November 7, 2005 2005-005

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2005-005

Department of Labrador and Aboriginal Affairs

Summary:

The Applicant applied under the Access to Information and Protection of Privacy Act (ATIPPA) for access to briefing notes prepared for the Minister upon his appointment as Minister Responsible for Labrador Affairs. The Department of Labrador and Aboriginal Affairs originally denied access to these records in their entirety, invoking section 20(1) of the ATIPPA (policy advice or recommendations). As a result of discussions with the Commissioner's Office, the Department eventually agreed to release a portion of the records, but in so doing invoked several other exceptions in support of their decision to withhold the remainder of the records. The Applicant was not satisfied with the Department's response. The Commissioner found that some of the information did fall under the section 20 exception, but concluded that the majority of the severed records did not. The Commissioner considered any mandatory exceptions not originally invoked by the Department, but did not accept those discretionary exceptions subsequently raised by the Department. The Commissioner recommended that the Department release the majority of the records to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as am, ss. 2(o), (q) and (t), 3, 7, 9, 11, 12, 14, 18(1), 20(1), 20(2)(a), (k) and (l), 27(1) and (3), 30(1) and (2), 47(1), 64(1); Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 1(a)(i) and (ii), 13(1) and (2); Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, ss. 13(1) and (2)(a); Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, ss. 2(a), 23; Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5, as am, s. (21); Access to Information Act, R.S. 1985, c. A-1, s. 4(1)(b)

Authorities Cited:

Alberta OIPC Order 97-007 (1997); Ontario OIPC Orders PO-2028 (2002), PO-1993 (2002), and P-341 (1992); Ontario (Ministry of Northern Development & Mines) v. Ontario (Assistant Information and Privacy Commissioner), 181 O.A.C. 251, 2004 CarswellOnt 189 (eC); Ontario (Ministry of Northern Development & Mines) v. Ontario (Assistant Information and Privacy Commissioner), 2005 WL 2302398 (Ont. C.A.), 2005 CarswellOnt 4553 (eC); Ontario (Ministry of Transportation) v. Cropley, 2005 WL 2302395 (Ont. C.A.), 2005 CarswellOnt 4552 (eC); British Columbia OIPC Order 02-38 (2002); Newfoundland and Labrador OIPC Reports 2005-002, 2005-003, and 2005-004; Dagg v. Canada (Minister of Finance), 213 N.R. 161, 1997 CarswellNat 869 (eC); Rubin v. Canada (Minister of Transport), 221 N.R. 145, 1997 CarswellNat 2190 (eC); Air Atonabee Ltd. v. Canada (Minister of Transport), 27 F.T.R. 194, 1989 CarswellNat 585 (eC); General Accident Assurance Co. et al. v. Tom Mitchinson et al., (March 8, 1994) Toronto Doc. 557/92 (Ont. Div. Ct.)

Other Resources Cited:

Access to Information and Protection of Privacy Act Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September, 2004.

I BACKGROUND

[1] The Applicant submitted an access to information request to the Department of Labrador and Aboriginal Affairs (the Department), dated 14 March 2005, wherein he requested the following:

Briefing Notes – in any and all formats, including paper & electronic – prepared for Minister [...] upon his appointment as Minister of Labrador Affairs.

[2] The Department replied in correspondence dated 18 April 2005, stating in part:

Please be advised that access to these records has been refused in accordance with the following exceptions to disclosure, as specified in the Access to Information and Protection of Privacy Act (the Act):

'20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal (a) advice or recommendations developed by or for a public body or a minister'

- [3] On 24 May 2005 the Applicant filed a Request for Review with this Office, under the *Access to Information and Protection of Privacy Act (ATIPPA)*. The Applicant asked me to review the files and recommend to the Department that any information "...that does not directly give advice to the Minister" be released. The Department was notified of this Request for Review in correspondence dated 26 March 2005, and was asked to provide the appropriate documentation and a complete copy of the responsive records for our review. An unsevered copy of the records was received at this Office on 31 May 2005.
- I believe it would prove useful at this point to briefly describe the nature of the responsive records. While they have been identified as briefing notes, it is important to understand that these notes were intended to assist a Minister of the Crown in anticipating and answering questions that may be asked in the House of Assembly while it is in session. They tend to be standardized and include the following categories: Title, Issue, Anticipated Questions, Key Messages or Suggested Responses, Other Suggested Responses, and Background. Occasionally, these briefing notes will have other sections such as a Media Response, an Appendix and/or a section on Recent Developments. By virtue of this structure the "Anticipated Questions" section is meant to prepare the Minister for potential questions from Opposition members and the "Key Messages"

or "Suggested Responses" sections are meant to suggest ways of answering those questions. Any answers that are subsequently provided by the Minister are therefore given in a public forum. The Background section is simply meant to provide any additional information that the Minister may need to familiarize himself/herself with the issues.

- [5] In providing the records to this Office, the Department's Access and Privacy Coordinator indicated that he would be away from the office until 19 June 2005 and, in his absence, identified an alternate Coordinator. Attempts to contact the alternate Coordinator in order to discuss the possibility of resolving this Request for Review by informal means were not successful. As a result, on 27 June 2005 the Applicant and the Department were notified that the file had been referred to the formal investigation process. However, in a subsequent conversation between this Office and the Department, the Department expressed an interest in continuing with attempts at an informal resolution. The Applicant agreed and on 15 July 2005 the file was referred back to the informal process. An initial meeting between this Office and the Department took place on 18 July 2005.
- In a subsequent meeting with this Office on 24 August 2005, the Department agreed to release a portion of the responsive records, but maintained that a significant portion was policy advice and should not be released. In addition, the Department attempted to invoke a number of other exceptions, notably sections 18 (Cabinet confidences), 21 (legal advice), 22 (harmful to law enforcement), 23 (harmful to intergovernmental relations or negotiations), 24 (harmful to financial or economic interests of a public body), 27 (harmful to third party business interests), and 30 (personal information). The Department was informed that our Office would consider all mandatory exceptions, but would not consider the additional discretionary exceptions at this late stage of the process. The mandatory exceptions are those specified in sections 18, 27 and 30.
- [7] On 26 August 2005 the Applicant informed this Office that he was not prepared to accept the amount of information proposed to be severed by the Department. As a result the file was referred back to the formal investigation process. The Department and the Applicant were invited to submit written representations to this Office in support of their position, as per section 47(1)(a) and (c) of the *ATIPPA*:

47. (1) During an investigation, the commissioner shall give the following persons an opportunity to make representations:

(a) the person requesting the review;

- (b) a third party who was notified under section 28 or would have been notified had the head intended to give access; and
- (c) another person the commissioner considers appropriate.
- In correspondence to the Applicant dated 1 September 2005, a copy of which was received at this Office on 7 September 2005, the Department released a severed copy of the responsive records to the Applicant. Each page of these records was numbered by the Department as LAA2005-001 through to LAA2005-081. For ease of reference I will use the numerical values 1 through 81 when referring to the records. Please note that two pages within the records are numbered as 52. I will identify these pages as 52A and 52B. The Department also cited the relevant sections of the legislation in the left-hand margins, indicating which exceptions were being engaged. It is important to note that, notwithstanding our meeting on 24 August 2005, the Department informed the Applicant that, in addition to section 20, they were withholding information pursuant to sections 18, 21, 22, 23, 24, 27, and 30.
- [9] All information under the headings of "Issue," "Anticipated Question(s)," "Key Messages," "Suggested Responses," and "Media Line (Response)" was severed in its entirety. All information under the heading of "Other Suggested Responses" was also severed, with the exception of a single sentence on page 8 and two sentences on page 20. In addition, several portions of information under the heading of "Background" was severed. The Title of each note, the date it was drafted as well as the individuals who drafted and approved the note, the headings and portions of the Background material were released to the Applicant.

II PUBLIC BODY SUBMISSION

- [10] Section 47 of the *ATIPPA* (see paragraph 7 of this Report) allows for the submission of representations in response to an investigation by this Office. While there is no requirement for me to seek representations from the public body, as a matter of course I extended this privilege in accordance with section 47(1)(c). The Department in this case chose not to provide this Office with a written submission in support of their position, despite being given the opportunity to do so. Instead, the Department chose to write me a lengthy letter criticizing this Office and objecting to the process.
- [11] However, in previous correspondence to this Office, dated 23 August 2005, the Department indicated that in their opinion all information contained in the sections entitled "Issue," "Anticipated Questions" and "Key Messages" constitutes advice to the Minister as contemplated by section 20(1)(a), including any factual information:

While some of the information in the Key Messages section could be considered factual if it was included in the Background section, its positioning in a section developed to provide advice on speaking notes for the Minister changes the context and so is excluded.

[12] This point was also raised by the Department in our meeting with them on 24 August 2005.

III APPLICANT'S SUBMISSION

[13] In a written submission dated 6 September 2005 the Applicant acknowledges and accepts that policy advice and information that would reveal the substance of deliberations of cabinet can be withheld under the *ATIPPA*:

I understand that the Act provides an exception for policy advice, under Sec. 20(1)(a), and accept that. As such, I agree that policy advice can be excised from release under ATIPPA. I also understand that Sec. 18 excludes the release of information which would reveal the deliberations of cabinet.

[14] The Applicant's position, however, is that factual information would not fall under these exceptions and should be released:

However, the Act clearly states that factual material – under Sec. 20(2)(a) – shall not be censored from release. To quote directly from the Act: 'The head of a public body shall not refuse to disclose under subsection (1) – (a) factual material.'

IV DISCUSSION

- [15] I would first note that section 64(1) of the *ATIPPA* places the burden clearly in the hands of the public body in proving that the Applicant has no right to any record being withheld:
 - 64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.
- [16] Section 20(1) *authorizes* a public body to refuse access to a record, but does not *require* a public body to refuse such access. It is not my intent, nor my mandate, to recommend that a public body exercise its discretion and release records they are authorized to withhold. The purpose of this review is to determine if the records in question fall within the exception and, if so, the exercise of discretion remains in the purview of the public body. If not, the Applicant's submission will be deemed to be well-founded and appropriate recommendations will be made.
- [17] Sections 18(1), 27(1) and 30(1) are mandatory exceptions and, as such, there is no discretion. If the information falls within one of these exceptions the public body must withhold the information.
- [18] I have divided the discussion into the following six sections:
 - Policy Advice or Recommendations (Section 20)
 - Cabinet Confidences (Section 18)
 - Business Interests of a Third Party (Section 27)

- Personal Information (Section 30)
- Public Body Response
- Discretionary Exceptions Other than Section 20

Policy Advice or Recommendations (Section 20)

- [19] Section 20(1) is a discretionary exception which allows a public body to withhold policy advice or recommendations:
 - 20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal
 - (a) advice or recommendations developed by or for a public body or a minister; or
 - (b) draft legislation or regulations.
- [20] The application of section 20(1) turns in part on the definition of "advice" and "recommendations." Given that neither of these terms is defined in the *ATIPPA*, I have relied on the definitions used by Information and Privacy Commissioners in other jurisdictions and supported by the Courts. In his Order 97-007, dealing with ministerial briefing notes, the Information and Privacy Commissioner for Alberta stated that "Advice must contain more than mere factual information, and must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. A factual summary of events, without more, is not sufficient."
- [21] The Office of the Information and Privacy Commissioner for Ontario has also dealt extensively with the definition of advice and recommendations. In Order PO-2028, ordering the Ministry of Northern Development and Mines to release information under the headings of "Potential Issues" and "Funding Options," the Assistant Commissioner stated:

In previous orders, this office has found that the words 'advice' and 'recommendations' have similar meanings, and that in order to qualify as 'advice or recommendations' in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be

accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993].

[22] Section 13(1) of Ontario's *Freedom of Information and Protection of Privacy Act* is, in all material respects, equivalent to section 20(1) of Newfoundland and Labrador's *ATIPPA*. Ontario's Assistant Commissioner went on to state:

To summarize, the Ministry's position that 'advice' should be broadly defined to include 'information, notification, cautions, or views where these relate to a government decision-making process' flies in the face of a long line of jurisprudence from this office defining the term 'advice and recommendations' that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.

A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word 'advice' in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

(Emphasis added)

- [23] The decision of the Assistant Commissioner of Ontario in Order PO-2028 was upheld by the Ontario Superior Court of Justice (Divisional Court). In dismissing the application of the public body, Dunnet, J., in Ontario (Ministry of Northern Development & Mines) v. Ontario (Assistant Information and Privacy Commissioner), 181 O.A.C. 251, 2004 CarswellOnt 189 (eC), at paragraphs 62 and 63, said:
 - In my view, the Ministry seeks to ascribe to the word 'advice' an overly broad meaning tending to eviscerate the fundamental purpose of the statute to provide a right of access to information under the control of institutions, in accordance with the principles that information should be available to the public and exemptions from the right of access should be limited and specific (s. I(a)(i), (ii), of the Act).

- 63 Section 13(2) of the Act lists various types of information, such as factual material, statistical surveys and certain reports, which are not to be protected under section 13(1). They are not intended, as the Ministry would suggest, to limit what would otherwise have been a very broad interpretation of the exemption at section 13(1).
- I should also note that the decision of Dunnet, J. was recently unanimously upheld by the Ontario Court of Appeal in Ontario (Ministry of Northern Development & Mines) v. Ontario (Assistant Information and Privacy Commissioner), 2005 WL 2302398 (Ont. C.A.), 2005 CarswellOnt 4553 (eC). In a companion decision, the Ontario Court of Appeal unanimously upheld a similar Divisional Court ruling dismissing the application of the Ministry of Transportation for judicial review of Order PO-1993, made by the Office of the Information and Privacy Commissioner of Ontario. In Ontario (Ministry of Transportation) v. Cropley, 2005 WL 2302395 (Ont. C.A.), 2005 CarswellOnt 4552 (eC), Juriansz J.A., at paragraphs 27 and 28, said:
 - 27 The most fundamental principle of interpretation is that words must be understood in light of the context and purpose of the whole statute...
 - In my view, the meaning of 'advice' urged by the Ministry would not be consonant with this statement of purpose. The public's right to information would be severely diminished because much communication within government institutions would fall within the broad meaning of 'advice', and s. 13(1) would not be a limited and specific exemption. I conclude, in the words of the Divisional Court that 'the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose, and is reasonable.'
- [25] You will note that Juriansz, J.A. specifically references the stated purpose of the legislation and the effect that such a purpose has on the interpretation of exemptions within the statute. I believe this to be a very important issue and will deal with it in more detail later is this Report.
- [26] It is also important to note that "advice" is also defined in Appendix 3 of the *ATIPPA* Policy and Procedures Manual. This Manual is produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice. Advice is defined as an "Expression of opinion on policy related matters. Includes proposals, recommendations, analysis, policy options and draft legislation or regulations."

- [27] In my opinion, it is quite clear that the use of the terms "advice and recommendations" used in section 20(1) of the *ATIPPA* is meant to allow public bodies to protect a suggested course of action, and not merely factual information, regardless of where this factual information may be found within the record. This is supported and clarified by the legislation in section 20(2)(a).
 - 20. (2) The head of a public body shall not refuse to disclose under subsection (1)
 - (a) factual material; ...
- [28] While section 20(1) sets out the general exception, section 20(2) lists a number of exemptions to the protection afforded by section 20(1). For example, section 20(2)(a) of the legislation clearly states that "factual material" is not included as advice or recommendations and that this material shall not be withheld from disclosure under section 20(1). This point was dealt with by the Information and Privacy Commissioner for British Columbia in his Order 02-38. In discussing the application of section 13(1) of British Columbia's Freedom of Information and Protection of Privacy Act, equivalent to section 20(1) of the ATIPPA, the Commissioner at paragraph 129 stated:
 - 129 I will first deal with the single sentence that the Premier's Office has withheld under s. 13(1) from p. 3 of the August 2, 2001 briefing note to the Solicitor General and Labour Minister. The public bodies argue simply that the sentence 'clearly constitutes advice developed for a public body' (para. 4.39, initial submission). I disagree.... The severed sentence does not set out or imply options or recommended courses of action. It is factual material and, as provided in s. 13(2)(a), it cannot be withheld under s. 13(1).

(Emphasis added)

- [29] In discussing another record at paragraph 142, British Columbia's Commissioner again makes this point:
 - 142 ...It does not, on its face, express any advice or recommendations. Nor would its disclosure by inference reveal advice or recommendations. It is factual material in my view, such that s. 13(2)(a) applies. I conclude that s. 13(1) does not apply to this paragraph.

- [30] It is noteworthy that sections 13(1) and 13(2)(a) of British Columbia's legislation is virtually identical to sections 20(1) and 20(2)(a) of this Provinces *ATIPPA*, respectively.
- [31] As indicated in paragraph 11, the Department argues that the location of factual information within the responsive records is determinative to the application of section 20(1). They argue that if factual information is included in a briefing note under the heading of "Key Messages" that in itself would reveal advice. I do not agree. If the legislators had intended the context of factual information to be a factor in applying this exception, they would not have specifically excluded this type of information. As indicated, section 20(2)(a) clearly, and without qualification, states that factual material is not to be withheld under this exception. I would again refer to Order 02-38 wherein at paragraphs 136 and 138 the British Columbia Commissioner states:
 - 136 ...The sentence deleted from the bottom of p. 19 explicitly contains a recommendation for action. I do not, however, agree that the small amount of text severed at the top of p. 20 is protected by s. 13(1). This information appears under the heading 'RECOMMENDED DECISION', but it does not, in fact, recommend anything, explicitly or implicitly. The applicant already knows that this record set out three options. The information severed from p. 20 does not, explicitly or implicitly, disclose any of the options. It does not contain advice or recommendations.
 - 138 This submission appears to flow from the fact that some of the Ministry records have a heading 'ADVICE AND RECOMMENDED RESPONSE'. As I understand the applicant's argument, he is concerned that this label is a colourable attempt to gain protection under s. 13(1). If the applicant is concerned that a public body might succeed in withholding information simply because it has labeled the information 'advice' or 'recommendations', his fears are unwarranted. A public body can attach whatever label it likes, but it remains for the public body to establish whether information under such a heading truly qualifies for protection under s. 13(1) or any other exception. Boot-strapping will not work.
- [32] While I am in no way suggesting that boot-strapping was a strategy in the case at hand, it is important that public bodies avoid applying any exceptions to a record based on its title or location. This is an easy trap to fall into and public bodies must be careful to review all records on a line-by-line basis and to only sever that information which clearly falls within the exception. As indicated in Section 3.11 of the *ATIPPA* Policy and Procedures Manual, "A careful review of

the information contained in a record is required in order to determine whether or not an exception to disclosure applies. It is usually not possible to make this determination merely on the basis of the title, type, classification or format of a record." It appears obvious from the pattern of severance in the records partially released to the Applicant on 1 September 2005 that the Department in this case applied a class test and failed to do an appropriate line-by-line review. In my view, a briefing note does not enjoy blanket protection.

- [33] I believe that this point is also supported by the language of section 20(1). This section provides a public body with the discretion to refuse to disclose *information* that would reveal advice or recommendations, as opposed to a *record* containing information. There is an important distinction between the words 'information' and 'record.' Information is facts or data that would be contained within a record and is not necessarily the entire record. This distinction is supported by the definition of 'record' in section 2(q) of the *ATIPPA*, which identifies information as a component of a record:
 - 2(q) 'record' means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;
- [34] By limiting this section to *information*, the legislators intended that it should not be used to protect an entire record or large portion of a record, unless the entire record or portion constitutes advice or recommendations. Notwithstanding that a record may contain information that invites protection under this section, if other information within that record is not advice or recommendations it should be released. In other words, the record should be appropriately severed.
- [35] This issue of appropriate severance is fully supported by the purposes of the legislation as specified in section 3, and the general right of access as specified in section 7:
 - 3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
 - (a) giving the public a right of access to records;

- (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;
- (c) specifying limited exceptions to the right of access;
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
- (e) providing for an independent review of decisions made by public bodies under this Act.
- (2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.

(Emphasis added)

- 7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.
- (2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.
- (3) The right of access to a record is subject to the payment of a fee required under section 68.
- [36] I addressed this point in my Report 2005-002, at paragraph 25:
 - The language in the ATIPPA, like other access and privacy statutes in Canada, creates a bias in favour of disclosure. By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it. Furthermore, the legislation places the burden squarely on the head of a public body to prove that any information that is withheld is done so appropriately and in accordance with the legislation.

- [37] In his Order 97-007, the Alberta Commissioner also dealt specifically with this point. In considering the application of section 23 (advice) of Alberta's *Freedom of Information and Protection of Privacy Act* to briefing notes, the Commissioner said:
 - The Public Body submitted that once the ministerial briefing note is demonstrated to contain some component that could be construed as engaging the section 23 exception that the exception should be fully engaged to permit the statutory decision maker to withhold the entire record.
 - 55 Such an interpretation would be inconsistent with the general principles enounced in the Act regarding severing. Section 2(a) provides that one of the purposes of the Act is to allow any person a right of access to the records in the custody or under the control of a public body, subject to limited and specific exceptions as set out in the Act. Accordingly, there is a presumption in favour of disclosure, placing upon the head of a public body an obligation to disclose as much as possible and accordingly sever only the exempt material.
- [38] The relevance of a stated purpose in access to information legislation was highlighted by the Supreme Court of Canada. In Dagg v. Canada (Minister of Finance), 213 N.R. 161, 1997 CarswellNat 869 (eC), LaForest, J., at paragraph 63, remarked:
 - Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the Access to Information Act recognizes a broad right of access to 'any record under the control of a government institution' (s.4(1)(b)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.
- [39] It is important at this point to also discuss the context of section 20 and exactly what it is meant to protect. Again, I would refer to this province's *ATIPPA* Policy and Procedures Manual, at section 4.2.3:

Section 20 is intended to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny, while allowing information to be released which would not cause real harm.

- [40] This description of section 20 is consistent with the definition of advice and recommendations referenced earlier in this Report. There is a clear understanding that advice or recommendations in the context of access to information legislation is directly associated with the policy-making process within government. It is entirely reasonable to assume that such a process would involve some form of deliberation meant to generate discussion and consideration and, ultimately, a decision. In the absence of these essential elements I do not believe that information would invite the protection of section 20(1). For example, a list of potential questions that may be asked of a Minister in the House of Assembly does not form part of a deliberative process for the purpose of considering and adopting government policy. It is simply a series of possible questions that may be asked. I do not believe that section 20(1) is meant to protect this type of innocuous information, the release of which would not lead to the "excessive scrutiny" of a deliberative process as described by governments own policy and procedures manual. That is not to say that a potential question put forward as an option to a Minister may never reveal important information, but I present that this would be the exception rather than the rule.
- [41] After reviewing the responsive records in detail, I agree that some of the information clearly falls within the definition of advice or recommendations as referenced in section 20(1) and, indeed, the Applicant has acknowledged and accepted this point. It is equally clear, however, that a significant portion of the information being withheld by the Department is purely factual in nature and should be released. Section 20(1) specifically restricts the exception to access to information that is advice or recommendations, regardless of the context or location of the information within a particular document. This specificity is greatly emphasized by the extensive list of exclusions found in section 20(2), including factual material.
- [42] If the legislators had intended the location of information within a briefing note to be a determinative factor they would have said so in the legislation. They did not. They would have also qualified the term "factual material" as it appears in section 20(2). They did not. When considered in the context of the overall purpose of the legislation, as specified in section 3, I am convinced that the legislators intended that exceptions be interpreted narrowly with as much information as possible being released, and I see nothing in section 20 that would support otherwise.

- [43] Even if one were to accept that there is some merit in the Department's position, the stated purpose of the *ATIPPA* would lead one to the same conclusion that much of the material should be released. Following on the comments from the Supreme Court of Canada in Dagg v. Canada (Minister of Finance), the Federal Court of Appeal, in Rubin v. Canada (Minister of Transport), 221 N.R. 145, 1997 CarswellNat 2190 (eC), succinctly described the effect of the purpose of the federal *Access to Information Act*. McDonald, J.A., at paragraph 23, stated:
 - In my opinion, therefore, all exemptions must be interpreted in light of this clause. That is, all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.
- [44] For all of these reasons I have identified all factual material within the responsive records and have recommended that it be released to the Applicant.
- [45] On reviewing the responsive records I also noted that a significant portion of the information being withheld under section 20 had been previously released to the public. In some cases information now being withheld by the Department was previously released verbatim. For example, page 4 contains a briefing note entitled "Location of Aboriginal Affairs Office/Staff." The Department withheld the two paragraphs under the heading "Key Messages" on page 4, claiming that the information was protected by section 20(1)(a). These two paragraphs are included word-for-word in a news release issued by the Department on 23 February 2005, entitled "Minister says Aboriginal Affairs office is appropriately located." It is also interesting to note that the Department issued this news release just three weeks prior to receiving the Applicants request for access.
- [46] In total, this Office was able to identify information that had been released to the public on 50 of the 82 pages under review. These pages are as follows: 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 22, 24, 26, 28, 29, 32, 33, 34, 35, 36, 39, 41, 43, 44, 45, 46, 48, 50, 51, 52A, 52B, 55, 56, 63, 64, 68, 69, 71, 72, 73, 74, 75, 77, and 78. This information has been released in various

forms, but primarily by way of news releases. While the majority of this information was withheld under section 20, information on pages 4, 14, 20, 24, 35, 69 and 72 was withheld under the mandatory section 27 exception. I will deal with section 27 later in this Report. It is also important to note that our search of publicly released information was by no means exhaustive and it is possible that more of the information in these records has been previously released. I would encourage the Department, therefore, to ensure that the previous release of information be fully considered when determining the application of an exception to access.

- I find it quite puzzling that information that had been released to the media and is currently available on the Internet is now being withheld as an exception to access. Without even considering the specific provisions of the *Act*, this on its face would appear quite contrary to the purpose of the legislation. In my opinion, this is a clear violation of the spirit and intent of this legislation and I can only conclude that this Department has disregarded its obligation to provide records to the public, subject only to limited exceptions. I will again deal with this point later in this Report, under the heading "Public Body Response."
- [48] In addition to the intuitive concerns with claiming exceptions for information previously released, the *ATIPPA* itself speaks to this point. As mentioned earlier in this Report, section 20(2) lists a number of exceptions to the exception. Specifically, section 20(2)(1) is relevant to the case at hand:
 - 20. (2) The head of a public body shall not refuse to disclose under subsection (1)
 - (1) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy;...
- [49] I see no evidence that the Department appropriately considered and applied this provision when severing the records. With the amount of public attention given to many of the topics described within the briefing notes and the amount of information released to the media, it is quite reasonable to expect that this should have been a primary consideration of the Department when deciding what to release. It is obvious from my review of the records, however, that this was not the case. In my opinion, there must be compelling evidence to support the withholding of

information under an exception to access when that same information has already been released to the public. It is my further opinion that such evidence does not exist in the case at hand. As such, I have recommended that any information previously released to the public now be released to the Applicant. I would also note that on reviewing this information, the majority would not have invited the protection of section 20 even if it had not been publicly released.

- [50] I should also note that the Department had a discretionary option to refuse to release any information already available to the public (section 14). They chose not to exercise this discretion and instead have now claimed that the information should not be released because it is protected by an exception. The obvious rhetorical question becomes why is information previously released to the public now considered to be policy advice?
- [51] On a similar note, my investigation revealed that the Department withheld information within a particular briefing note under section 20(1) of the *ATIPPA*, yet released that same information to the Applicant in another part of the same briefing note, in some cases on the same page. For example, on page 10 the Department withheld the first sentence under the heading "Other Suggested Response(s)." This identical information was released to the Applicant in the first paragraph under the heading "Background," just 12 lines below on the same page. This situation also occurred four times in the briefing note found on pages 36 to 38 and one time in the briefing note found on pages 46 to 47.
- [52] I can only assume that this is a direct result of the Department's argument that the location of information is a deciding factor when applying exceptions to access. As I have indicated earlier, I have rejected this argument and I do not accept the application of blanket exceptions. The mere notion of claiming an exception for information simply based on its location within a record, when that same information has been released in another location within the same record, is frivolous at best.
- [53] In addition to the public release of information, section 20(2) has other provisions that I believe are relevant to the case at hand. Sections 20(2)(h) and (k) provide:

- 20. (2) The head of a public body shall not refuse to disclose under subsection (1)
 - (h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;
 - (k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;
- [54] On reviewing the responsive records I have found information that I believe falls within these categories and I have recommended that it be released to the Applicant. For example, I believe the information found on page 32 is clearly a feasibility study related directly to a project of a public body and, consequently, cannot be withheld as policy advice or recommendations.

Cabinet Confidences (Section 18)

- [55] Section 18(1) is a mandatory exception. If a record is deemed to fall within this exception, a public body is required to withhold the relevant record or sever it from a document to be released:
 - 18. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet.
 - (2) Subsection (1) does not apply to
 - (a) information in a record that has been in existence for 20 years or more; or
 - (b) information in a record of a decision made by Cabinet on an appeal under an Act.
- [56] In my Report 2005-004 I dealt extensively with the section 18 exception. In order to invite protection under this provision information must be shown to reveal the substance of deliberations of Cabinet. At paragraph 31 of Report 2005-004 I address the issue of "substance of deliberations," and in so doing have accepted the test set out by the Nova Scotia Court of Appeal:

31 Saunders, J.A. of the Nova Scotia Court of Appeal, in O'Connor v. Nova Scotia, 2001 NSCA 132, sets out what he feels is an appropriate test when determining whether a record would reveal the substance of deliberations of Cabinet...

Is it likely that the disclosure of the information would permit the reader to draw <u>accurate</u> inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption ...

- [57] The Department invoked section 18(1) in four separate areas within the responsive records. On page 15 the Department is claiming that the second paragraph (three sentences) under the heading "Key Message" is protected by section 18. On page 16 the Department is withholding one question under the heading of "Anticipated Questions" and the third paragraph under the heading "Key Messages" (total of three sentences). On page 50 the Department is withholding the last sentence under the heading "Background" and on page 74 they are withholding two full sentences and a partial sentence under the heading of "Background."
- [58] I do not accept the Department's assertion that the three sentences on page 15 and two of the three sentences on page 16 (under the heading "Key Messages") would reveal the substance of deliberations of Cabinet. The Department submitted no evidence in support of their position and I am unconvinced that the release of this information would allow the reader to draw accurate inferences about Cabinet deliberations. These sentences are general statements about issues that have been discussed and debated in a number of public forums. I should note that this information was also withheld under section 20(1). However, I do not accept that it constitutes advice or recommendations.
- [59] It is also important to note that this information appears under the heading "Key Message" and, as such, it is reasonable to assume that the Minister was prepared to reveal this information in the House of Assembly in response to a potential question. I fail to see how information intended to be released in a very public forum is now a Cabinet secret. Surely, if the release of this information would be contrary to a *mandatory* exception in the *ATIPPA* it would never have appeared in a briefing note as information intended to be disclosed to the public by a Minister. Doing so could place the Minister in direct contravention of the legislation. To emphasize this

point, I would question how a Department can claim a mandatory exception on the one hand, and on the other hand include that same information as a "key message" to the public.

[60] With respect to the third sentence on page 16 (under the heading "Anticipated Questions."), the single sentence on page 50 and the two full sentences and one partial sentence on page 74, I accept that this information has been appropriately withheld in accordance with section 18(1). In each case, the information makes a direct reference to Cabinet and, when taken in the context of the other information released to the Applicant, would reveal the substance of deliberations of Cabinet.

Business Interests of a Third Party (Section 27)

- [61] Section 27(1) is a mandatory exception which establishes a reasonable expectation of harm to the business interests of a third party:
 - 27. (1) The head of a public body shall refuse to disclose to an applicant information
 - (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party;
 - (b) that is supplied, implicitly or explicitly, in confidence; and
 - (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or

- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
- [62] "Third Party" is defined in section 2(t) to mean "...a person, group of persons or organization other than (i) the person who made the request, or (ii) a public body."
- [63] It is important to note the use of the word "and" at the end of section 27(1)(b). This clearly indicates that at least one of the conditions in each of 27(1)(a), (b) *and* (c) must be met, thereby establishing a three-part test. I spoke to this point in my Report 2005-003, at paragraphs 38 and 39:
 - 38 Section 27(1) and similar sections in other access legislation is considered to be a three-part "harms test," as established in Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5, [1997] N.S.J. No. 238 (N.S.S.C.). In that decision, Kelly, J at paragraph 29 set out this three-part test with regard to Section 21 in Nova Scotia's legislation:
 - (a) that disclosure of the information would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
 - (b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and
 - (c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).
 - Note that all three parts of the test must be met in order to sever a record. It should also be noted that Nova Scotia's 21(1)(c) is identical to Newfoundland and Labrador's 27(1)(c) except the ATIPPA adds a fourth injury in relation to the release of information in a report which has been completed by a person or body appointed to resolve a labour relations dispute, which in any case is irrelevant to the present matter.
- [64] The Department has withheld information under section 27(1) on the following pages: 4, 7, 10, 13, 14, 19, 20, 24, 25, 28, 30, 31, 32, 34, 35, 44, 47, 49, 61, 65, 69, 72, and 81. Before dealing with some of this information specifically, I will first deal with the application of this section in general.

With the exception of the information on pages 25, 34 and 47, all of the information being withheld under section 27 is done so under the authority of either 27(1)(a)(ii) or 27(1)(b). The information on pages 25 and 34 is being withheld under authority of 27(1)(a)(ii) and 27(1)(b). The information on page 47 is being withheld under authority of 27(1)(a)(ii), 27(1)(c)(i) and 27(1)(c)(ii). It is very important to note that in neither of these cases has the Department invoked all three parts of the three-part test. The fact that the release of information may invite one or two of these parts is not sufficient to invite the protection of this section. The language of this provision is clear in its requirement that all three parts of the test must be met. In quoting specific parts of this test, to the exclusion of other parts, the Department has shown a complete misunderstanding of this section. For example, withholding information under section 27 simply because it was supplied in confidence falls woefully short of establishing the harm envisioned by this section of the legislation. I would once again refer the Department to the ATIPPA Policy and Procedures Manual. At section 4.2.10 it states:

Paragraphs 27(1)(a) to (c) provide a three-part harms test; that is, the information in question must meet ALL parts of the following test before a public body may apply the exception:

- The information would reveal third party trade secrets, or, the commercial, financial, labour relations, scientific or technical information of or about a third party,
- The information was supplied in confidence, either implicitly or explicitly, and
- Disclosure of the information could result in one or more specified harms.

(Emphasis in original)

[66] This section of the Manual goes on to state that:

A public body must be able to present detailed and convincing evidence of the facts that led to the expectation that harm would occur if the information were disclosed. There must be a link between the disclosure of specific information and the harm which is expected from release.

[67] No such evidence was presented by the Department in the case at hand.

- [68] I would now like to deal with some of this information specifically. On page 14, for example, the Department is withholding a single sentence under section 27(1)(b). In addition to my previous comments regarding the application of the three-part test, this information was revealed in a news release issued by the Department on 28 April 2005. I am unconvinced that information in a news release is now subject to a mandatory exception. If one were to accept the Department's claim, one would also conclude that the Department had violated the legislation in April by releasing information that it had a statutory obligation not to release. I believe the more logical explanation is simply that the Department has misapplied section 27 in this circumstance. As such, I am recommending that this particular information be released to the Applicant.
- [69] The Department withheld previously released information under the mandatory section 27 in several other areas within the responsive records. The last sentence on page 20 (with the exception of two words), the second paragraph under the heading "Background" on page 24, the first paragraph on page 35, five sentences on page 69, and one full sentence and a partial sentence on page 72 were withheld under section 27(1)(a)(ii). The information on page 35 was also withheld under section 20(1)(a). This information had all been released by way of a news release, annual report or mineral exploration document available on government's website. For the same reasons mentioned above, I am recommending that all of this information be released to the Applicant.
- [70] In addition to information previously released by government, the Department withheld information previously revealed in newspaper articles. The first paragraph under the heading "Background" on page 4 was withheld under section 27(1)(b). However, this information appeared in two newspaper articles dated February 18 and 23, 2005. I do not accept the Department's claim that this information would be harmful to a third party when the third party has released that information to the media. Surely, if the third party felt that this information was confidential they would not have been speaking publicly on the issue.
- [71] My recommendation to release information that is otherwise available is supported by the Federal Court of Canada. In Air Atonabee Ltd. v. Canada (Minister of Transport), 27 F.T.R. 194, 1989 CarswellNat 585 (eC), MacKay J. sets out a standard for "confidential information" as

contemplated by the third party exemption in the federal *Access to Information Act*. This standard includes a test of public accessibility:

- My review of the authorities, facilitated in part by submissions of counsel, is undertaken in order to construe the term 'confidential information' as used in subs. 20(1)(b) in a manner consistent with the purposes of the Act in a case where the records in question, under control of a government department, consist of documents originating in the department and outside the department. This review leads me to consider the following as an elaboration of the formulation by Jerome A.C.J. in Montana, supra, that whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:
- (a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,...
- [72] On page 19 two paragraphs under the heading "Background" have been withheld under section 27(1)(a)(ii). The first of these paragraphs simply indicates that a meeting took place in 2003. I do not accept that such general information meets the stringent test set out in section 27 and, therefore, I am recommending that this paragraph be released to the Applicant.
- [73] On page 49 the Department is withholding a single sentence under section 27(1)(b). This sentence contains a general statement about the concerns of people in Labrador. Similarly, the Department is withholding a single sentence on page 61 which provides a general statement about many stakeholders. Neither of these sentences even identifies a third party, let alone adversely affects the business interests of a third party. If the Department is claiming, as they appear to be, that the release of these two sentences would adversely affect the business interests of "people in Labrador" and "many stakeholders," respectively, I must again question the Department's understanding of section 27 and what it is meant to protect. I simply do not accept that the definition of "third party" was meant to capture such general circumstances. For obvious reasons, I am recommending that these sentences be released to the Applicant. I should note that the sentence on page 49 was also withheld under section 20(1)(a). However, I do not accept that this information constitutes advice or recommendations.

[74] With respect to all of the other information being withheld under section 27, I am not recommending that this information be released at this time. While I am convinced that the Department failed to appropriately apply the three-part test, I must also consider any potential harm to the third parties who are referenced in this material. It is not my place, nor my desire to presuppose the potential effect of the release of this information on individuals, groups or organizations. For this reason, I am recommending that the Department reconsider each situation where they have cited section 27, apply the three-part test and provide detailed and convincing evidence to this office that all parts of the test have been met. Where the Department is unable to provide such evidence I recommend that they contact the third party under authority of section 28 of the *ATIPPA*. As a suggestion, the Department may wish to consider contacting each of the third parties identified in the records to seek their consent in accordance with section 27(3)(a):

- 27. (3) Subsections (1) and (2) do not apply where
 - (a) the third party consents to the disclosure; ...

Personal Information (Section 30)

- [75] Section 30(1) is a mandatory exception which protects personal information:
 - 30. (1) The head of a public body shall refuse to disclose personal information to an applicant.
- [76] "Personal information" is defined in section 2(o) to mean "...recorded information about an identifiable individual..." This definition is very broad and captures a significant amount of information, including an individual's name.
- [77] It is noted that this section of the *ATIPPA* does not include a harms test. Unlike some other jurisdictions, there is no test of reasonableness when dealing with the release of personal information. In the absence of any discretion, a public body simply has to determine if information meets the definition set out in section 2(o) and, if so, they must not release it. While

exceptions to this general rule are set out in section 30(2), none of them are relevant to the case at hand.

- [78] The Department has invoked section 30(1) in three areas within the responsive records. Individual names were withheld from pages 22, 65 and 81. As names are included in the definition of personal information, I agree that section 30(1) applies and the information specific to this section must be withheld.
- [79] In addition, individual names appear under the heading "Other Suggested Response(s)" on page 12 and 44 and under the heading "Anticipated Question" on page 65. I have recommended that these names be severed from the record and not released to the Applicant.

Public Body Response

- [80] When responding to an access request a public body has a duty to assist the Applicant and to respond in a timely and complete manner:
 - 9. 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.
- [81] Having thoroughly investigated this Request for Review, I must conclude that the Department failed to fulfill its duty to assist as mandated by section 9. Of particular concern is the fact that a significant amount of the information being withheld had been publicized in news releases and other forums. In fact, some of the information had been publicly released within days of the Department receiving the Applicants original request and within days of informing the Applicant that the information he was seeking was considered policy advice or recommendations and could not be released. For example, the Department received the Applicant's request on 18 March 2005. Portions of the withheld information had been released to the public on 8 March 2005, 10 March 2005, 11 March 2005, 21 March 2005, and 24 March 2005. The Department informed the Applicant that access had been denied on 18 April 2005, yet released portions of the information in a news release on 28 April 2005. On 1 September 2005 the Department released a severed

- copy of the records to the Applicant, yet did not release information that had been revealed in a news release approximately three weeks prior on 8 August 2005.
- [82] Based on the dates and content of many of these news releases I can only conclude that the Department failed to assist the Applicant as mandated by the *Act* in general and section 9 in particular. To further support this point I would like to draw attention to the amount of time that the Department took to respond to this Office. I believe a timely response to the Commissioner's Office is implicitly a part of the duty to assist and is necessary to ensure procedural fairness.
- [83] On 18 July 2005 a representative of this Office met with the Department's Coordinator to discuss the partial release of the responsive records. The Coordinator indicated that he would consult with the appropriate people and make a decision as soon as possible. On 5 August 2005 our Office contacted the Coordinator and was told that we would receive a response the following week. On 17 August 2005 our Office had still not received a response and we again contacted the Coordinator asking for a response by the end of the week. On 19 August 2005 the Coordinator indicated that he hoped to be able to respond "sometime next week." On 22 August 2005 an official of this Office informed the Department that we were not able to support these continued delays and we required a response by 12 noon on 23 August 2005. In response, representatives of the Department met with this Office on 24 August 2005, more than five weeks after our initial meeting on 18 July 2005.
- [84] As a result of the above noted meeting on 24 August 2005 it was determined that this file could not be resolved through informal means and the Department and the Applicant were informed on 26 August 2005 that the file had been referred back to the formal process. The Department was given the opportunity to provide a written submission in support of their position by 1 September 2005. On 30 August 2005 the Department requested an additional month to respond. Given the elapsed time and the continued delays, this Office was simply not prepared to accept yet another significant delay. However, in recognition of the importance of the issue, and with the consent of the Applicant, my Office provided a one week extension to 8 September 2005. On 9 September 2005, my Office received a very disturbing letter from the Department. Rather than support their

position, the Department chose to severely criticize this Office and to "object" to the manner in which my review had proceeded to date.

- [85] I would remind the Department that I am an independent officer of the House of Assembly and, as such, have been delegated the responsibility to oversee the application of the *ATIPPA*. With this delegation comes specific investigative powers and a mandate to ensure that each individual case is appropriately investigated and fairly reported. I take exception to this process being drawn into question by a public body and it is my view that such actions only serve to interfere with and delay an important statutory process and, consequently, prejudice the rights of the citizens of this Province.
- [86] I find the delays initiated by the Department and their lack of an appreciation for the authority of this Office to be completely unreasonable and unacceptable. This Department has shown clear disregard for the legislation, for the rights of the Applicant and for due process. I believe that the time spent formulating a lengthy letter criticizing the process and this Office would have been much better spent dealing with the records and the reasons for withholding them.

<u>Discretionary Exceptions Other than Section 20</u>

- [87] When the Department first informed the Applicant on 18 April 2005 that access had been denied, they referenced only section 20(1). On 24 August 2005, over four months later, the Department attempted to invoke a number of other exceptions (see paragraph 6). At that time, the Department was informed that my Office would only consider those additional exceptions that are mandatory in nature and that we would not consider any additional discretionary exceptions at this point in the process. I believe it is important to provide my reasons for this decision.
- [88] First, I believe it useful to highlight the difference between mandatory and discretionary exceptions. Under a mandatory exception a public body has a statutory obligation not to release. As such, I believe I have a duty to share in the responsibility of ensuring that any information protected by a mandatory exception is appropriately withheld, whether or not the public body has invoked the exception.

[89] Discretionary exceptions, on the other hand, provide a statutory "option" rather than an obligation. Even thought a public body *may* not release the information, they have the option of exercising their discretion and releasing the material. In my opinion, 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 is was appropriate to release the information to the Applicant. The Office of the Information and Privacy Commissioner of Ontario spoke to this point in Order P-341:

In my view, when a request for information is received by an institution, it is the head's (or delegated head's) responsibility, as decision maker under the Act, to identify and review all records which fall within the scope of the request, and to give full consideration to all relevant factors under the Act when determining whether or not to grant access. This consideration includes determining whether any exemptions provided in the Act apply, and if a discretionary exemption applies, whether discretion will be exercised in favour of or against disclosure.

As far as the record at issue in this appeal is concerned, without making comment on the possible application of section 19 to the record, it is my view that in responding to the original request the designated head must be deemed to have either concluded that the record, with the exception of the section 21 severance, did not qualify for exemption, or chosen to exercise his discretion against claiming exemption under section 19.

[90] Order P-341 was upheld by the Ontario Divisional Court in General Accident Assurance Co. et al. v. Tom Mitchinson et al., (March 8, 1994) Toronto Doc. 557/92 (Ont. Div. Ct.). A transcription of the endorsement of this decision by Southey, J. can be accessed on the Information and Privacy Commissioner of Ontario Web site at www.ipc.on.ca/docs/p-341div.pdf. In endorsing this decision Southey, J. said:

We are in complete agreement with Order P-341. The necessary implication of the finding that the head chose to exercise his or her discretion against claiming an exemption under section 19 is that the Ministry chose to waive any privilege that might have attached to the record.

[91] While the facts of Order P-341 are somewhat different than the case at hand, I believe the general reasoning supports my position that public bodies are obligated to review all responsive

records, consider all possible exceptions and exercise appropriate discretion when initially responding to the applicant. To do so several months after the fact is simply not acceptable.

- [92] I am further supported by the language of the legislation. Section 11 of the *Act* requires a public body to respond to an applicant within 30 days, unless the time limit is extended under specific circumstances. Section 12 sets out the content of this response. The relevant portions of this section are as follows:
 - 12. (1) In a response under section 11, the head of a public body shall inform the applicant
 - (a) whether access to the record or part of the record is granted or refused;...
 - (c) if access to the record or part of the record is refused,
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,...
 - (iii) that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.
- [93] When taken in the context of section 9, requiring a public body to respond without delay in an open, *accurate* and *complete* manner, it is clear that a public body has a duty to identify and consider all exceptions and to provide a complete response within the statutory time limits specified in section 11. Failure to do so gives the applicant a right to seek intervention from the Information and Privacy Commissioner or from the Courts.
- [94] Notwithstanding my comments on discretionary exceptions, I believe there are circumstances that may warrant the introduction of one or two additional exceptions after the initial response to an applicant. At the very least, however, I would expect that this would be done in a reasonable time frame and be fully communicated to the applicant. In the case at hand, the Department invoked a single section of the legislation in their initial response to the Applicant on 18 April 2005. On 24 August 2005, over five months after receiving the Applicant's request, the

Department attempted to claim seven additional exceptions, four of which were discretionary. Neither the Applicant nor my Office received any prior notification of this decision from the Department. This is simply unreasonable and unacceptable.

V CONCLUSION

- [95] Having thoroughly reviewed the responsive records and considered the jurisprudence in this area, I have concluded that the withholding of much of the information was not appropriate. While I have agreed that some of the information is policy advice or recommendations, Cabinet confidences or personal information, it is evident from my investigation that the Department failed to apply the exceptions in a manner consistent with the specific provisions of the *ATIPPA* and with the general spirit and intent of the legislation. Furthermore, the Department has failed to prove that the Applicant has no right of access to the majority of the records at issue, as is their responsibility under section 64(1). I do not accept the Department's very broad interpretation of section 20(1) and I have set out what I believe to be very convincing arguments in disputing such an interpretation.
- [96] I have also commented at length on the manner in which this request was handled by the Department and have highlighted a number of their inappropriate actions and decisions. I find several aspects of this case to be disturbing, including the amount of time involved, the withholding of information that had already been publicly released, the application of a blanket approach to information, the Department's improper application of section 27, the introduction of new exceptions late in the process and an apparent lack of appreciation of the role and authority of this Office. It is also evident from my investigation that the Department did not follow established protocols specified in governments own *ATIPPA* Policy and Procedures Manual. As such, I have found that the Department in this case has failed to meet its duty to assist the Applicant as mandated by section 9 of the legislation.

VI RECOMMENDATIONS

- [97] Under authority of section 49(1) of the ATIPPA, I hereby make the following recommendations:
 - 1. That all information I have determined not to constitute advice or recommendations as contemplated by section 20(1) be released to the Applicant, with the exception of information protected by other provisions as indicated below. This information is in addition to the information already released to the Applicant and has been appropriately highlighted on a copy of the responsive records delivered to the Department with this Report;
 - 2. That all information that has previously been released to the public be released to the Applicant. This information has been appropriately highlighted on a copy of the responsive records delivered to the Department with this Report. In addition, the source and date of the release has been recorded in the right hand margin for ease of reference by the Department;
 - 3. That all information withheld under section 20(1) but released in another section of the record be released to the Applicant. This information has been appropriately highlighted and identified in the right hand margin on a copy of the responsive records delivered to the Department with this Report;
 - 4. That the information being withheld under section 18(1) on page 15 and under the heading "Key Messages" on page 16 be released to the Applicant. This information has been appropriately highlighted and identified in the right hand margin on a copy of the responsive records delivered to the Department with this Report;
 - 5. That certain information being withheld under section 27(1) on pages 4, 14, 19, 20, 24, 35, 49, 61, 69, and 72 be released to the Applicant. This information has been appropriately highlighted and identified in the margins on a copy of the responsive records delivered to the Department with this Report;

- 6. That all information being withheld under section 27(1), with the exception of the information identified in number 5 above, be reconsidered by the Department in accordance with the three-part harms test set out in section 27. This information is not highlighted but is identified in the right hand margin on the copy of the responsive records delivered to the Department with this Report. I further recommend that the Department notify this Office of the outcome of this reconsideration no later than 30 calendar days from the date of this Report. I further recommend that where the Department is unable to provide detailed and convincing evidence that the three-part test has been met that they contact the third parties affected and seek their consent to release the information. If the third parties are unwilling to provide such consent, the Department should notify this Office within the above noted time frame;
- 7. That the Department perform its duties under the *ATIPPA* in a manner that is consistent with the duty to assist an applicant. I would include in this recommendation full and complete cooperation with the Office of the Information and Privacy Commissioner;
- 8. That the following information was appropriately severed from the responsive records by the Department and that they continue to be withheld from the Applicant;
 - a. all information that I consider to be advice and recommendations as contemplated by section 20(1)
 - b. information withheld under section 18(1) on pages 50 and 74 and under the heading "Anticipated Questions" on page 16
 - c. information withheld under section 30(1) on pages 12, 22, 44, 65 and 81

This information is not highlighted on the copy of the responsive records delivered to the Department with this Report, but has been identified in the right hand margins.

[98] Under authority of section 50 of the *ATIPPA*, I direct the head of the Department of Labrador and Aboriginal Affairs to respond to these recommendations within 15 days after receiving this Report.

[99] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of November, 2005.

Philip Wall Information and Privacy Commissioner Newfoundland and Labrador