



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-006

February 2, 2021

Department of Justice and Public Safety

Summary:

The Complainant made an access to information request to the Department of Justice and Public Safety for records of his incarceration history pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”). The Department provided the records but redacted some information on the basis of exceptions in sections 29 (policy advice or recommendations), 31 (disclosure harmful to law enforcement), 37 (disclosure harmful to individual or public safety) and 40 (disclosure harmful to personal privacy). The Complainant objected to these redactions and also believed that records were missing from the Department’s response. The Commissioner found that the Department had conducted a reasonable search for records and had appropriately applied the exceptions to access. The Commissioner therefore recommended that the Department continue to withhold the redacted information.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, ss. 13, 29, 31, 37, 40.

Authorities Relied On:

NL OIPC Reports [A-2021-001](#), [A-2015-003](#).

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 Department of Justice and Public Safety (“the Department”) for records of his incarceration history at Her Majesty’s Penitentiary (“HMP”) from 2009–2020 including all disciplinary history.
- [2] The Department responded by providing the Complainant with a large number of records, some of which were redacted in whole or in part on the basis of sections 29 (policy advice or recommendations), 31 (disclosure harmful to law enforcement), 37 (disclosure harmful to individual or public safety) and 40 (disclosure harmful to personal privacy). The Complainant filed a complaint with our Office asking that the redactions be reviewed.
- [3] During the course of informal resolution the Complainant also requested that the Department search again for a photo that he believed should be in the custody of HMP and should have been included in the responsive records provided by the Department.
- [4] 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

- [5] The Department provided our Office with a detailed submission describing its rationale for the application of the various exceptions under *ATIPPA, 2015* it used to withhold information from the Complainant. We will refer to them where necessary later in this Report.

III COMPLAINANT’S POSITION

- [6] The Complainant stated that in his view the information in the records was necessarily about him personally, and he believed that it should therefore be provided to him.

IV ISSUES

[7] The issues to be dealt with in this Report are:

1. whether the exceptions used by the Department were correctly applied; and
2. whether a reasonable search for records by the Department ought to have found the photo described by the Complainant.

V DECISION

[8] Section 13 of *ATIPPA, 2015* requires a public body to respond to an applicant in an open, accurate and complete manner. This duty includes the duty to conduct a reasonable search for records, which means a search conducted by knowledgeable staff in locations where the records in question might reasonably be located. The standard for assessing a public body's efforts is reasonableness, not perfection. (See, for example, Report A-2021-001).

[9] The records responsive to the Complainant's request are in the custody of HMP, for which the Department of Justice and Public Safety is responsible. The Department compiled a set of several hundred pages of records of various kinds, including Provincial Corrections Offender Management System (PCOMS) Unit Notes, which are detailed logs by correctional officers of daily contacts with inmates; Officer's Statements describing different types of incidents or issues (including some photographs); and disciplinary records and other formal reports.

[10] From our review of the records and the Department's submissions we have concluded that the Department has conducted a reasonable search for the requested records. During the informal resolution process the Complainant asked that the Department look again for a photo relating to a specific incident. The Department undertook a second search and responded that HMP has no archived photos relating to that request. The Department suggested that it is possible that the Royal Newfoundland Constabulary might have custody of such photos, though this has not been confirmed. That of course would have to be the subject of a separate access request to that public body.

[11] Our Office has also done a line-by-line review of the redactions made by the Department, and our assessment is that the Department has done them correctly. Some information was withheld on the basis of section 29 of the Act, the relevant part of which reads as follows:

29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

[12] The purpose of that exception is to allow individuals to have open and frank discussions with co-workers and superiors, and express confidential opinions, without being concerned that their advice will be disclosed to others. This exception was used, correctly in our view, to withhold some confidential opinions expressed by corrections staff to superiors.

[13] Some information was withheld on the basis of certain provisions of section 40 (disclosure harmful to personal privacy):

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.

...

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

...

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; or

...

(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

...

(e) *the third party will be exposed unfairly to financial or other harm;*

...

(h) *the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;*

...

[14] The purpose of this exception is to preserve the privacy of other individuals by withholding personal information about them. Where section 40 has been used, it has been applied to withhold personal information about third parties that is presumed by section 40(4) to be an unreasonable invasion of their personal privacy. This would include, for example, names and other personal information of other inmates, names and other personal information about people who are not HMP staff, and sometimes personal information relating to other outsiders. We are satisfied that this has been done correctly. In several places in the records, some personal information of correctional officers has been redacted. However, this has been done in accordance with sections 29, as stated above, or under section 31 which will be addressed below.

[15] Some information was also withheld on the basis of various provisions of section 31, as follows:

31. (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;*

...

(e) *reveal law enforcement intelligence information;*

(f) *endanger the life or physical safety of a law enforcement officer or another person;*

...

(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;

...

(n) adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

(o) reveal information in a correctional record supplied, implicitly or explicitly, in confidence; or

...

[16] Section 31 essentially protects information where its disclosure could reasonably be expected to harm law enforcement in some way. We cannot discuss this in very much detail, because to do so might risk disclosing the protected information ourselves. However, we can give some examples.

[17] For instance, in some cases, names of correctional officers were redacted in documents where they had been involved in physical contact with an inmate, or had expressed views critical of an inmate's conduct. We accept that in a prison environment there is a reasonable risk that disclosing the names could endanger the safety of the officer involved. We note, however, that the Department did not withhold all correctional officer names: names were only withheld in relation to the circumstances described above.

[18] In other instances, information about response times and procedures when alarm codes are called, or when counts are conducted, or about details of weapons, have been redacted because disclosure could harm security of HMP. We are satisfied that those redactions are reasonable. This also explains why some records are completely withheld, for example information used for making and scoring security assessments of inmates.

[19] The Department also relied on section 37 (disclosure harmful to individual or public safety) to withhold some information. In report A-2015-003, we stated that:

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.

[20] In the present case the Department has applied section 37 in conjunction with section 40(1) and section 31 to the same information. Given that we have already concluded that the latter provisions have been applied correctly, there is no need to determine whether section 37 was appropriately applied.

[21] We have paid particular attention to specific pages identified by the Complainant in the complaint, but our conclusion is that the Department has properly applied the exceptions in the *ATIPPA, 2015*. The Department is therefore entitled to withhold the redacted information.

VI RECOMMENDATIONS

[22] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Department of Justice and Public Safety continue to refuse access to the redacted information.

[23] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Justice and Public Safety 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.

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of February, 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador