



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-040

September 16, 2024

Executive Council

Summary:

The Complainant clarified an earlier access request to the Executive Council for records related to four Orders in Council. The Executive Council located responsive records, but determined that they fell under a mandatory exception to access at section 27 of the **Access to Information and Protection of Privacy Act, 2015**. The Clerk of the Executive Council further considered whether the public interest ought to override this mandatory exception to access, per subsection 27(3) of the Act, but determined against such an override and the Public Body refused to release the records. The Commissioner agreed with the Executive Council and recommended that it continue to withhold the records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 14 and 27.

Authorities Relied On: [Mastropietro v. Newfoundland and Labrador \(Education\), 2016 NLTD\(G\) 156](#).

NL OIPC [Report A-2024-023](#).

BACKGROUND

- [1] The Complainant had previously submitted an access request to Executive Council (EC), and a subsequent complaint to this Office, which resulted in [Report A-2024-023](#). EC accepted our recommendations in the Report and contacted the Complainant to clarify their request.
- [2] Through some back-and-forth between the Complainant and EC, the Complainant clarified the request for records as follows:
1. Records pertaining to the submissions to cabinet (nominations of the individuals appointed to MUN's Board of Regents by the Orders in question, their backgrounders, etc.)
 2. The submissions to cabinet made with respect to the Orders in question.
 3. The "minutes of council" pertaining to the Orders in question.

The Complainant further requested that if EC found that any of these records fell under the cabinet confidences exception to access per section 27 of the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015), that the Clerk exercise her discretion under subsection 27(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.

- [3] EC sent a final response to the Complainant confirming that the records responsive to the request are cabinet records subject to the mandatory exception to access at section 27 of ATIPPA, 2015 and refused to release the records. EC further advised the Complainant that the Clerk:

[H]as carefully examined and considered all records, materials and information withheld associated with this request, is satisfied that it does not meet the test for disclosure in accordance with subsection 27(3) and has made a decision to refuse access to the information requested in accordance with [section 27] of the Act.

- [4] The Complainant did not accept EC's position and filed a complaint with our Office.

- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of ATIPPA, 2015.

PUBLIC BODY'S POSITION

- [6] EC's Final Response to the Complainant provided its position: the responsive records fall under a mandatory exception to access and the Clerk is not of the opinion that the public interest ought to override this mandatory exception.

- [7] In its response to our Office, EC elaborated further with a description of the responsive records in question:

A Cabinet Submission is the key instrument of written policy advice to Cabinet. Staff within Departments and Agencies prepare Cabinet Submissions (also referred to as Memoranda to Executive Council) . . .

Decisions of Cabinet are formally expressed in the form of Minutes of Council . . . and Orders in Council . . . Minutes of Council are formal records of the decision of Cabinet. They are the mechanism for providing direction to ministers and departments/agencies and are not publicly available.

EC advised that all responsive records fall under this description and it was required to withhold them pursuant to section 27 of ATIPPA, 2015:

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

. . .

(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

. . .

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

(a) a cabinet record.

[8] EC confirmed that the Clerk reviewed and considered the matter at hand.

[9] In response to the Complainant's view, noted below, that EC should have transferred the request, EC advised that it is not of the opinion that transferring the request to either the Department of Education or the Department of Justice and Public Safety is necessary. It also pointed out that the five-day timeline for transferring a request under section 14 of ATIPPA, 2015 had passed.

COMPLAINANT'S POSITION

[10] The Complainant was of the opinion that section 27 did not apply to the first set of records, those related to the nominations of the individuals appointed to MUN's Board of Regents by the Orders in question, including information about their backgrounds.

[11] The Complainant acknowledged that section 27 did apply to the second and third sets of records about submissions to cabinet made with respect to the Orders in question and the "minutes of council" pertaining to those Orders. However, the Complainant believes the Clerk should have applied her discretion per subsection 27(3) of ATIPPA, 2015 and found that the public interest outweighed the reason for the exception.

[12] With regard to EC's position on section 27(3) of ATIPPA, 2015, the Complainant relied on the Supreme Court of Newfoundland and Labrador's decision [Mastropietro v Newfoundland and Labrador \(Education\)](#). The Complainant also referenced an opinion piece published in the Telegram entitled: "Who is really in charge at Memorial University?" as evidence of public interest in matters of transparency and decision making at the University.

[13] With reference to the Mastropietro decision, the Complainant stated:

The Court in para 31 clarified that "Section 27(3) contemplates a subjective assessment being conducted by the Clerk of the Executive Council as to

whether the public interest in the disclosure of the information outweighs the reason for the exception. What's critical under section 27(3) of the Act is the determination made by the Clerk." The Court acknowledged in para 35 that "There may be some other manner in which to challenge a determination made by the Clerk of the Executive Council under section 27(3) of the Act."

[14] The Complainant further suggested that EC should have transferred the request to either the Department of Education or the Department of Justice and Public Safety if, in the public bodies opinion, those public bodies had custody and control of the records.

ISSUES

[15] The issues to consider are:

- (1) whether section 27 of ATIPPA, 2015 applies to the responsive records;
- (2) if section 27 does apply to the records, whether the Clerk appropriately used her discretion to not disclose them per subsection 27(3) of ATIPPA, 2015; and
- (3) whether EC should transfer the request to another public body.

DECISION

[16] We accept that section 27 applies to the entirety of the request, including any "submissions to cabinet." Presumptively, EC must therefore deny access.

[17] We have no reason to believe that the Clerk has not considered the exercise of discretion appropriately here. Neither the Mastropietro decision (which suggests the potential avenue for challenging a decision of the Clerk would be judicial review) nor the opinion piece in the Telegram change this determination.

[18] Finally, at this point in the access to information process, it would not be appropriate for EC to now transfer the request to another public body. It has conducted a search for and located responsive records, and denied access under a mandatory exception.

RECOMMENDATIONS

- [19] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the Executive Council maintain its position on this matter.
- [20] As set out in section 49(1)(b) of ATIPPA, 2015, the head of the Executive Council must give written notice of his, her, or their decision with respect to these recommendations to the Commissioner and any person who received a copy of this Report within ten business days of receiving this Report.
- [21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of August, 2024.



Jacqueline Lake Kavanagh
Information and Privacy Commissioner (Acting)
Newfoundland and Labrador