



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-018

April 14, 2021

Serious Incident Response Team

Summary:

The Serious Incident Response Team of Newfoundland and Labrador (“SIRT-NL”) received an access to information request for the file relating to an investigation into the actions of a police officer that were the subject of a complaint. SIRT-NL withheld the entire record from the Complainant, citing section 34(1)(a) and (b) (disclosure harmful to intergovernmental relations or negotiations) and section 40 (disclosure harmful to personal privacy) of the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”). It also claimed that section 30 (legal advice) applied to part of the record. In addition, SIRT-NL requested the Commissioner’s opinion on whether it was a public body as defined by *ATIPPA, 2015* and also suggested that section 21 of the *Serious Incident Response Team Act* (“*SIRT Act*”) applied so as to exclude the responsive records from the scope of *ATIPPA, 2015*. The Commissioner found that SIRT-NL is a public body subject to *ATIPPA, 2015*; that section 21 of the *SIRT Act* did not apply to exclude the record, as that *Act* had not been proclaimed at the material time; that section 34(1)(a) and (b) of *ATIPPA, 2015* applied so as to justify withholding the record; and that it was not necessary to discuss the application of sections 30 or 40 of *ATIPPA, 2015*. The Commissioner recommended that SIRT-NL continue to withhold the record.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 2, 5, 30, 34, and 40;
[Serious Incident Response Team Act](#), SNL 2017, c. S-13.003, sections 21 and 22;
[Interpretation Act](#), RSNL 1990, c. I-19, section 8;
[Order-In-Council 2019-202](#), Oct. 19, 2019.

I BACKGROUND

- [1] The Serious Incident Response Team of Newfoundland and Labrador (“SIRT-NL”) received an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) for the complete file in the custody of SIRT-NL relating to a criminal investigation into the actions of an officer of the Royal Newfoundland Constabulary (“RNC”) that were the subject of a complaint. The investigation was conducted by the Royal Canadian Mounted Police (“RCMP”) at the request of SIRT-NL, and the RCMP provided its investigative file to SIRT-NL for review.
- [2] SIRT-NL withheld the entire record from the Complainant, citing section 34(1)(a) and (b) (disclosure harmful to intergovernmental relations or negotiations) and section 40 (disclosure harmful to personal privacy) of *ATIPPA, 2015*. The Applicant filed a complaint with this Office.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II SIRT-NL’S POSITION

- [4] As a preliminary matter, SIRT-NL “does not necessarily acknowledge” that it is a public body under *ATIPPA, 2015* and asks for the Commissioner’s opinion on that question.
- [5] SIRT-NL submits that section 34(1)(a) and (b) of *ATIPPA, 2015* (disclosure harmful to intergovernmental relations or negotiations) applies to the record so as to justify withholding it in its entirety. SIRT-NL further submits that section 40 (disclosure harmful to personal privacy) applies to large portions of the record. SIRT-NL also claims that section 30 (legal advice) applies to part of the record.
- [6] Finally, SIRT-NL points to section 22 of the *Serious Incident Response Team Act* (“*SIRT Act*”) which provides that section 5 (application) of *ATIPPA, 2015* is amended to exclude SIRT-NL investigative files from the scope of the *ATIPPA, 2015* and asks that this provision be applied so as to withhold the record.

III COMPLAINANT'S POSITION

- [7] The Complainant submits that the application of section 34 of the *Act*, which is a discretionary provision, is an overreach and is contrary to the purpose of *ATIPPA, 2015* and is also contrary to the purpose for which SIRT-NL was established.
- [8] The Complainant further submits that it is unreasonable for SIRT-NL to claim that none of the records in the file could be redacted so as to remove personal information and then disclose the remainder of the record.
- [9] The Complainant also filed an affidavit attesting to the Complainant's need for the responsive record and the potential harm resulting from the record being withheld.

IV ISSUES

- [10] The issues to be determined in this Report may be stated as follows:
1. Whether SIRT-NL is a public body to which *ATIPPA, 2015* applies;
 2. Whether the SIRT-NL amendments to section 5 of *ATIPPA, 2015* can be applied to the responsive record;
 3. Whether sections 34(1)(a)(i) and 34(1)(b) of *ATIPPA, 2015* apply to the responsive records so that SIRT-NL is authorized to withhold the records;
 4. Whether section 40 of *ATIPPA, 2015* applies so as to require that the records be withheld;
 5. Whether section 30 of *ATIPPA, 2015* applies so as to withhold a legal opinion;
 6. Whether the record should be disclosed because withholding it could result in harm to the Complainant.

V DECISION

Effect of Proclamation of the *SIRT Act*

[11] SIRT-NL is a civilian-led oversight agency, reporting to the Minister of Justice and Public Safety, responsible for conducting independent investigations into serious incidents involving death, serious injury, sexual offences, domestic violence or any matter of significant public interest that may have arisen from the actions of a police officer in the Province. It is the subject of its own statute, the *Serious Incident Response Team Act*, (“*SIRT Act*”) which provides that:

3. (1) There is established a Serious Incident Response Team to provide oversight of policing by providing independent investigation of serious incidents involving police officers in the province.

[12] The *SIRT Act* contains provisions for the appointment of the Director and other members of the team, and granting them the authority to conduct investigations. In addition, section 21 of the *SIRT Act* contains a provision amending *ATIPPA, 2015* to add to section 5 of that Act the following:

(k.1) a record relating to an investigation by the Serious Incident Response Team as defined under the Serious Incident Response Team Act if all matters in respect of the investigation have not been completed;

and:

(n) a record relating to an investigation by the Serious Incident Response Team as defined under the Serious Incident Response Team Act in which suspicion of guilt of a police officer is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

[13] The effect of this amendment to *ATIPPA, 2015* would be that certain SIRT-NL investigative records may be excluded from the scope of the Act in the manner and to the extent described.

[14] However, the access request in the present matter was made on December 7, 2020, the decision to withhold the entire responsive record from the Complainant was made by SIRT-NL on January 4, 2021, and the complaint to our Office was made on January 15, 2021. At all of those material times, the *SIRT Act* had not yet been proclaimed.

[15] Statutes in our parliamentary system come into force in a number of ways. It is common for a statute to come into force on the date upon which it is given Royal Assent. Other statutes may state that their coming into force will take place only upon “proclamation” as the *SIRT Act* does in section 22:

22. This Act comes into force on a day to be proclaimed by the Lieutenant-Governor in Council.

[16] The effect of such a provision is to delay the coming into force of most of the statute. In practice, such an Act comes into force on the date that its proclamation is published in the official *Newfoundland and Labrador Gazette*, issued weekly by the Queen’s Printer. The *SIRT Act* was proclaimed on Friday, March 26, 2021, after the present investigation had commenced.

[17] The *Interpretation Act*, at section 8, provides that in such circumstances any sections of a statute that are necessary to give effect to the statute upon proclamation are actually in force from the original date of Royal Assent:

8. Where an Act or a provision of the Act is not to come into force immediately on its being passed and confers power to

- (a) make appointments;*
- (b) hold elections;*
- (c) make regulations;*
- (d) make, grant, or issue instruments;*
- (e) give notices;*
- (f) prescribe forms; or*
- (g) do any other thing,*

that power may, for the purpose of making the Act or provision effective at the date of its coming into force, be exercised at a time after the passing of the Act, subject to the restriction that a regulation made under the power shall not, unless the contrary is necessary for making the Act or provision effective from its commencement, come into force until the Act or provision comes into force.

[18] After careful consideration, our assessment of the effect of non-proclamation is as follows. First, under the *Interpretation Act*, such parts of the *SIRT Act* that are required to make that Act “effective on commencement” would have been in force at the material times. Therefore it is arguable, and we accept, that the provisions of the *SIRT Act* relating to the appointment of the Director and other members were in force from the date the Act was given Royal Assent. On this interpretation, SIRT-NL as an organization was already properly appointed by the time the access request was made.

[19] Even if that were not the case, it is our view, alternatively, that the power of the Lieutenant-Governor in Council to establish a governmental organization or agency, and to appoint members to it, is a constitutional power of the executive branch that is separate from the legislative authority of the House of Assembly. The Lieutenant-Governor in Council has established SIRT-NL by *Order-In-Council 2019-202*, dated October 19, 2019, and other subsequent orders. On that alternative interpretation also, SIRT-NL was properly appointed by the time the access request was made.

Status of SIRT-NL as a Public Body

[20] The result, on either interpretation, is that SIRT-NL was, in the terms of section 2(x)(iii) of *ATIPPA, 2015*, constituted as:

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister.

Therefore, SIRT-NL is a public body subject to the Act. Because the Orders-in-Council pre-date the access request in the present case, the Team was therefore empowered (and indeed required) to accept the access to information request under *ATIPPA, 2015*, and to process it and to provide the Complainant with a final decision, after which the Complainant had the right to file a complaint with our Office.

Application of Exclusionary Provision (Section 5)

[21] Because SIRT-NL is a public body subject to *ATIPPA, 2015*, it follows that all of the existing provisions of *ATIPPA, 2015* including those claimed by SIRT-NL, such as sections 34, 40 and 30, are in principle applicable to the responsive records. However, section 21 of the *SIRT Act*,

creating an amendment to *ATIPPA, 2015*, is clearly not a provision that would be required to give effect to the *SIRT Act* as contemplated by the *Interpretation Act*. It follows that section 21, and therefore the amendments to *ATIPPA, 2015*, did not come into force until the *SIRT Act's* proclamation on March 26, 2021, after the processing of the access request and the filing of the present complaint. Therefore, the amended section 5 cannot be claimed in the present case to exclude the responsive records from the scope of the *Act*.

Powers of SIRT-NL

[22] It is our view that most other provisions of the *SIRT Act*, such as the conferring of investigative powers upon the Director and other investigators, also did not come into force until proclamation. This interpretation is reinforced by the fact that Regulations under the *SIRT Act*, providing for detailed investigative powers and procedures, were not issued until March 26, 2021, the date of proclamation, when they were published in the Gazette.

[23] This is the view expressed by SIRT-NL itself, in its explanation of how the serious incident investigation in question was conducted. In the fall of 2019, SIRT-NL had concluded that it lacked the legislative authority to conduct the investigation itself, because the *SIRT Act* had not been proclaimed. SIRT-NL therefore entered into an agreement with the RCMP for the RCMP to conduct the investigation. This becomes important in the assessment of the application of section 34 of *ATIPPA, 2015*, below.

Section 34 (1)(a) and (b)

[24] The principal exception claimed by SIRT-NL is section 34(1)(a) and (b) which reads:

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

(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:

(i) the government of Canada or a province,

(ii) the council of a local government body,

(iii) the government of a foreign state,

(iv) *an international organization of states, or*

(v) *the Nunatsiavut Government; or*

(b) *reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*

[25] The responsive records are a complete investigative file. The evidence before us is that SIRT-NL, lacking legislative authority to conduct the investigation itself because the *SIRT Act* had not yet been proclaimed, entered into an agreement with the RCMP for the RCMP to conduct the investigation.

[26] The RCMP, under the terms of the agreement, completed its investigation and provided its report, and the complete investigation file, to SIRT-NL for its review, with the understanding that it would be held in confidence and that it would not be further disseminated.

[27] SIRT-NL reviewed the RCMP investigation file and prepared its own summary report, focusing on whether the RCMP had conducted its investigation properly. That summary report has been provided to the Complainant.

[28] The RCMP was subsequently informed of the access request for the investigative file, and wrote to SIRT-NL stating that the file is still its property, that it is subject to the federal *Access to Information Act*, not the provincial *ATIPPA, 2015*, and that any requester should apply for access under federal legislation.

[29] The RCMP has stated that it does not agree to the disclosure by SIRT-NL of the information in the file, and further states that should the file be disclosed, the RCMP may in future revisit the arrangement under which it was provided.

[30] SIRT-NL argues that under these circumstances, disclosure will reveal information received in confidence from a government agency within the meaning of section 34(1)(b), and also that disclosure is likely to harm the relationship between itself and the RCMP within the meaning of section 34(1)(a)(i). SIRT-NL is concerned that the RCMP may no longer agree to

conduct investigations on SIRT-NL's behalf in future, which would seriously interfere with its operations.

[31] In our view these are reasonable concerns, and they are supported by the evidence provided to this Office. Section 34 is an information-level, rather than record-level, exception. In most cases that would require line by line redaction. However, given the nature of the information and the fact that all of the information in the record was created or compiled by the RCMP, the exception must apply to all of the information. It is on that basis that the record as a whole can be withheld.

[32] Although the circumstances have now changed with the proclamation of the *SIRT Act*, and SIRT-NL now has the authority to conduct its own investigations, disclosure of the file could still be expected to harm the relationship with the RCMP. More importantly, the decision under review in this Report is the decision to withhold the records made by SIRT-NL in January 2021 in response to the access request. That decision must be evaluated in the context of the circumstances and the law applicable at the time it was made. We therefore conclude that SIRT-NL was entitled to withhold the entire record from disclosure on the basis of section 34.

Section 40

[33] SIRT-NL also argues that because the investigation was conducted in a small community, it is impossible to redact complainant and witness statements and conclusions derived from those statements in other parts of the record, in such a way as to protect the personal privacy of identifiable individuals under section 40 (disclosure harmful to personal privacy). SIRT-NL submits that so much information would have to be redacted that the remainder would be meaningless. While we agree that if the record were to be provided a great deal of personal information would likely need to be redacted on that basis, it is not necessary to deal with this argument, given our conclusion on section 34, above.

Section 30

[34] The record also contains documents that SIRT-NL submits are legal opinions and may therefore be withheld on the basis of section 30 (legal advice). Again, it is not necessary to deal with this argument, given our conclusion above.

Harm to the Complainant

[35] The Complainant has also submitted that SIRT-NL had previously promised that “...you can always get access to your file...” and that the refusal to provide it “...places me at undue risk of harm, mental suffering and anguish.” We do not wish to minimize the Complainant’s concerns. However, disclosures in response to an access to information request are governed by the provisions of *ATIPPA, 2015*. While there are provisions permitting a public body to withhold information if its disclosure could result in harm to individual safety or physical or mental health, there is no equivalent provision that requires a public body to disclose information that should, or must, be withheld under other provisions of the Act.

[36] The most that can be said about the risk of harm asserted by the Complainant is that it could be a factor to be considered by the public body in exercising its discretion whether or not to disclose the record under a discretionary exception such as section 34. On the evidence before us we are satisfied that SIRT-NL considered the Complainant’s access request on its own merits and took all of the relevant factors into consideration in exercising its discretion to withhold the record.

[37] In conclusion, we are satisfied that SIRT-NL at all material times was a public body subject to *ATIPPA, 2015*, and that disclosure of the responsive record would reveal information received in confidence from the RCMP and such disclosure would reasonably be expected to harm the relationship between SIRT-NL and the RCMP, within the meaning of section 34(1)(a) and (b). Therefore SIRT-NL is entitled to withhold the record.

VI RECOMMENDATIONS

- [38] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Serious Incident Response Team continue to withhold the responsive record.
- [39] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Serious Incident Response Team 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.
- [40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of April, 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador