



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2015-003

September 25, 2015

Women's Policy Office

Summary:

The Applicant requested from the Women's Policy Office a copy of a 2011 report dealing with sexual exploitation and the sex trade in Newfoundland and Labrador (the "Report"). The Women's Policy Office released the recommendations contained in the report, approximately five pages, to the Applicant but denied access to the remainder of the Report relying on section 37(1) (disclosure harmful to individual or public safety) of the *Access to Information and Protection of Privacy Act, 2015*. The Applicant filed a Complaint with this Office and the Commissioner found that the Women's Policy Office had not met the burden of proof to withhold the entire Report under section 37(1) and therefore the Commissioner recommended that portions of the Report be released.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, s.37.

Authorities Relied On:

Newfoundland and Labrador OIPC Report 2007-001; Alberta OIPC Orders F2013-28, F2004-029 and F2004-032; British Columbia OIPC Order F13-25.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Applicant submitted an access to information request to the Women’s Policy Office seeking disclosure of a copy of a 2011 report entitled “It’s Nobody’s Mandate and Everyone’s Responsibility: Sexual Exploitation and the Sex Trade in Newfoundland and Labrador” (the “Report”).
- [2] Following receipt of the request, the Women’s Policy Office informed the Applicant that it had decided to disclose the recommendations contained in the Report, approximately five pages, as that information was released previously in response to another access to information request but that the remaining information contained in the Report had been refused in accordance with section 37(1) of the *ATIPPA, 2015*.
- [3] The Applicant was not satisfied with the Women’s Policy Office’s response and filed an Access Complaint with this Office. Through the informal resolution process the Women’s Policy Office did disclose another five pages of the Report to the Applicant, as this information was already publicly available through a Canadian Broadcasting Corporation (“CBC”) online news article, however, the Women’s Policy Office continued to deny access to the remainder of the Report.
- [4] Attempts to resolve this Access Complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] The Women’s Policy Office advised that it, in consultation with the Royal Newfoundland Constabulary (“RNC”), had decided that there was a reasonable expectation of probable harm to individuals or public safety should the Report be released and it was for that reason that the Applicant was denied access to the full Report. The Women’s Policy Office stated that the very act of releasing the Report may put certain individuals or groups of individuals at risk, whether they engaged in the development of the Report or not. It was the belief of the Women’s Policy Office and the RNC that releasing the Report may result in details being released which could identify

individuals or groups of individuals, thereby putting them at a significant risk of harm. It was also the RNC's opinion that there is a likelihood that the release of the Report could impact the life and safety of certain individuals or groups of individuals. Neither the Women's Policy Office nor the RNC provided a position with respect to public safety.

III APPLICANT'S POSITION

[6] It is the Applicant's opinion that the Report had been kept hidden until a copy of the Report was leaked to the media in the fall of 2013. The media involved, CBC, did not publish the entire Report but did publish a very small number of pages. Through other access to information requests the Applicant learned that there were a number of occasions where the Report had been considered for release to the public which never occurred and the Applicant noted that the exception to disclosure "harmful to the public" was never relied upon in these previous circumstances. The Applicant questions whether one of the reasons the Report has not been released is to hide Government's inaction on combating sexual exploitation in our province.

IV DECISION

[7] Section 37(1) of the *ATIPPA, 2015* states:

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

(a) threaten the safety or mental or physical health of a person other than the applicant; or

(b) interfere with public safety.

[8] The burden of proving that section 37(1) of the *ATIPPA, 2015* applies to the Report is on the Women's Policy Office. The Women's Policy Office must prove that it is more likely than not that the disclosure of the Report could reasonably be expected to threaten the safety or mental or physical health of individuals or interfere with public safety.

[9] Legislation in other jurisdictions such as Alberta and British Columbia has sections with language that is substantially similar to section 37(1) of the *ATIPPA, 2015*. The Alberta

Commissioner has outlined a harms test that has been applied in numerous reports when assessing their equivalent of section 37(1) of the *ATIPPA, 2015*. The test, from Order F2013-28 at paragraph 33, is as follows:

[para33] In Order 99-009, former Commissioner Clark explained the necessary elements for establishing the reasonableness of an expectation that the disclosure of information could threaten the health or safety of an individual under what is now section 18 of the FOIP Act. He said:

In Order 96-004, I said that where “threats” are involved, the Public Body must look at the same type of criteria as the harm test referred to in Order 96-003, in that (i) there must be a causal connection between disclosure and the anticipated harm; (ii) the harm must constitute “damage” or “detriment”, and not mere inconvenience; and (iii) there must be a reasonable expectation that the harm will occur.

Consequently, for section 17(1)(a) to apply, [now section 18(1)(a)], the Public Body must show that there is a threat, that the threat and the disclosure of the information are connected, and that there is a reasonable expectation that the threat will occur if the information is disclosed

[10] As with other harms tests under the *ATIPPA, 2015*, public bodies cannot rely on speculation that harm might take place but must establish a reasonable expectation that harm would result from the disclosure of the specific records or information at issue and not from unrelated factors. Report 2007-001 from former Commissioner Wall examined the former section 37(1) of the *ATIPPA, 2015* (section 26) and stated that “a public body wishing to use section 26(1) must present evidence of a reasonable expectation of such a threat to result if the records are released.”

[11] Turning to the Report in question, the Women’s Policy Office’s argument centered on the fact that certain individuals or groups of individuals will be at risk of harm if the Report is released. The Women’s Policy Office also argued that the Report could identify individuals which would in turn put them at risk of harm.

[12] The Report does not identify individuals specifically, however, sometimes identity can be ascertained through a mosaic of information. While it is my opinion that the Women’s Policy Office’s argument could have been stronger, with more evidence provided, after reviewing the Report I believe it is self-evident that certain information in the Report would meet the harms test and should be withheld.

[13] Although it is my conclusion that some information in the Report can be withheld based on section 37(1) of the *ATIPPA, 2015*, I am unable to agree with the Women's Policy Office that the entire Report should be withheld. The majority of the information contained in the Report has come from various organizations and representatives and the Women's Policy Office has not provided detailed and convincing evidence that all this information meets the harms test. The Women's Policy Office has not established a reasonable expectation that harm would result from the disclosure of the entire Report.

[14] When applying an exception to disclosure the purpose of the legislation must always be considered. Section 8 of the *ATIPPA, 2015*, outlines the right of access stating that even if information is excepted from disclosure an applicant still has a right of access to the remainder of the record if it is reasonable to sever the information excepted from disclosure from the record. A review of decisions in other jurisdictions with similar sections to section 37(1) of the *ATIPPA, 2015* demonstrates that records must always be reviewed on a line by line basis. The fact that the Women's Policy Office was relying on Section 37(1) of the *ATIPPA, 2015* to withhold the entire Report is inconsistent with the fact that public bodies must review records on a line by line basis and must not apply exceptions to disclosure to entire records as a default. In this case, the harms test must be considered and met for all information in a record in order for the information to be withheld. It should only be in a very rare case that section 37(1) of the *ATIPPA, 2015* applies to except from disclosure all information requested, and in this case the evidence is insufficient to support that approach.

[15] Based on the above, I am recommending that the majority of the Report be released. The portions of the Report that I am suggesting for release are general comments and information that has been supplied by various organizations or representatives consulted.

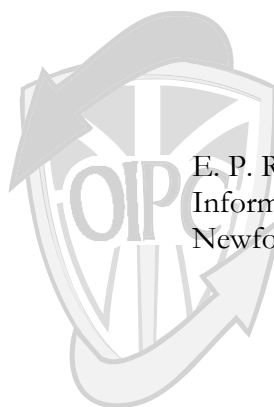
V RECOMMENDATIONS

The Women's Policy Office has not met the burden of proof to withhold the entire Report based on section 37(1) of the *ATIPPA, 2015*. I am providing the Women's Policy Office with a copy of the Report with my recommendations. The areas highlighted or bracketed in yellow are the areas that can be withheld based on section 37(1). The areas not highlighted or bracketed in yellow is all the

information that I am recommending for release as this information should not be withheld based on section 37(1). Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Women's Policy Office release the information that is **not highlighted or bracketed in yellow** to the Applicant.

[16] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Women's Policy Office 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 within 10 business days of receiving this Report.

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of September 2015.



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