



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2016-031

December 21, 2016

### Service NL

**Summary:**

Service NL received an access request seeking disclosure of personal information in a complaint letter, as well as any telephone records related to the complaint letter. Service NL denied access to the redacted portions of the complaint letter based on section 40(1) (disclosure harmful to personal privacy) of the *ATIPPA, 2015*. The Applicant was not satisfied with Service NL's response and filed a complaint with this Office. The Commissioner determined that Service NL applied section 40(1) appropriately and recommended that Service NL continue to withhold the information.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, sections 2(u), 40(1), 40(5)(c).

**Authorities Relied On:**

British Columbia OIPC Order F15-50 (*Williams Lake (City) (Re)*, 2015 BCIPC 53 (CanLII)).

**Other Resources:**

Access to Information Policy and Procedures Manual, ATIPP Office, Office of Public Engagement, November 2015 at: [Access to Information Policy and Procedures Manual](#).

## I BACKGROUND

[1] The Applicant requested and received from the Motor Vehicle Registration Division of Service NL a copy of his medical file. Included in the file was a complaint letter regarding the Applicant's medical fitness to drive. The complainant's name and other personal information of the complainant was redacted.

[2] The Applicant sought an un-redacted copy of complaint letter as he wanted to know who had made the complaint. Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the "ATIPPA, 2015") the Applicant made an access request to Service NL seeking disclosure as follows:

*Please send me the original photocopy see attached. As you can see I do have a copy with black out info that is no good to me no [sic] to my attorney. Please send a copy of the original so we can read then proceed legally. Also if is [sic] any record of telephone conversation we would like to have also with your cooperation we can avoid ending in the supreme court trial division section 52 of the Act.*

[3] Service NL refused access to an un-redacted version of the complaint letter, based on section 40 (disclosure harmful to personal privacy) of the *ATIPPA, 2015*. Service NL also advised that a search for telephone records related to the complaint was performed, however, no records were located. The Applicant was not satisfied with Service NL's response and filed a complaint with this Office.

[4] As attempts to resolve the complaint by informal resolution were unsuccessful the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

## II PUBLIC BODY'S POSITION

[5] Service NL explained that the Motor Registration Division received an unsolicited complaint letter questioning whether the Applicant was medically able to operate a motor vehicle. Service NL advised that the Motor Registration Division must follow up on receipt of this kind of information as it is considered a matter of public safety. The Applicant was

requested to undergo a medical exam by a physician and the complaint letter was disregarded as the Applicant's medical exam demonstrated that he was medically fit to drive.

[6] The information initially provided to the Applicant by the Motor Vehicle Registration Division was not in response to an official access to information request. The Applicant was provided with his medical file, however, it was determined by the Motor Vehicle Registration Division that the personal information in the complaint letter should not be provided to the Applicant.

[7] The Applicant subsequently submitted an official access to information request to Service NL seeking a non-redacted version of the complaint letter. The redacted information in the complaint letter was reviewed by Service NL under the *ATIPPA, 2015* to determine if any further information could be provided to the Applicant.

[8] After reviewing the matter, Service NL confirmed that the information redacted met the definition of personal information, as it included the name of the complainant as well as other personal information of the complainant. In considering section 40(1), Service NL also considered section 40(5), specifically section 40(5)(c) – “the personal information is relevant to a fair determination of the applicant's rights.” Service NL relied on the *Access to Information Policy and Procedures Manual* (“ATIPP Manual”) which outlined the test for section 40(5)(c) at pages 102-103 as follows:

*Paragraph 40(5)(c) states that in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the public body must consider whether the personal information is relevant to a fair determination of the applicant's rights.*

*The Ontario Information and Privacy Commissioner has stated that in order for their corresponding provision to be regarded as a relevant consideration, four factors must be established:*

*1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;*

2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[9] After considering section 40(5)(c), Service NL determined that the information was properly redacted and continued to withhold the personal information under section 40(1) of the *ATIPPA, 2015*.

### III APPLICANT'S POSITION

[10] The Applicant did not provide a written submission, either during the informal resolution or formal investigation process. However, the Applicant's complaint to this Office stated that he felt that under section 300 (defamatory libel) of the *Criminal Code* "the informant did commit a criminal offence against me". Through informal discussions with the Applicant it was clear he was seeking the identity of the person who made the complaint against him.

### IV DECISION

[11] The relevant portions of section 40(1) and 40(5)(c) of the *ATIPPA, 2015* state:

*40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*

...

*(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*

...

*(c) the personal information is relevant to a fair determination of the applicant's rights;*

...

- [12] Subsection 2(u) of the *ATIPPA, 2015*, defines “personal information” as “recorded information about an identifiable individual, including the individual’s name...”. I agree with Service NL that the name of the complainant is personal information and that the other information redacted is also personal information as it would identify the complainant.
- [13] If section 40(2) does not apply, section 40(5) must be considered when a public body is considering whether the disclosure of personal information would be an unreasonable invasion of a third party’s personal privacy under section 40(1). In this case, Service NL correctly focused on section 40(5)(c), which involves considering whether the personal information is relevant to a fair determination of the Applicant’s rights. Service NL considered this factor in light of the Applicant’s statement that he wanted to “proceed legally”.
- [14] Order F15-50 from the British Columbia Information and Privacy Commissioner’s office dealt with a similar issue where an individual was seeking the identity of another individual as they wished to pursue legal action against that person for defamation of character and invasion of privacy. The burden of proof is on the applicant under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 to establish that disclosure of personal information would not be an unreasonable invasion of a third party’s personal privacy. While this differs from the *ATIPPA, 2015*, the analysis in Order F15-50 assessing the four factors cited is informative as they are essentially the same factors listed in the ATIPP Manual.
- [15] The British Columbia OIPC determined that all four factors must be present. In assessing the four factors, the Adjudicator in Order F15-50 did not make a finding with respect to the third factor but found that the fourth factor had not been established. The Adjudicator concluded that the identifying information was not necessary for a fair determination of the applicant’s rights and that the information should be withheld.
- [16] The Applicant’s complaint to this Office alleged that there had been an offence committed against him under section 300 (defamatory libel) of the *Criminal Code*. Based on a discussion with the Applicant it seems that the Applicant may consider proceeding against

the complainant in a civil action for defamation as he believes the complainant's allegations to be false. I therefore find that the first factor is satisfied as the right in question is a legal right.

[17] In his access request to Service NL, the Applicant indicated that he wanted to "proceed legally". Whether a simple assertion by an applicant that he or she is contemplating legal action is sufficient to meet the second requirement of the four factors was discussed in Order F-15-50 at paragraphs 23-24 as follows:

*[23] The City accepts that the legal actions the applicant refers to are recognized legal rights that satisfy the first element of the test.[10] However, the City says that the applicant has merely asserted that he is contemplating legal action, without any proof, so the second element has not been met. The City cites Order F05-31, where the Adjudicator observed that the applicant had not provided any proof that it was contemplating suing and that more is necessary to fulfil the second part of the test than merely asserting that one is contemplating suing. [11]*

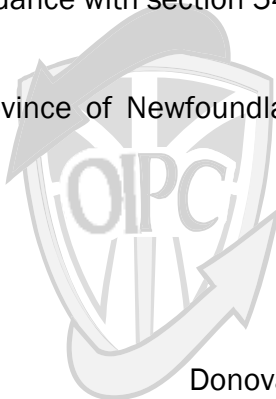
*[24] I recognise the City's concern about a lack of concrete steps by the applicant to initiate legal action. However, in Order F15-33[12] the applicant's pursuit of a matter through to an OIPC inquiry was accepted as some evidence of the seriousness with which legal action was contemplated. So too here, the applicant has pursued the information at issue to this inquiry out of a belief that he needs it to bring a proceeding. I accept this as some indication of a commitment to pursue that proceeding. Further, the City does not suggest other steps the applicant could have taken to demonstrate that he is seriously contemplating legal action, and none are immediately apparent to me. The facts differ from Order F05-31, cited by the City, where the adjudicator noted the applicant Union could have indicated its resolve to sue by passing a formal resolution. The applicant's belief that he needs the information in order to bring the contemplated proceeding, combined with his pursuit of the information to this inquiry, satisfies me that the second element of the test is met.*

[18] Even though the Applicant is only making a statement that he wants to "proceed legally" he does make reference to his attorney in his access request to Service NL and in his complaint to this Office he alleges that an offence has been committed against him. Based on this, it is reasonable to conclude that the Applicant believes that he needs this information to commence a legal proceeding and therefore I find that the second of the four elements is satisfied.

- [19] While the first and second elements of the four factors are satisfied, I am unable to make the same conclusion in regards to the third and fourth factors. The personal information which the Applicant is seeking, in this case the name of the complainant, does not have any bearing on, nor is it significant to the determination of the right in question. The Applicant has the complaint letter with the details of the complaint against him. The Applicant has determined the complaints to be false. If he wishes to pursue a legal matter, neither the name of the complainant nor the other personal information that has been redacted, are necessary to determine the legal right in question.
- [20] Regarding the fourth factor, and similar to the conclusion in Order F15-05 at paragraphs 26-28, I do not find that the personal information which the Applicant is seeking is required in order to prepare for the proceeding or to ensure an impartial hearing. There is no indication that the Applicant has tried and failed to commence a proceeding through the courts. Overall, I find that the personal information the Applicant is seeking is not necessary for a determination of his rights. If the Applicant wishes to pursue legal proceedings then his rights will be determined by the courts.
- [21] It must be borne in mind that section 40(5) is a balancing provision. In this case the balancing exercise results in a determination that releasing the requested information would be an unreasonable invasion of the complainant's personal privacy. As the four factors are not satisfied, section 40(5)(c) is not a basis upon which the Applicant can receive disclosure of the requested personal information. While the Applicant may wish to know the name of the person who made a complaint against him, this is not a sufficient reason for the disclosure of the complainant's name or other personal information.
- [22] I find that the application of section 40(1) of the *ATIPPA, 2015* by Service NL in this case was correct. This section clearly intends to protect the names of individuals as well as other personal information contained in records where the release is not authorized under section 40(2) or other legislation.

## V RECOMMENDATIONS

- [23] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Service NL continue to withhold the personal information it redacted from the complaint letter.
- [24] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Service NL must give written notice of his or her decision with respect to this recommendation to the Commissioner and to any person who was sent a copy of this Report (in this case the Applicant) within 10 business days of receiving this Report.
- [25] Please note that within 10 business days of receiving the decision of Service NL 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*.
- [26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21<sup>st</sup> day of December, 2016.



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