provided by that source with respect to a law enforcement matter;

(e) reveal law enforcement intelligence information;

(f) endanger the life or physical safety of a law enforcement officer or another person;

(g) reveal information relating to or used in the exercise of prosecutorial discretion;

(h) deprive a person of the right to a fair trial or impartial adjudication;

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) facilitate the commission or tend to impede the detection of an offence under an Act or regulation of the province or Canada ;

(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;

(m) reveal technical information about weapons used or that may be used in law enforcement;

(n) adversely affect the detection, investigation, prevention or prosecution of an or the security of a centre of lawful detention;

(o) reveal information in a correctional record supplied, implicitly or explicitly, in confidence; or

(p) harm the conduct of existing or imminent legal proceedings.

[25] With the exception of a notation in two particular places indicating reliance on 22(e), there was no indication from the public body which specific paragraph of section 22 was being relied upon until the Department submitted its formal representations. As noted above, section 22 contains sixteen different criteria by which information may be withheld. In the absence of any indication as to which one they are relying on, it is nearly impossible to determine which provision within section 22 the Department might believe to be applicable. In its formal submission, the Department, for the first time, indicated that it was relying on section 22(1)(a) to withhold the remainder of the information for which section 22 was claimed. It is not enough for the Department to simply claim section 22 in general and expect this Office to know which one of the sub-paragraphs might be applicable. If a public body believes a particular exception is applicable it is up to the public body to cite that particular exception (right from the Applicant's initial request) and then provide reasons as to why it is applicable. Otherwise, the informal resolution process becomes exceedingly difficult.

[26] As noted, the Department has now stated that the information that has been withheld under section 22(1)(a) would reveal information about a law enforcement matter and that "[a]s the Inland Fisheries Enforcement Program and its officers undertake law enforcement duties, this is clearly a law enforcement matter." The Department cites Report 2007-003 from this Office in support of this position. They also cite *Ontario (Community Safety and Correctional Services) v. Information and Privacy Commissioner*, 2007 CanLII 46174 in support of the proposition that the definition of "law enforcement matter" does not always require an ongoing investigation or proceeding. The Court stated "[w]e find that 'matter' does not necessarily always have to apply to some specific ongoing investigation or proceeding." This language seems to imply that while a specific or ongoing proceeding may not, in every case, be necessary for a "law enforcement matter" to be present, this will be the exception rather than the rule. The Court went on to find that the information to which access was sought did in fact relate to a specific and ongoing proceeding. Further, while the Court considered the definition of "matter" in this case, it did not consider the definition of "law enforcement". Law enforcement is defined in section 2 of the *ATIPPA* to mean:

> *(i) policing, including criminal intelligence operations, or*
> *(ii) investigations, inspections or proceedings* ***that lead or could lead to a penalty or sanction being imposed****;*
>
> [emphasis added]

[27] Therefore, if the "matter" (specific and ongoing or not) is not one that could result in sanction or penalty, there is no law enforcement matter and section 22 is not applicable. This part of the definition cannot be ignored. While a specific or ongoing proceeding may not be necessary for a sanction or penalty to be imposed, it is logical that this would usually be the case. In the case at hand, there is no information at issue with respect to any matter that could result in sanction or penalty being imposed. There is also no "policing" matter involved.

[28] The relevance of this latter part of the definition of "law enforcement" was also noted by my predecessor in Report 2007-003:

> *[97]The definition of law enforcement contains two distinct categories. The first category is specifically limited to policing activities, while the second category includes a much broader list of activities. It is this second category that is at issue in the case at hand. I note that within this category, there are two distinct elements.* ***An activity must fall within the scope of an investigation, inspection or a proceeding, but it must also lead or have the potential to lead to some penalty or sanction.*** *Given the broad nature of the terms "investigation" and "proceeding" I have no hesitation in agreeing that the 1994 investigation meets this portion of the definition. However,* ***I believe the second element of the definition in*** [sic] ***considerably more restrictive****.*
>
> [emphasis added]

[29] Further, the above noted case can be distinguished from the case at hand on its facts. The information to which the Department has applied section 22(1)(a) is general information with respect to the necessary qualifications, functions and management of certain employees. Some of this information could conceivably be included in a job description. I find it difficult to accept that information about job qualifications, functions or the management of particular employees comes under the definition of "law enforcement", as broad as it may be. The information at issue in *Ontario (Community Safety and Correctional Services) v. Information and Privacy*

Commissioner was such that it could be used in criminal investigations at any time (a fact that was also recognized by the Court). Clearly, the facts of the case at hand are substantially different, and limit the application of that case to the information at issue here.

[30] The Department has also claimed section 22(1)(e) for some of the information that has been withheld. As noted, section 22(1)(e) provides that information may be withheld when it would reveal law enforcement intelligence information. Given the above noted discussion with respect to the definition of "law enforcement", I find that the information at issue does not constitute a law enforcement matter, and therefore, section 22 (1)(e) is not applicable.

[31] Further, section 22(1)(e) contemplates the revelation of "law enforcement intelligence information". Several Orders from the Ontario Information and Privacy Commissioner (Orders M-202, P-650, P-1492) have considered the definition of "intelligence information" as follows:

> *... information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.*

[32] It is in this sense that "intelligence" is used in sections 2 and 22(1)(e); it refers to information that has been secretly or covertly gathered in furtherance of police or other penal investigations and/or prosecutions. This is the type of information that is protected by section 22(1)(e). On its face, the information that has been withheld under this section is certainly not "law enforcement intelligence information"; it is not information that has been gathered as part of a police or other penal investigation or prosecution. The Department has also not presented evidence to show how section 22(1)(e) is applicable, and therefore has failed to discharge the burden of proof with respect to this section.

Section 23

[33] Section 23 of the *ATIPPA* is a discretionary exception that allows a public body to withhold information that could reasonably be expected to cause harm to intergovernmental relations or

negotiations or would reveal information received in confidence from a government body. Section 23(1) provides as follows:

> *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*
>
> *(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*

[34] Again, the Department did not initially indicate what part of section 23 they were relying on. As noted in Report 2006-006, there is an important distinction between sections 23(1)(a) and 23(1)(b). Section 23(1)(a) clearly anticipates a reasonable expectation of harm. Section 23(1)(b), however, requires only that the information be "received in confidence" and does not require a determination of harm. The Department indicated in its formal submission that it was relying on section 23(1)(b). In Report 2006-006, my predecessor stated as follows:

> *[21] I agree with the analysis of the Commissioner in Order 331-1999 and believe that for the purposes of section 23(1)(b) of the ATIPPA, the intent of the Department in receiving the information at issue is an important consideration in determining confidentiality, in addition to the intent of the supplier of the information. As such, the Department maintains the onus of establishing that it fully intended to receive the information in confidence. This differs from the requirement of section 27(1)(b), where the focus is on establishing whether or not the supplier of the information intended that it be supplied in confidence.*

> *[22] I also note that section 27(1)(b) allows for implicit confidentiality while section 23(1)(b) does not. In supplying information to a public body a third party need only establish an implicit expectation of confidentiality in order to engage section 27(1)(b). In the absence of similar express language in section 23(1)(b), the threshold is obviously higher. I believe the Legislators, in leaving out the phrase "implicitly or explicitly" in this provision, intended a more strict interpretation of confidentiality and placed a higher standard on public bodies to show that information had been received in confidence.*
>
> *[25] I have not seen any clear evidence in support of such confidentiality, outside of statements by the Department to that effect. I am not convinced that a mere statement that information that had been provided to a public body some four and one half years ago was provided in confidence should justify the withholding of that information from disclosure. To do so would allow any organization listed in section 23(1)(a) to simply state, after the fact, that information was provided in confidence in order to engage the protection of section 23(1)(b). I do not believe that the Legislators meant section 23(1)(b) to provide such broad protection, particularly in light of my comments thus far. It is also important to consider this point in the context of section 3 of the ATIPPA, which states in part that the purpose of the legislation is to provide to the public a right of access to records, subject to limited exceptions. This bias in favour of disclosure lends support to a more narrow interpretation of section 23(1)(b).*

[35] I agree with these statements and note that the Department has not provided any evidence that this information was received in confidence and the record itself does not indicate that the information was received in confidence. Therefore, the Department has failed to discharge its burden of proof with respect to this section.

Section 18

[36] The Department has claimed section 18 with respect to a Cabinet Directive and one sentence in an e-mail. 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 the Cabinet on an appeal under an Act.*

[37] As discussed most recently in Report A-2008-008 and Report A-2008-010, 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 have also adopted, is set out in *O'Connor* as follows:

> *[56]…Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption …*
>
> [Emphasis in Original]

[38] 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.*

[39] The information in the e-mail that was withheld under this section simply identifies that a decision was made by Cabinet. I cannot accept that this sentence would allow one to draw accurate inferences with respect to the substance of deliberations of Cabinet

[40] However, with respect to the Cabinet Directive, I am satisfied that disclosure of the information contained therein would allow one to draw accurate inferences about Cabinet deliberations.

Section 30

[41] The Department has also severed some information under section 30. Section 30 states as follows:

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

Personal information is defined in section 2 of the *ATIPPA*:

> *2. …*
>
> *(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;*

[42] Section 30 has been appropriately claimed in some instances, but other information that has been severed under section 30 is clearly not personal information. It appears that the Department severed too broadly when considering this section. They have severed whole paragraphs and claimed section 30, when merely severing names or other identifying details would have

sufficed. It is important for the Department to be mindful that line by line severing is the appropriate manner in which to redact documents and whole paragraphs must not be withheld when they can be appropriately severed to remove information about identifiable individuals.

[43] Finally, the Department has identified some records as not being responsive to the Applicant's request. The Applicant's request was very broad, and access was sought to "…all documentation related to this review." It appears to me, that some of the information that was considered non-responsive and thus not provided to the Applicant could fall under this broad request, in that it might be considered to be related to the review. For example, any information that was provided to the author or discussed between government officials as a result of the review is, in my opinion, responsive to the request, and should therefore be provided to the Applicant (subject, of course, to any appropriate exceptions).

V CONCLUSION

[44] I have found that section 18 has been properly claimed with respect to the information contained in the Cabinet Directive, but that it is not applicable to the sentence in the e-mail for which it has been claimed.

[45] With respect to section 20, I have found that the Department is not entitled to rely on this section merely because the record does not contain a final report or recommendations. Portions of the records that are factual clearly must be released under section 20(2)(a). Where it is clear, on its face, that information in the record will reveal advice and recommendations, then the Department may rely on section 20 to withhold information. However, section 20 has been claimed for significant amounts of information that do not, in my opinion meet this test, and the Department has failed to show or explain otherwise. Therefore, I find that the Department is not entitled to rely on this section with respect to these portions of the responsive record.

[46] As the Department has not presented evidence to show that section 22(1)(e) is applicable, I find that section 22(1)(e) cannot be used to withhold the information for which it has been

claimed. With respect to the other information for which section 22(1)(a) has been claimed, I find that the information for which this section has been claimed is not a "law enforcement matter". Therefore, I find that the Department is not entitled to rely on section 22.

[47] With respect to section 23, the Department has not provided any evidence that this information was received in confidence and the record itself does not indicate that the information was received in confidence. Therefore, the Department is not entitled to rely on section 23(1)(b).

[48] I have also found that while section 30 is applicable to some of the information for which it was claimed, it has also been inappropriately applied in some cases. Where this is the case, the Department is not entitled to rely on section 30.

[49] Finally, I have found that some of the information which the Department has marked as non-responsive, is actually responsive, given the Applicant's broad request. The Applicant may wish to file a new request for this information, in order to restart the legislative timelines under the *ATIPPA* and preserve the right to request review of additional information released to him.

VI RECOMMENDATIONS

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

1. I recommend that the Department release to the Applicant all of the information that has been highlighted on a copy of the record that has been provided to the Department along with this Report.
2. I recommend that the Department reconsider that information which it has deemed non-responsive, keeping in mind the broad scope of the Applicant's request and release to the Applicant additional information upon receipt of a new request from the Applicant.

3. I recommend that in future, the Department be mindful of its duty to assist the Applicant, as well as its duty to cooperate fully with the Commissioner's Office and discharge its burden of proof to the best of its ability. While this Office cannot force the Department to cooperate with informal efforts at resolution, I recommend that the Department review its approach and consider whether greater effort at the informal stage might serve the interests of all parties, in addition to fulfilling the spirit and intent of the *ATIPPA.*
4. I recommend that the Department review its overall approach to compliance with the *ATIPPA*, including its capacity to deal promptly with requests for information from this Office, and its approach to severing, which should always be consistent with the purpose of the legislation, which is to provide access to information subject to specific and limited exceptions.
5. I recommend that in future, in the course of deciding whether to withhold information from an Applicant, the Department be mindful of the statutory requirement to be able to provide every Applicant with an explanation of its decisions. In particular, I recommend that in future the Department be prepared to either support the use of an exception to disclosure with detailed reasons, or not apply that exception at all.

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

[52] 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.*

[53] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of February 2009.

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