



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-002

January 11, 2019

Department of Natural Resources

Summary:

The Complainant made a request for draft reports provided to the Minister of Natural Resources by the rate mitigation committee, as mentioned by the Minister in response to questions from the media. The Department of Natural Resources (the “Department”) provided some of the requested information to the Complainant. Some information was redacted citing sections 29(1)(a) (Policy advice or recommendations), 35(1)(d), 35(1)(f) and 35(1)(g) (Disclosure harmful to the financial or economic interests of a public body) of the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”). The Complainant requested that the Commissioner review the Department’s application of the exceptions to disclosure. Upon review, the Commissioner determined that the Department appropriately applied the redactions to the responsive records, and recommended that it continue to withhold the information in question.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 9, 29, and 35.

Authorities Relied On:

[John Doe v. Ontario \(Finance\)](#), 2014 SCC 36, [2014] 2 S.C.R. 3; OIPC Guidance Documents [Policy Advice or Recommendations \(Section 29\)](#) and [Guidance for Public Interest Override](#); and OIPC Reports: [A-2018-021](#), [A-2017-015](#), [A-2016-032](#).

I BACKGROUND

- [1] The Department of Natural Resources (the “Department”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015”) seeking disclosure of the following:

On September 5th 2018 the Minister of Natural Resources said in response to questions to the media that she has received draft reports from rate mitigation committees. Please provide these reports as provided to the Minister.

- [2] The Department responded, providing access to some of the records responsive to the request, while making redactions to withhold other information relying upon sections 29(1)(a), 35(1)(d), 35(1)(f) and 35(1)(g) of the *ATIPPA, 2015*. The Complainant asked the Commissioner to review that decision.
- [3] As informal resolution was unsuccessful the matter was referred for formal investigation pursuant to section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] The Department advised that it, along with the Department of Finance and Nalcor officials formed a working group to develop further options for rate mitigation. Part of this committee’s work includes “considering and exploring all opportunities that could support rate mitigation.” The responsive records are PowerPoint presentations made to this committee and, “reflects the ‘options’ being considered and have not been finalized,” and therefore, “cannot be released at this time.”
- [5] In regards to section 29(1)(a), the Department acknowledges that, “the topic is a matter of public interest as indicated by the complainant” but asserts that, “it is not in the interest of the general public to release all options that are currently being considered and discussed.” The Department points to the concept that, “Departments must be able to have a free and frank discussion of ideas in order to be able to manage the affairs of the

province,” and, “to simply release all ideas being considered, many of which will never see fruition, is tantamount to creating unnecessary and unwarranted anxiety in the public.” The Department further referenced this Office’s Guidance Document on [Policy Advice or Recommendations \(Section 29\)](#), highlighting the case of *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3 at paragraphs 26-27:

Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include...consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information,” and, “...can take many forms...as long as a list sets out alternatives courses of action relating to a decision to be made, it will constitute policy options.

- [6] The Department references a primary purpose of the *ATIPPA, 2015* under section 3(1)(a), “disclosure of information to citizens that is required to participate meaningfully in the democratic process, which is balanced by specifying limited exceptions necessary to preserve the ability of government to function efficiently,” as per section 3(2)(c). In support of this argument, it quoted paragraph 46 of *John Doe v. Ontario (Finance)*, which holds that interpreting “advice”:

...as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

- [7] The Department additionally argues that a full and frank discussion of policy options, including advice and recommendations, is necessary and access to information legislation recognizes this, as reinforced by the courts. It again referenced *John Doe v. Ontario (Finance)* at paragraph 45:

[45] Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada...The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived

partisan considerations into public servants' participation in the decision-making process.

[8] The Department argues that the information in question contains advice and policy options developed for the Crown and, “the fact that the Minister and Premier have spoken about the topic does not mean that all information on the subject should be disclosed as asserted by the Complainant.” It notes that, “these PowerPoint presentations were prepared for the sole purpose of briefing the Minister and/or Premier and/or eventually Cabinet on options, not to present final decisions or even recommendations at this point. To disclose these options would be not only premature, but foolhardy at this point in time.”

[9] With respect to section 35, the Department argued that the information redacted pursuant to section 35(1)(d) of the *ATIPPA, 2015* included “information that could reasonably be expected to disclose information prematurely as it relates to proposal/projects which the department are contemplating and which could cause significant loss.” It went on to note that the timing of release of specific information is important regarding this section and reiterated its position in relation to section 29(1)(a) that:

...it would be gravely premature to provide policy options at this time. No decisions have been made on the options...At this stage in development many options will be proposed, some may be accepted, while others might not make it past inclusion in these PowerPoints. To throw all these options out to the public at this time could result in unnecessary and false speculation on government's future plans.

[10] It also submits that section 35(1)(f) applies to “information that would reveal the substance of future negotiations between the province and other public bodies or third parties.” The Department claims this could, “reasonably be expected to hamper negotiation efforts in future...as disclosing the other options prior to discussions on this option would be the equivalent of publically revealing any potential negotiation strategy.” Finally, the Department submits that, “section 35(1)(g) was applied primarily to information that revealed financial/economic details or factors that could impact the financial interests of the Provincial Government.” It notes that the Government of Newfoundland and Labrador, “has a financial and economic interest in the contents of these reports,” and asserts that,

“the premature release of these options, many which may not be developed, will impact the financial and economic integrity of government.”

[11] The Department also responded to the Complainant’s assertion that the public interest override found in section 9 of *ATIPPA, 2015* meant that the records must be disclosed, despite the exceptions relied upon to withhold them. The Department cites the [Guidance for Public Interest Override](#) issued by this Office, arguing “that it has not been clearly demonstrated that the public interest in disclosure outweighs the reason(s) for the exception.”

[12] The Department went on to highlight a statement in the *Guidance for Public Interest Override* that, “there is a wide difference between what is interesting to the public and what it is in the public interest to make known.” It also noted 4 of the 5 factors set out on page 5 of Guidance document: 1) likelihood of harm, 2) severity of harm; 3) age of information, and 4) impact of release on the public interest. It is on this basis that the Department asserts that “not only has the public interest not been clearly demonstrated, in fact it is in the public’s interest to not release at this time.” It again points to the ongoing nature of the discussions, that all options are on the table, and the likelihood that future negotiations will occur, to suggest it is not in the interest of the public to disclose options prematurely. Additionally, it argued that the harm associated with premature release of information, “clearly outweighs any public interest in all options being considered,” as “having all options in the public forum would significantly impact the deliberative process of government decision and policy making by subjecting those discussions to what would likely be excessive scrutiny in today’s environment.” It pointed to the idea that “special interest groups will very likely lobby government for their preferred option which may not be the best interest of the province.”

[13] Finally, the Department notes that,

there will be a time in the not too distant future when release of these records is possible, but today is not the day and it would harm the financial interests of the province, impair the negotiating position of the province and seriously curtail the free and frank discussion of options at an early stage of policy development if [it] were forced to release this information now.

III COMPLAINANT'S POSITION

[14] The Complainant argues in relation to section 29(1)(a) that the information in question forms, “more than policy recommendations,” and is instead, “part of a process which the Premier and Minister have both spoken publicly about and, as such, it is of public interest.” It further notes that because the information in question is of public interest, its public release would “allow a public conversation which would be in the best interest of the province. This information has not been prepared for one single Minister, but exceeds one Minister; it represents various options which deserve a public conversation.”

[15] The Complainant submits in relation to section 35(1)(d), that the information in question “includes options which are related to electricity rates,” specifically options Nalcor and the provincial government could “take to ensure the lowest rates possible for ratepayers in this province.” It argues that the redacted information may relate to, “parts of the Muskrat Falls agreements, projected excess energy sales, the equity share in the project, etc.,” and that, “portions of this information are already in the public domain but may not be accurate.” The Complainant posits that disclosure of the information in question would allow, “an informed discourse,” and notes that “Nalcor is owned by the taxpayers of Newfoundland and Labrador and as such, there is no third-party relevant to this information.”

[16] Finally, the Complainant argues in relation to sections 35(1)(f) and (g) that the Premier, the Minister of Natural Resources and other Government and Nalcor officials, “have already made various comments about the options available,” and the citizens of the province, “have the biggest financial stake in the Muskrat Falls project and rate increases will impact them directly,” and therefore the information in question, “should be made public so that an open and informed public conversation can occur.”

IV DECISION

[17] The relevant sections of the *ATIPPA, 2015*, include:

29. (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;

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35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

—

(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body;

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9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

...

(b) section 29 (policy advice or recommendations);

...

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

...

(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

Application of section 29(1)(a)

[18] The Department provided this Office with the responsive records in full, which consist of PowerPoint presentations. Portions of the records at issue are in keeping with the description set out under section 29(1)(a); namely that they include proposals, analyses, options and recommendations developed by or for a public body or minister. Information in the responsive records withheld by the Department constitutes the options under discussion and consideration but not finalized in relation to the issue of rate mitigation. Furthermore, this information does not fall within any of the exceptions to the application of section 29(1) set out under section 29(2). As this material falls within the scope of section 29(1)(a), the Department is entitled to withhold it.

Application of Section 35(1)(d), (f) and (g)

[19] The portions of the responsive records to which the Department applied sections 35(1)(d), (f) and/or (g) also meet the descriptions set out under these sections of the *ATIPPA, 2015*. Upon review, the material in question pursuant to section 35(1)(d) constitutes a preliminary stage presentation of options and discussion of those options, disclosure of which would constitute premature disclosure of a project or proposal. As the Department noted, there will come a time when this material may be subject to disclosure, but I agree with its assessment that it would be premature to do so at this time.

[20] The material withheld under section 35(1)(f) also falls within the description of material developed as considerations for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body and therefore the Department is entitled to redact and withhold the that information.

[21] Finally, the Department provided sufficient evidence that the information redacted pursuant to section 35(1)(g) falls within the description of that which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body were it to be disclosed. Therefore, this Office determines that the Department is also entitled to redact and withhold that material.

Public Interest Override - Section 9

[22] The Complainant failed to demonstrate that section 9 ought to apply such that the public interest in the disclosure of the information in question outweighs the application of the discretionary redactions allowing redaction of the information. While the Complainant, not having seen the redacted information, may not be in the best position to establish that the information should be released in the public interest, having reviewed this responsive records I can confirm that nothing in the content of the information being withheld convinces me that the public interest override applies here. The Department provided compelling evidence not only demonstrating that section 9 ought not to apply, but that releasing the information could potentially harm the public interest at the present.

[23] That said I acknowledge the irony that as recently as today, the media reported public comments by the Premier about the rate mitigation debate. The potential for the perception of having one's cake and eating it too may stick in the public's craw, especially in the context of relying upon the Act's discretionary exceptions. In terms of the Department's reference to the potential disclosure of rate mitigation options in the not too distant future, the public has an interest in the Department settling on its options as soon as possible and disclosing them.

V CONCLUSION

[24] The Department has properly withheld the information in question pursuant to sections 29(1)(a), and 35(1)(d), (f) and (g) of the *ATIPPA, 2015*, and section 9 does not apply to override these exceptions.

VI RECOMMENDATIONS

[25] I agree with the initial decision of the Public Body, and I therefore recommend the information in question continue to be withheld from disclosure in accordance with sections 29(1)(a) and 35(1)(d), (f) and (g) the *ATIPPA, 2015*.

[26] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department must give written notice of his or her decision with respect to this recommendation to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of January, 2019.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador