



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2011-016

December 13, 2011

### Department of Child Youth and Family Services

#### Summary:

Two Applicants applied to the Department of Child Youth and Family Services under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to a report resulting from an independent review of a particular case. In both cases, the Department denied access to the entire report citing section 30. The Department also argued that the new *Children and Youth Care and Protection Act*, which came into force well after the access requests were filed, operated to remove this record from the scope of *ATIPPA*. The Department therefore concluded that the release of the record at issue should be considered with respect to the provisions of the new *Children and Youth Care and Protection Act*. The Commissioner stated that his task is to review the decisions of the Department to withhold or release records. The Department’s decisions were made prior to the enactment of the *Children and Youth Care and Protection Act*. The Commissioner found that the *ATIPPA* was the applicable legislation at the time the decisions to deny access were made. Therefore, the Commissioner also found that section 30 did not apply to the majority of the record, as it consisted of a review of the policies and procedures that were followed in the handling of the case. He recommended that this information be released. Some of the information was the Second Applicant’s own personal information and it was recommended that this be released as well. Section 30 was found to be applicable where the record contained the personal information of other individuals.

#### Statutes Cited:

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as amended, ss.30, 43; *Child Youth and Family Services Act*. S.N.L. 1998, c. C-12.1, repealed ss. 67, 68, 69, 70; *Children and Youth Care and Protection Act*, S.N.L. 2010 c. C-12.2 ss. 69, 84(3).

## I BACKGROUND

[1] This Report represents the culmination of two separate Requests for Review, filed by two different applicants for the same information. While the First Applicant was not personally involved in the case, the Second Applicant was, and the Second Applicant had given the First Applicant consent to access her personal information. Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”), the First Applicant submitted an access to information request to the Department of Child Youth and Family Services (the “Department”) dated February 14, 2011. The request sought disclosure of records as follows:

*Report of [name of Reviewer], independent child protection consultant, into the case of [name].  
Please redact names if necessary.*

[2] The Second Applicant submitted an access to information request dated April 4, 2011 to the Department requesting disclosure of:

*[Name of Reviewer] independent review into our case, and all information including recommendations.*

[3] On March 3<sup>rd</sup>, 2011, the First Applicant was advised that access to the record had been denied in accordance with section 30 of the *ATIPPA*. On March 7, 2011, this Office received a Request for Review from the First Applicant asking the Commissioner to review the decision of the Department.

[4] On April 7<sup>th</sup>, 2011, the Department sent the Second Applicant a letter advising that access to the record had been denied in full in accordance with section 30 as well. On May 4, 2011 this Office received a Request for Review from the Second Applicant asking the Commissioner to review the decision of the Department.

[5] Attempts to resolve these Requests for Review by informal means were not successful and by letters dated April 6<sup>th</sup>, 2011 (in the case of the First Applicant) and October 12, 2011 (in the case of the Second Applicant), the parties were advised that their Requests for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, all parties were given the opportunity to provide written submissions to this Office in

accordance with section 47. Both Applicants declined to provide a formal submission, but the Department did forward a submission further outlining its position.

## II PUBLIC BODY'S SUBMISSION

[6] The Department states that the record contains

*...“personal information regarding persons other than the [Second] Applicant, and, as the information contained in the Report does not fall into either of the categories enumerated in subsection 30(2) of ATIPPA, it is mandatory that the Department not disclose such personal information regarding persons other than the [Second] Applicant”*

[7] Further, the Department submits that it has already released to the Second Applicant all of the information pertaining to her that was in her file at the Department. As the report the Second Applicant now seeks is based (in part) on that file, it is the Department's position that she has received all information pertaining to her as contained in the Department's file and reflected in the report.

[8] The Department also states that while the Second Applicant is likely aware of some of the personal information of others contained in the report, she is not entitled to the personal information of the others contained in the Department's files that forms the basis for the report.

[9] The Department also makes another argument against release of the record that was not initially made at the time when either Applicant first requested access to the record. The new *Children and Youth Care and Protection Act* (the “new Act”) came into force on June 30, 2011, at which time the *Child Youth and Family Services Act* (the “old Act”) was repealed. The Department sets out its position as follows:

*Subsection 84(3) of the [new Act] states:*

*(3) An order made and a proceeding commenced under the Child, Youth and Family Services Act shall, on the coming into force of this Act, be considered to be an order made and a proceeding commenced under this Act.*

*The Act does not define the term "proceeding". A broad interpretation of this section would mean that a request for disclosure of information could be deemed to be a "proceeding". Subsection 84(3) of [new Act] is consistent with paragraph 29(2)(c) of the Interpretation Act. Paragraph 29(2)(c) states:*

*29. (2) Where an Act or enactment is repealed in whole or in part or a regulation is revoked in whole or in part and other provisions are substituted*

*(c) a proceeding taken under the Act, enactment, or regulation repealed or revoked shall be taken up and continued under and in conformity with the provisions substituted, so far as it consistently may be;*

*Thus, we are of the view that the appropriate assessment of this matter should now occur under the [new Act], in particular, Part VIII, Confidentiality and Disclosure of Information. Section 69 states:*

*69. Notwithstanding the Access to Information and Protection of Privacy Act, the use of, disclosure of and access to information in records pertaining to the care and protection of children and youth obtained under this Act, regardless of where the information or records are located, shall be governed by this Act.*

*Based on this section, the ATIPPA is not applicable to this disclosure request, and, as such, this request must be assessed under the [new Act].*

#### IV DISCUSSION

[10] I would first like to deal with the arguments of the Department concerning the applicability of the new *Children and Youth Care and Protection Act*. The Department seems to argue that the *ATIPPA* is not applicable to this access request because under the new *Act*, a proceeding commenced under the old *Act* is considered a proceeding under the new *Act* and new *Act* states that all requests for information pertaining to a child in care are governed by the new *Act*. However, in this case, there was no proceeding ever commenced under either the old *Act* or the new *Act*, thus making both section 84(3) of the *Child Youth Care and Protection Act* and section 29(2)(c) of the *Interpretation Act* inapplicable.

[11] An access to information request is initiated under the *ATIPPA*. The *ATIPPA* then provides for a request for review by the Commissioner if an Applicant is unhappy with the decision or response of a public body. For the sake of argument, if I accept that an Access to Information request or a Request for Review might be considered a "proceeding", it is one that is commenced under the

*ATIPPA* and not the *Children and Youth Care and Protection Act* or the former *Child Youth and Family Services Act*. At the very least, I do not consider a decision in response to an access to information request to be a “proceeding.” Whether or not a request for review is a “proceeding” under the *ATIPPA*, it certainly is not a “proceeding” under either the old or new legislation cited by the Department.

[12] Aside from the *ATIPPA*, the only other legislation which the Department may have been justified in considering with respect to its initial decisions to withhold this information from the Applicants was the old *Child Youth and Family Services Act*, as this was the law in force at the time that the decisions in response to the access requests were made. The new *Act* could not have been relevant to the decisions which are currently under review, as the Department could not take into consideration legislative provisions which were not in force at the time these decisions were made. The disclosure provisions of the old *Child Youth and Family Services Act* were as follows:

67. In this Part, "information" means personal information obtained under this Act or a predecessor Act which is held on file by or is in the possession of or under the control of the provincial director or a director, and includes information that is written, photographed, recorded or stored by any other means.

68. (1) A person over 12 years of age has the right to and shall, on request, be given access to information relating to himself or herself, including

- (a) information relating to his or her birth family;
- (b) the reasons why he or she was removed from his or her parent;
- (c) the reasons for the continuation of a court order relating to him or her; and
- (d) the identity of former caregivers.

(2) A person who has the custody of a child other than temporary custody has the right to and shall, on request, be given access to information including information about the child referred to in subsection (1).

(3) The right to be given access to information does not extend to information excepted from disclosure under section 69.

(4) Where information excepted from disclosure under section 69 can reasonably be severed, a person referred to in subsection (1) or (2) has the right of access to the remainder of the information.

69. *A person shall be denied access to information where*

- (a) *the disclosure is prohibited under the Adoption of Children Act;*
- (b) *there are reasonable grounds to believe that the disclosure might result in physical or emotional harm to that person or to another person;*
- (c) *where the disclosure would identify a person who made a report under section 15; or*
- (d) *the disclosure could reasonably be expected to jeopardize an investigation under this Act or a criminal investigation.*

70. *A director may, without the consent of another person, authorize the disclosure of information obtained under this Act if the disclosure is*

- (a) *necessary to ensure the safety, health or well-being of a child;*
- (b) *shared with persons entrusted with the care of a child or youth;*
- (c) *necessary for the administration of this Act; or*
- (d) *for research and evaluation purposes.*

[13] The regulations under the *ATIPPA* states that the provisions above (while they were in force) prevail over the *ATIPPA*, which means that a request for information described above would be dealt with according to those provisions and not the *ATIPPA*. As the record at issue does not contain such information, these provisions do not apply and the request should have been dealt with solely under *ATIPPA*. The provisions above deal specifically with disclosure of personal information. The record at issue contains very little personal information and is primarily concerned with a review of policies and procedures that affected the handing of a particular case.

[14] Section 43 of the *ATIPPA* states that the Commissioner may review a decision of the public body in relation to an access request. The new legislation does not apply because it was not in force when the decisions under review were made. The old legislation does not apply to this request for the reasons above. Therefore, the review of these decisions should be made solely with a view to the *ATIPPA*, as this was the only applicable and relevant legislation that affected the initial decisions of the Department to deny access to the Applicants.

[15] The Department has also withheld the record citing section 30(1) of the *ATIPPA*. This section reads as follows:

*30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

[16] Personal information is defined in section 2(0) as follows:

- (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 the individual's personal views or opinions;*

[17] The record consists of a report from an independent reviewer into the manner in which a case involving the Second Applicant was handled by the Department and other involved agencies. It looked into the internal policies and procedures of the Department and the interplay between the Department and the other involved agencies for the purpose of evaluating the performance of the Department in handling this particular case, and to provide recommendations for improvements if warranted. The review did not re-open the initial investigation or reconsider the facts of the case. It simply looked at the policies, procedures and other relevant factors that affected the handling of the case. Further, the *ATIPPA* is clear in its definition of personal information, and information about policies and procedures does not constitute personal information. As such, none of this information also can be withheld under section 30.

[18] Information in the report was intentionally presented in a manner that was least identifying, and mostly consisted of an explanation and examination of the policies and procedures followed by the Department during their investigation. A small amount of personal information was scattered throughout the report, and some of this personal information was about the Second Applicant herself. The rest of the personal information was about others involved in the case, and I agree that it must be withheld from the Applicants.

[19] Section 30(2)(a) states that personal information that is about the applicant cannot be withheld under section 30(1). Clearly, the Second Applicant's own personal information must be released to her. Additionally, section 30(2)(b) states that if the person whom the information is about has



provided consent, then personal information about that person can be released. The Second Applicant provided consent for the release of her personal information to the First Applicant.

[20] The Department also argues that the Second Applicant has already been given all the information pertaining to her in their file. Even if that is correct, it is irrelevant to the Second Applicant's request, because the Second Applicant made a specific request for a copy of a report, rather than a request for all personal information in her file. The decision of a public body must be made and justified on the actual request rather than irrelevant factors.

## V CONCLUSION

[21] As the decisions of the Department to deny access to the record were made prior to the enactment of the *Children and Youth Care and Protection Act*, section 69 of that *Act* does not apply. The Commissioner is authorized to review a decision of a public body. The decisions made in this case should have been based solely on the provisions in the *ATIPPA*, as the old *Child Youth and Family Services Act* contained no provisions governing the release of this type of information. There is no exception in the *ATIPPA* which would permit withholding the entire report, which is what the Department has done. While section 30 operates to protect the personal information of others in the report, the majority of the information contained therein is not personal information and some is the Second Applicant's own personal information. This information should therefore be released, not only to the Second Applicant, but to the First Applicant as well, as the Second Applicant has consented to its release.

[22] Section 30 is applicable to some information in the report, as it relates to identifiable individuals other than the Second Applicant; this information should remain redacted under section 30.



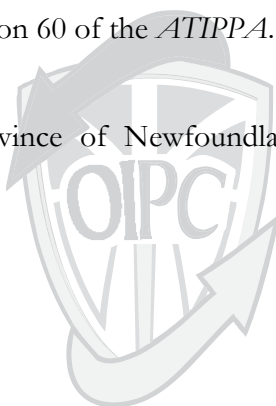
## VI RECOMMENDATIONS

[23] Having found that the Department has improperly applied section 30 to the majority of the record, under authority of section 49(1) of the *ATIPPA*, I recommend that the Department release to the Applicants the requested record, with the exception of a small amount of personal information of the other individuals which I have indicated on a highlighted copy of the record enclosed with this report.

[24] Under authority of section 50(1) I direct the head of the Department to write to this Office and to both Applicants within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

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

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 13<sup>th</sup> day of December, 2011.



E. P. Ring  
Information and Privacy Commissioner  
Newfoundland and Labrador