



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-007

April 18, 2013

Royal Newfoundland Constabulary

Summary:

The Applicant applied under the *Access to Information and Protection of Privacy Act* (“the *ATIPPA*”) to the Royal Newfoundland Constabulary (the “RNC”) for access to a report relating to a motor vehicle accident. The RNC refused access to all responsive records citing section 173 of the *Highway Traffic Act* and sections 22(2)(a) and (b) of the *ATIPPA* (disclosure harmful to law enforcement). The RNC later acknowledged that section 22(2)(a) was inapplicable. The Commissioner determined that the RNC had improperly applied section 173 of the *Highway Traffic Act*; however, the RNC’s application of section 22(2)(b) was appropriate. As a result the Commissioner made no recommendations.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 22(2)(a) and (b); *Highway Traffic Act*, R.S.N.L. 1990, c. H-3, sections 2(xx), 169, 170, 171, 172, 173, 174; *Access to Information Regulations* (N.L. Reg. 11/07), section 5(j).

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request to the Royal Newfoundland Constabulary (the “RNC”) on August 1, 2011. The request sought disclosure of records as follows:

Report Ontario Provincial Police. Accident was June 14, 2010 [named individual]’s Freshwater Road Accident. Ontario Police on behalf of RNC. [second named individual]

[2] The RNC responded to the request on September 20, 2011 and denied access to the responsive records pursuant to section 173 of the *Highway Traffic Act* (the “*HTA*”) and sections 22(2)(a) and (b) of the *ATIPPA*. In a Request for Review dated October 12, 2011 and received in this Office on the same date, the Applicant asked for a review of the decision of the RNC.

[3] Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated February 19, 2013 both the Applicant and the RNC were advised that the Request for Review had been referred for formal investigation pursuant to subsection 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. The parties were informed that the issues to be addressed in the submissions, and which would form the substance of this Report, were:

1. *Was the Public Body correct in its application of section 173 of the Highway Traffic Act and its refusal to disclose information requested by the Applicant pursuant to this provision?*
2. *Was the Public Body correct in its application of section 22(2)(a) (disclosure harmful to law enforcement) and its refusal to disclose information requested by the Application pursuant to this provision?*
3. *Was the Public Body correct in its application of section 22(2)(b) (disclosure harmful to law enforcement) and its refusal to disclose information requested by the Application pursuant to this provision?*

II PUBLIC BODY'S SUBMISSION

- [4] The RNC provided its submission in correspondence dated March 14, 2013. In relation to its claim of section 173 of the *HTA*, the RNC's position is that it is:

“prohibited from providing the full particulars of the investigations, and that severing just a part of this investigative report (i.e., the MVAR) will not ensure compliance with Section 173 of the Highway Traffic Act.

- [5] In relation to section 22(b), the RNC explains:

*[...] the record is a “law enforcement record” as per the definition in section 2(i) of the ATIPPA.
[...] the RNC take the following position with respect to the applicability of Section 22(b)[sic] of ATIPPA [sic] in this case:*

The Chief's belief (that the disclosure could reasonably be expected to expose to civil liability a person who has been quoted or paraphrased in the report) stems from the fact that a law suit regarding this collision is presently before the Court.

The Chief has been given discretion under s.22 of the legislation to withhold materials where he reasonably expects a party could be exposed to civil liability. He has considered the Applicant's request for the records and he has considered the fact that a law suit is outstanding. He has exercised his discretion to withhold these materials.

- [6] The RNC acknowledges in its submission that section 22(2)(a) is not applicable to the present matter.

III APPLICANT'S SUBMISSION

- [7] A written submission was not received from the Applicant.

IV DISCUSSION

[8] The issues to be considered in this matter are whether the Department has properly applied section 173 of the *Highway Traffic Act* and sections 22(2)(b) of the *ATIPPA* to withhold information from the Applicant.

[9] It is necessary for a full understanding of this matter to provide some details of the information requested by the Applicant. The Applicant has requested access to a report prepared by the Ontario Provincial Police (the “OPP”) at the request of the RNC in relation to a fatal motor vehicle accident (the “Report”).

Section 173 of the *Highway Traffic Act*

[10] The RNC’s claim of section 173 of the *HTA* is permitted pursuant to section 6(2) of the *ATIPPA* which states:

6. (2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.

Section 173 of the *HTA* is specifically referenced in section 5(j) of the *ATIPPA Access to Information Regulations*.

[11] Section 173 of the *HTA* states:

173. A written report or statement made or provided under section 169, 170, 171 or 172

(a) is not open to public inspection; and

(b) is not admissible in evidence for any purpose in a trial arising out of the accident except to prove

(i) compliance with section 169, 170, 171 or 172, or

(ii) falsity in a prosecution for making a false statement in the report or statement.

[12] Therefore, information must come clearly within the parameters of at least one of the categories of information enumerated in sections 169-172 of the *HTA* in order to be protected from disclosure. I will review these sections individually starting with section 169 which states:

169. (1) The driver of a vehicle involved in an accident shall

[...]

(b) give to a traffic officer and to anyone sustaining loss or injury and, upon request, to a person at the scene of the accident his or her name, address, the name and address of the registered owner of the vehicle where the owner is a person other than the driver, the registration number of the vehicle and show his or her driver's licence to those persons; [...]

(2) The driver of a vehicle that collides with an unattended vehicle shall stop and either locate and notify the driver or owner of the unattended vehicle of the name and address of the driver, the number of the driver's licence and the registration number of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a written notice giving the information referred to above.

(3) Where the driver cannot locate the other driver or owner or cannot leave the notice required under subsection (2), the driver shall report the details of the collision as soon as possible to a peace officer having jurisdiction where the collision occurred.

(4) The driver of a vehicle involved in an accident resulting in damage to property upon or adjacent to a highway, other than a vehicle under subsections (2) and (3), shall take reasonable steps to locate and notify the owner or person in charge of the property of that fact and of the name and address of the driver, the number of the driver's licence and the registration number of the vehicle.

(5) Where the driver cannot locate the owner or person in charge of the property referred to in subsection (4), he or she shall report the details referred to in subsection (4) to a peace officer having jurisdiction where the accident occurred. [...]

[13] The driver of the vehicle involved in the accident, and all passengers of that vehicle, are deceased. They did not prepare any of the information referred to in section 169 of the *HTA* and, consequently, neither the Report nor its contents falls within the parameters of section 169 of the *HTA*.

[14] Section 170 of the *HTA* states:

170. (1) Where an accident results in injury or death to a person or in property damage to an apparent extent of \$1,000 or more, the driver of the vehicle involved in the accident shall immediately

make a written report of the accident to the nearest peace officer having jurisdiction in the area where the accident occurs.

(2) Where the driver referred to in subsection (1) is incapable of making the report required by that subsection and there is another occupant of the vehicle capable of making the report, the occupant shall make the report required to be made by the driver.

(3) Where a report has not been made under subsection (1) or (2) and the driver or occupant is not the owner of the vehicle, the owner shall immediately after learning of the accident make the report.

(4) Where the driver referred to in subsection (1) is the owner, and is alone and incapable of making the report required by that subsection he or she shall make the report immediately after becoming capable of making it.

[15] The same analysis which I applied to section 169 applies to section 170 of the *HTA*. The Report does not fall into the category of information described in section 170, nor is such information contained in the Report.

[16] I will delay an examination of section 171 for a moment and instead turn my attention to section 172 which states:

172. (1) Where a motor vehicle that shows evidence of having been involved in a serious accident or having been struck by a bullet is brought into a garage, parking station, parking lot, used-car lot or repair shop, the person in charge of the place into which the vehicle is brought shall immediately report that fact to the nearest peace officer or police station, giving the name and address of the owner or operator and also the identification plate number and a description of the vehicle.

(2) A report need not be made under this subsection (1) where the owner or operator of the vehicle is also the person in charge of the place into which the vehicle is brought and has made a report under section 169 which includes the information required under subsection (1).

(3) A Provincial Court judge who investigates or holds an inquiry respecting the death of a person from an accident in which a vehicle was involved shall immediately upon the conclusion of the investigation or inquiry make a written report to the registrar giving the time and place of the accident, the name of the person killed and the name and address of the driver of the vehicle involved.

[17] The Report was not prepared by a person in charge of a garage, parking station, parking lot, used-car lot or repair shop, nor is any such information contained therein. Consequently, section 172 of the *HTA* also cannot be claimed to withhold the Report from disclosure

[18] Finally I must turn my attention to section 171 of the *HTA* which states:

171. (1) A peace officer who has witnessed or investigated an accident shall immediately forward to the Chief of Police or the Officer Commanding the Royal Canadian Mounted Police Force in the province a written report, in a form to be prescribed by the registrar, setting out full particulars of the accident including the names and addresses of the persons involved and the extent of the personal injuries or property damage and the Chief of Police or the Officer Commanding shall send a copy of the report to the registrar and to the minister.

(2) Where a report has been made under section 169, 170 or this section, the registrar or the minister may require the driver involved or a peace officer or person having knowledge of the accident or of personal injuries or property damage resulting from the accident to provide additional information or to make a supplementary report.

[19] “Peace officer” is defined in the *HTA* as follows:

2. In this Act

[...]

(xx) "peace officer" includes a member of the Royal Newfoundland Constabulary, the Royal Canadian Mounted Police Force stationed in the province, a member of a municipal police force and a park warden appointed under the Public Service Employment Act (Canada) who is stationed in the province;

[20] The records provided to me indicate that the members of the OPP who prepared the Report were sworn into the RNC and are, therefore, within the definition of “peace officer” under the *HTA*. I must now determine if the Report is a “*written report, in a form to be prescribed by the registrar*” a copy of which is provided “*to the registrar and to the minister*”. It is my opinion that this prescribed form is meant to describe a specific form namely, a Motor Vehicle Accident Report (“MVAR”) which is a carbon copy form completed by peace officers in relation to motor vehicle accidents indicating the necessary details of the incident. It is clear that the purpose of the report described in section 171 is to provide particulars of the persons involved in the accident and the extent of any damage or injuries. This report is not meant to capture any investigative information in relation to the accident. As a result, section 171 of the *HTA* also fails to protect the requested information from disclosure and section 173 may not be claimed as a blanket exception to the disclosure of the Report prepared by the OPP.

Section 22(2)(b) of the ATIPPA

[21] Section 22(2)(b) of the *ATIPPA* states:

22 (2) The head of a public body may refuse to disclose information to an applicant if the information [...]

(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record; or [...]

[22] Section 2(i) of the *ATIPPA* defines “law enforcement” as:

(i) policing, including criminal intelligence operations, or

(ii) investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed;

[23] The Report was prepared by sworn-in members of the RNC police force for the purpose of, amongst other things, investigating whether any penalty or sanction should be imposed. Consequently, it is clear to me that the Report falls squarely within both aspects of the definition of a “law enforcement” and, therefore, is a “law enforcement” record. I must now determine whether the disclosure of the Report “*could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record*”. The RNC has provided evidence of two on-going court proceedings which relate to this matter and based on the nature of the Report and the nature of those proceedings, there is a reasonable expectation of exposure to liability for the author or those persons quoted or paraphrased therein. I should be clear that this is, in no way, an indication that the Report makes any pronouncements on liability or wrong-doing. The *Act* does not require any findings of liability, rather all that is required is a reasonable expectation of exposure to liability. I accept that where legal proceedings are ongoing, the disclosure of related records in a case of this nature could expose individuals to liability.

[24] Furthermore, as it is difficult to predict how the legal proceedings will unfold, or who will become involved it is not possible for me to recommend that the Applicant be provided with even a severed copy of the Report.

V CONCLUSION

[25] The RNC has failed to establish the application of section 173 of the *Highway Traffic Act* to the withheld records; however, the RNC remains entitled to withhold the information on the basis of section 22(2)(b) of the *ATIPPA*. I would point out, however, that section 22 is not a mandatory exception and it is within the discretion of the RNC to release the requested information to the Applicant or portions thereof especially in consideration of the nature of the Report, the time which has passed since the accident and the likelihood of the Report being disclosed in the legal proceedings.

VI RECOMMENDATIONS

[26] In view of the conclusions I have reached above, there is no need for me to make any recommendation to the RNC under paragraph 49(1)(a) of the *ATIPPA*.

[27] Although I have made no recommendations, under the authority of section 50 of the *ATIPPA* I direct the head of the RNC to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the RNC with respect to this Report.

[28] In addition, in accordance with subsection 49(2) of the *ATIPPA*, I hereby notify the Applicant of the right to appeal the decision of the RNC to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60. The Applicant must file any appeal within 30 days after receiving a decision of the RNC referenced above.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18th day of April 2013.

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