



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2010-007

June 8, 2010

Office of the Citizens' Representative

Summary:

The Applicant applied to the Office of the Citizens' Representative (the "OCR") under the *Access to Information and Protection of Privacy Act* (the "ATIPPA") for access to records pertaining to Access to Information Requests made by the Applicant to two government departments and in respect of a corresponding investigation by the OCR. The OCR refused access to all records claiming section 30.1(c) (Disclosure of House of Assembly service and statutory office records) of the ATIPPA. The OCR advised that the information requested by the Applicant was collected in the course of an investigation under the *Citizens' Representative Act* and was connected with the investigatory functions of the OCR. The OCR directed the Applicant to the two relevant departments as an alternative source of the requested information. The Commissioner agreed with the OCR and found that the requested information was connected with the investigatory functions of the OCR and is protected from disclosure pursuant to section 30.1(c) of the ATIPPA. Consequently, the Commissioner made no recommendations to the OCR. The Commissioner did, however, suggest that the OCR improve its administrative procedures in respect of completing Access to Information Request forms.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 2(p)(v), 9 and 30.1(c); *Citizens' Representative Act*, S.N.L. 2001, c. C-14.1, as amended ss. 15 and 31(1); *House of Assembly Accountability, Integrity and Administration Act*, S.N.L. 2007, c. H-10.1, as amended, s. 2(r)(v).

Other Resources:

Newfoundland and Labrador, Access to Information and Protection of Privacy Office, *Access to Information ATIPP Act: Part I-III, Policy and Procedures Manual* (St. John's: Department of Justice, 2008), available at: http://www.justice.gov.nl.ca/just/info/access_policy_and_procedures_manual.pdf; *Concise Oxford English Dictionary* 10th Edition, Revised, New York: Oxford University Press (2002); Citizens' Representative of Newfoundland and Labrador website available at: <http://www.citizensrep.nl.ca/>.

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 Office of the Citizens’ Representative (the “OCR”), which was received on January 28, 2010, in which he sought the disclosure of records as follows:

Access to the Records’/Information an complete List of ALL REQUESTS made by the Applicant to [two departments of the Government of Newfoundland and Labrador] under the Access to Information and Protection of Privacy Act, and including the dates the complaint/REQUEST was made, and the Response by those two Departments, and any action taken, including the dates of such actions ALL provide to [the OCR Investigator], with the Office of the Citizen’s Representative File # [FILE NUMBER] Letter dated November 3rd, 2006 to [Deputy Minister of one of the aforementioned Government departments] from [the OCR Investigator].

- [2] By correspondence dated January 29, 2010, the OCR advised the Applicant that access to the requested records had been refused pursuant to section 30.1(c) (Disclosure of House of Assembly service and statutory office records) of the *ATIPPA*.
- [3] In a Request for Review dated February 10, 2010, and received by this Office on the same date, the Applicant asked that this Office: 1) determine whether certain administrative procedures which were employed by the OCR in respect of the handling of the Applicant’s access request were properly carried out and 2) review the record to determine whether the OCR had appropriately applied section 30.1(c).
- [4] Attempts at informal resolution of this matter were unsuccessful as the Applicant maintains that the records are disclosable pursuant to sections 31(1) (information disclosable if in the public interest) and 39(e) (disclosure of personal information for the purpose of complying with a subpoena, warrant or order) of the *ATIPPA*. That is, the Applicant believes he may obtain these records through compulsion by the courts by reason of public interest but in order to obtain this order the Applicant suggests that he must first obtain a formal report from this Office.
- [5] By letters dated March 12, 2010, both the Applicant and the OCR 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*. The OCR declined to make a submission, choosing instead to rely on the documentation and position it had already put forth during informal resolution. The Applicant provided a five-page submission in support of his position.

II PUBLIC BODY'S SUBMISSION

[6] The OCR has chosen to rely on the position and argument it put forth during informal resolution. During those attempts, the OCR provided the background of this matter and relied on section 30.1(c) of the *ATIPPA* in support of its position to refuse access to the records.

[7] According to the OCR, the Applicant filed a complaint with the OCR in 2006 which resulted in an investigation being conducted by the OCR (the "Complaint File"). In the course of investigating the Complaint File and in accordance with the OCR's governing legislation, the *Citizens' Representative Act*, information was compelled and disclosures were received by the OCR. An investigation was conducted and the Complaint File was closed. The OCR reported this decision to the Applicant.

[8] The OCR indicates that, subsequent to the Complaint File being closed, the Applicant filed the aforementioned access request with the OCR. The OCR reviewed the Complaint File and determined that its contents constituted "evidence collected from respondents by staff investigators in the course of their duties" and were, therefore, exempt from disclosure pursuant to section 30.1(c) of the *ATIPPA*.

[9] In support of its reliance on section 30.1(c) the OCR submitted:

OCR is an independent Office of the House of Assembly that is primarily responsible for the receipt and confidential investigation of complaints regarding matters of administration. Complaints are typically registered against provincial departments, agencies, boards and commissions that are captured by the Citizens' Representative Act and its Schedule. For purposes of consideration under ATIPPA, OCR is a 'statutory office' as referenced in Section 2(r)(v) of the House of Assembly Accountability, Integrity and Administration Act.

[...]

Crucial to its ability to access information in the course of an investigation is its exemption from disclosing records connected with its investigatory function under the ATIPPA. We contend that the spirit and intent of the exemption was, inter alia, to preserve the integrity of the investigative processes used by Statutory Officers of the House, and to provide a measure of comfort for complainants, respondents and witnesses participating in investigations that information will not be recklessly or mistakenly dispensed in access requests to OCR flowing from OCR investigations. If OCR cannot ensure respondents and witnesses that information it receives stays within the confines of the investigatory function clause in Section 30.1(c), it would have an exceedingly difficult time assuring that both full documentary disclosure and candid witness evidence has been given. Its investigative powers would, thus, be fettered.

III APPLICANT'S SUBMISSION

[10] The Applicant filed a five-page detailed submission on this matter. I will summarize my understanding of those parts which are relevant to this Review. The Applicant submits that there are certain records collected during an investigation by the OCR which complainants should have a right to.

[11] The Applicant referenced invoices which he had received from the relevant government departments referenced in his access request. It is my understanding that the Applicant requires the requested records to verify the accuracy of these invoices.

[12] The Applicant cites various sections of the *Citizens' Representative Act* which he states are indicative of how an investigation of the OCR should be carried out, including a reference to section 31 which outlines the ability of the OCR to compel information and documentation during an investigation.

[13] The Applicant goes on to submit that sections 18 and 47 of the *Citizens' Representative Act* are in conflict and, on this basis, he concludes that he is entitled to ask this Office to review the decision of the OCR to withhold the records. He explains these concerns in some detail and also submits that section 47 provides him with the right to appeal the decision of this Office should this Office accept the decision of a public body to withhold records or information.

[14] In respect of the Applicant's entitlement to request a Request for Review from this Office I note that no objection has been made by either the OCR or this Office with respect to this Review. The issue of whether an Applicant has a right to appeal a decision of this Office has not been raised as an issue in this Review; however, I will note that an applicant's right to appeal is contained in section 60 of the *ATIPPA* which grants an applicant the right to appeal a decision of a **public body**, not a decision of this Office. Consequently, it is not necessary for me to examine either of these issues further.

[15] Finally, the Applicant believes that there is nothing which would prevent the information collected under an OCR investigation from being disclosed by a court order.

IV DISCUSSION

[16] The issues to be decided are as follows:

- a. Whether the administrative procedures employed by the OCR in handling the Applicant's access request were properly carried out; and
 - b. Whether section 30.1(c) of the *ATIPPA* is applicable to any information in the responsive records.
- a. Whether the administrative procedures employed by the OCR in handling the Applicant's access request were properly carried out.**

[17] The Applicant has raised an issue with the fact the OCR did not complete the "For Public Body Use Only" box on his Access to Information Request form. This box is supposed to contain the date on which the form was received and the file number assigned to the access request.

[18] The *ATIPPA* makes no mention of how a public body must complete an Access to Information Request form nor is any obligation or duty explicitly imposed on a public body in respect of same. One of the duties placed on a public body in responding to an access request is stated in section 9 of the *ATIPPA*:

9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

[19] The Department of Justice ATIP Office's *Access to Information ATIP Act: Part I-III, Policy and Procedures Manual* (the "ATIP Manual") states under the heading "Receiving a Request":

On the day an access request is received, the Access and Privacy Coordinator, or whichever employee first receives the application, must date stamp the application.

[20] The purpose of this statement is to enable proper tracking of access requests and to ensure that access requests are handled within the legislative timeframes. In this manner, the public body, and the Applicant if need be, is able to determine precisely when the time commenced for responding to the access request. Failure to stamp an access request may lead to confusion and, perhaps, an inability to properly track the timeline employed.

[21] The Applicant's access request was not date stamped on the date it was received. However, the Applicant, himself, did date the access request – January 28, 2010. On January 29, 2010, the OCR responded to the Applicant acknowledging receipt of his access request and providing the OCR's response. Consequently, the OCR did respond without delay to the Applicant's access request despite failing to date-stamp same. The failure to date the access request did not negatively affect the processing of the Applicant's access request.

[22] I have no recommendation to make in this regard as the OCR did not breach any provision of the *ATIPPA*; however, I suggest that the OCR abide by the administrative procedures recommended by the ATIP Manual in completing Access to Information request forms so as to avoid problems and confusion in the future.

b. Whether section 30.1(c) of the *ATIPPA* is applicable to any information in the responsive records.

[23] As noted, the OCR withheld the records from the Applicant on the basis of section 30.1(c). Section 30.1(c) states as follows:

30.1 The Speaker of the House of Assembly or the officer responsible for a statutory office shall refuse to disclose to an applicant information [...]

(c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.

[24] Section 30.1(c) has not yet been considered by this Office, nor could any reference to any comparable provision be found in the reports of any other jurisdiction in Canada. Section 2(p)(v) of the *ATIPPA* indicates that the definition of a public body includes “the House of Assembly and statutory offices as defined in the *House of Assembly Accountability, Integrity and Administration Act*. The OCR is clearly a “statutory office” as defined in section 2(r)(v) of the *House of Assembly Accountability, Integrity and Administration Act*. In respect of what constitutes “investigatory functions”, the *Concise Oxford English Dictionary* defines “investigate” and its derivative “investigatory” as follows:

• *v. carry out a systematic or formal inquiry into (an incident or allegation) so as to establish the truth. ✕ carry out research into (a subject). › make a search or systemic inquiry.*

[25] It further defines “function” as follows:

• *n. 1 an activity that is natural to or the purpose of a person or thing [...]*

[26] These definitions provide useful guidance in this particular circumstance as no relevant jurisprudence or report could be located. This does not mean that further consideration of the definition of “investigatory functions” will not be required in relation to another set of facts in another matter. Furthermore, it is important to note that section 30.1(c) is broad and protects records “**connected with** the investigatory functions of the statutory office.” It encompasses more than actual investigation documents or information and this may necessitate further consideration in another matter.

[27] According to the website of the OCR:

The primary work of the Citizens’ Representative is to accept complaints from citizens who feel they have been treated unfairly with respect to their contact with government offices and agencies. The Citizens’ Representative and his staff will attempt to mediate citizens’ complaints and if this is not possible, will undertake an impartial and unbiased investigation. If the complaint cannot be resolved

throughout the investigation, an investigation report is generated and recommendations can be made to the House of Assembly.

[28] Sections 15 and 31(1) of the *Citizens' Representative Act* state:

15. The Citizens' Representative may, on a written complaint or on his or her own initiative, investigate a decision or recommendation made, including a recommendation made to a minister, or an act done or omitted, relating to a matter of administration in or by a department or agency of the government, or by an officer, employee or member of the department or agency, where a person is or may be aggrieved.

[...]

31. (1) The Citizens' Representative may require a person who, in his or her opinion, is able to give information relating to a matter being investigated by him or her

(a) to furnish the information to him or her; and

(b) to produce a document, paper or thing that in his or her opinion relates to the matter being investigated and that may be in the possession or under the control of the person,

whether or not the person is an officer, employee or member of the department or agency of the government and whether or not the document, paper or thing is in the custody or under the control of a department or agency of the government.

[29] The self-defined “primary work” of the OCR is to accept, mediate, investigate and report on complaints from citizens in respect of government offices and agencies. The power of the OCR to investigate complaints is codified under section 15 of the *Citizens' Representative Act*. These actions by the OCR clearly take the form of a “systematic or formal inquiry” into a matter and the objective is to verify the truth of the complaint or the actions giving rise to the complaint. Consequently these actions must constitute an “investigation” as defined above and must, in turn, be “investigatory” in nature.

[30] Furthermore, these actions form part of the natural and regularly occurring activities of the OCR; they are a function of the OCR. In relation to this function, section 31 grants the OCR the ability to compel information and documentation submitted during an investigation. Consequently, as this is naturally related to the investigation this is also a function of the OCR or, at the very least, is connected thereto. As a result, this information and documentation would be directly connected with and form a part of the investigatory functions of the OCR.

[31] Additionally, the Applicant clearly acknowledges in his access request that he is seeking documents which were provided to the OCR in relation to his Complaint File. The Applicant goes so far as to indicate the Complaint File number.

[32] Consequently, the records requested by the Applicant are clearly connected with the investigatory functions of the OCR and are, therefore, mandatorily exempted from disclosure and the OCR acted properly in refusing to provide the Applicant access to same.

V CONCLUSION

[33] I have found that there is no statutory obligation upon a public body to complete the administrative portion of an Access to Information Request form. There is, however, a provision instructing public bodies to do so within the *ATIPP Manual*. So long as a public body abides by the provisions of the *ATIPPA*, such an oversight should have minimal, if any, impact on the handling of the access request. Other than this small oversight, the OCR handled the access request of the Applicant properly and in a timely fashion. I have no recommendation to make in this regard as the OCR did not breach any provision of the *ATIPPA*. I suggest, however, that the OCR abide by the administrative procedures recommended by the *ATIPP Manual* in completing Access to Information request forms so as to avoid problems and confusion in the future.

[34] I have further found that all of the information in the records for which section 30.1(c) has been claimed has been properly exempted from disclosure by the OCR. This information is connected with the investigatory functions of the OCR and should, therefore, be withheld from the Applicant.

VI RECOMMENDATIONS

[35] Having carefully reviewed the records provided by the OCR and the submissions of the parties, I conclude that the case of the Applicant is not well founded and the OCR was entitled to withhold the entirety of the records pursuant to section 30.1(c). I therefore issue no recommendation for the release of further or other information as a result of this Report.

[36] Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the OCR 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 OCR under paragraph 37 of this Report, below.

[37] Under the authority of section 50 of the *ATIPPA* I direct the head of the OCR to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the OCR with respect to this Report.

[38] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of June 2010.

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