



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-024

October 14, 2020

Human Resource Secretariat

(Now known as Treasury Board Secretariat)

Summary:

The Office of the Human Resource Secretariat (“HRS”) (now known as Treasury Board Secretariat) received an access request under the *Access to Information and Protection of Privacy Act, 2015*, (ATIPPA, 2015) for records relating to a workplace investigation. HRS provided a package of documents including notes taken during witness interviews. The names and identifying information of the witnesses were redacted under section 37 (disclosure harmful to individual or public safety). The Complainant argued that it was necessary to obtain access to the redacted information to assess the quality and completeness of the investigation. The Commissioner found that section 37 cannot be applied to records which fall under section 33 (information from a workplace investigation), and that even if it could the test for section 37 was not met. The Commissioner recommended release of the redacted information.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, s. 33, s. 37(1)(a), s.40(1)

Authorities Relied On:

NL OIPC Reports [A-2020-001](#) and [A-2018-017](#).

Other Resources:

OIPC Guidance Document: [Section 33: Information from a Workplace Investigation](#).

I BACKGROUND

- [1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) to the Office of the Human Resource Secretariat (now known as Treasury Board Secretariat, hereinafter “HRS”) for records relating to a workplace investigation, to which the Complainant was a party.
- [2] HRS responded by providing the Complainant with a package of responsive records including notes taken during witness interviews. However, the names and identifying information of the witnesses were withheld on the basis of section 37 and section 40.
- [3] The Complainant filed a complaint with our Office. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] HRS has stated that it has withheld the names and identifying information of the witnesses because there was a likelihood of harm to the witnesses should that information be released. HRS cited s. 37(1)(a) of *ATIPPA, 2015* as its authority to do so.
- [5] HRS has also claimed that the names of the witnesses are required to be withheld under section 40(1) however it did not make any further submissions on this section during the investigation.

III COMPLAINANT’S POSITION

- [6] The Complainant states that they require the names of the witnesses to allow them to assess the quality and completeness of the investigation into the incident.

IV ISSUES

[7] During the course of the investigation and in review of the submissions from HRS, the following issues were identified:

1. *Can the exemptions in either section 37 or 40 override the mandatory disclosure set out in section 33 of ATIPPA, 2015?*
2. *If section 37 can be applied, is there sufficient evidence to support withholding the records under this section?*

V DECISION

[8] HRS has acknowledged, and this Office has confirmed, that the records meet the requirements set out in section 33. The records were created in relation to a workplace investigation as defined in section 33(1)(c) and the Complainant is a party to the investigation, therefore the relevant portions of section 33 are:

33. (2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

[9] Our guidance, and previous reports on the issue of withholding records contemplated by the mandatory release set out in section 33 state that the only information that can be withheld is information that is irrelevant to the investigation. HRS has made no claim that the redacted information is not relevant, only that sections 37 or 40 should apply and therefore the information should be withheld.

[10] The issue of applying exceptions to information required to be disclosed under section 33 was specifically dealt with in Report A-2020-001, in which this Office stated:

[14] Section 33(3) of ATIPPA, 2015 is a mandatory disclosure provision requiring the head of a public body to disclose to an Applicant who is a party to a workplace investigation all relevant information created or gathered for the purpose of a workplace investigation. Information which might otherwise be exempt from disclosure under other provisions of ATIPPA, 2015 may therefore

be subject to mandatory disclosure if created or gathered during a workplace investigation and relevant to the investigation.

[11] The issue of releasing the names of witnesses to a party to the investigation was specifically addressed in Report A-2018-017 which stated:

[16] Because the Complainant is a party to the workplace investigation, the names of witnesses may not be redacted, as he is entitled to know who made the statements relied upon by the City. It would however, be appropriate to redact personal information that is not relevant to the investigation - for example, a witness's personal e-mail address or phone number

[12] Having reviewed the information withheld by HRS, and given the circumstances of the investigation, the OIPC confirms that the identities of the witnesses are relevant to the investigation and therefore cannot be withheld under either section 37 or 40.

[13] HRS's argument that section 37 can be applied to records required to be disclosed in accordance with section 33 is incorrect. However, even if it could be applied, HRS has not provided sufficient evidence to prove that the test for section 37 has been met. The evidence provided would support the notion that some of the witnesses may be experiencing stress as a result of the circumstances, but beyond that it amounts to little more than supposition and allegations.

[14] As noted above, sufficient evidence is lacking to support the application of section 37, notwithstanding the fact that section 33 takes precedence over other exceptions in *ATIPPA, 2015* and the information is required to be disclosed in any case. It is conceivable, however, that a circumstance could arise in the future where there is clear and convincing evidence that section 37 applies to certain records, yet section 33 may apply to require disclosure. The legislature may wish to consider the interplay between sections 33 and 37 of the Act in order to ensure that the serious harm contemplated by section 37 will not result from a good faith effort to comply with the disclosure requirements of section 33.

VI RECOMMENDATIONS

- [15] Under the authority of s. 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Human Resource Secretariat disclose the withheld records to the complainant
- [16] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Human Resource Secretariat 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 14th day of October 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador