Dear [Redacted],

Re: Your request for access to information under Part II of the Access to Information and Protection of Privacy Act [Our File #: MIGA/34/2015]

On July 9, 2015, the Department of Municipal and Intergovernmental Affairs received your request for access to the following records/information:

"All correspondence between the Department & the Minister and Witless Bay Town Council related to the motion 2015-051 brought forward at April 21 2015 where 3 councillors abstained from voting without authority. Please include any requests by council of clarification and any legal opinion given including any advice on pending action. Please include any correspondence to outside solicitors."

On July 20, 2015 you provided further clarification:

"[I]n a June 17, 2015 letter to the Town of Witless Bay referenced as: COR/2015/02547-01 Dan Noseworthy provided a legal opinion suggesting that he had obtained a department legal opinion stating that Section 206 (1) h did not apply to the decision of 3 councillors to abstain from voting as required by the act.. In the letter Mr. Noseworthy stated: “The three councillors indicated that if they were required to vote they requested that a legal opinion be obtained prior to the vote. This legal opinion was subsequently obtained."

This indicates that a legal opinion was given to Mr. Noseworthy regarding the matter, either a department, or an outside solicitor provided. Also, to obtain this opinion there would be correspondence between the department legal staff or an outside solicitor. This would be in the form of emails or letters outlining the problem and correspondence indicating the grounds for the opinion- Re “This legal opinion was subsequently obtained”. I require all correspondence regarding the obtaining of this legal opinion,

The content of the letter makes no reference to details of the opinion, or specifics on who provided it, and my query regarding the “council clarification” is whether there is any record of Town Council seeking clarification on the letter of
June 17, 2015. With respect to “pending action, I was seeking any correspondence as to whether internal documents indicated further research or if the letter is the final word.”

I am pleased to inform you that a decision has been made to provide access to the requested information/records. In accordance with your request for a copy of the records, the appropriate copies have been enclosed. Please note that any references to legal opinions from the town’s solicitor would have to be requested from the town.

Please be advised that you may ask the Information and Privacy Commissioner to review the processing of your request, as set out in section 42 of the Access to Information and Protection of Privacy Act. A request to the Commissioner must be made in writing within 15 business days of the date of this letter or within a longer period that may be allowed by the Commissioner.

The address of the Information and Privacy Commissioner is as follows:

Office of the Information and Privacy Commissioner
2 Canada Drive
P. O. Box 13004, Stn. A
St. John’s, NL. A1B 3V8

Telephone: (709) 729-6309
Toll-Free: 1-877-729-6309
Facsimile: (709) 729-6500

You may also appeal directly to the Supreme Court Trial Division within 15 business days after you receive the decision of the public body, pursuant to section 52 of the Act.

Please be advised that responsive records will be published following a 72 hour period after the response is sent electronically to you or five business days in the case where records are mailed to you. It is the goal to have the responsive records posted to the Office of Public Engagement's website within one business day following the applicable period of time. Please note that requests for personal information will not be posted online.

If you have any further questions, please feel free to contact me by telephone at 729-2787 or by e-mail at tarakelly@gov.nl.ca.

Sincerely,

Tara Kelly
Director / ATIPP Coordinator

Enclosures
From: Woodrow, Denise <denisewoodrow@gov.nl.ca>
Sent: Tuesday, June 16, 2015 2:53 PM
To: Noseworthy, Dan; Janes, Colleen G.
Subject: RE: WB - Your Comments Are Required. (council abstaining from vote)

Hi Dan,

From our discussion earlier on this issue, the relevant minutes indicate that the councilors attempted to abstain from the vote. They were then advised by the Mayor of the requirements to vote or to abstain in the MA, 1999 and that the discussion resulted in the Mayor and those Councillors agreeing to seek legal advice on the matter. It’s my understanding that the minutes were amended to reflect that the motion before council at the time that the councilors attempted to abstain was to be considered defeated.

In Snow v. Town of Norris Arm, 2007 NLTD 22, the court found vacating a councilors seat in the circumstances would hold any councilor to a perfect standard with no latitude for any honest mistake. In this case the councilor, Mr. Snow, attended a regular meeting of the Town Council where, amongst other things, discussions were held by the Mayor and Councillors in attendance with respect to part time casual call-in applicants. This item had not been listed on the agenda for the Council’s meeting on that date. The names of the applicants for part time employment were read at the meeting and discussions then centered around forming a committee to interview these people. Mr. Snow expressed an interest in sitting on the committee and was immediately advised by Mayor Fred Budgell that he was unable to as his sister had applied for a position and he would be in a conflict of interest. The Applicant informed the meeting he did not feel he was in conflict. At this juncture it was agreed that an opinion would be sought respecting Mr. Snow’s possible conflict of interest but this was after there were discussions respecting the possible make-up of the selection committee and the type of questions that would be asked.

The Town Council of Norris Arm again met when the Applicant was informed by Mayor Budgell that pursuant to the Municipalities Act, he was in a conflict of interest. Mr. Snow advised Council that after consultation with the Department he, too, was satisfied he was in a conflict of interest if he were to sit on a selection committee and that he had no further interest in being in on the interview process. Mr. Snow then left the Council meeting. The Council moved to have his seat declared vacant and finalized this at a Hearing on March 13, 2006. Council took the position that Mr. Snow had placed himself in a conflict of interest position at the previous meeting and therefore had his seat declared vacant.

In overturning this decision of council, the court stated:

[24] I am of the opinion that to uphold the Council’s decision on the facts of this case, which appears to have been an honest error in judgment, would require holding any Councillor sitting on an elected municipal council to a perfect standard with no latitude for any honest mistake. This would open doors to attack the integrity of any elected Councillor if he/she had any possibility of being in a conflict position although that person might initially have the honest belief that he/she was not. A determination by council respecting the
possibility of a conflict of interest should first be made before a Councillor’s seat is declared vacant. It then becomes incumbent upon that Councillor to ensure that he/she is not in conflict after this finding is made.

In my view, the council handled the matter of the councilors wanting to abstain from the vote in accordance with the MA, 1999. Although it became apparent during the meeting that several Councillors wished to abstain, the Mayor addressed the matter and it appears that any decision that may have resulted from the vote was never final. In this situation, there is no evidence to rebut the presumption of regularity - a presumption applied in the context of a municipal council by the NL Court of Appeal in Friends of Ragged Beach Inc. v. Witless Bay (Town), 2013 NLCA 25:

[18] In the circumstances, in the absence of evidence to the contrary, reliance may be placed on the presumption of regularity; in this case, the presumption of regularity applies in respect of administrative procedures (Ellis-Don Ltd. v. Ontario (Labour Relations Board), 2001 SCC 4 (CanLII), [2001] 1 S.C.R. 221, at paragraph 33). The inference to be drawn is that, had there been dissenting voters, names would have been identified as voting for or against the motion.

[19] Based on the sample minutes, there is no evidence here that would rebut the presumption of regularity. The inference follows that the town council was carrying on its affairs in accordance with the legislation. Mr. Vickers’ complaint that the minutes of meetings do not identify which councillors voted for or against a motion, and that the business of the council is thereby impugned, was not established.

In light of the above noted, there is nothing to suggest that section 206 applies to the actions of council at the meeting. Please let me know if you become aware of anything that may inform this opinion.

Regards,
Denise

From: Noseworthy, Dan
Sent: Tuesday, June 16, 2015 10:29 AM
To: Woodrow, Denise
Subject: WB - Your Comments Are Required.

Denise

At a meeting between the Minister and the Council of Witless Bay yesterday the question was raised as to a potential violation of Section 206. (1) (h) of the Municipalities Act. The matter was raised due to three councilors indicating they were abstaining from voting during a Friendly Hearing being held to assess allegations of conflict of interest against two other councillors.

During a Friendly Hearing being held for Deputy Mayor Wiseman and Councillor Carey, a vote was called as to their violation of the conflict of interest provision of the Act. During the vote, Councillors Estrada, Murphy, and Brinston indicated they were abstaining from the vote. The record shows that the Mayor advised them that the Act prohibited abstaining without consequences at which time the Councillors indicated that if they had to vote they requested that a legal opinion be obtained first. The opinion was subsequently obtained from the towns solicitor.

Based on these actions the question has been raised as to whether the three councilors violated the Act.

A copy of the Minutes from the Hearing is attached.

Tks.

Dan
Town of Witless Bay
Private Meeting (Friendly Hearing)
April 21, 2015

Attending: Mayor Sebastien Despres, Deputy Mayor Dena Wiseman, Councillors: Rene Estrada, Ralph Carey, Kevin Smart, Ken Brinston, Albert Murphy
Annette Conway, Kelly Hopkins (Legal Counsel representing Deputy Mayor Dena Wiseman and Councillor Ralph Carey)

Reporting: Geraldine Caul

1. Mayor Sebastien Despres called the Private Meeting (Friendly Hearing) to order at 7:30 p.m.

   Introductions were made and the meeting proceeded.

2. 2015-049 Councillor Kevin Smart/Councillor Albert Murphy
   Be it resolved Council adopt the Agenda of April 21, 2015 as presented.

   Amendment: Councillor Albert Murphy/Councillor Rene Estrada
   Be it resolved Council amend the motion to use the original agenda so that Item #4 reads: “Private Hearing relating to the alleged Conflict of Interest relating to the snow clearing of Pond Path.”

Discussion: Deputy Mayor Dena Wiseman asked that Legal Counsel for her and Councillor Ralph Carey speak on their behalf. Ms. Annette Conway read through the process for initiating the hearing. She said that Council has the responsibility to vacate the seat of a councillor in a conflict of interest, yet the process of initiating an action is challenging. Recent case law demonstrated councils must exercise due diligence and the rules of natural justice when pursuing a conflict of interest resolution. The Province’s Supreme Court, in ruling on a number of recent appeals by councillors whose seats were declared vacant by their respective councils for conflict of interest, has determined that the rules of natural justice require a council to give a councillor whose seat is to be declared vacant, reasonable notice before the dismissal action is taken. This affords the affected councillor time to respond to the allegation of conflict of interest. The rules of natural justice require a council to:

1. Provide the councillor with a written document explicitly setting out the details of allegation of conflict of interest;
2. Arrange for a hearing to be held with the councillor;
3. Provide the councillor with a reasonable period of notice prior to the hearing; and
4. Permit the councillor during the hearing:
   i. To be heard by himself or herself or through legal counsel;
   ii. To examine and cross-examine witnesses, submit exhibits and make submissions.

Deputy Mayor Dena Wiseman asked that the record reflect her and Councillor Ralph Carey’s request to postpone this hearing due to Council’s failure to follow the rules of natural justice.
Mayor Sebastien Despres noted also that the amendment to the agenda that specifies "Pond Path" is not in line with what Municipal Affairs asked of Council, and perhaps not in line with what Deputy Mayor Wiseman's and Councillor Ralph Carey's legal counsel prepared.

Mayor Despres stated that he erred in his initial handling of the alleged conflict of interest issue, by sending a letter on behalf of the Town without having it cleared by a majority of Council, and for this reason the Town withdrew this initial letter. Council met, and a majority of Council declared the issue as closed. No further concerns relating to a conflict of interest were brought back to the table by Council or sent to the councillors in question.

For the amendment: Councillors Albert Murphy, Ken Brinson, Rene Estrada.
Against the amendment: Mayor Sebastien Despres, Deputy Mayor Dena Wiseman, Councillors Kevin Smart and Ralph Carey.
Amendment failed.

For the motion: Mayor Sebastien Despres, Mayor Dena Wiseman, Councillors Kevin Smart and Ralph Carey
Against the motion: Councillors Albert Murphy, Ken Brinson and Rene Estrada
Motion carried (the agenda stands as presented).

3. A brief discussion took place on how the meeting is to proceed. Councillor Rene Estrada explained that Council is here to hear Ralph and Dena and their legal counsel speak.

Sebastien added that once they have spoken they will leave and the remaining councillors will hold a discussion, and then invite them back.

2015-050 Councillor Ken Brinston/Councillor Kevin Smart
Be it resolved the meeting proceed with a presentation by Deputy Mayor Dena Wiseman, Councillor Ralph Carey and their legal counsel. Once they have completed their presentation, they will leave the chamber and return if Council has questions, or wish to hold further discussions.
Motion carried unanimously.

4. There was a brief presentation made by Annette Conway, Legal Counsel for Deputy Mayor Dena Wiseman and Councillor Ralph Care. Points outlined are:

The issue defined by Municipal Affairs is whether Dena and Ralph were in conflict during the motions relating to snow clearing as defined in the Municipalities Act, section 207.

There were two motions made on snow clearing; one to ratify regulations on snow clearing and the second to empower public works via electronic means to award snow clearing contract for October 2014 – April 2017.

Under section 207 of the Municipalities Act, relating to monetary interest, the monetary interest would have to be in relation to the tendering of the snow clearing contract.

Legal Counsel Annette Conway continued her presentation saying that the main access to Deputy Mayor Dena Wiseman and Councillor Ralph Carey's property is Southside Track and not Pond Path. She said that Pond Path was being cleared anyway, and was historically being cleared for years.
Ms. Conway explained that Section 207 of the Municipalities Act states that “A councillor shall not speak to a matter before the council or a committee of the council where the councillor has a monetary interest in the matter distinct from an interest arising from his or her functions as a councillor. A councillor’s responsibility is to speak on behalf of its residents, and because Deputy Mayor Dena Wiseman was bringing forward a question on behalf of a resident who inquired about the snow clearing of this road for a gentleman in ill health who lived on this road, and who needed medical attention, Dena’s action was within her role as councillor. The discussion came up as a result of her/their position on Council, and therefore not distinct from her function as a councillor.

Ms. Conway indicated also that in most municipalities councillors have properties accessing onto a snow cleared road.

At 8:40 p.m., Deputy Mayor Dena Wiseman, Councillor Ralph Carey and their legal counsel left the chamber.

Mayor Sebastien Despres left the Chair for discussions with Council. He explained that it’s important that Council considers that if the seats of these councillors are vacated without proper cause or without following the proper process, the decision could be reversed by the courts, and that the Town could incur significant legal costs. He explained that Municipal Affairs was very clear in its directions:

"Council must decide whether or not Deputy Mayor Dena Wiseman and Councillor Ralph Carey were in a conflict of interest when they voted on the motions concerning snow clearing."

2015-051 Mayor Sebastien Despres/Councillor Kevin Smart
Be it resolved that Deputy Mayor Dena Wiseman and Councillor Ralph Carey were not in conflict when they voted on the motions concerning snow clearing.
For the motion: Mayor Sebastien Despres, Councillor Kevin Smart
Abstaining: Councillors Ken Brinston, Albert Murphy, Rene Estrada
Motion failed.

A discussion followed concerning the right of these councillors to abstain. The Municipalities Act was then read,

"A councillor shall not abstain from voting on a motion or resolution before the council unless he or she is required to abstain from voting because of a conflict of interest under section 207 or he or she has been permitted to abstain by a majority vote of the other councillors in attendance at the meeting." (Section 212, 2).

"Where a councillor abstains from voting on a motion or resolution, a decision shall not be made on that motion or resolution unless the number of councillors in favor of the motion or resolution is equivalent to or more than a majority of the councillors in attendance at the meeting." (Section 212, 3)."

Councillors Brinston, Murphy and Estrada then signaled that if they were compelled to vote, they would vote against the motion. Councillor Ken Brinston asked if Council could talk to a lawyer and get his opinion before voting on this issue.

2015-052 Councillor Albert Murphy/Councillor Ken Brinston
Be it resolved Council seek advice from a lawyer pertaining to both allegations 1 and 2 (whether conflict existed during the voting of the motions relating to Town Plan and the snow clearing).

Amendment: Mayor Sebastien Despres/Councillor Kevin Smart
Be it resolved Council seek advice from lawyer pertaining to allegation 1 only (snow clearing) because a formal decision was already made relating to the Town Plan.
For the motion: Mayor Sebastien Despres, Councillor Kevin Smart
Against the motion: Councillors Rene Estrada, Ken Brinston, Albert Murphy
Amendment failed.
Motion carried.

2015-053 Councillor Ken Brinston/Councillor Albert Murphy
Be it resolved Council postpone the April 28 public meeting of Council if the lawyer isn’t available before the public meeting is scheduled to take place.
Motion carried unanimously.

2015-054 Councillor Albert Murphy/Councillor Rene Estrada
Be it resolved Geraldine contact Dan Noseworthy and update him on the progress of the alleged conflict of interest issue.
Motion carried unanimously.

There was a discussion on whether both staff should be attending this private meeting. Sebastien noted that the Municipalities Act stipulates the clerk is to attend public meetings of council as well as other meetings as required by council, and in the absence of the clerk, the assistant clerk is to attend. It was noted that Council decided some time ago that it was unnecessary for the Town to pay both staff members to attend meetings, but that Geraldine requested and was granted that the assistant clerk be present during the public meetings. Geraldine explained that each staff member handles specific and separate duties, and during public meetings information may be required from the clerk and assistant clerk.

2015-055 Councillor Rene Estrada/Councillor Ken Brinston
Be it resolved the assistant clerk attend meetings pertaining to the alleged conflicts of interest.
Motion carried unanimously.

At 9:26 p.m., Deputy Mayor Dena Wiseman, Councillor Ralph Carey and their legal counsel were invited back into the chamber.

Mayor Sebastien Despres explained that no decision has been made, that there was a motion made to seek legal advice from a lawyer on allegations 1 and 2. He said the remainder of council will meet with the lawyer as soon as possible.

2015-056 Deputy Mayor Dena Wiseman/Councillor Ken Brinston
Be it resolved Council adjourn the private meeting (friendly hearing) at 9:30 p.m.
Motion carried unanimously.
June 17, 2015

Town of Witless Bay
P.O. Box 130
Witless Bay, NL A0A 4K0

Mayor and Council:

At our meeting on June 15, 2015 the question was raised as to whether Councillors Estrada, Murphy, and Brinston violated Section 206 (1)(h) of the Municipalities Act by their indication they were abstaining from voting during a Hearing held for Deputy Mayor Wiseman and Councillor Carey. At our meeting it was indicated that the Department would assess the information and provide its’ input to Council.

The details, as indicated in the record of the Hearing, are that a Friendly Hearing was held on April 21, 2015 by Council to provide Deputy Mayor Wiseman and Councillor Carey with the opportunity to provide their position on the allegations that they violated the Municipalities Act on their voting on the snow clearing contract of the town. During the meeting, a vote was called as to the violation of the Act by these Councillors at which time Councillors Estrada, Murphy, and Brinston indicated they were abstaining from voting on the matter. With this indication, the Mayor proceeded to advise the Councillors that the Act prohibited them from abstaining from a required vote without the approval of Council. The three Councillors indicated that if they were required to vote they requested that a legal opinion be obtained prior to the vote. This legal opinion was subsequently obtained.

Based on these details, it is the Department’s view that there is nothing to support the application of section 206 to the actions of council or the councillors at the meeting. With the indication by the Councillors they were abstaining from the vote, the Mayor advised them of the consequences of refusing to vote at which time another course of action was determined and implemented.

With this question addressed, it is the Department’s view that Council is now in a position to immediately proceed with the vote on the allegations of conflict of interest by Deputy Mayor Wiseman and Councillor Carey on their voting on the town’s snow clearing contract. Council is also to immediately proceed with the vote on determining if any councillor is in a position of conflict with respect to the adoption of the Town Plan, and resulting from that initiate the required actions to adopt the Plan.

Yours truly,

DAN NOSEWORTHY
Eastern Regional Director

cc: Eastern Regional Office
Mayor Sébastien Després and Councillors
Town Council of Witless Bay
P.O. Box 130
Witless Bay, NL A0A 4K0

Dear Mayor Després and Councillors:

As you are aware there has been significant discussion over the past number of months regarding the Town’s new Town Plan (the Plan), as well as alleged Conflict of Interests. I have had significant representation on these items. As Minister, it is my preference that any municipality will work through such issues, with the assistance of officials of the Department of Municipal and Intergovernmental Affairs (MIGA).

I am advised that you have now reached a decision as a council on whether a number of councilors were in conflict during prior discussions and motions associated with the Town Plan, and have decided they were not in conflict at that time. I understand that this decision was reached in the context of prior discussions and motions that were focused on newer amendments proposed by the current Council, versus discussions on the entirety of the Town Plan.

My intent is to now ensure that no confusion remains regarding the steps Council must now take if you wish to have the proposed town plan considered for registration under the Urban and Rural Planning Act, 2000. As identified in my letter of March 18, 2015, various steps are required of Council to remedy the procedural errors associated with prior motions by Council regarding the Town Plan. Please be advised that before Council discusses or votes on the amended Plan, you must first determine whether any members of Council are in conflict with respect to involvement in renewed discussions or motions to approve the entire Town Plan.

A motion of Council to approve the Town Plan before submission to the Department for registration is a motion regarding the entirety of the plan, inclusive of all its contents and of all its similarities or differences from the plan currently registered for the Town. This is the context under which Council must consider the conflict of interest matter(s). You may wish to consider obtaining legal advice on this particular matter, especially in light of ongoing allegations of conflict, before beginning the process required by the Urban and Rural Planning Act, 2000.

Further, as noted in my letter of March 18, 2015, if Council is still seeking to make amendments to the version of the plan on which the Commissioner held public hearings, you should consider whether a new public hearing is required or advisable. If the amendments are within the purview of the Commissioner’s report (i.e. arose from the submissions to the Public Hearing and discussed within the Commissioner’s Report) then the Act does not require a further public hearing. However, the Act does allow for an additional hearing to occur as such a process
ensures transparency and provides an opportunity for community residents to provide their input on the version of the Plan which Council is considering.

If the amendments Council wishes to consider fall outside the purview of the Commissioner's report then these should be considered new amendments and the process outlined in the Urban and Rural Planning Act, 2000 (sections 14 – 24) must be followed. Based on a letter from Mr. Reginald Garland to my Department dated January 14, 2015, which was copied to Council, it appears that your amendments may be outside the purview of the Commissioner's Report. Council should be certain that you have reviewed the circumstances in determining which course of action is to be taken.

Given the length of time that work on the new Town Plan has taken and the numerous inquiries from residents, it is incumbent on Council to move expeditiously. As such, I ask that Council make your determination on whether any members of Council are in conflict with respect to a new vote regarding the entire Town Plan by June 21, 2015. Further, I ask that Council advise the Department at that time of whether you intend to hold a further or new public hearing, and if so, the date for the hearing. In the absence of a further public hearing I ask that Council's vote regarding whether to approve the plan to submit to the Department for registration occur by July 15, 2015.

I ask for an expeditious and appropriate resolution to this issue, without which I will have no choice but to consider my authorities as Minister to address this matter. To ensure Council fully understands the importance of timely and appropriate action I have asked to meet with Council, scheduled for June 15, 2015.

Sincerely,

KEITH HUTCHINGS, MHA
District of Ferryland
Minister of Municipal & Intergovernmental Affairs

cc: Ms. Geraldine Caul, Town Clerk
cc: Ms. Darlene Dunne, Executive Assistant
cc: Mr. Dan Noseworthy, Eastern Regional Director
cc: Mr. Corrie Davis, Manager – Land Use Planning