



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-017

April 6, 2023

Independent Appointments Commission

Summary:

The Complainant sought information from the Independent Appointments Commission on the merit-based review of applicants for two Vice-Chairperson positions with the Labour Relations Board. There were 125 pages of responsive records, 84 of which were withheld pursuant to section 27 (cabinet confidences) and section 32(a) (confidential evaluations). The Complainant asserted that the Commission had not met its section 13(1) duty to assist, alleging that it had not performed a reasonable search for records and that sections 27 and 32(a) were not applied properly to withhold information. The Commissioner found that the Independent Appointments Commission did meet its duty to assist and that it had properly applied sections 27 and 32(a), and that the information should continue to be withheld.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 13, 27, and 32.

Authorities Relied On:

[Reports A-2022-030](#), and [A-2022-032](#).

BACKGROUND

- [1] The Complainant made an access to information request to the Independent Appointments Commission (“IAC”) regarding the merit-based review of the applicants for two Vice-Chairperson positions with the Labour Relations Board.
- [2] IAC searched for records responsive to the request, and located 125 pages of responsive records. From this total number, 84 pages were withheld in their entirety. The withheld documents can be divided into two groups:
- A. One group of records were withheld pursuant to section 32(a) and section 40(1) of *ATIPPA, 2015*.
 - B. One group of records were withheld pursuant to sections 27(1)(h), 27(2)(a), 32(a), and 40(1) of *ATIPPA, 2015*.

There were also some further redactions made throughout the released documents pursuant to section 31(1)(l) and 40(1) of *ATIPPA, 2015*.

- [3] During the informal resolution process, IAC did agree to remove most of the redactions in the documents provided to the Complainant that were claimed exclusively under section 40(1). The information that remained redacted in these documents were names and pronouns which fell under the scope of section 40(1). IAP provided these modified documents with some redactions removed to the Complainant and the complaint with respect to section 40 was resolved informally.
- [4] As informal resolution was unsuccessful for the remainder of the issues, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [5] IAC states that most of the information sought by the Complainant involves the evaluation of candidates for the Vice-Chairperson positions and the IAC is authorized to withhold it

pursuant to section 32(a) of *ATIPPA, 2015*. IAC further submits that there is no way to sever any of this information and produce a document that is coherent and, therefore, many pages of responsive records are withheld in their entirety. IAC also claims that some records are being withheld as they are cabinet confidences that are required to be withheld under section 27. In particular, there is a report that forms part of the submission that is made to Cabinet for the formal appointment process. As a result, the document is a cabinet record and it must be withheld in its entirety.

COMPLAINANT'S POSITION

[6] The Complainant challenged the position of the public body on several grounds. First, the Complainant submits that IAC did not meet its section 13(1) duty to assist. To support this argument, the Complainant submitted copies of documents that they received in the past in response to similar requests but which were not provided by IAC in response to the present request. Second, the Complainant has suggested in their various correspondence and submissions to this Office that section 32(a) should not be used to withhold evaluative information for candidates that have accepted a position with a department or agency and have passed through the IAC process. Essentially, the Complainant argues that once a candidate has accepted a position, the evaluative information on that candidate should be disclosed. The Complainant states that the release of such information is in line with section 40(2)(f) of *ATIPPA, 2015*, as it speaks to the function and position of an officer or employee of a public body. The Complainant also argues that section 27 and section 31 of *ATIPPA, 2015* were not properly applied against the records in question. The Complainant also questions why section 31(1)(l) was used to redact a small piece of information in the responsive records.

ISSUES

- [7] There are 4 issues to be addressed:
- i) Did IAC meet its duty to assist the complainant pursuant to section 13(1) of *ATIPPA, 2015*?

- ii) Should section 32(a) no longer be applicable to information about candidates who have successfully moved through the IAC process and have accepted a position with a government department or board?
- iii) Is section 27 correctly applied to the records that are responsive to the Complainant's access request?
- iv) Is section 31(1)(l) correctly applied to the records that are responsive to the Complainant's request?

DECISION

[8] Relevant sections of *ATIPPA, 2015* are:

13(1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

...

27(1) In this section, "cabinet record" means

(h) a record created during the process of developing or preparing a submission for the Cabinet;

27(2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record

...

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

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

...

32. The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of

(a) determining suitability, eligibility, or qualifications for employment or for the awarding of contracts or other benefits by a public body.

...

40(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

(f) The information is about a third party's position, functions, or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

[9] A public body's duty to conduct a reasonable search for records responsive to an access to information request is found in section 13 of *ATIPPA, 2015* (duty to assist), quoted above. As this Office has noted in A-2022-32, and elsewhere, the standard applied to a search for documents by the public body is reasonableness, not perfection. As stated in A-2022-30, it is important that the public body provide information to this Office on what steps it took in conducting its search so that this Office can assess whether the reasonableness standard was met.

[10] In response to the Complainant's request, searches for responsive records were conducted by both IAC and the Public Service Commission. These public bodies advised that they had searched emails, correspondence, desktops, shared drives, HPRM, and paper files. The search terms used were "Labour Relations Board" and "Vice-Chair" or "Vice Chairperson". Relevant subject matter experts, as well as administrative staff and the IAC's ATIPP coordinator were involved in the search. In reviewing the correspondence between the complainant and IAC, it is clear that the public body conducted its search appropriately and maintained proper contact with the Complainant throughout.

[11] The Complainant's position that the search for records was not reasonable is based primarily on the fact that two documents obtained by the Complainant in response to similar requests in the past were not disclosed by IAC in response to the present request. However, IAC advises that the documents in question were located, but they form part of the cabinet record withheld from the Complainant pursuant to section 27. Why these records may have been released in response to another access request is unclear, but each access request must be assessed on its own merits and if the records are indeed cabinet records within the meaning of section 27, then IAC would be required to withhold them. Section 27 is discussed below. Overall, IAC did meet its duty to assist the Complainant.

[12] The record withheld pursuant to section 27 is a report prepared for the Minister regarding the recommendation of the two Vice-Chairpersons to the Labour Relations Board. If accepted, the report is submitted to Cabinet to make the appointment. This report clearly meets the definition of a cabinet record pursuant to section 27(1)(h) and must be withheld pursuant to section 27(2)(a) of *ATIPPA, 2015*. Section 27 is a mandatory exception to access which requires a public body to withhold a cabinet record, though section 27(3) does allow the Clerk of the Executive Council to release a record if it is in the public interest to do so. In the present case, IAC advises that Cabinet Secretariat was consulted when processing the access request and the Clerk of the Executive Council reviewed the records and determined that it would not be appropriate to release them.

[13] A significant portion of the responsive records withheld by IAC have been withheld pursuant to section 32(a). This exception allows for information to be withheld by a public body if it is evaluative or opinion material used to determine a person's suitability or qualifications for employment or another position with a public body. In this case, the information withheld are all part of the evaluative process, such as resumes and assessment sheets. There are sound policy reasons for withholding this information. Evaluations are a mixture of the objective and subjective and explicitly involve someone forming an opinion on someone else. The person being evaluated is in a relatively defenseless position, as that person has very little ability to change an evaluation once it is done. Evaluations are necessary, but they are certainly imperfect and can be wrong. If a poor evaluation of a person is disclosed to the public, the professional, economic, and social damage caused by that disclosure could be tremendous. A poor evaluation is like gum on your shoes – it follows you everywhere and it is difficult to get off.

[14] If evaluations for employment or other positions with a public body were to be disclosed, it would undermine the hiring or appointment process. For those being evaluated, particularly for various administrative boards that provide little or no remuneration, the motivation to apply for such a position would have to be weighed against the consequences of a poor evaluation being disclosed publicly. Applying for a position with a public body should not come with possible punitive consequences. As for the person doing the evaluating, if evaluative information was to be released, the evaluator, cognizant of the impact of their judgments, may

not be as honest or forthright in their evaluation. The evaluator may also be publicly criticized for the judgments they arrive at. In general, unless you are an elected official, the court of public opinion should never weigh in on a person's suitability or qualifications for a position with a public body.

[15] The Complainant has argued that the evaluative material for candidates that are chosen for a position with a public body should be released once those candidates have assumed their new roles. The Complainant states that this is in keeping with section 40(2)(f) of *ATIPPA, 2015*, which states that the disclosure of a person's position, function, or remuneration is not an unreasonable invasion of privacy. This stretches section 40(2)(f) beyond its intent. That section provides an exhaustive list of what can be disclosed and not be considered an unreasonable invasion of privacy. That list does not include qualifications and suitability, which is what the evaluative process considers. It is also important to note that accepting employment or any other position of a public body does not vitiate the privacy rights that a person enjoyed prior to joining the public body. Such a position goes against one of the expressed purposes of *ATIPPA, 2015*, which is to protect "the privacy of individuals with respect to personal information about themselves held and used by public bodies."

[16] Lastly, the Complainant has challenged the use of section 31(1)(l) to withhold a short piece of information from page 92 of the responsive records package. This redaction is overly cautious as the information is simply a reference to a specific computer program used by the Government of Newfoundland and Labrador. The Provincial Government is open about its use of this program and it routinely posts job advertisements looking for employees with experience using the system. Section 31(1)(l) applies to information that could reasonably be used to reveal security arrangements. That is not what is being redacted on page 92, and the material should be disclosed.

RECOMMENDATIONS

[17] Under the authority of section 47 of *ATIPPA, 2015* I recommend the following:

1. That the Independent Appointments Commission continue to withhold the information redacted pursuant to sections 27(2)(a) and sections 32(a), and
2. That the Independent Appointments Commissioner release the information redacted pursuant to section 31(1)(l).

[18] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Independent Appointments 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.

[19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of April 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador