May 1, 2006 2006-006

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2006-006

Department of Municipal and Provincial Affairs

Summary:

The Applicant applied to the Department of Municipal and Provincial Affairs (the "Department") under the Access to Information and Protection of Privacy Act (the "ATIPPA") for access to the minutes of a meeting between various organizations, including several levels of government. This meeting was held on 11 October 2001 in response to the diversion of aircraft and passengers to Newfoundland and Labrador on 11 September 2001. The Department denied access to the minutes in their entirety citing sections 21 (legal advice), 23 (intergovernmental relations) and 30 (personal information) of the ATIPPA. The Department was primarily relying on section 23(1)(b) by claiming that the entire record was received in confidence and, therefore, should not be disclosed. The Commissioner concluded that the information was not received in confidence as per section 23(1)(b) and recommended that it be disclosed, subject to appropriate severing. The Commissioner agreed with the Department that a small portion of the record should be withheld as legal advice. The Commissioner also recommended that personal information be withheld.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as am, ss. 2(o), 3, 21, 23(1), 27(1). 30(1), 47, 49(1), 50, 64(1); Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, ss. 16(1)(b), 21(1)(b) and 22(2)(f); Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, s. 21

Authorities Cited: British Columbia OIPC Order 331-1999 (1999)

I BACKGROUND

[1] The Applicant submitted an access to information request to the Department of Municipal and Provincial Affairs (the "Department"), dated 15 September 2005, wherein he requested access to the following:

Any debriefing materials – in any and all formats, including paper and electronic – prepared by the Emergency Measures Organization following the diversion of aircraft and passengers to Newfoundland and Labrador on Sept. 11, 2001.

[2] In correspondence dated 18 October 2005, the Department advised the Applicant that it was "...more than willing to grant [him] access to the information...," but asked that he be more specific as to the information he was seeking. On 28 October 2005 the Applicant narrowed his request as follows:

The minutes of the major debriefing held on Oct. 11, 2001, including the 'lessons learned' document that came out of that debriefing.

- [3] On 22 November 2005 the Department advised the Applicant that access to the entire record was being denied in accordance with sections 21, 23 and 30 of the *Access to Information and Protection of Privacy Act* (the "ATIPPA"). The Department did not indicate which portions of the record were being withheld under which exception.
- In correspondence dated 9 December 2005, and received at this Office on 12 December 2005, the Applicant asked that I review the decision of the Department and determine whether the exceptions were correctly applied. The Department was notified of this Request for Review in correspondence dated 13 December 2005, and was asked to provide the appropriate documentation and a complete copy of the responsive record for our review. An unsevered copy of the record was received at this Office on 19 December 2005.
- [5] Attempts to resolve this Request for Review by informal means were unsuccessful. On 3 February 2006 the Applicant and the Department were notified that the file had been referred to the formal investigation process and they were each given the opportunity to provide written

representations to this Office under authority of section 47 of the *ATIPPA*. The Department provided a written submission in support of its position. The Applicant did not provide a written submission.

II PUBLIC BODY SUBMISSION

- The Department submits that the responsive record is confidential and should be withheld in its entirety in accordance with section 23(1)(b) of the *ATIPPA*. The Department points out that officials from the Government of Canada, the Government of Newfoundland and Labrador and two local Government's attended the debriefing meeting on 11 October 2001. It argues that each of these officials had an expectation of confidentiality: "Disclosure of their words would indeed reveal information that was given in confidence and your office should not recommend the disclosure of these minutes." The Department goes on to argue that the information was provided frankly in the spirit of cooperation between various levels of government and the private sector, and disclosure of this information could result in these officials being less frank and forthcoming in the future.
- The Department also argues that section 23(1)(b) does not require the public body to show that disclosure of the information would cause harm, nor does it make any reference to the purpose for which the information was obtained. As such, the Department maintains that "[a] decision that a confidence would be revealed is enough to satisfy the test that is required to determine whether the information should be released or not."
- In support of its arguments the Department refers to the Province of Alberta. It states that in Alberta information that has been supplied to a public body in confidence can only be disclosed with the written consent of the government body or organization that supplied the information. In the absence of similar language in the *ATIPPA*, the Department sought the consent of the parties who provided the information in this case. These parties refused to provide such consent.

- [9] The Department has agreed, however, to release three pages of the responsive record. These three pages provide a summary of the information contained in the remainder of the record. The Department has agreed to release this information with the exception of one sentence on the first page and a single word on the second page.
- [10] While the Department's position is that the entire record be withheld, with the exception of the three page summary, it has provided an alternative argument in the event this Office does not accept the application of section 23(1)(b). If we do not recommend that the responsive records be withheld in accordance with section 23(1)(b) the Department has asked that we consider the severing of certain portions of the record. The Department has stated that "[c]ertain information can reasonably be disclosed," but has asked that item number 2 on page 5 be withheld in accordance with section 21 of the *ATIPPA* and information provided by specific individuals be withheld in accordance with section 23(1)(b).

III DISCUSSION

- [11] 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.
- [12] For ease of reference I have divided the discussion into the following four sections:
 - Intergovernmental Relations (Section 23)
 - Legal Advice (Section 21)
 - Personal Information (Section 30)
 - Third Party Information

Intergovernmental Relations (Section 23)

- [13] Section 23 of the *ATIPPA* is a discretionary exception which allows a public body to withhold information that could reasonably be expected to cause harm to intergovernmental relations or negotiations or would reveal information received in confidence from a government body. Section 23(1) provides as follows:
 - 23. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
 - (a) harm the conduct by the government of the province of relations between that government and the following or their agencies:
 - (i) the government of Canada or a province,
 - (ii) the council of a local government body,
 - (iii) the government of a foreign state, or
 - (iv) an international organization of states; or
 - (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.
- The record at issue is a copy of the minutes of a meeting held on 11 October 2001 (the "minutes"). For clarification, the minutes include a cover page, a list of participants, the minutes themselves and a three page summary (referred to as the "lessons learned document" by the Applicant). Together these documents comprise the responsive record. The Department argues that the minutes are confidential and should be withheld in their entirety under authority of section 23(1)(b). The question, therefore, is not one of harm, as anticipated by section 23(1)(a), but one of confidence. This is an important distinction between sections 23(1)(a) and 23(1)(b). Specifically, I must determine whether or not the information as recorded in the minutes was received by the Department in confidence. As the Department correctly points out in their submission, it is not necessary for me to make a determination of harm in considering the application of section 23(1)(b). My intent, therefore, is to analyze the term "received in confidence" and to apply that analysis to the current situation.

- I should note that in its original response to the Applicant denying him access to the information, dated 22 November 2005, the Department claimed section 23 without any further reference to specific provisions of this section. In fact, the Department simply stated that the information "...must not be released pursuant to Section 23 of the ATIPP Act." No additional information was provided and there was no indication of the specific information being withheld under this section. In its submission, however, the Department has claimed that the responsive record should be withheld in accordance with section 23(1)(b). At no point in its submission does the Department reference section 23(1)(a), which allows information to be withheld if it can be shown that disclosure of that information would be harmful to intergovernmental relations. I believe this to be significant because had the Department claimed section 23(1)(a), in addition to section 23(1)(b), I would have looked to the issue of harm independent of whether or not the information was received in confidence. Based on the information before me, however, I can only assume that the Department makes no claim of harm and, as such, it is not necessary for me to consider section 23(1)(a).
- Before dealing specifically with the confidentiality of the record, I believe it is important to address the reference in section 23(1)(b) to 23(1)(a). The application of section 23(1)(b) is limited to information that has been received from one of the sources listed in 23(1)(a). Information received from other sources is not captured and, as such, not protected by this section.
- Of the organizations that participated in the meeting and contributed to the minutes, the majority of them represent the Government of Canada, the Government of Newfoundland and Labrador or a local Government. These organizations are clearly listed in section 23(1)(a). I must emphasize, however, that simply being listed in section 23(1)(a) does not automatically qualify an organization for protection under section 23(1)(b). The Department must still demonstrate that the information was received in confidence before being able to withhold it under this exception.
- [18] In addition to the government bodies represented at the meeting, there were also representatives of at least two private corporations in attendance. Any information provided by

these organizations is considered third party information and cannot be protected under section 23(1) of the *ATIPPA*. I will deal with this issue later in this Report.

[19] Having established that the majority of organizations that contributed to the minutes are government organizations as anticipated by section 23(1), I must now look to the question of confidentiality. In the absence of a definition of "confidential" in the *ATIPPA*, the Department has relied on the definition in *Black's Law Dictionary*, 8th edition:

The ATIPP Act does not define the word "confidential" or "confidence". "Confidential" is defined in <u>Black's Law Dictionary</u>, 8th Edition, to include "information meant to be kept secret". "Confidence" is defined as "a communication made in trust and not for public disclosure"....

[20] While I take no issue with this definition, I believe that a determination of confidentiality in an access to information context requires more in-depth analysis. Section 23(1)(b) uses the phrase "received in confidence," as opposed to the phrase "supplied in confidence," which is used in section 27(1)(b) of the *ATIPPA*. The Information and Privacy Commissioner of British Columbia, in his Order 331-1999, has addressed the significance of this difference in the context of that province's *Freedom of Information and Protection of Privacy Act*:

The next issue is the meaning of the phrase "received in confidence" in \underline{s} . $\underline{16(1)(b)}$. The concept of confidential information arises in other sections of the Act. Section 21(1)(b), for example, protects information that, among other things, has been "supplied in confidence" to a public body. Section 22(2)(f) says that one circumstance to be considered is deciding whether someone's personal information can be released is whether that information was "supplied in confidence". The phrase used in \underline{s} . $\underline{16(1)(b)}$ differs from that used in \underline{s} s. $\underline{21(1)(b)}$ and $\underline{22(2)(f)}$. It is an accepted rule of statutory interpretation that where different words are used in a statute, the Legislature intended each to have a different meaning....

It is not necessary for the purposes of this inquiry to comment exhaustively on the meanings of the different phrases in ss. 16, 21 and 22. In my view, however, use of the word "supplied" in ss. 21 and 22 – which deal with information provided to a public body by a non-public body third party – focuses more on whether the supplier of the information expected it to be kept confidential. By contrast, I think s. 16 focuses on the intention of both the receiver and the supplier of the information....

Sections 16(1)(b) and 21(1)(b) of British Columbia's *Freedom of Information and Protection of Privacy Act* are, in all material respects, equivalent to sections 23(1)(b) and 27(1)(b) of the *ATIPPA*, respectively. The British Columbia Commissioner goes on to say that

In cases where information is alleged to have been "received in confidence", in my view, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. For example, it may be that if a public body asks the British Columbia government for information, and says the request is made in confidence, the information will have been received in confidence. But if the government declines at the outset to treat the supply as being confidential, the information will not have been received in confidence. This interpretation accords with what I think is the legislative policy underlying <u>s. 16(1)(b)</u>, i.e., to promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions.

- I agree with the analysis of the Commissioner in Order 331-1999 and believe that for the purposes of section 23(1)(b) of the *ATIPPA*, the intent of the Department in receiving the information at issue is an important consideration in determining confidentiality, in addition to the intent of the supplier of the information. As such, the Department maintains the onus of establishing that it fully intended to receive the information in confidence. This differs from the requirement of section 27(1)(b), where the focus is on establishing whether or not the supplier of the information intended that it be supplied in confidence.
- I also note that section 27(1)(b) allows for implicit confidentiality while section 23(1)(b) does not. In supplying information to a public body a third party need only establish an implicit expectation of confidentiality in order to engage section 27(1)(b). In the absence of similar express language in section 23(1)(b), the threshold is obviously higher. I believe the Legislators, in leaving out the phrase "implicitly or explicitly" in this provision, intended a more strict interpretation of confidentiality and placed a higher standard on public bodies to show that information had been received in confidence.
- [23] In its submission, the Department references the Province of Alberta in defense of its position. The Department points out that in Alberta a public body can only disclose information that was supplied in confidence with the consent of the organization that supplied the

information. In the case at hand, the parties that supplied the information have not provided such consent. In considering the Department's reference to Alberta I have closely examined the pertinent section of that province's equivalent legislation and have compared it to the *ATIPPA*. Section 21 of Alberta's *Freedom of Information and Protection of Privacy Act* is analogous to section 23 of the *ATIPPA*:

- 21 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to:
 - (a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:
 - (i) the Government of Canada or a province or territory of Canada,
 - (ii) a local government body,
 - (iii) an aboriginal organization that exercises government functions, including
 - (A) the council of a band as defined in the Indian Act (Canada), and
 - (B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,
 - (iv) the government of a foreign state, or
 - (v) an international organization of states,

or

- (b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.
- (2) The head of a public body may disclose information referred to in subsection (1)(a) only with the consent of the Minister in consultation with the Executive Council.
- (3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

(4) This section does not apply to information that has been in existence in a record for 15 years or more.

While the intent of these two provisions is similar, the differences in the wording must be carefully considered. Of particular relevance is the fact that section 21(1)(b) of Alberta's legislation uses the phrase "supplied in confidence" rather than "received in confidence." In addition, Alberta allows information to be supplied "explicitly or implicitly" in confidence. For all of the reasons discussed above, I do not accept section 21(1)(b) of Alberta's *Freedom of Information and Protection of Privacy Act* as sufficiently equivalent to section 23(1)(b) of the *ATIPPA*. I do not believe the Department's reference to Alberta, therefore, lends any support to its claim of protection under section 23(1)(b).

- With respect to Alberta's requirement for consent, as mandated by section 21(3) of its legislation, I would suggest that the existence of such a provision is associated with the emphasis on the supplier of the information. In using the phrase "supplied in confidence" in section 21(1)(b) Alberta is focusing more on the intent of the supplier rather than the receiver of the information. By comparison, section 23(1)(b) of the *ATIPPA* places equal emphasis on the intent of the receiver. It stands to reason, therefore, that Alberta would provide a consent provision for the exchange of information between government bodies while this province does not.
- On reviewing all of the material before me I acknowledge the possibility that some of the individuals who attended the meeting may have been under the impression that any information they were contributing was done so with an expectation of confidentiality. Notwithstanding this possibility, I have not seen any clear evidence in support of such confidentiality, outside of statements by the Department to that effect. I am not convinced that a mere statement that information that had been provided to a public body some four and one half years ago was provided in confidence should justify the withholding of that information from disclosure. To do so would allow any organization listed in section 23(1)(a) to simply state, after the fact, that information was provided in confidence in order to engage the protection of section 23(1)(b). I do not believe that the Legislators meant section 23(1)(b) to provide such broad protection, particularly in light of my comments thus far. It is also important to consider this point in the context of section 3 of the *ATIPPA*, which states in part that the purpose of the legislation is to

provide to the public a right of access to records, subject to *limited* exceptions. This bias in favour of disclosure lends support to a more narrow interpretation of section 23(1)(b). A more appropriate interpretation of this exception would involve clarifying the issue of confidentiality at the time the information is received, which in this case would have been 11 October 2001.

- Further to my earlier comments, it is also important to address the Department's expectations with respect to confidentiality. I have stated my agreement with the British Columbia Commissioner that in order to engage section 23(1)(b), the Department must establish that it received the information in confidence. In its submission the Department does not provide any evidence to this effect. In fact, in an e-mail to the Applicant dated 18 October 2005, the Department informed him that it had gathered most of the information being requested and in attempting to clarify the request stated that "[w]e, as a Department are more than willing to grant you access to the information..." Such a statement does not appear to coincide with an intention of confidentiality. Based on the lack of clear and convincing evidence, together with an express willingness of the Department to release the information, I do not accept that the responsive record qualifies for an exception under section 23(1)(b).
- [27] Having found that section 23(1)(b) does not apply to the responsive record, I will now look to the issue of severance. In its submission, the Department addressed the possibility that I would not accept the application of section 23(1)(b) to the entire set of minutes. Under these circumstances the Department agreed that portions of the record can be disclosed, but claimed that specific information is protected under sections 21 and 23(1)(b) of the *ATIPPA*.
- With respect to section 23(1)(b), the Department has said that if the entire set of minutes is not protected by this section then at least certain information should be. Specifically, the Department has listed eight individuals and has stated that the information provided by these individuals cannot be disclosed in accordance with section 23(1)(b). For all of the reasons specified above, I have determined that the responsive record was not "received in confidence" as required by section 23(1)(b) and, as such, this exception does not apply. In order to accept that the information provided by these eight individuals should be severed while the other information should not, the Department would need to show that the disclosure of that

information would cause harm to those particular individuals. As indicated in the Department's own submission, harm is not a factor in the application of section 23(1)(b). In order for me to consider harm the Department would have had to claim section 23(1)(a), which it did not. As such, I see no reason to treat these eight individuals differently. For obvious reasons, I do not accept that section 23(1)(b) applies in this circumstance.

Legal Advice (Section 21)

- [29] Section 21 of the *ATIPPA* is a discretionary exception that protects legal advice:
 - 21. The head of a public body may refuse to disclose to an applicant information
 - (a) that is subject to solicitor and client privilege; or
 - (b) that would disclose legal opinions provided to a public body by a law officer of the Crown.
- [30] The Department has claimed that a single sentence on page 5 of the minutes be withheld in accordance with section 21. This sentence is identified as number 2 in the second paragraph of page 5. I agree that this information is solicitor and client privileged and has been appropriately withheld by the Department.

Personal Information (Section 30)

- [31] Section 30(1) of the *ATIPPA* is a mandatory exception that protects personal information:
 - 30. (1) The head of a public body shall refuse to disclose personal information to an applicant.
- [32] Personal information is defined in section 2(o):
 - 2. In this Act
 - (o) "personal information" means recorded information about an identifiable individual, including

- (i) the individual's name, address or telephone number,
- (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
- (iii) the individual's age, sex, sexual orientation, marital status or family status,
- (iv) an identifying number, symbol or other particular assigned to the individual,
- (v) the individual's fingerprints, blood type or inheritable characteristics,
- (vi) information about the individual's health care status or history, including a physical or mental disability,
- (vii) information about the individual's educational, financial, criminal or employment status or history,
- (viii) the opinions of a person about the individual, and
- (ix) the individual's personal views or opinions;
- November 2005, the Department claimed that "[t]he minutes contain personal information which should not be released pursuant to Section 30 of the ATIPP Act." It did not specify what information it was claiming as personal information. I note, however, that the Department made no reference to section 30 in its submission. Again, I can only assume that the Department reversed its decision to claim this exception. Given the mandatory nature of section 30, however, I believe that I am compelled to recommend that any personal information authorized to be withheld under the *ATIPPA* be severed from the responsive record.
- On reviewing the responsive record I have identified personal information on seven pages. In each case the information consists of one or two words. Specifically, personal information appears on the list of participants, and on pages 4, 7, 8, 9, 10 and 12 of the minutes. I have recommended that the Department sever this personal information from the responsive record before disclosing it to the Applicant.

Third Party Information

[35] As indicated earlier, there were representatives of at least two private sector organizations at the meeting on 11 October 2001. Given that section 23(1)(b) only applies to those government organizations listed in section 23(1)(a), any information provided by these private organizations is not captured by section 23 of the *ATIPPA*. In order to withhold this information, therefore, the Department would have had to invoke another exception. For example, section 27 of the *ATIPPA* is a mandatory exception which requires a public body to refuse to disclose information that would be harmful to the business interests of a third party. The Department, however, did not claim such an exception. On reviewing the responsive record I do not believe that any of the information in the minutes provided by private organizations would have met the three-part harms test set out in section 27(1). As such, the Department's decision not to invoke section 27 was the correct one. I am recommending that this information, with the exception of any personal information, be released to the Applicant.

IV CONCLUSION

- Having thoroughly reviewed the responsive record and carefully considered the language of the *ATIPPA*, I have concluded that the Department inappropriately withheld the information in its entirety. In my opinion, the information at issue was not received in confidence as anticipated by section 23(1)(b) and, as such, cannot be withheld in accordance with that exception. Furthermore, I do not accept that specific information within the record should be withheld under this section, while other information is released. I have treated the record consistently with respect to section 23(1)(b) and have concluded that none of the information should be withheld under this provision.
- In addition to section 23(1)(b), I considered the application of sections 21 (legal advice) and 30 (personal information). I have concluded that the Department has appropriately claimed section 21 and I have also concluded that a small amount of additional information should be severed in accordance with section 30. This information appears on seven pages of the record.

V RECOMMENDATION

Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Department of Municipal and Provincial Affairs provide the Applicant with a copy of the responsive record, with the exception of item number 2 on page 5 of the minutes and the personal information on the page containing the list of participants as well as on pages 4, 7, 8, 9, 10 and 12 of the minutes. The information to be severed has been highlighted on a copy of the responsive record delivered to the Department with this Report. All other information is recommended for release.

[39] Under authority of section 50 of the *ATIPPA*, I direct the head of the Department of Municipal and Provincial Affairs to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

[40] Please note that within 30 days of receiving a decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court Trial Division in accordance with section 60 of the *ATIPPA*.

[41] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1st day of May 2006.

Philip Wall Information and Privacy Commissioner Newfoundland and Labrador