



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2024-044

October 10, 2024

### Department of Fisheries, Forestry and Agriculture

**Summary:**

The Complainant made an access to information request to the Department of Fisheries, Forestry and Agriculture seeking all records to and from the Newfoundland and Labrador Beekeeping Association. At issue in this complaint is an email exchange between the Provincial Apiarist and the President of the Newfoundland and Labrador Beekeeping Association, from which information was withheld pursuant to section 29 (policy advice or recommendations). During the investigation, the Department claimed section 36(b) (disclosure harmful to conservation) also applied to the information. The Commissioner disagreed that section 29(1)(a) applied, but agreed to consider the applicability of section 36(b) notwithstanding it was put forward late in the investigation process. The Commissioner recommended the Department continue to withhold the redacted information pursuant to section 36(b).

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 29(1) and 36(b).

[Endangered Species Act](#), SNL 2001, c.E-10.1, section 44(1)(f).

[Endangered Species List Regulations](#), O.C. 2002-272, Schedule C.

**Authorities Relied On:** NL OIPC Reports [A-2024-011](#), [A-2020-020](#), [A-2021-033](#), [A-2024-039](#), and [2005-005](#).

[Merck Frostt Canada Ltd. V. Canada \(Health\), 2012 SCC 3 \(CanLII\)](#).

[Ontario \(Natural Resources and Forestry\) \(Re\), 2015 CanLII 25493 \(ON IPC\)](#).

## BACKGROUND

[1] On April 29, 2024, the Complainant filed an access to information request under the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015) to the Department of Fisheries, Forestry and Agriculture requesting the following information:

Any and all records concerning letters, meetings, emails, & presentations to/from the Newfoundland Beekeeping Association.

[2] The search produced 588 pages of responsive records. There were a number of redactions to the records provided to the Complainant. The Complainant filed a complaint with this Office arguing that the Department had improperly withheld information within an email exchange between the Provincial Apiarist and the President of the Newfoundland and Labrador Beekeeping Association (NLBKA) pursuant to sections 29(1)(a) (policy advice or recommendations) and 40(1) (disclosure harmful to personal privacy) of ATIPPA, 2015.

[3] During the investigation, the Department agreed to release additional information and the only remaining issue was the information redacted from the email exchange pursuant to section 29(1)(a), comprising a portion of two sentences and one full sentence.

[4] As informal resolution was unsuccessful, on September 11, 2024, the complaint proceeded to a formal investigation in accordance with section 44(4) of ATIPPA, 2015.

[5] During the formal investigation, the Department provided further representations to support withholding the information. The Department argued that in addition to the information being withheld pursuant to section 29(1)(a), it was also relying on section 36(b) (disclosure harmful to conservation), concerning the conservation of the Yellow-banded Bumble Bee. This species of bee is listed as a vulnerable species under Schedule C of the **Endangered Species List Regulations**, which is enacted under the **Endangered Species Act**.

[6] The Department advised that upon discussion with subject matter experts, it concluded that section 36(b) applied given the potential consequences if the information withheld were disclosed.

[7] The Department also provided information from the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) Assessment and Status Report on the Yellow-banded Bumble Bee in Canada in support of the application of section 36(b) and advised if they had known this information from the outset, this exception would have been applied to the initial access to information request.

[8] On September 17, 2024, the Complainant was notified that the Department also wished to apply section 36(b) as it relates to the Yellow-banded Bumble Bee and the **Endangered Species List Regulations**. At that time the Complainant was provided an opportunity to put forward further representations with respect to the application of section 29(1)(a), as well as section 36(b) late into the investigation. The Complainant availed of this opportunity and provided additional submissions on September 26, 2024, with respect to both exceptions relied upon by the Department.

#### **PUBLIC BODY'S POSITION**

[9] The Department maintains that the information was properly withheld from the Complainant pursuant to sections 29(1)(a) and 36(b).

[10] The Department asserts its late submission for applying an additional exception to access is the result of receiving new information provided by subject-matter experts about the potential harm to Yellow-banded Bumble Bee conservation, and section 36(b) would have been applied at the outset if the Department had this information at the time of the initial access to information request.

#### **COMPLAINANT'S POSITION**

[11] The Complainant disagreed with the redactions pursuant to section 29(1)(a), stating the record is not a conversation between government employees, but captures the Department disclosing advice or recommendations to a member of the public. The Complainant highlighted that the information cannot be shielded from a member of the public pursuant to

section 29(1)(a) when the Department released this same record to another member of the public, meaning the President of the NLBKA.

[12] The Complainant disagreed with the Department relying on section 36(b) late in the investigation, stating the Department was improperly attempting to buttress their earlier misuse of section 29(1)(a) with the application of section 36(b). The Complainant cited Report [A-2024-011](#) where this Office declined to consider the applicability of other exceptions claimed by a public body late in the investigation process.

[13] The Complainant also argued that should this Office consider the use of section 36(b), the Department will be unable to show a “reasonable prospect of probable harm” if this information is disclosed. The Complainant cited two cases and asserted that they hold that “reasonable prospect of probable harm” is the test required for the Department to establish the degree of likelihood that harm will result from disclosure of information, [Merck Frost Canada Ltd. V. Canada \(Health\)](#) and [Ontario \(Natural Resources and Forestry\) \(Re\)](#).

## ISSUES

- [14] At issue in this Report is:
- a. whether the Department properly applied section 29(1)(a) to the withheld information; and
  - b. whether the Department can now, belatedly, apply section 36(b) as an alternate exception and, if so, does this exception apply to the withheld information.

## DECISION

### Did the Department properly apply section 29(1)(a)?

- [15] Section 29(1)(a) of the Act provides:
- 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;

[16] Determining the correct application of the section requires consideration of the purpose of this section.

[17] This Office interpreted the purpose of section 29(1)(a) in Report [A-2021-033](#):

This exception is intended to provide public servants with a “safe space” in which to hold discussions or debates around courses of action and to provide advice or recommendations about policy or procedural matters, without being concerned that their views and opinions will be made public. The extensive jurisprudence on this topic, including court decisions, confirms that the exception covers drafts of documents and the discussions around them.

[18] This Office also considered the application of section. 29(1)(a) in Report [A-2024-039](#):

Section 29(1)(a) addresses the need for public bodies to withhold records that document internal discussions and debates that are needed to develop and implement policies and plans.

[19] What section 29(1)(a) does not cover is discussions that involve an analysis by a public body that is not internal to the public body, which is the case at hand. As such, we find that section 29 cannot apply to the information withheld from the email exchange between the Provincial Apiarist and the President of the NLBKA.

### **Can the Department belatedly apply section 36(b)**

[20] As noted in Report [A-2024-011](#), put forward by the Complainant, our Office has dealt with this issue in several previous reports and cites several portions of Report [A-2020-020](#) which described our position:

[43] The long-standing position of our Office, going back to Report 2005-005 (Labrador and Aboriginal Affairs) is that it is normally inappropriate to claim additional exceptions at a late stage in the complaint process. The complaint received by this Office from an applicant is, necessarily, a complaint about the decision to refuse access made by the public body in its final response to the applicant’s access request. Pursuant to section 17 of the Act, where access to any information is refused, the public body’s final response must contain “...the reasons for the refusal and the provision of this Act on which the refusal is based.” That decision, and the reasons for it, as claimed by the public body at the time of its response to the applicant, are what this Office is required to investigate.

[21] This Report goes on to highlight that refusing to consider a late exception is not an absolute rule, stating:

[46] There may be occasions when, through exceptional circumstances, inexperience or inadvertence, a public body may be justified in claiming additional exceptions that were not set out in its final response to an applicant. At the very least, however, we would expect that this would be done in a reasonable time, and be fully communicated to the applicant as soon as possible.

[22] Report [A-2020-020](#) also states that it should be presumed that a final response from a public body to the applicant is the result of the consideration of all applicable exceptions. In Report [2005-005](#) our Office stated:

[89] ... if the public body did not invoke a specific discretionary exception in its original denial to the Applicant, it is reasonable to assume that they considered the exception, reviewed all relevant factors and decided that it was appropriate to release the information to the Applicant.

[23] In the case at hand, there are exceptional circumstances in that subject-matter experts provided new information to the Department after the Department had provided its final response to the Complainant. Had this information been provided earlier, it is clear that section 36(b) would have been applied at the outset.

[24] Another significant consideration noted in Report [A-2020-020](#) and Report [A-2024-011](#) for late exceptions is whether the Complainant was notified of the public body's subsequent decision to claim additional exceptions. This is important in order to ensure procedural fairness. In this case, the Complainant was notified of the new exception and although late in the investigative process, they availed of the opportunity to provide thorough submissions, including case law.

[25] Section 36(b) sets out:

36. The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of

(b) an endangered, threatened or vulnerable species, sub-species or a population of species;

[26] As noted above, the Complainant takes the position that the Department must demonstrate a “reasonable prospect of probable harm” in order to rely on section 36(b). For the sake of clarity, it should be pointed out that the actual threshold set out in the two decisions cited by the Complainant is “reasonable expectation of probable harm,” which is well-established as the threshold for harms-based exceptions to the right of access. Section 36(b) is unusual, however, in that it applies “if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of . . . an endangered, threatened or vulnerable species, sub-species or a population of a species”.

[27] While “damage” is clearly very close to, if not synonymous with “harm”, “interfere with” adds a different nuance. It is an accepted principle of statutory interpretation that when a legislature places two alternative terms in a provision such as this, they must be interpreted as having different meanings. “Interfere with” is defined by Oxford as to “prevent (a process or activity) from continuing or being carried out properly.” Therefore, the threshold to be met when it comes to interfering with conservation is whether there is a reasonable expectation that disclosure of the information would probably have such an effect. Based on the argument and evidence provided by the Department, we are satisfied that it has established this threshold. Furthermore, based on the information provided by subject-matter experts about the potential harm to Yellow-banded Bumble Bee conservation, we are satisfied that disclosure of this information could reasonably be expected to result in the damage contemplated by this exception. In summary, we are satisfied that it is probable that disclosure of this information could reasonably be expected to damage and interfere with the conservation of an endangered, threatened or vulnerable species, sub-species or population of species.

[28] It should also be noted that once a record is released, there are no restrictions on how that information might be used or further disclosed. The motivations or intentions of any individual Applicant are largely irrelevant to the question of whether information can be released by a public body. Rather, disclosure to one person must be treated as if the

information has been released to the world, and the consequences of such wide-ranging disclosure must be considered.

- [29] The information provided by subject-matter experts provides enough evidence to raise legitimate and reasonable concerns that should the information withheld be disclosed, it could reasonably be expected to damage and interfere with the conservation of the Yellow-banded Bumble Bee.

## RECOMMENDATIONS

- [30] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the Department of Fisheries, Forestry and Agriculture continue to withhold the information pursuant to section 36(b) that was previously redacted under section 29(1)(a) of the Act.
- [31] As set out in section 49(1)(b) of the **Access to Information and Protection of Privacy Act, 2015**, the head of the Department of Fisheries, Forestry and Agriculture 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 10<sup>th</sup> day of October 2024.



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