

REPORT A-2010-001

January 28, 2010

Department of Environment and Conservation

Summary:

The Applicant applied under the Access to Information and Protection of Privacy Act ("ATIPPA") for access to a report regarding greenhouse gas emissions forecast scenarios prepared for the Department of Environment and Conservation (the "Department") (the "GHG Report"). The Department initially refused access to the GHG Report in its entirety citing section 20(1)(a) (policy advice or recommendations) of the ATIPPA. The Department later cited section 18 (cabinet confidences) as an additional exception to disclosure. Later still, the Department released portions of the GHG Report to the Applicant but withheld other portions pursuant to section 20(1)(a). At this time the Department also added section 27 (disclosure harmful to business interests of a third party) as an additional exception to disclosure. The Commissioner found that sections 18 and 27 were not applicable to the information contained in the GHG Report. In respect of section 20(1)(a), the Commissioner found that a small portion of information contained in the GHG Report was exempted from disclosure pursuant to section 20(1)(a), however, the remainder was recommended for release in accordance with sections 20(2)(a) and (e) or because the information does not reveal advice or recommendations. The Commissioner also commented on the issue of delay and the Department's attempt to claim additional exceptions to disclosure after a Request for Review has been filed with this Office.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as

amended, ss. 20(1), 20(2)(a), (e), 18(1), 27.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-003, A-2008-012, A-2009-007; Ontario OIPC Orders PO-1852, PO-2145, PO-1842.

Other Resources Cited:

<u>Preparing for a Review</u>: Guidelines from the Office of the Information and Privacy Commissioner (Newfoundland and Labrador OIPC).

I BACKGROUND

[1] In accordance with the Access to Information and Protection of Privacy Act (the "ATIPPA") the Applicant submitted an access to information request to the Department of Environment and Conservation (the "Department") which was received on December 18, 2008, in which she sought the disclosure of a record as follows:

Report GHG emissions Scenarios to 2020 "GHG Forecast" (the "GHG Report").

- [2] By correspondence dated January 19, 2009, the Department advised the Applicant that access to the requested record had been refused pursuant to section 20(1) (policy advice or recommendations) of the ATIPPA.
- [3] In a Request for Review dated January 26, 2009, and received in this Office on January 28, 2009, the Applicant asked that this Office review the record to determine whether the Department had appropriately applied section 20(1) and whether the record could be released.
- [4] There was a significant period of delay in the Department's provision of the responsive record to this Office. This issue will be dealt with later in this Report.
- [5] On May 21, 2009, the Applicant and this Office were notified that the Department intended to claim an additional exception to disclosure of the record: section 18(1) (cabinet confidences) of the *ATIPPA*.
- The Department failed to respond to this Office in any meaningful way during the informal resolution process from July 14, 2009, to October 23, 2009, and, consequently, informal resolution attempts were unsuccessful. By letters dated October 23, 2009, both the Applicant and the Department were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the ATIPPA. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47 of the ATIPPA.



- Prior to the expiration of the timeframe in which the parties were invited to provide their formal submissions, the Department requested that the formal investigation process be suspended for two weeks so that it could provide additional information from the GHG Report to the Applicant. It believed that this may resolve the Request for Review. The delay was permitted by this Office following consultations with the Applicant.
- [8] On November 17, 2009, the Department provided some additional information from the GHG Report to the Applicant. At that time the Department also narrowed its reliance on section 20(1) of the ATIPPA to only subsection (a). The Department also indicated that it had severed parts of the record pursuant to section 27(1)(a)(ii), (b), (c)(i), (ii) and (iii) claiming that the disclosure of portions of the GHG Report would be harmful to the business interests of third parties. Section 18 of the ATIPPA was not cited by the Department at that time.
- [9] The Applicant maintained that additional information in the GHG Report should be released and, consequently, informal resolution was once again unsuccessful. By letters dated November 30, 2009, both the Applicant and the Department were advised that formal investigation pursuant to section 46(2) of the ATIPPA had been re-commenced. Both parties were once again given the opportunity to provide written submissions to this Office in accordance with section 47 of the ATIPPA. The Applicant declined to make a submission. The Department provided a one-page letter in support of its position.

II PUBLIC BODY'S SUBMISSION

[10] In its submission the Department relies on section 20(1)(a) and section 27. No mention is made of section 18 and it is unclear whether this section is still being relied on by the Department as an exception to disclosure. Given that the burden of proof is on the public body as per section 64(1) of the ATIPPA, I must assume that the Department has abandoned its section 18 claim by failing to comment or put forth any argument or evidence in support of its claim.

[11] The Department makes the following point in support of its reliance on section 20(1)(a):

The Department has undergone extensive review and consultation in this matter and feel [sic] strongly that the information we have withheld is within our right to refuse under Section 20 of the Act; where "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..."

[12] The Department makes the following point in support of its reliance on section 27:

Information was also severed under Section 27 of the Act where we felt that disclosure "would reveal commercial information of a third party that was supplied implicitly or explicitly, in confidence and where the disclosure could harm significantly the competitive position of the third party."

III DISCUSSION

- [13] The issues to be decided are as follows:
 - 1. Whether section 20(1)(a) of the ATIPPA is applicable to any information in the responsive records;
 - 2. Whether the Department is entitled to rely on additional exceptions to disclosure which were not originally cited in its refusal of access to the Applicant;
 - 3. If so, whether section 18 of the *ATIPPA* is applicable to any information in the responsive records; and
 - 4. Whether section 27 of the ATIPPA is applicable to any information in the responsive records.

Preliminary Matter of Delay

- [14] I would first like to address the issue of delay in the handling of this matter. As noted, the Applicant filed the above-noted Request for Review on January 26, 2009. It has now been over 11 months since the Request was filed.
- [15] The responsive record was not received at this Office until March 5, 2009. This was almost one month after the timeframe for providing the record had passed. Initially the delay was due to an



oversight on the part of the Department. Following this oversight, the provision of the responsive record was delayed due to deliberations within the Department regarding the claiming of any additional exceptions. During that time the Department indicated to the Investigator from this Office that it was considering claiming section 18(1) of the ATIPPA in respect of the GHG Report.

- [16] On March 5, 2009 the Investigator spoke with the Department's ATIPP Coordinator to ask that the responsive record be provided by March 6, 2009, regardless of any additional exceptions to disclosure which were being considered. The Department was advised at that time that any additional discretionary exceptions would not be considered by this Office as the Department was outside the 14-day timeframe for claiming any additional discretionary exceptions. This timeframe is set out in the guidelines which are provided to public bodies by this Office when a Request for Review is initiated. The Department was also advised that any additional mandatory exceptions would be considered on a case-by-case basis.
- [17] On April 16, 2009, the Department notified this Office that it intended to also claim section 18 of the ATIPPA as grounds for its refusal to allow access to the GHG Report. Notification of same was not given to the Applicant until May 21, 2009. Consequently this additional exception was not claimed until almost four months after the Request for Review was filed with this Office, and over five months after the Applicant initially applied for access to the GHG Report.
- [18] Between April 16, 2009, and July 14, 2009, the Investigator had discussions with the Department with regard to the release of additional information from the GHG Report. At the end of that timeframe it was the understanding of the Investigator that the Department was prepared to release a significant portion of the GHG Report. At some point between July 14, 2009, and August 4, 2009, the Coordinator took leave from her position and was replaced with another Coordinator.
- [19] Between August 4, 2009, and September 16, 2009, the Investigator contacted the new Coordinator several times and requested the Department's final position as to whether additional information would be released as per the informal resolution discussions which had taken place. On September 16, 2009, this Office advised the Department that should its response not be received before September 23, 2009, the matter would be moved to formal investigation.



- [20] Following this notification, on September 24, 2009, this Office was advised by the Deputy Minister of the Department that the Department was in the process of severing the responsive record based on the suggestions of the Investigator and that a significant portion of the record would be released. It was indicated that the Department's response would be provided within two to three days. As a result this Office, in consultation with the Applicant, agreed to hold off commencement of formal investigation until the Department's response was received.
- [21] No response was received from the Department within the timeframe provided by the Department. Following the expiration of this timeframe the Investigator took leave and formal investigation could not be immediately commenced. No response was received from the Department during this time period either.
- [22] Consequently on October 23, 2009, the matter was referred to formal investigation. On October 28, 2009, the Deputy Minister of the Department requested that formal investigation be delayed or suspended to allow the Department the opportunity to reach a decision regarding the release of information from the GHG Report. The Department again indicated that it hoped to release a significant portion of the requested record. This Office requested that the Department provide this request in writing, however, no written confirmation was received by this Office. Instead, on November 5, 2009, the Department again requested a two week delay to provide its response.
- [23] On November 9, 2009, following discussions with the Applicant and on the condition that this delay would be no longer than two weeks in length, this Office agreed to allow for the extension of time.
- [24] On November 17, 2009, the Department provided a severed copy of the GHG Report to this Office and the Applicant. The additional release of information was not acceptable to the Applicant and formal investigation was re-commenced on November 30, 2009, over one month after its initial commencement.
- [25] It should be noted that the Investigator in this matter encountered some confusion in dealing with the Department as discussions with the Department were being held with both the Deputy Minister and the Coordinator. At times it appeared that there was some lack of communication and



miscommunication within the Department as the Investigator on more than one occasion received conflicting information as to the status of the matter and the intentions of the Department. This only added to the difficulties experienced in dealing with the Department and the ability of this Office to move this matter to resolution.

[26] As discussed in Report A-2008-012, the informal resolution process is an integral part of a Request for Review. Participation in this informal resolution process by the Department, however, was minimal, and then only at the constant urging of this Office. I believe it is important to reiterate my comments to this effect in Report A-2008-012:

[17]...the public body must [...] respond to each request for review with a willingness to engage in a meaningful discussion with the assigned investigator from this Office. The informal resolution process, provided for in section 46 of the Act, is essentially a form of mediation, and is critical. (...) However, the informal process requires that someone must be authorized and prepared to put the necessary time and effort into discussing with the investigator the reasons for the decision to withhold information, based on a reasoned and thoughtful application of the relevant provisions of the Act.

Difficulties were experienced in terms of the Department's timelines in responding to the informal resolution process and it is for this reason that I feel it necessary to point out the importance of this process yet again.

- [27] Furthermore, the ATIPPA contains several statutory timeframes, including a 30-day timeframe for informal resolution and a timeframe for providing formal submissions. In the past, this Office has not rigidly enforced the timeframe for informal resolution where there are indications of progress, where there is a clear willingness to work towards resolving the matter, and where additional time is needed simply to explore various approaches and proposals for informal resolution. In respect of the timeframe for providing a formal submission, the Department did not appear concerned with abiding by the statutory timeframe or any of the consensually revised timeframes which were set for providing submissions.
- [28] I have several concerns regarding the dealings between this Office and the Department, namely the time taken in the provision of: i) the responsive record to this Office, ii) the Department's position on additional exceptions to disclosure, and iii) the Department's position as to the release



of additional information. The latter is especially concerning given that to the best of the knowledge of the Investigator a decision had been made by the Department to release a significant portion of the GHG Report over three months before the response was provided. Delays such as this hamper the ability of this Office to resolve matters in a timely fashion and run counter to a fundamental purpose of the ATIPPA: giving the public a right of access to records.

1. Whether section 20(1)(a) of the ATIPPA is applicable to any information in the responsive records.

- [29] It is useful at this point to provide some details regarding the GHG Report. The GHG Report was prepared by the Department in 2008 and provides estimates of future greenhouse gas emissions in the Province for different sectors, developments and projects for the purpose of setting reduction targets.
- [30] As noted, the Department withheld some information from the Applicant on the basis of section 20. Initially the Department indicated a blanket reliance on section 20(1); however, the Department has since reduced it reliance to section 20(1)(a). Section 20(1)(a) states as follows:
 - 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;
- [31] Section 20(1)(a) operates in conjunction with section 20(2). That is, once it has been determined that information fits within the parameters of advice or recommendations, the public body may exercise its discretion to withhold the information from disclosure pursuant to section 20(1) unless it is exempted by section 20(2). If the information falls within a subsection of section 20(2), it cannot be withheld under section 20(1).



[32] Section 20(2) states:

- (2) The head of a public body shall not refuse to disclose under subsection (1)
 - (a) factual material;
 - (b) a public opinion poll;
 - (c) a statistical survey;
 - (d) an appraisal;
 - (e) an environmental impact statement or similar information;
 - (f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;
 - (g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;
 - (h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;
 - (i) a report on the results of field research undertaken before a policy proposal is formulated;
 - (j) a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a 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;
 - (l) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or
 - (m) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- [33] The Department had initially withheld the entire GHG Report on the basis of section 20(1). It has since released portions of the GHG Report but it maintains that section 20(1)(a), and also section 27, apply to certain parts of the record.



- [34] It is my opinion that while the Department may exercise its discretion to sever certain information in the GHG Report, other information must be disclosed pursuant to sections 20(2)(a) and (e) or by reason that section 20(1)(a) is simply inapplicable to the information.
- [35] Section 20(2)(a) is straightforward and requires that any factual material be disclosed to an applicant. A portion of the information contained in the GHG Report is clearly factual information and should be released.
- [36] Section 20(2)(e) has not yet been considered by this Office, but other jurisdictions have given consideration to what constitutes "an environmental impact statement or similar information." In Order PO-1852 the Ontario Information and Privacy Commissioner accepted the definition of "environmental impact assessment" which is provided by *The Dictionary of Environmental Law and Science*:

<u>The Dictionary of Environmental Law and Science</u>, edited by William A. Tilleman, Chair of the Alberta Environmental Appeal Board defines the term "environmental impact statement" as follows:

1. A document required of federal agencies by the National Environmental Policy act for major projects or legislative proposals significantly affecting the environment. A tool for decision making, it describes the positive and negative effects of the undertaking and cites alternative actions. 2. A documented assessment of the environmental consequences and recommended mitigation actions of any proposal expected to have significant environmental consequences, that is prepared or procured by the proponent in accordance with guidelines established by a panel. 3. An environmental impact assessment report required to be prepared under [Alberta's Environmental Protection and Enhancement] Act. 4. A detailed written statement of environmental effects as required by law.

Although established in the context of another province's environmental protection legislation, I find that this in an appropriate definition to adopt for the purposes of interpreting the same term in section 13(2)(d) of the Act.

[37] I could find no further consideration of the definition of "environmental impact assessment" in any jurisdiction and, consequently, this definition provides useful guidance in this particular circumstance. This does not mean that further consideration of the definition of the "environmental impact assessment" will not be required in relation to another set of facts in another matter.



- [38] Section 20(2)(e) may apply to an entire record or to particular information within a record. Information in a record which is found to be an environmental impact assessment or similar information may be severed in accordance with other exceptions to disclosure. That is, where section 20(2)(e) is found to apply to information in a record, the entire record is not automatically designated for release. Therefore, if I find that section 20(2)(e) applies to the GHG Report, I must nevertheless review the GHG Report on a line-by-line basis to ensure that no other exceptions to disclosure apply.
- The Executive Summary of the GHG Report indicates that it was prepared in order to create targets which were required by another initiative of the Department. The information used to create these targets came from, among other sources, environmental impact statements. Consequently, the GHG Report is a detailed written statement of environmental effects required by a government initiative and is comprised of information obtained directly from environmental impact statements. The information contained in the majority of the GHG Report is closely related and intertwined with information that would be considered an environmental impact statement and, therefore, it is my opinion that it would meet the latter part of section 20(2)(e) ("[...] or similar information.") This information should therefore be released.
- [40] There is a small amount of information contained in the GHG Report which likely falls within the parameters of section 20(1)(a). As mentioned above it is possible for section 20(2)(e) to apply to either an entire record or to particular information within a record and, therefore, information in a record which is found to be an environmental impact assessment or similar information may be severed in accordance with other exceptions to disclosure.
- [41] Section 20 was most recently dealt with in Report A-2009-007. In that Report, I found as follows:

[14] Having reviewed the discussions of the phrase "advice or recommendations" in my predecessor's Report 2005-005, in the Ontario Court of Appeal decision in Cropley, and in the Federal Court of Appeal decision in 3340901 Canada Inc. v. Canada (Minister of Industry), I have reached the following conclusions on the meaning of the phrase "advice or recommendations" found in section 20(1)(a):



- 1. The statement by my predecessor in Report 2005-005 that "the use of the terms 'advice' and 'recommendations' . . . is meant to allow public bodies to protect a suggested course of action" does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than "a suggested course of action."
- 2. The term "advice or recommendations" must be understood in light of the context and purpose of the ATIPPA. Section 3(1) provides that one of the purposes of the ATIPPA is to give "the public a right of access to records" with "limited exceptions to the right of access."
- 3. The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.
- 4. Neither "advice" nor "recommendations" encompasses factual material.
- [42] Certain information in the GHG Report encompasses expressions of opinion, matters for decision and options which may be chosen. This information is located on pages 3, 5, 12-13, 17, and 19-20 of the GHG Report.
- [43] Graphs and charts are also contained within the GHG Report. The description and title of these figures has been released in full or in part to the Applicant. The graphs are merely visual representations of the titles and the description. The graphs would have been created and then the title and description would have been drafted to provide a written representation of what was depicted in the graphs in further detail. Consequently, if the description and title have been released then the graph should be as well. Likewise the information severed from the description relates directly to factual information which has already been released to the Applicant. Consequently, the graphs and the accompanying descriptions do not constitute advice or recommendations and should be released to the Applicant.
- [44] Any remaining information severed by the Department pursuant to section 20(1)(a) does not constitute advice and recommendations and this information should also be released.



- 2. Whether the Department is entitled to rely on additional exceptions to disclosure not originally cited in its refusal to access to the Applicant.
- [45] According to "Preparing for a Review: Guidelines from the Office of the Information and Privacy Commissioner" which is provided by this Office to all public bodies at the time a Request for Review is received by this Office:

Normally, all exceptions should be claimed at the time a response is issued to the Applicant's access request. Should you wish to invoke any additional discretionary exceptions under the ATIPPA, you must inform the Applicant and this Office of your intention to do so within 14 days of receipt of correspondence from this Office notifying you that the Applicant has filed a Request for Review. Any discretionary exceptions received after this period will not be considered by this Office.

- [46] It is the position of this Office that public bodies must claim all discretionary exceptions to disclosure within 14 days of being notified of the commencement of a Request for Review. Notification of same must also be provided. However, the *Guidelines* clearly state that this timeframe applies only to discretionary exceptions. No mention is made of mandatory exceptions.
- [47] In the Department's initial response to the Applicant, the Department advised that access to the requested record had been refused pursuant to section 20(1) of the *ATIPPA*.
- [48] The Department later notified the Applicant that it also believed that section 18 of the ATIPPA was applicable to the requested record.
- [49] Later still, the Department notified the Applicant that it had narrowed its reliance on section 20(1) of the ATIPPA to only subsection 20(1)(a), but it also informed the Applicant that it was severing certain information pursuant to section 27(1)(a)(ii), (b), (c)(i), (ii) and (iii). Section 18 was not referred to in any way in this notification, nor has it been mentioned since.
- [50] Sections 18 and 27 of the ATIPPA are mandatory exceptions to disclosure. This means that if these sections are found to apply to any information in the records the Department **must** refuse to disclose this information; that is, access to the record or parts of the record must be denied. A public body exercises no discretion in relation to the application of mandatory exceptions.



- [51] Likewise, where this Office becomes aware of information which has not yet been released to an Applicant, but which a public body has indicated its intention to release, and the information is protected by a mandatory exception, this Office must recommend that the public body withhold this information. To do otherwise would make this Office complicit in a breach of the *ATIPPA*.
- [52] Consequently, this Office must be aware of the possible application of mandatory exceptions at all times throughout its involvement in a Request for Review. This is not to say that all belated claims of mandatory exceptions will be found to be valid; rather, it means that this Office must always consider whether these exceptions apply to the relevant information.
- [53] Therefore, the Department is entitled to claim the additional mandatory exceptions set out in sections 18 and 27; however, whether these exceptions are actually applicable to the information for which they are claimed will be analyzed below.
 - 3. If so, whether section 18 of the *ATIPPA* is applicable to any information in the responsive records.
- [54] It appears that the Department has ceased its reliance on section 18. This is likely due to the release of parts of the GHG Report to the Applicant and is further indicated by the fact that the Department made no mention of section 18 in its formal submission to this Office.
- [55] Consequently, I will not consider the application of section 18 to the requested record other than to say that I have reviewed the record and have concluded that there is no evidence that it would have had any application to the information contained in the GHG Report.
 - 4. Whether section 27 of the *ATIPPA* is applicable to any information in the responsive records.
- [56] In Report 2005-003, at paragraph 38, my predecessor discussed the three-part harms test that must be met in order for the exception set out in section 27 to be applicable. The three parts of the test may be stated as follows:
 - (a) disclosure of the information will reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;



- (b) the information was supplied to the public body in confidence, either implicitly or explicitly; and
- (c) there is a reasonable expectation that the disclosure of the information would cause one of the four injuries listed in 27(1)(c).
- [57] All three parts of the test must be met in order for a public body to deny access to information by relying on section 27(1). If a record fails to meet even one of the three parts, the public body is not entitled to rely on section 27(1) to sever information in the responsive record.
- [58] It is important to note that the Department has not identified or provided evidence as to who the third party or parties involved are.
- [59] Section 2(t) of the ATIPPA states:
 - (t) "third party", in relation to a request for access to a record or for correction of personal information, means a person, group of persons or organization other than
 - (i) the person who made the request, or
 - (ii) a public body.
- [60] Based on my review of the GHG Report it appears possible that certain information in the GHG Report potentially relates to other public bodies. If this is the case then these parties cannot be considered third parties under the above definition and section 27 does not apply.
- [61] The GHG Report does, however, make some reference to other parties which may be considered third parties and, therefore, I will provide an analysis of the application of section 27.
- [62] I must first consider whether the information at issue in this case would reveal the type of information referred to in paragraph (a) of section 27(1).
- [63] The only plausible categories for me to consider are scientific and technical information.
- [64] In Ontario Order PO-2145, the following statement with respect to technical information was made:



Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act. [Order P-454]

[65] In Ontario Order PO-1842, the following statement with respect to scientific information was made:

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act. [Order P-454]

- [66] Section 27 has been claimed in respect of only a very small portion of the information contained in the GHG Report. I am satisfied that the information for which section 27 is claimed does not consist of technical or scientific information and, therefore, the first part of the test is not met, and I do not need to examine this issue any further.
- [67] However, even if I were to accept that the information in the GHG Report for which section 27 has been cited is technical or scientific, I am unable to accept that the second part of the test, requiring the relevant information to have been supplied in confidence, has been met. Whether information was supplied in confidence was most recently considered by this Office in Report A-2009-006. Based on the discussion which I provided in that Report I am unable to conclude that the information in the GHG Report for which section 27 has been cited was supplied in confidence.
- [68] Finally, if I were to accept that the first and second parts of the test were met, it is well established in case law and Reports of this Office that in order for the remaining provision of section 27 to come into play, "detailed and convincing" evidence must be presented by the public body. No evidence of any kind has been provided by the Department. Consequently, any use of section 27 in respect of the GHG Report must fail and the information must be released to the Applicant.



[69] There is no information in the GHG Report which may be severed in accordance with section 27 and any information to which this section is cited should be released to the Applicant.

V CONCLUSION

- [70] I feel it is important for me to note at this time that legitimate debates regarding the interpretation and proper application of the ATIPPA do arise between this Office and public bodies. These debates can take some time to resolve, however, communication and interaction between this Office and the relevant public body must be productive and timely. Unfortunately in the present situation significant delays were experienced in this regard. In the end, however, I must acknowledge the release of a significant portion of the requested record. Over the course of this review, the Department has improved on its initial position greatly by moving from a complete refusal of access to a significant release of information.
- [71] Also, I want to note the importance of providing detailed arguments to this Office. In this situation had the Department provided a more detailed reasoning of its position it may be that this Office could have assisted the Department in moving the matter forward faster.
- [72] I have found that not all of the information in the GHG Report for which section 20 has been claimed relates to a course of action that will ultimately be accepted or rejected by its recipient, nor does it contain an opinion on policy-related matters. Rather, a large portion of the information constitutes an environmental impact statement or similar information and factual information. This information should, therefore, be disclosed to the Applicant.
- [73] With respect to the later-claimed exceptions, I explained that while discretionary exceptions must be claimed by a public body within 14 days of a Request for Review being filed in order to be considered by this Office, mandatory exceptions such as sections 18 and 27 will be considered by this Office at any time. It appears, however, that the Department has ceased its reliance on section 18 and there is no evidence that it applies to the requested record. Furthermore, there is no information in the GHG Report which may be severed in accordance with section 27 and any information for which this section is cited should be released to the Applicant.



VI RECOMMENDATIONS

[74] Under the authority of section 49(1) of the ATIPPA, I hereby recommend that the Department release to the Applicant the information highlighted in blue on a copy of the responsive record that has been provided to the Department along with this Report. Information which is highlighted in

pink on the copy of the responsive record which has been provided to the Department along with

this Report constitutes information which the Department has appropriately severed.

[75] I do note, however, that if the Department agrees with the recommendation of this Office to

release information which was initially severed from the GHG Report pursuant to section 27, but

remains convinced that section 27 may still possibly apply to this information, the Department must

notify the relevant third parties in accordance with sections 28 and 29 of the ATIPPA. It should be

noted, however, that this Office is convinced that this is a situation where section 27 clearly has no

application to the cited information.

[76] Under the authority of section 50 of the ATIPPA I direct the head of the Department to write

to this Office and to the Applicant within 15 days after receiving this Report to indicate the final

decision of the Department with respect to this Report.

[77] 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 of Newfoundland and Labrador Trial

Division in accordance with section 60 of the ATIPPA.

[78] Dated at St. John's, in the Province of Newfoundland and Labrador, this 28th day of January,

2010.

E. P. Ring

Information and Privacy Commissioner

Newfoundland and Labrador

