



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-014

July 9, 2019

Tourism, Culture, Industry and Innovation

Summary:

The Department of Tourism, Culture, Industry and Innovation (the “Department”) received an access request for records relating to the non-resident caribou quotas in the Buchans Plateau area (CMA 62) and specifically regarding the quota for a named individual’s business. The Department provided access to some records but withheld the remaining records based on sections 27(1) and 27(2)(a) (Cabinet confidences), 29(1) (Policy advice or recommendations), 39 (Disclosure harmful to business interests of a third party) and section 40(1) (Disclosure harmful to personal privacy). Through the investigation with this Office, the Department released further information previously withheld based on sections 29, 39 and 40 of the *ATIPPA, 2015*. The Commissioner determined that the Department had conducted a reasonable search for records and had properly applied the remaining exceptions and recommended the Department continue to withhold the records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 27 and 29.

Authorities Relied On:

Newfoundland and Labrador OIPC Report [A-2018-025](#).

Other Resources:

OIPC NL [Practice Bulletin Reasonable Search](#), March 2017.

I BACKGROUND

- [1] The Department of Tourism, Culture, Industry and Innovation (the “Department”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) seeking the following records:

All documents and correspondence regarding the reduction of non-resident caribou quotas in CMA 62. Specifically, and without limiting the scope of the foregoing, any documents and correspondence relating to the reduction of a [named individual's] [named business] non-resident caribou quota.

- [2] The Department clarified with the Complainant the timeframe of the request to be the reduction of the 2018 non-resident caribou allocation.
- [3] The Department provided access to some of the responsive records while withholding other records relying on sections 27(1)(a), 27(1)(c), 27(1)(h), 27(2)(a) (Cabinet confidences), and other information relying on section 29(1) (Policy advice or recommendations), 39(1)(a)(ii), 39(1)(b), 39(1)(c)(i) (Disclosure harmful to business interests of a third party) and section 40(1) (Disclosure harmful to personal privacy) of the *ATIPPA, 2015*.
- [4] The Complainant was not satisfied with the redactions and also questioned whether all responsive records were located. They therefore asked the Commissioner to review the Department’s use of the exceptions as well as the search conducted. Through the informal investigation process with this Office, the Department released further information that was initially withheld under sections 29, 39 and 40 of the *ATIPPA, 2015*. The Complainant agreed that any remaining information withheld based on section 40 is not at issue in this Report.
- [5] As an informal resolution could not be reached, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*. At issue in this report are the records withheld under section 27(2)(a) and the information withheld under section 29(1).

II PUBLIC BODY'S POSITION

- [6] The Department claimed that the records withheld under section 27 are Cabinet records. The Department explained that at the relevant time, the allocation of caribou licenses was a Cabinet decision.
- [7] The Department indicated that the Clerk of the Executive Council had examined and considered all records withheld in accordance with section 27(2)(a) of the *ATIPPA, 2015*, and approved the use of section 27. The Department advised that the Clerk was satisfied that the records withheld do not meet the test for disclosure set out in section 27(3) of the *ATIPPA, 2015*.
- [8] During the informal resolution process, the Department exercised its discretion and released further information initially withheld based on section 29(1)(a); however, the Department asserted that the remaining information withheld constitutes policy advice as set out in the exception claimed and would not be released.
- [9] The Department provided an explanation of the search conducted to locate responsive records. The Department advised that as the request was narrow and specific, the areas and individuals within the Department that would have responsive records were limited. The Department confirmed that all relevant staff searched their emails, the filing cabinets where records of this nature are kept were searched and the records management system for the Department was also searched. The Department determined it was not necessary to search offsite storage given the recent timeframe of the request.
- [10] When questioned about the search during informal investigation, the Department confirmed that currently the Department's Assistant Deputy Minister ("ADM") and one other staff member deal with outfitting, and the search for records included these individuals. The wording of the access request had been sent to these two individuals as well as the Minister's secretary and was copied to a number of other individuals.

[11] The staff member who deals with outfitting conducted the search for records as part of the original search and that person would be knowledgeable and experienced with the information requested. The ADM for the Department reviewed these records.

[12] One additional record was located during the course of this investigation; however, the Department withheld it, citing sections 27(1)(e) and 27(2)(a) of the *ATIPPA, 2015*.

[13] The Department also explained that any background information and decisions relevant to this request would be contained in the records withheld based on section 27(2)(a), and that there were also verbal discussions held on this topic. The Department advised that there are no further records responsive to the access request.

III COMPLAINANT'S POSITION

[14] The Complainant is questioning why they/their business received cuts to their allocation of the 2018 caribou licenses because they felt that they were disproportionately targeted for a reduction. The Complainant explained that the reduction has caused a loss of revenue and a depreciation in the value of their business.

[15] The Complainant felt that the information they received in response to their access request was incomplete, generic in nature and did not address the request they made.

[16] The Complainant stated that there was no information provided from the “chain of command” within the Department explaining what would have led to the decision to target their business and cut their caribou allocation far beyond what others received. The Complainant felt there were records lacking from key individuals, two individuals they specifically named, who they believe would have been involved in the process.

[17] The Complainant stated that outfitters and the outfitting industry comes under the auspices of the Department; however, they feel they have received no relevant information from the Department to their access request. The Complainant further explained that the Department of Fisheries and Land Resources would provide the Department with the Wildlife

Game Management Plan and then the Department is responsible for implications of that management plan to the outfitting sector. The Complainant feels that if changes were required to the status quo, then staff of the Department would provide the Department's Minister with different case scenarios and there would be correspondence back and forth on the matter specific to individuals or companies with caribou allocations. The Complainant feels that all these records are missing.

[18] The Complainant believes that information has been deliberately withheld and they want to see the documentation explaining why they received significant license cuts.

IV DECISION

Section 27

[19] Section 27 of the *ATIPPA, 2015* is as follows:

27. (1) In this section, "cabinet record" means

(a) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;

...

(c) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;

...

(e) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;

...

(h) a record created during the process of developing or preparing a submission for the Cabinet; and

(i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).

(2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record; or

(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.

(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

[20] A cabinet record is defined in section 27(1) above, and section 27(2)(a) requires that a cabinet record be withheld from disclosure. Cabinet records are generally withheld in their entirety as the exception is based on the class of record rather than the information within the record. I have concluded that the Department has properly withheld these records as they meet the definitions in section 27(1).

Section 29

[21] Section 29(1) of the *ATIPPA, 2015* states:

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;

[22] This exception is discretionary and encompasses advice, proposals, recommendations, analyses or policy options.

[23] The record at issue here is an Information Note to the Department of Fisheries and Land Resources regarding the Wildlife Game Management Plan 2018/2019. During the informal resolution process, the Department exercised its discretion and chose to release further information that was initially withheld under section 29(1)(a) and now the majority of the Information Note has been released.

[24] Accordingly, I am satisfied that the remaining information withheld in the Information Note fits within the exception claimed as advice and recommendations.

Reasonable Search

[25] Report A-2018-025 recently addressed the duty to assist and a reasonable search at paragraphs 16-19 as follows:

[16] The duty to assist is outlined in section 13 of the ATIPPA, 2015:

13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

[17] Many previous reports address the duty to assist, including Report A-2018-020. The duty to assist requires that public bodies make every reasonable effort to assist an applicant in making a request and provide timely responses to an applicant in an open, accurate and complete manner.

[18] Report A-2018-020 states the position of this Office with regard to the duty to assist:

[8] It is a long held position of this Office that the duty to assist has three components, as outlined in Report A-2009-011:

[80] ...First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.

The standard for assessing a public body's efforts is reasonableness, not perfection.

[19] Our guidance piece, Practice Bulletin on Reasonable Search, outlines that a reasonable search is one conducted by knowledgeable staff in locations where the records in question might reasonably be located.

[26] The Complainant raised issues with the search conducted, asserting that additional records exist. Our guidance piece, *Practice Bulletin on Reasonable Search*, sets out some criteria when reviewing the search conducted by a public body. The access request was specific to the Complainant's reduction of non-resident caribou quotas. The Department has asserted that a limited number of individuals deal with this topic within the Department. Furthermore, because the request was for recent records, the search should have been generally limited and specific in scope and location.

[27] The Department provided an explanation of the search in its initial response to this Office; however, during our informal investigation, this Office raised additional questions with the Department regarding the search conducted in light of the assertions of the Complainant. The Department provided more details on the search conducted and based on the additional details, I am satisfied that a reasonable search had been undertaken by the Department to locate records responsive to this request. As our practice bulletin states, the *ATIPPA, 2015* does not require a public body to prove with absolute certainty that records do not exist. The search must be reasonable and the public body must demonstrate that it searched in areas where records should be located.

[28] The records being withheld are cabinet records. As the allocation of caribou licenses for 2018 was a Cabinet decision, it is not unreasonable that there are no other responsive records that can be released. The definition of cabinet records is quite broad, and as a result, the “paper trail” the Complainant is seeking is protected by section 27, which requires public bodies to withhold a wide variety of documents that feed into the Cabinet process.

[29] Even though the Complainant has concerns with the lack of records and believes that additional records should exist with two specific individuals, I am satisfied that the Department has conducted a reasonable search and has located all the responsive records, including the records of these two individuals.

V RECOMMENDATIONS

[30] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the Department continue to withhold the remaining records pursuant to section 27(2)(a) and continue to withhold the remaining information pursuant to section 29(1)(a).

[31] 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 these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9th day of July 2019.



Victoria Woodworth-Lynas
Information and Privacy Commissioner (A)
Newfoundland and Labrador