



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-022

May 10, 2021

Eastern Health

Summary:

An access to information request was submitted to Eastern Health seeking information related to ambulance red alerts and offload delays. Eastern Health responded and provided partial access to the records, redacting some information under sections 29(1), 35(1), and 40(1). The Complainant objected, asking that this Office review the redactions and consider whether the public interest override in section 9 should apply to the information. This Office upheld Eastern Health's decision to withhold the majority of information under sections 29(1), 35(1) and 40(1). The Commissioner recommended disclosure of one sentence that was redacted under section 29(1). The Commissioner further concluded that section 9 did not apply and the information can continue to be withheld.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, ss. 9, 29, 35, 40.

Authorities Relied On:

NL OIPC Report A-2021-016

Other Resources:

[Guidelines for Public Interest Override](#), OIPC, 2015.

I BACKGROUND

- [1] The Complainant submitted an access to information request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) to Eastern Health seeking the following:

Email correspondence and any presentations or documentation around red alerts, ambulance offload delays and how they relate to each other spanning from October 1, 2020 and present day.

- [2] Eastern Health responded by providing partial access to the records, withholding some information under section 29 (policy advice and recommendations), section 35 (disclosure harmful to financial or economic interests of a public body), and section 40 (disclosure harmful to personal privacy). The Complainant then 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 PUBLIC BODY’S POSITION

- [4] Eastern Health provided a submission and its position will be expanded upon below.

III COMPLAINANT’S POSITION

- [5] The Complainant sought a review of the exceptions applied and also put forward detailed arguments that the information should be released in the public interest.
- [6] The Complainant quoted from this Office’s “Guidelines for Public Interest Override”:

The purpose of adding this public interest override includes promoting democracy by increasing public participation in order to facilitate better informed decision-making. As well, it can increase scrutiny, discussion, comment and review between citizens and the government. Fundamentally, it is grounded in the idea that government information is managed for public purposes and that the public are the owners of the information.

[7] The Complainant stated that among the factors cited as supporting release are circumstances when “a policy decision has a widespread or significant impact on the public.”

[8] The Complainant argued that several issues of concern about the ambulance system on the northeast Avalon have been identified through previous access to information requests and media reporting, including evidence that:

- the service has been “dangerously understaffed”;
- that there were more than 2,000 occurrences over 12 months where there was no ambulance available to respond to calls;
- that the most serious form of “red alert” (where there was no ambulance with at least one emergency 911 call waiting) happened 470 times in that recent 12 month period; and
- the number of ambulance transports is well above national operational standards, an issue linked to increased staff burnout and time loss due to mental health issues and higher than average injury claims.

[9] The Complainant argued that when citizens of metro St. John’s require an ambulance, they expect that one will be available in their time of need.

[10] Finally, the Complainant stated that safety issues have been noted in cases where a compelling public interest has been found to exist and that this is an issue critical to public safety. Furthermore, it is an issue that deserves a critical examination to determine what steps need to be taken to ensure the safety of citizens.

[11] Based on the foregoing, the Complainant stated that the public interest override should apply to these circumstances in order to require that additional information be disclosed.

IV DECISION

[12] At issue is information redacted pursuant to sections 29, 35, and 40. More importantly, the Complainant has specifically raised the section 9 public interest override. This override is

applicable to any redactions made under sections 29 or 35, but not to any information which may be severed pursuant to section 40.

Section 29 – Policy Advice and Recommendations

[13] Eastern Health made redactions under section 29 (policy advice or recommendations). In most cases the information redacted constituted policy advice or recommendations. That is, it described certain considerations, specific recommendations and advice. We mostly agreed with Eastern Health's use of section 29(1), however, there was one specific sentence that appeared more factual in nature explaining information in a graph. This graph and the accompanying sentence appear twice in the responsive records, at pages 85 and 98. In both instances, the graph was released but the sentence was withheld under section 29(1). We did not agree with Eastern Health's use of the exception in this case.

Section 35 – Disclosure Harmful to the Financial or Economic Interests of a Public Body

[14] Eastern Health relied on a number of subsections under this exception, specifically subsections 35(1)(c), (d), (f) and (g):

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

...

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

...

(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or

...

[15] Most of the information redacted under this exception relates to various proposals or part of a project which has not been implemented or made public. Other information qualifies as having been developed for the purpose of contractual or other negotiations. As such, section 35(1) has been correctly applied to the records.

Section 40 – Personal Privacy

[16] Eastern Health applied section 40 (disclosure harmful to personal privacy), to the email address and other personal information of a third party individual. The information fits within the exception claimed and has been withheld properly under *ATIPPA, 2015*.

Section 9 – Public Interest

[17] Having found that the majority of the information redacted under sections 29(1) and 35(1) can be withheld under those exceptions, we must now consider whether, under section 9, the public interest in the disclosure of the information outweighs the reason for the exception.

[18] Section 9 of *ATIPPA, 2015* is as follows:

9.(1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

- (a) section 28 (local public body confidences);*
- (b) section 29 (policy advice or recommendations);*
- (c) subsection 30 (1) (legal advice);*
- (d) section 32 (confidential evaluations);*
- (e) section 34 (disclosure harmful to intergovernmental relations or negotiations);*
- (f) section 35 (disclosure harmful to the financial or economic interests of a public body);*
- (g) section 36 (disclosure harmful to conservation); and*

(h) section 38(disclosure harmful to labour relations interests of public body as employer).

(3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

(4) Subsection (3) applies notwithstanding a provision of this Act.

(5) Before disclosing information under subsection (3), the head of a public body shall, where practicable, give notice of disclosure in the form appropriate in the circumstances to a third party to whom the information relates.

[19] Section 9 is known as the public interest override and it is a provision which applies to most of the discretionary exceptions in *ATIPPA, 2015*, as specified in section 9(2). It provides that where the public interest in disclosure of information outweighs the reason for the exception, the exceptions enumerated at section 9(2) cannot apply. In all instances where a public body applies any of those exceptions subject to section 9, the public body must be able to demonstrate that it considered the public interest in disclosure and whether or not section 9 is applicable, regardless of whether the complainant has raised the issue.

[20] Eastern Health included in its submission an analysis of the applicability of section 9 to the exceptions claimed and why in its opinion section 9 did not apply. Eastern Health stated that when determining whether there is a public interest in disclosure, the head of a public body should consider whether the information in a record serves the purpose of informing or enlightening the citizenry about the activities of government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[21] Eastern Health's position is that section 29 of the *ATIPPA, 2015* recognizes that there is a space required to protect the full and frank discussion of policy alternatives within public bodies. Furthermore, with regard to section 35, Eastern Health submits that:

Section 35 recognizes timing as a factor in the determination of the balance between two sometimes competing public interest factors: the public interest in the recognition of a space for public bodies to prepare, research, analyze, plan, negotiate, secure, and present with the public interest in disclosure, accountability, and transparency.

[22] It is Eastern Health's opinion that the exemptions outlined in section 29(1) and section 35(1) were intended to carve out a space for advice, planning, and weighing of options. Eastern Health submits that it would be inappropriate to release incomplete and possibly irrelevant information or records prior to a decision being made.

[23] Based on our review of the records and Eastern Health's submissions, we have determined that section 9 does not supersede the applied exceptions in this instance. In particular, after careful review we feel that the information held back would not so beneficially enlighten the citizenry, to the extent to which it would outweigh the harms intended by the relevant exceptions claimed by the public body. While the subject of serious deficiencies in an ambulance service is broadly one of public interest, the threshold in section 9 must be specifically applied to the redacted information, and in this case the information that was withheld does not meet that threshold.

V CONCLUSIONS

[24] Based on our review, we have concluded that sections 29, 35 and 40 apply to most of the redacted information. However, there is one instance where we would recommend disclosure, as the exception does not apply. Having reviewed section 9, and Eastern Health's submission with respect to the public interest override, we have concluded that public interest in the information does not outweigh the purpose for the exceptions.

VI RECOMMENDATIONS

[25] I recommend that Eastern Health disclose the sentence which appears on pages 85 and 98 and was redacted under section 29(1).

[26] I recommend that Eastern Health continue to withhold the remaining information redacted under sections 29(1), 35(1) and 40(1) of *ATIPPA, 2015*.

[27] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Eastern Health 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.

[28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of May 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador