



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-012

February 23, 2021

Public Service Commission

Summary:

The Complainant made an access to information request to the Public Service Commission (“PSC”) for records related to an employee wellness survey the PSC had conducted at the Royal Newfoundland Constabulary, pursuant to the *Access to Information and Protection of Privacy Act*. The PSC consulted with the Royal Newfoundland Constabulary prior to refusing to release the information to the Complainant citing section 31(1)(p) of the Act (disclosure harmful to a legal proceeding). Some information was also withheld under section 40 (disclosure harmful to personal privacy). The Complainant made a complaint to this Office stating that they believed the exceptions had been misapplied, and that the records should be released in full. The Commissioner found that neither section 31(1)(p) nor section 40 applied to the records and recommended their release.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, ss. 2, 11, 14, 17, 31, 39, and 40.

Authorities Relied On:

NL OIPC Reports [A-2008-002](#), [A-2007-003](#), [A-2006-014](#), and [A-2021-003](#).

I BACKGROUND

[1] The Complainant made an access to information request pursuant to the Access to Information and Protection of Privacy Act, 2015 (“ATIPPA, 2015” or the “Act”) to the Public Service Commission (“PSC”) for the following records:

Any records (e-mail, memos, or other correspondence) regarding the survey administered to RNC Police Officers by the Department of Employee Safety and Wellness in relation to an initiative by the Employee Safety and Wellness Strategist (RNC) in preparation of the RNC Workplace Wellness Strategy. Any records (e-mail, memos, or other correspondence) between the Department of Employee Safety and Wellness and the RNC Chief of Police regarding the survey administered by the Department of Employee Safety and Wellness, A Copy of the survey questionnaire and the survey results compiled by the Employee Safety and Wellness Strategist.

[2] After consulting with the Royal Newfoundland Constabulary (“RNC”) and the Department of Justice and Public Safety, the PSC responded and refused access to the requested records citing section 31(1)(p) of ATIPPA, 2015 (disclosure harmful to a legal proceeding).

[3] A similar survey was conducted by the Royal Newfoundland Constabulary Association (“RNCA”) in 2019, entitled the Workplace Satisfaction and Engagement Survey. The results of that survey are, at the time of writing, available to the public on the RNCA’s website. The survey which is the subject of this request, is a survey created by the PSC as part of its Guiding Minds at Work program. The survey was to be used to help implement the program by providing information on psychological health and safety in the workplace.

[4] The Complainant made a complaint to this Office requesting that the PSC’s refusal to release the records be reviewed.

[5] 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

- [6] Prior to the PSC's formal response to the request and during this Office's investigation into the complaint, the PSC consulted with the RNC and the Department of Justice and Public Safety. The majority of the arguments presented during the investigation were put forth by the RNC and subsequently adopted by the PSC.
- [7] In the final response to the Complainant's request, the PSC refused to release the records based on section 31(1)(p) of *ATIPPA, 2015*. No further exceptions to disclosure were noted and no other arguments were made.
- [8] Later, in its initial submission to this Office, the PSC continued to claim section 31(1)(p) and noted some instances in the records where section 40 would apply.
- [9] After this Office requested that the PSC provide more information regarding the application of section 31(1)(p), the PSC requested that the RNC provide the requested information directly to this Office. The RNC's response indicated that there is an ongoing grievance under the RNC's collective agreement regarding the use and disclosure of the results of a similar, but wholly separate, survey. This formed the basis for the section 31(1)(p) claim. The response also included a claim that a number of other exceptions should be applied to the records, including section 39 (disclosure harmful to business interests of a third party), which is a mandatory exception.
- [10] The RNC argued that the previous survey was used in an attempted to undermine the authority of, and confidence in, both the Chief of Police and the RNC in general. It believes that, if released, this survey would be used in a similar fashion. It argued that this undermining of authority and confidence could have a detrimental effect on the Chief's efforts to hold rogue officers accountable. It stated that the results of the survey could be misunderstood or misinterpreted.
- [11] While the parties were attempting an informal resolution of this complaint, it was argued that the request should have been made to the RNC and not the PSC because: the survey

involved RNC officers; was completed by an “embedded employee”; and the *Royal Newfoundland Constabulary Act, 1992* gives the Chief of Police exclusive authority for the management and control of the RNC.

III COMPLAINANT’S POSITION

[12] The Complainant argued that none of sections 31(1)(p), 39 or 40 apply to the records and that they should be released without redaction.

IV ISSUES

[13] The issues to be addressed in this report are:

1. What was the appropriate public body to respond to this request?
2. What is the Commissioner’s obligation, if any, to consider discretionary and mandatory exceptions claimed after the final response to the applicant?
3. Application of section 31(1)(p) to the records;
4. Application of section 39 to the records; and
5. Application of section 40 to the records.

V DECISION

Issue 1 – To whom should the Complainant have made the request?

[14] This issue was not communicated to either the Complainant or this Office, prior to the formal submissions, however it would be prudent to address it. According to section 11:

11. (1) A person may access a record or seek a correction of personal information by making a request to the public body that the person believes has custody or control of the record or personal information.

[15] The request was made to the public body the Complainant believed had custody or control of the records. The argument that the request should have been made to the RNC and not the PSC is inconsistent with *ATIPPA, 2015*.

[16] Section 14, which deals with a public body's ability to transfer a request to another public body, states:

14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it, where it appears that

- (a) the record was produced by or for the other public body; or*
- (b) the record or personal information is in the custody of or under the control of the other public body.*

(2) The head of the public body to which a request is transferred shall respond to the request, and the provisions of this Act shall apply, as if the applicant had originally made the request to and it was received by that public body on the date it was transferred to that public body.

[17] As such, once the request was received, the onus was on the PSC to determine if the request should be transferred to another public body. Once the five business day time limit set out in section 14(1) had expired, it could no longer exercise that discretion, and to bring it up at the formal submission stage of this Office's investigation was clearly too late.

Issue 2 – Commissioner's obligation to consider exceptions claimed late in the process

[18] This Office has considered this issue a number of times, as summarized in Report A-2021-003 at paragraphs 14 to 16. In general, pursuant to section 17 of *ATIPPA, 2015*, a public body's final response to a request must contain *"...the reasons for the refusal and the provision of this Act on which the refusal is based"*. It is that decision that this Office is required to investigate when a complaint is received.

[19] As noted in Report A-2005-005, this is particularly important with respect to discretionary exceptions. A complainant is entitled to expect that the contents of a final response are the result of careful consideration of all of the potential exceptions and, in the case of discretionary exceptions, their absence would mean that either they do not apply or the public body has decided to exercise its discretion and not apply them.

[20] Section 31(1)(p) was the only exception claimed in the final response. In its submission in response to the complaint, the PSC continued to claim section 31(1)(p). While not specifically mentioned in its response, the PSC did identify instances where it claimed section 40 (a

mandatory section) in the records provided to this Office. No other exceptions were claimed or identified in the submissions.

[21] After reviewing the PSC's submission in response to the complaint, this Office sought further information and clarification on the issue of the application of section 31(1)(p). The PSC requested that the RNC provide this information and clarification on its behalf. It was at this point that the RNC, through its legal counsel, attempted to raise further exceptions. The additional exceptions included 31(1)(a), 37(1)(b), 38(1)(a) and 39(a)(ii). Other than section 39, these additional exceptions are discretionary, and as noted above, it would be inappropriate to consider their application at this late stage.

[22] Additionally, the PSC had previously consulted with the RNC prior to sending its final response to the Complainant. Therefore, the RNC had the opportunity to note any exceptions it believed could be applied long before the point at which the additional exceptions were communicated to this Office. As noted above, the Department of Justice and Public Safety was also consulted by the PSC and during these consultations some further exceptions, other than section 31(1)(p), were considered. However, the PSC ultimately declined to claim those exceptions in both its final response to the Complainant and in its initial submissions to this Office. As the public body to which the request was made, the discretion to claim or not to claim a discretionary exception was wholly with the PSC.

Issue 3 – Application of Section 31(1)(p)

[23] With respect to section 31(1)(p), the Act states:

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

...

(p) harm the conduct of existing or imminent legal proceedings.

[24] Previous reports (A-2008-002, A-2007-003 and A-2006-014) support the proposition that there are two requirements to be met for this exception to apply, the first being the identification of an existing or imminent legal proceeding, and the second being an assessment of the harm to the proceeding. The standard of proof is on a balance of probabilities and the onus is on PSC to prove the Complainant has no right to the records.

[25] In this case, the legal proceeding consists of a grievance filed by RNC management under its collective agreement. The subject matter of the grievance is the use of the results of a previous survey (but not the survey to which this complaint relates) to undermine the authority of, or confidence in, the Chief of Police and RNC as a whole.

[26] The PSC did not address the issue of whether a grievance under a collective agreement constitutes a “legal proceeding” with respect to the Act. In the absence of a submission on this point it should be noted that *ATIPPA, 2015* does not include a definition of “legal proceeding”. In Report A-2008-002, it was found that an arbitration hearing fits the definition of a legal proceeding. Specifically, the definition of legal proceeding from the *Manitoba Freedom of Information and Protection of Privacy Act Resource Manual* was adopted, which defines a legal proceeding as:

A proceeding before a court, tribunal or other body having authority, by law or by consent, to make decisions concerning a person’s rights. This includes administrative proceedings before a board or tribunal to acquire a right, enforce a remedy or that leads or could lead to a sanction or penalty.

[27] As such, this grievance fits the requirements for a legal proceeding as it is an administrative proceeding to determine if the RNC’s collective agreement has been breached.

[28] Therefore, whether disclosure of the records could reasonably be expected to result in harm to the conduct of the proceeding must also be considered. The previous reports noted above commented on this issue and all agree that the mere existence of a legal proceeding is not enough to prove harm, and there must be clear and convincing evidence that the release of the record will cause harm to the proceeding. It should also be noted that the harm has to be with respect to the legal proceeding and not with respect to the public body. Report A-2006-014 at paragraph 50 says:

"Injurious" means hurtful or harmful to the conduct of legal proceedings. The "conduct" of legal proceedings is the management, direction, carrying on of legal proceedings."

[29] The RNC argued, and subsequently the PSC adopted, the assertion that the current legal proceeding is:

[...] directed solely at achieving a cease and desist order [...] from using the survey itself to undermine and continue to intimidate the Chief of Police's management of the RNC.

[30] It was further stated that:

The survey in question contains topical responses that if released publically would defeat the purpose of the legal proceeding which is to obtain a cease and desist order to prevent the inappropriate use of survey results as a tool of coercion and intimidation.

[...]

This, with respect, is not merely an issue of possible misunderstanding or misinterpretation of the survey results, but rather the release of the survey results would defeat the legal proceeding's value which is to prevent the use of the survey results for a purpose other than for what the survey was intended.

[31] With respect to the difficulties the RNC is facing, the subject matter of the current legal proceeding is a totally separate survey than the one which is the subject of this Report. As noted above, the previous survey was conducted by the RNCA, which has since made the results public. The current survey was conducted by the PSC, in consultation with RNC management, for a different purpose in a different context. The results of this survey have not yet been made public. The subject matter of the legal proceeding is not the release of the results of the previous survey – those result are already publically available. Rather, it is about the use of the results. No connection has been established between the alleged harm caused by the use of the previous survey and the release of the results of the current survey. -

Issue 4 - Application of section 39

[32] A claim was made that the release of the requested records could harm the labour relations of the RNC and thus the records should be withheld under section 39(1). However section 2(cc) defines “third party” as follows:

2(cc) "third party", in relation to a request for access to a record or for correction of personal information, means a person or group of persons other than
(i) the person who made the request, or
(ii) a public body.

[33] Section 39(1)(a)(ii) states:

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

[34] Therefore, as the section applies only to third parties and the RNC, as a public body, is excluded from the definition of third party, then section 39 cannot apply in this matter.

Issue 5 - Application of section 40

[35] The PSC has not provided a specific subsection upon which they are relying to redact information under section 40. The redacted information consists of the names, email addresses, and email signatures of the RNC employees who sent emails asking administrative questions about the survey which do not reveal or indicate in any way the employees' responses to the survey questions. As the survey was completed at management's request and the administrative questions were asked in the course of the employees' work, the information is simply the work product of the employees, and it would not be considered personal information. Alternatively, even if it was considered to be personal information, the release of the information would not be an unreasonable invasion of the employees' privacy. Given that more than 300 employees completed the survey, it should also be noted that there is no way for the simple administrative exchanges contained in the records to be associated with the employees' responses to the survey, or even to prove that the employee completed the survey at all. As such, section 40 does not support the information being withheld.

VI RECOMMENDATIONS

[36] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Public Service Commission disclose the requested records to the Complainant in full.

[37] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Public Service Commission 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.

[38] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of February 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador