



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-011

April 25, 2017

Royal Newfoundland Constabulary

Summary:

The Applicant applied under the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015”) for access to the policies and procedures of the Royal Newfoundland Constabulary (the “RNC”). The RNC refused to release the records, relying on the exception to disclosure in section 31(1)(c), claiming that disclosure of the records would reveal investigative techniques and procedures currently used, or likely to be used. The RNC also submitted that portions of the records contained legal advice and should be withheld pursuant to subsection 30(1). Following a review of the records and considering the RNC’s submissions, the Commissioner rejected the RNC’s claim to subsection 30(1) but recommended that portions of one policy be withheld pursuant to paragraph 31(1)(c). The Commissioner recommended that the remaining records at issue be released to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, SNL 2015, c.A- 1.2, ss. 3, 31(1)(c), 43(1), 44(4).

Royal Newfoundland Constabulary Public Complaints Regulations, CNLR 970/96

Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990

Authorities Cited:

OIPC NL Reports [A-2008-005](#); [2007-003](#); OIPC ON Interim Report [MO-2347-I](#); [Reid v. Jesso et al \(2000\)](#), ([Royal Newfoundland Constabulary Public Complaints Commission](#)); *Newfoundland and Labrador (Information and Privacy*

Commissioner) v. Eastern Regional Integrated Health Authority,
2015 NLTD(G) 183.

Other Resources:

[Ontario Major Case Management Manual](#) (Toronto: Ontario
Ministry of Community Safety and Correctional Services, 2004);
*OIPC NL Public Body Guidelines for Preparing for an Access
Complaint.*



I BACKGROUND

- [1] The Applicant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) on December 29, 2016 to the Royal Newfoundland Constabulary (the “RNC”) for the following information:

Royal Newfoundland Constabulary Policies and Procedures

- [2] The RNC maintains an intranet-based policy and procedure manual (the “Manual”) for its officers and civilian staff detailing approximately 150 policies and procedures guiding the RNC’s operations. Topics addressed include: the RNC’s organization and structure, its guidelines for responding to particular criminal offences, conducting investigations, recruitment, uniform standards, and many others. The Chief of the RNC also, from time to time, issues Routine Orders amending the RNC’s policies and procedures.
- [3] The RNC refused access to the responsive records, relying on the exception in paragraph 31(1)(c) of the *ATIPPA, 2015* that allows a public body to withhold information that could reasonably be expected to “reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement.”
- [4] The Applicant subsequently filed a complaint with this Office. During the informal resolution process, this Office worked with the Applicant to identify 11 policies and procedures of particular interest to the Applicant. The RNC released 2 in full and 9 with redactions. The Applicant objected to the redactions applied to 7 of the 9 redacted policies and procedures. As the complaint could not be fully resolved it was referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.
- [5] During the formal investigation of this matter, the RNC consented to the release of the following additional policies and procedures without any redactions:

- (a) Abuse/Violent Crimes Against Persons;
- (b) Assaults;

- (c) Laying Charges;
- (d) Police Notebooks; and
- (e) Statements.

[6] The outstanding issue to be addressed in this Report is the application of sections 30(1) and 31(1)(c) to the information redacted from two policies and procedures:

- (a) Criminal Investigation Division; and
- (b) Discipline.

II PUBLIC BODY'S POSITION

[7] The RNC submits that its policies and procedures are instructions and guidelines for police officers and, as such, contain information detailing investigative techniques and procedures which may be withheld from disclosure pursuant to paragraph 31(1)(c) of the *ATIPPA, 2015*.

[8] The RNC also submits that portions of the Discipline policy should be withheld as solicitor client privileged information pursuant to subsection 30(1).

III APPLICANT'S POSITION

[9] The Applicant submits that the information sought is already generally known to the public due its frequent citation in decisions of the RNC Public Complaint Commissioner. The Applicant also contends that similar policies and procedures are made available to the public in other jurisdictions and that the two records should therefore be disclosed in full pursuant to his access request.

IV DECISION

[10] Subsection 30(1) of the *ATIPPA, 2015* reads:

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

(a) *that is subject to solicitor and client privilege or litigation privilege of a public body; or*

(b) *that would disclose legal opinions provided to a public body by a law officer of the Crown.*

[11] The RNC did not claim this particular exception until it notified this Office of its intention to do so on April 7, 2016. Every public body notified of an access to information complaint by this Office is provided with a copy of a document entitled “*Public Body Guidelines for Preparing for an Access Complaint*”, which states that:

Normally, all exceptions claimed should be claimed at the time a response to the access request is provided to the Applicant. Should a Public Body wish to invoke any additional discretionary exceptions under the ATIPPA, 2015, it must inform the Applicant and this Office of its intention to do so within 10 business days of receipt of correspondence from this Office notifying the Public Body that the Applicant has filed a Complaint. Any discretionary exceptions claimed after this period will not be considered by this Office.

[12] As the RNC failed to inform of its intention to claim this additional exception within the requisite time period, it ordinarily would not be considered. I will, however, provide my analysis and conclusions for the benefit of the parties.

[13] Previous reports of this Office as well as decisions of the Supreme Court of Newfoundland and Labrador have addressed the application of subsection 30(1). Key considerations when assessing a claim of solicitor client privilege are articulated in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, 2015 NLTD(G) 183 at paragraph 24:

4. *The necessary elements of a valid claim to privilege:*

- i) a communication between a solicitor, acting in his or her professional capacity, and the client;*
- ii) the communication must entail the seeking or giving of legal advice, and*
- iii) the communication must be intended to be confidential.*

[14] The RNC asserted that section 30(1) applies in particular to one portion of the Discipline policy which details the role of the RNC Legal Services Unit in providing an opinion to the Chief of the RNC or collaborating with the Director of Public Prosecutions. The RNC contends that this information is subject to solicitor client privilege. As noted above, in order to establish a valid claim of legal advice privilege, the information must be a communication between a solicitor and a client which entails the seeking or giving of legal advice. While the section speaks to the role of counsel in providing an opinion, it does not conform to the necessary elements of a valid claim of legal advice privilege.

[15] Paragraph 31(1)(c) of the *ATIPPA, 2015* reads:

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

...

(c) reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement;

[16] Paragraph 31(1)(c) refers to investigative techniques and procedures in “law enforcement”, which is defined at paragraph 2(n) as:

- (i) policing, including criminal intelligence operations, or*
- (ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment;*

[17] The two records presently at issue describe the RNC’s procedures for conducting investigations and the discipline of officers. This Office previously considered the meaning of “law enforcement” in reports A-2008-005 and 2007-003. Given the topics addressed by the policies and procedures (discussed in more detail below) and the mandate of the RNC under the *Royal Newfoundland Constabulary Act* to provide police services, I find that the information in the Criminal Investigation Division policy clearly relates to “law enforcement”. The record relating to the Discipline policy relates to law enforcement in the sense that it

applies to officers and employees alleged to have violated their law enforcement and other duties. Even if it did describe investigatory techniques, it does not reveal anything because those subject to it are already aware of its content via the RNC's intranet. Accordingly, I find that the RNC cannot apply paragraph 31(1)(c) to withhold any portion of the Discipline policy.

[18] In order to rely on paragraph 31(1)(c) in regards to the Criminal Investigation Division policy, the RNC must show that the disclosure of the information could reasonably be expected to reveal investigative techniques and procedures currently used or likely to be used in law enforcement.

[19] Section 31(1)(c) is addressed in Report A-2008-005. The context involved an investigation into workplace harassment that was determined not to be a "law enforcement matter" and, even if it was, the techniques and procedures subject to disclosure were of a routine and customary nature and would not have revealed "specialized or covert investigative techniques or procedures".

[20] The Applicant contends that portions of the Manual have already been disclosed in proceedings pursuant to the *Royal Newfoundland Constabulary Public Complaints Regulations*. Indeed, paragraph 3(1)(j) of those regulations specifically makes it an offence for an officer to "carry out his or her duties in a manner contrary to the Policy and Procedures Manual". Following a review of the Public Complaints Commission's published decisions, I note that the Manual is frequently relied on by adjudicators and the Court as an authority and portions are often reproduced in decisions.

[21] The Criminal Investigation Division policy is referenced and reproduced in part in *Reid v. Jesso et al (2000)*, (*Royal Newfoundland Constabulary Public Complaints Commission*). That decision cites the Criminal Investigation Division policy and reproduces the first two sections of it. Accordingly, that portion of the record is already within the general knowledge of the public.

[22] Similarly, numerous policies and procedures from the Manual have been entered in full as public exhibits to the presently ongoing Commission of Inquiry Respecting the Death of Donald Dunphy. While the Criminal Investigation Division policy is not among these exhibits, inquiries of this nature may also be a source of public disclosure of information.

[23] Finally, in terms of the remainder of the Criminal Investigation Division policy as well as the Manual generally, it is relevant to note that a number of other jurisdictions within Canada publish a wide range of information relating to the conduct of police investigations. Much of this information is similar, although not always identical, to the policy and procedure presently at issue. One example of such publicly available information is the Ontario Ministry of Community Safety and Correctional Services' "Ontario Major Case Management Manual", which is available online. This document details the organization of an investigation; the roles and responsibilities of officers and supervisors; and the use of various resources and techniques in collecting and analyzing evidence.

[24] Section 8(1)(c) of Ontario's *Municipal Freedom of Information and Protection of Privacy Act* has been interpreted to require a public body to establish that disclosure would reveal investigative techniques or procedures and that such disclosure would harm or hinder their effective utilization in the future. This is most clearly articulated in the Ontario Information and Privacy Commissioner's decision in Interim Order MO-2347-I addressing a request for access to portions of the Toronto Police Service's policy and procedures manual:

In order to meet the "investigative technique or procedure" test in section 8(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487]. In addition, the techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to," the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in Ontario (Attorney General) v. Ontario

(Information and Privacy Commissioner), [2003] O.J. No. 2182 (Div. Ct.), Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 1998 CanLII 7154 (ON CA), 41 O.R. (3d) 464 (C.A.).

[25] Section 31 is one of several discretionary exceptions in the *ATIPPA 2015*, most of which do not make any reference to harm resulting from disclosure. While some do speak directly to an expectation of harm, section 31(1)(c) only requires a reasonable expectation that disclosure would reveal investigative techniques and procedures.

[26] To date, we have not read-in any requirement to establish harm to any of the *ATIPPA, 2015* exceptions that do not expressly reference harm (such as, among other things, section 27 (cabinet confidences), section 29 (policy advice or recommendations), section 30 (legal advice), or section 32 (confidential evaluations)). Accordingly, I decline to apply the test established by the Ontario Information and Privacy Commissioner. Instead, I am satisfied that section 31(1)(c) empowers the RNC to withhold information that would reveal investigative techniques without a requirement to consider whether disclosure would harm the utilization of those investigative techniques.

[27] Had the legislature intended to require the RNC to establish harm stemming from revelation of an investigative technique or procedure, language requiring same could have been included as is found in section 21(1)(c) of Alberta's *Freedom of Information and Protection of Privacy Act*:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(d) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

[28] As referenced above in this Office's decision in Report A-2008-005, "investigative techniques" refers to "specialized or covert investigative techniques". I am further satisfied that in order to meet this definition the techniques must not be already publicly available, obvious or otherwise already within the general knowledge of the public. Therefore, while the RNC need not establish that disclosure would result in harm, the information that may be

withheld is narrow: it is only specialized techniques or procedures that are not already in the general public knowledge or otherwise publicly available. It is on this basis that I will review the Criminal Investigative Division policy pursuant to section 31(1)(c).

[29] The Criminal Investigation Division policy provides general guidance to officers in conducting investigations; advice on developing investigative leads; checklists for investigators and supervisors; and procedures and duties for members assigned to the Criminal Investigation Division. The RNC opposes the release of information contained under the following headings:

- (a) Developing Investigative Leads and Proactive Strategies;
- (b) Call-Out/Stand-By Procedures CID;
- (c) CID Night Shift; and
- (d) Weekend Supervisory Duties.

While it is unnecessary for the RNC to establish harm in order to prove that the information may be withheld, the RNC contends that knowledge of this information could undermine or jeopardize an ongoing investigation or the prosecution of a criminal charge.

[30] This policy relates to law enforcement and discusses the conduct of investigations. It also makes reference to various investigative techniques such as collecting and preserving physical evidence and the use of electronic probes. As the information under the heading of “Developing Investigative Leads and Proactive Strategies” makes specific reference to various techniques for conducting police investigations, I find that the exception provided by paragraph 31(1)(c) properly applies to withhold this information. Although other jurisdictions have published similar information about the conduct of police investigations, I am satisfied that the information I have recommended that the RNC continue to withhold has been developed by the RNC in its own specific context and is sufficiently dissimilar to that which is publicly available elsewhere.

[31] The remaining sections of the policy under the headings of “Call-Out/Stand-By Procedures CID”, “CID Night Shift” and “Weekend Supervisory Duties” detail procedures to

follow in response to various situations: which personnel to consult, and duties of officers and supervisors. I am not convinced that the procedures covered are “investigative”. Therefore, paragraph 31(1)(c) cannot be applied to withhold them from disclosure.

V RECOMMENDATIONS

[32] Under the authority of paragraph 47 of the *ATIPPA, 2015* I recommend that the Royal Newfoundland Constabulary release to the Applicant the following policies and procedures in full:

- (a) Abuse/Violent Crimes Against Persons;
- (b) Assaults;
- (c) Laying Charges
- (d) Police Notebooks;
- (e) Statements; and
- (f) Discipline;

[33] Further under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Royal Newfoundland Constabulary continue to withhold a portion of the Criminal Investigations Division policy. I am providing the Royal Newfoundland Constabulary with a copy of the policy, which is 8 pages in length, and the areas highlighted in yellow are the areas that may be withheld pursuant to paragraph 31(1)(c). I recommend that the Royal Newfoundland Constabulary release to the Applicant the remainder of the policy.

[34] As set out in section 49(1)(b) of the *ATIPPA, 2015* the head of the Royal Newfoundland Constabulary must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report (in this case, the Applicant) within 10 business days of receiving this Report.

[35] Please note that within 10 business days of receiving the decision of the Royal Newfoundland Constabulary under section 49, the Applicant may appeal that decision to the

Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[36] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of April, 2017.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador

