



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2025-013

March 6, 2025

### Department of Health and Community Services

**Summary:**

The Complainant requested access to a consultant's report on fertility services. The Department provided the consultant's report, withholding portions under sections 29 (policy advice or recommendations), section 35 (disclosure harmful to the financial interests or economic interests of a public body), and section 40 (disclosure harmful to personal privacy). The Complainant argued the redactions were excessive and the public interest override should apply, given the government's recent commitment to establishing an in vitro fertilization clinic. However, the Commissioner found that the withheld information fell within the cited exceptions and that premature disclosure could harm ongoing decision-making and financial negotiations. The Commissioner recommended the Department continue to withhold the redacted information.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 9, 29, 35, and 40.

**Authorities Relied On:**

NL OIPC Reports [A-2021-033](#), [A-2024-052](#), [A-2017-003](#), [A-2017-015](#); [Mastropietro v. Newfoundland and Labrador \(Education\), 2016 NLTD\(G\) 156](#); [OIPC Guidelines for Public Interest Override](#).

## BACKGROUND

- [1] The Complainant submitted an access to information request pursuant to the **Access to Information and Protection of Privacy Act, 2015** (the “Act”) to the Department of Health and Community Services seeking the following:

Requesting a copy of the research report from Thinkwell Research submitted to Government of Newfoundland and Labrador Public Procurement Agency under solicitation #RFP122011216A - Fertility Services Review. My previous request in early summer 2024 received a response that the report needed to be circulated internally before release. I trust that assume [sic] five months after that response the report is ready for release

- [2] The Department responded by providing partial access to the records, withholding some information under section 29 (policy advice and recommendations), section 35 (disclosure harmful to financial or economic interests of a public body), and section 40 (disclosure harmful to personal privacy). The Complainant proceeded to file a complaint with this Office.
- [3] As informal resolution was unsuccessful, the Complaint proceeded to formal investigation in accordance with section 44(4) of the Act.

## PUBLIC BODY’S POSITION

- [4] The Department submits it received the final version of the consultant’s report in September 2024 and the Complainant subsequently submitted their access request for the consultant’s report in October 2024. At the time of the request and the subsequent complaint to our Office, the consultant’s report and its recommendations are still under review by the provincial government. The Department’s position is that premature release of the consultant’s report could lead to several harms such as raising unrealistic public expectations, causing unnecessary stress among staff of the Newfoundland and Labrador Fertility Program (“NLFS”), and prejudicing the financial and economic interests of the provincial government.
- [5] Additionally, the Department noted that its Minister has publicly expressed the intent to release the consultant’s report once the review is completed and decisions have been finalized. This statement was made in the House of Assembly signaling the provincial

government's commitment to transparency while safeguarding the integrity of its decision-making processes.

## COMPLAINANT'S POSITION

[6] The Complainant argues that significant portions of the consultant's report were unjustifiably severed and contends that the exceptions applied constitute an overreach. Their position is that the withheld sections likely include critical recommendations, data, and supporting commentary that are essential for addressing systemic shortcomings in fertility care in the province.

[7] The Complainant further argues that the consultant's report was received by the provincial government in September 2024, or earlier, yet they have delayed its release for months despite stating it would be made public "as soon as possible." This pattern of inaction and prolonged secrecy, according to the Complainant, undermines public confidence and suggests that further delays are likely unless disclosure is compelled.

[8] The Complainant has invoked the public interest override under Section 9 asserting that the public interest in disclosure clearly outweighs the reasons for withholding the information. The Complainant believes that recent developments with the Premier's public announcement outlining the plan to establish an in vitro fertilization ("IVF") clinic by late 2025 or early 2026 eliminates the provincial government's justification for withholding information, as the decision-making process has now entered the public domain and emphasizes that the public has a right to review the consultant's recommendations to engage meaningfully in discussions and hold the provincial government accountable.

## ISSUES

[9] At issue for this Report is whether the Department properly applied the exceptions to access and whether section 9 should apply to require the disclosure of the information otherwise withheld under sections 29 and 35.

## DECISION

### Application of Section 29

[10] Section 29(1)(a) 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;

[11] This exception has been applied to withhold portions of records that include policy, advice, and recommendations. As noted in Report [A-2021-033](#), the purpose of section 29 is to provide protection for public servants to freely engage in discussions and debates, and provide opinions, advice, or recommendations on policy matters. Although the consultant's report is not a series of discussions and debates between public servants, it does provide opinions, advice, or recommendations on policy matters. The purpose for the consultant's report was to provide the provincial government with recommendations on ways to enhance fertility services, including access to IVF.

[12] Having reviewed the consultant's report, we find that the withheld information clearly covers options, recommendations, proposals, and advice within the meaning of section 29(1)(a) of the Act, 2015.

### Application of Section 35

[13] The relevant portions of section 35 of the Act read as follows:

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

...

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(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;

...

[14] The Department applied redactions to information related to management of the small staff at NLFS which if released could cause undue or unnecessary stress given the Department is still in the decision-making process around the recommendations made within the consultant's report. We find that section 35(1)(c) was applied appropriately to withhold information falling within this section.

[15] As discussed in Report [A-2024-052](#), section 35(1)(d) is categorical in nature rather than harms-based, which means that so long as a public body can demonstrate that disclosure of information would be a premature disclosure of a proposal or project, the threshold has been met to apply the exception. In this case, upon review of the information withheld under this section along with the Department's assertion that the decisions surrounding the contents of the consultant's report had not been determined at the time the request was made, and still have not at the time of the complaint and this subsequent Report, we find the withheld information fall within the exception noted.

[16] Reports [A-2017-003](#) and [A-2017-015](#) discuss sections 35(1)(f) and (g). Section 35(1)(f) is also categorical in nature, meaning that if the record is of the kind described in that provision it may be withheld without any need to prove that harm will result from disclosure. Section 35(1)(g), however, requires the public body provide evidence of harm. As the purpose of the consultant's report was to provide plans and criteria for the recommendations suggested for the purposes of provincial government consideration in the implementation of IVF services, the information withheld under 35(1)(f) met the criteria for this exception. Given the implementation of IVF services is likely to be a lengthy and costly endeavor, the

information withheld under 35(1)(d) and (g) is also likely to lead to significant financial harm and prejudice the financial or economic interests of the provincial government if prematurely released. We conclude that the Department appropriately applied these exceptions.

#### Application of Section 40

[17] The Department also relied in small part on section 40(1) which reads as follows:

40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

[18] The information withheld under section 40 was the same information subject to the other exceptions to access addressed above. Having accepted that those exceptions apply to the redacted information, it is not necessary to assess the application of section 40 separately.

#### Section 9

[19] Having concluded sections 29 and 35 were properly applied, the next point to consider is whether the public interest override set out at section 9 applies, thus requiring the disclosure of the redacted information.

[20] In applicable circumstances, the Commissioner has the authority to recommend release of certain records, notwithstanding that such records fall within an exception, where it has been clearly demonstrated that the public interest in disclosure outweighs the reasons for the exception. An objective assessment of the public interest in disclosure of a record and the reasons for the exception is required under section 9 of the Act, which states:

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);

[21] The burden of proof to demonstrate that a Complainant has no right of access to a record is on the head of the public body as set out in section 43(1). Section 9 states that a discretionary exception shall not apply if the conditions for the override are met. There can be many factors at play in determining whether section 9 should apply to allow disclosure of information protected under other sections of the Act. These factors (whether raised by the Complainant or otherwise apparent or generally known), must show that the public interest in disclosure outweighs the harm against which the exception protects. The public body must be able to demonstrate that it has considered the public interest override in considering its decision whether or not to release information (see our [Guidelines for Public Interest Override](#), at page 6).

[22] With respect to the public interest at section 9, the Department highlighted its consideration of the public interest override; however, it concluded the public interest did not justify overriding the exceptions applied. The Department also takes the position the onus is on an applicant to demonstrate that the public interest outweighs the reason for the exception rather than any onus on the public body to provide evidence that the public interest does not outweigh the reason for the exception, citing *Mastropietro v. Newfoundland and Labrador (Education)*. The relevant sections are as follows:

[42] Further, section 59(2) of the [Act](#), set forth earlier, provides that the section 43 burden of proof applies with the necessary modifications to an appeal. Does this mean that where a public interest assessment must be conducted by this Court on an appeal, the head of the public body bears the onus of proving that it has not been clearly demonstrated that the public interest in disclosure outweighs the reasons for non-disclosure. In my view it does not. Instead the effect of section 43(1) and 59(2) in my view is simply that the head of the public body bears the onus even at the appeal stage of proving that the record or document in question falls within an exception to access under the *Act*.

[43] To find otherwise would mean that the head of a public body on an appeal would have to prove that the public interest in disclosure does not clearly outweigh the reasons for the exception from disclosure. This would be akin

to requiring the head of a public body to prove a negative and in the absence of clear and specific wording placing that burden on the head of the public body (which in my view is not the case under the [Act](#)) I do not believe such a burden exists.

[44] Further, it is my view that it is the party claiming the right to access to a record on the basis of public interest in disclosure who is in the best position to present evidence and make argument regarding such public interest. For all of the foregoing reasons it is my conclusion that the onus of clearly demonstrating that the public interest in disclosure outweighs the reasons for non-disclosure rests with the party seeking access to the record, in this case the Applicants.

...

[46] Section 23 of the Ontario legislation was dealt with by the Ontario Information and Privacy Commissioner in his decision in *Re Stadium Corporation of Ontario*, [1991 CanLII 4034 \(ON IPC\)](#) Order P-241, where the Commissioner stated as follows with respect to section 23:

The [Act](#) is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

[47] I agree with the general principle that a party asserting a right has the onus of establishing entitlement to that right. I also agree that this onus cannot be absolute but must be relaxed somewhat in a situation such as this, where the Applicants have not had the benefit of reviewing the document on which they are required to make submissions as to whether the public interest override should prevail.

...

[50] I am not saying that it is incumbent upon a person seeking to establish that there is a sufficient public interest in disclosure so as to outweigh the purpose of the exception from disclosure, to present evidence of the public interest in disclosure, in every case. There may well be cases where the public interest in disclosure, is so notorious as to be capable of judicial notice by the Court. There may be other cases, where the records or

documents themselves, are such that the Court is able to conclude there is a public interest in disclosure. However, in the absence of these or other similar circumstances, it is my view, that a person seeking to argue on an appeal, that the public interest in disclosure clearly outweighs the purpose of the exception from non-disclosure would be well advised to present evidence to the Court to support such an argument.

[23] At paragraphs 42-44 of Mastropietro, the court held that the burden of proof under section 9 is on the Complainant as they are the one asserting the right to access a record on the basis of public interest. However, recognizing that an applicant cannot view the records, this evidentiary burden is relaxed somewhat at paragraphs 46-47. In assessing evidence of public interest, there may be cases where the public interest is so notorious that further evidence is not required and in other circumstances there may be cases where the records themselves provide evidence of a public interest in its disclosure discussed at paragraph 50.

[24] The Complainant submits the information withheld from the consultant's report is of significant public interest, as the province has faced a longstanding lack of infertility services, negatively impacting thousands of patients for over a decade, and also asserts that delays in releasing the consultant's report have exacerbated concerns about transparency and accountability. The Complainant also believes that with the Premier now stating an implementation estimate of late 2025 or early 2026, that the potential harm of release, that is, the undue stress to NLFS staff and premature disclosure noted above (as described by the Department) are now irrelevant and the contents of the consultant's report should be released for public scrutiny in the decision-making process.

[25] Our Guidelines for Public Interest Override set out factors that support withholding information, factors that support disclosure, and factors that should not be considered. There is clearly a general public interest in promoting transparency, accountability, and public understanding. There may also be a particular public interest in informing the debate on the issues the consultant's report would address as raised by the Complainant, given the longstanding concern about fertility services for a sector of the public.

[26] Nevertheless, it must be recognized that there is still a need for a confidential zone within which to formulate and develop policy, as contemplated by the exception. While the Premier's

announcement signals progress, it does not eliminate the need to maintain confidentiality over information important to the ongoing policy development process and considerations. Release of the withheld information in the consultant's report prematurely, before the final decision is announced, could result in harm that outweighs the public interest benefits of immediate disclosure. Specifically, it could create unnecessary stress for staff and stakeholders involved in the NLFS, as well as releasing sensitive recommendations or financial projections which could prejudice ongoing negotiations, compromise the province's financial interests, create unfair advantages or unrealistic expectations for third parties, and undermine the effectiveness of the decision-making process and the potential for implementing the recommendations to come out of the consultant's report.

[27] The Complainant's concerns about delays, public scrutiny, and past provincial government inaction do not override the exceptions applied by the Department. While public interest is an important factor, it does not justify disclosure under section 9 unless it can clearly be demonstrated that the benefits of disclosure outweigh the reasons for withholding. The risks the Department has put forward highlight the importance of withholding the consultant's report until the review process is complete and a final decision has been announced,

[28] The provincial government has already committed to releasing the consultant's report once the policy review is complete. Public transparency will, therefore, still be achieved at the appropriate stage. We find that the Department has properly applied the redactions and that the public interest override has not been met, therefore, the Department may continue to withhold the information.

## RECOMMENDATIONS

[29] Under the authority of Section 47 the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the Department of Health and Community Services continue to withhold the information redacted from the responsive records.

[30] 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 Health and Community Services 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.

[31] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6<sup>th</sup> day of March 2025.



Kerry Hatfield  
Information and Privacy Commissioner  
Newfoundland and Labrador