



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-003

January 19, 2021

Digital Government and Service NL

Summary:

Digital Government and Service NL (DGSNL) received an access to information request under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* for an Occupational Health and Safety report into a fatality. DGSNL withheld the report on the basis of several provisions of section 31 (Disclosure harmful to law enforcement), and later also claimed that *ATIPPA, 2015* did not apply to the record as it was excluded under section 5 (Application). The Commissioner found that section 5 is jurisdictional in nature and therefore such a claim must be considered even though it was raised late in the proceeding, and that section 5 applied to the record. The Commissioner therefore concluded that DGSNL was authorized to withhold the record.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 5 and 31.

Authorities Relied On:

NL OIPC Report [A-2020-020](#).

Other Resources

NL OIPC Guidance on [Providing Reasons for Refusal of Access](#).

I BACKGROUND

- [1] Digital Government and Service NL (“DGSNL”) received an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the *Act*”) for a copy of the Occupational Health and Safety (“OHS”) investigation report into a fatality that occurred on June 19, 2017 on a power line construction project.
- [2] DGSNL responded to the request by acknowledging the existence of the report, but withheld it in its entirety on the basis of a number of provisions of section 31 of the *Act*. The Complainant filed a complaint with our Office.
- [3] 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] DGSNL in its final response to the Applicant dated October 20, 2020 set out its reliance on the following provisions of section 31 of *ATIPPA, 2015*:
- (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
- (a) interfere with or harm a law enforcement matter;*
 - (c) reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement;*
 - (h) deprive a person of the right to a fair trial or impartial adjudication;*
 - (n) adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;*
 - (p) harm the conduct of existing or imminent legal proceedings.*
- [5] During the course of the investigation of the complaint by our Office, DGSNL on November 30, 2020 claimed, in addition, that the record should be withheld on the basis of section

5(1)(j) of *ATIPPA, 2015*, which provides that the Act does not apply to records relating to a prosecution if all proceedings in relation to the prosecution have not been completed.

III COMPLAINANT'S POSITION

[6] The Complainant states that the report is necessary for the continuation of ongoing litigation with respect to the fatality.

[7] The Complainant also argued, with respect to section 31(1), that the OHS investigation has long been completed; that the disclosure of the investigative report will not affect any ongoing law enforcement or court matter; and that the report could not be used in a manner which would affect any right to a fair trial on any outstanding charges resulting from this incident.

IV ISSUES

[8] Whether DGSNL is entitled to withhold the responsive records under either section 31 or section 5 of *ATIPPA, 2015*.

V DECISION

[9] DGSNL has confirmed that there was an OHS investigation, which culminated in the creation of a report. Two companies and an individual have been charged with *Occupational Health and Safety Act* violations. The first court appearance was scheduled for July 4, 2019, in Provincial Court, but the proceedings were delayed. Court appearances were held on October 27, 2020 and November 19, 2020. There is currently no indication when the trial will commence, still less when it might be completed.

[10] DGSNL has claimed a number of provisions in section 31 of the *Access to Information and Protection of Privacy Act, 2015* as justification for withholding the entire report. In particular, it argues that section 31(1)(h) (disclosure that would “deprive a person of the right to a fair trial”) and section 31(1)(p) (disclosure that would “harm the conduct of existing or imminent

legal proceedings”) would directly apply so as to prevent the untimely disclosure of evidence that is central to the OHS prosecution. For reasons which will be explained shortly, we do not need to address the merits of DGSNL’s submissions regarding section 31.

[11] In addition, however, DGSNL has also claimed that the entire report must be withheld on the basis of section 5(1)(j) which reads:

5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to

...

(j) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

[12] It is clear that the entire investigation report is a record relating to a prosecution. It is also clear that the prosecution proceedings have not been completed. Therefore the Act does not, at least at this point in time, apply to the report, and so DGSNL would be entitled to withhold it.

[13] However, DGSNL made no mention of section 5 of the Act in its final response to the Complainant dated October 20, 2020, nor in its initial submissions to our Office following notification of this complaint. It only made the additional claim invoking section 5 on November 30, 2020, just before the expiry of the informal resolution deadline.

[14] Our Office has sometimes refused to consider exceptions to access claimed by a public body late in the proceedings. The rationale for this refusal is that the complaint under investigation is about the decision that was made by the public body in its final response to the applicant. As stated in Report A-2020-020:

The complaint received by this Office from an applicant is, necessarily, a complaint about the decision to refuse access made by the public body in its final response to the applicant’s access request. Pursuant to section 17 of the Act, where access to any information is refused, the public body’s final response must contain “...the reasons for the refusal and the provision of this Act on which the refusal is based.” That decision, and the reasons for it, as claimed by the public body at the time of its response to the applicant, are what this Office is required to investigate.

[15] This Office has further elaborated on this aspect of a public body's duty in the Guidance document from this Office discussing the requirement for a public body's to provide reasons for its decision to withhold records:

From an applicant's point of view, the reason why a request was refused is an essential part of the response. If applicants can clearly understand why access is refused, they may accept the public body's response. Ambiguity as to the reasons for refusing a request leads to a greater likelihood of complaints about the decision to refuse access. Even if a complaint is made, a thorough explanation of the reasons for the refusal can help define and focus the issues for investigation and facilitate an informal resolution.

[16] This is particularly important where the exceptions claimed are discretionary in nature. Report A-2020-020 went on to state:

In the case of discretionary exceptions, as Report 2005-005 stated, it should be presumed, and an applicant is entitled to expect, that a final response from a public body to the applicant is the result of the consideration of all applicable exceptions:

Discretionary exceptions, on the other hand, provide a statutory "option" rather than an obligation. Even though a public body may not release the information, they have the option of exercising their discretion and releasing the material. In my opinion, if the public body did not invoke a specific discretionary exception in its original denial to the Applicant, it is reasonable to assume that they considered the exception, reviewed all relevant factors and decided that it was appropriate to release the information to the Applicant.

[17] However, section 5 is not an exception to access. Rather, it is an exclusion, enumerating whole classes of records to which the Act does not apply. If our Office finds that a record falls within a class of records covered by section 5, then it has no jurisdiction to conduct a further analysis, or to recommend that the record be disclosed. Such a jurisdictional claim by a public body must be addressed, no matter how late in the proceeding the claim is made, since that issue must be determined before this Office can know whether or not it has the authority to embark on any further steps.

[18] As stated above, it is clear that the entire responsive record in the present case is a record relating to a prosecution which has not been completed. Therefore, pursuant to section 5(1)(j), the Act does not apply to it.

[19] Having concluded that *ATIPPA, 2015* does not apply to the record, it is not necessary for this Office to review the application of the provisions of section 31 originally claimed by DGSNL. I should note for clarification that section 5 is not a mandatory exception to access. It simply means that *ATIPPA, 2015* does not apply to the record, and the access to information process under the Act cannot be used to obtain a copy of it.

VI RECOMMENDATIONS

[20] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that Digital Government and Service NL may continue to refuse access to the responsive record.

[21] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Digital Government and Service NL 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.

[22] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of January, 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador