



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2023-005

February 7, 2023

Treasury Board Secretariat

Summary:

The Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* to the Treasury Board Secretariat for records relating to a complaint made against him and the subsequent investigation. Treasury Board Secretariat provided records to the Applicant, but withheld some information. The Applicant filed a complaint with this Office requesting a review of the decision to withhold some information pursuant to section 40(1) (disclosure harmful to personal privacy), specifically names of other employees and comments made about him. The Commissioner recommended that the Treasury Board Secretariat continue to withhold the information.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, section 33 and 40.

Authorities Relied On:

[College of the North Atlantic \(Re\), 2021 NLSC 120.](#)

[Section 33 – Information from a Workplace Investigation](#)

BACKGROUND

- [1] The Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* to the Treasury Board Secretariat (“TBS”) for information relating to a workplace complaint against him, including “information relating to this issue, the e-mail outlining my supervisor's accusations towards me. Minutes, workplace investigation etc.”
- [2] TBS located several records responsive to the Applicant's request. From these records, TBS redacted information pursuant to sections 29(1)(a) (policy advice or recommendations) and 40(1) (disclosure harmful to personal privacy).
- [3] Dissatisfied with TBS’ decision to withhold information pursuant to section 40, the Applicant filed a complaint with this Office asking the Commissioner to review TBS’ response. The decision to withhold some information pursuant to section 29 was not at issue in this investigation. The within complaint is specifically concerned with two questions posed by the investigator to the individual who made a workplace complaint about the Applicant, about whether that complainant knew of other employees who might have complaints about the Applicant and the nature of those complaints.
- [4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [5] TBS’s position is that the Applicant is not entitled to the names of the individuals who spoke to the complainant in the workplace complaint, nor is he entitled to their comments. TBS states that these individuals were not interviewed for this investigation nor have they made a complaint against the Applicant. TBS asserts that the redacted names are all employees who know each other and the Applicant. It is the opinion of TBS that the named individuals’ right to privacy in this particular instance takes precedence over the Applicant’s right to access.

APPLICANT'S POSITION

- [6] The Applicant believes that he should be provided with the workplace investigation complainant's responses to the questions posed by the investigator.

ISSUES

- [7] The only issue in this Report is whether TBS correctly applied section 40(1) to withhold the above information from the Applicant.

DECISION

- [8] The Applicant requested, and was provided, with information related to a workplace investigation of which he was the subject. The investigation stemmed from an interaction involving the Applicant and another employee. In the course of the investigation, the investigator obtained statements from the workplace investigation complainant and the Applicant. No other parties were interviewed by the investigator nor were any other witness statements collected for the purpose of the workplace investigation.

- [9] Sections 33(2) and (3) of *ATIPPA, 2015* state:

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

- [10] In *College of the North Atlantic (Re)*, 2021 NLSC 120, the Supreme Court of Newfoundland and Labrador held that the access provisions of section 33 are still subject to section 40 and the requirement to withhold personal information. Our Office has prepared an updated [guidance document explaining that decision](#). As noted by the court, and our guidance document, when there is interplay between sections 33 and 40, there must be a balancing act between what is necessary to provide the applicant with information to which they may be

entitled and protecting the privacy of individuals where names, comments, or other information would risk harm, even reputational harm.

[11] In this particular situation, I am of the opinion that the application of section 40 to the names and comments was appropriate.

[12] The investigator of the workplace investigation requested the information about other potential complaints from the workplace investigation complainant. The request for names was not for the purpose of identifying witnesses to the incident under investigation, but for the investigator to find out if others in the workplace took issue with the Applicant. I find, therefore, that this information is not relevant to the actual workplace investigation, and would fall outside of scope of section 33 of *ATIPPA, 2015*.

[13] The question of relevance also arises in relation to the comments by the investigation complainant about what the Applicant's colleagues said. Any comments made by the complainant in the workplace investigation attributed to the Applicant's colleagues are the workplace complainant's assessment, not witness statements from a party to the investigation and, in any case, the investigator determined that it was unnecessary to interview those colleagues. Therefore, I am of the view that any comments allegedly attributed to them are irrelevant. Evidently, the investigator deemed that potential complaints or concerns from colleagues were unnecessary and irrelevant to the outcome of the investigation.

[14] Even if I were to determine that the information was relevant within the meaning of section 33(2), the right of access provided by section 33 must still be balanced against the protection of personal information pursuant to section 40, per the Supreme Court of Newfoundland and Labrador in *College of the North Atlantic (Re)*, as outlined in the OIPC's guidance document on section 33:

Section 40 relates to the disclosure of personal information. Section 40 is also a mandatory exception to disclosure under ATIPPA, 2015. In College of the North Atlantic (R3), 2021 NLSC 120, the Court held that,

Section 33(3) of the Act does not override the provisions of section 40 of the same Act. In the context of a workplace investigation the employer is bound to provide all relevant material to the personal being investigated subject to the reasonable protection of privacy rights, under section 40, of complainants and third parties.

Neither section 33(3) nor section 40(1) can be read in isolation. As both are mandatory exceptions, where personal information is concerned, both sections must be read together in context with section 40(5).

Section 40(5) states:

(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

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

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

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable;

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

(i) the personal information was originally provided to the applicant; and

(j) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

Multiple factors come into play in determining what relevant information must be disclosed to an Applicant, including whether the disclosure is relevant to a fair determination of the Applicant's rights; whether a third party will be unfairly exposed to financial or other harm, including reputational harm; whether the information has been provided in confidence (or if a third party had a reasonable expectation of confidentiality); and whether the information has already provided to the Applicant.

[15] As noted above, the comments recorded by the investigator are merely the statements of the complainant, naming colleagues who, in the complainant's opinion, may have concerns about the Applicant. The investigator did not follow-up with those colleagues and they were not parties to the investigation of the complainant's complaint. In fact, there does not appear to be anything, other than the complainant's statements, to substantiate that these are indeed the views of the colleagues the complainant named. Section 40(5)(h), quoted above, in particular weighs against disclosing the personal information withheld by TBS. Therefore, on balance, I am satisfied that releasing the names of the colleagues and their alleged comments would represent an unreasonable invasion of their personal privacy.

RECOMMENDATIONS

[16] Under the authority of section 47 of *ATIPPA, 2015*, I recommend the Treasury Board Secretariat continue to withhold the information that was redacted under section 40(1).

[17] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Treasury Board Secretariat 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.

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of February 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador