



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-022

May 4, 2023

Royal Newfoundland Constabulary

Summary:

The Complainant submitted a request to the Royal Newfoundland Constabulary (RNC) seeking all information regarding their family, including children. The RNC did disclose some records responsive to the request but withheld others, claiming that *ATIPPA, 2015* did not apply to these records pursuant to section 5(1)(m). Upon consideration of the limitations placed on this Office under section 5(1)(m), and upon review of documents and other submissions provided by the RNC to demonstrate the applicability of section 5(1)(m), the Commissioner concluded that the information was subject to section 5(1)(m) and that *ATIPPA, 2015* did not apply.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 5(1)(m) and 97.

Authorities Relied On:

NL OIPC Report [A-2021-003](#).

Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner), 2010 NLTD 19 (CanLII).

BACKGROUND

- [1] The Complainant submitted an access to information request to the Royal Newfoundland Constabulary (“RNC”) pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “Act”) as follows:

*I wish all information regarding my family from the RNC. Absolutely everything.
They are all minors.*

- [2] The RNC’s search did produce responsive records and some were provided to the Complainant. These records included incident reports when the RNC had interactions with the Complainant. The RNC also determined that there were documents regarding traffic accidents involving the Complainant which were in the custody or control of the Motor Registration Division and the RNC provided advice to the Complainant about how to access them.
- [3] The RNC also found records that contained information on the Complainant’s minor children. However, these were not provided to the Complainant as the RNC claimed that *ATIPPA, 2015* did not apply pursuant to section 5(1)(m).

PUBLIC BODY’S POSITION

- [4] The RNC asserts that the remaining records not released to the Complainant clearly meet the definition of section 5(1)(m) of *ATIPPA, 2015* and therefore lie outside of the jurisdiction of the Act. As a result, the RNC submits that the Complainant has no right of access to these records and, further, that this Office has no authority to compel the production of the information to ensure that it actually meets the requirements for section 5(1)(m).

COMPLAINANT’S POSITION

- [5] The Complainant does not deny that the information in question involves sensitive criminal matters. However, the Complainant is seeking a determination that section 5(1)(m) of *ATIPPA 2015* is being properly applied.

ISSUES

- [6] The sole issue is whether section 5(1)(m) has been correctly applied to the information responsive to the Complainant's request.

DECISION

- [7] Section 5(1) of *ATIPPA, 2015* states:

5(1) This Act applies to all records in the custody or under the control of a public body but does not apply to

(m) a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

- [8] Section 5(1) contains a list of the types of information to which *ATIPPA, 2015* does not apply. The role of this Office when investigating a complaint regarding an access to information request differs depending on what provision of section 5 has been applied. Pursuant to section 97, the Commissioner can require records under sections 5(1)(c), (d), (e), (f), (g), (h) or (i) to be provided to this Office to be examined for the purposes of an investigation. Records included in these categories include archival material and records in a constituency office, among others.
- [9] The remaining types of information under 5(1) that the Commissioner has no statutory authority to compel production have to do with judicial matters and documents relating to criminal investigations.
- [10] This Office has not released a report considering section 5(1)(m), though A-2021-003 did address section 5(1)(j). That section considers disclosure of information during an ongoing prosecution and is similar to the circumstance covered in section 5(1)(m): suspicion of guilt and prosecutorial discretion. At paragraph 17 of that report I wrote:

However, section 5 is not an exception to access. Rather, it is an exclusion, enumerating whole classes of records to which the Act does not apply. If our

Office finds that a record falls within a class of records covered by section 5, then it has no jurisdiction to conduct a further analysis, or to recommend that the record be disclosed.

[11] The challenge is that this Office has very few tools at its disposal when in receipt of a complaint about denial of access to information involving a claim by a public body of section 5(1)(m).

[12] This predicament was addressed by Justice Fowler in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, which considered a claim for access that was denied under section 5(1)(k) (access to RNC records during an ongoing investigation). Justice Fowler wrote at paragraph 48:

[48] I find, therefore, that the commissioner as empowered by the Access to Information and Privacy Act of this province does not have the authority as a preliminary jurisdictional issue to determine for himself whether or not the section 5(1)(k) information or record sought is out the jurisdiction of the Commissioner as alleged in the matter before this Court. If the Commissioner was requesting, for example, access to a judge's notes; there is no authority that I am aware of that could override the right of a judge to not disclose notes or records related to an ongoing court matter. I would conclude that this would also apply to prosecutorial information in an ongoing matter before the courts.

[13] In *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)* Justice Fowler did suggest that in some instances an affidavit could suffice to provide evidence to prove that a section 5(1) claim was valid. However, Justice Fowler noted that there is nothing compelling a public body to take such a step. With respect to actually receiving the authority to review the files that are claimed as not subject to *ATIPPA*, Justice Fowler also noted at paragraph 51 that the Commissioner could seek a declaration from the court seeking access to a specific file. This approach would take the matter outside of the legislative framework of *ATIPPA* and leave the matter for the court to decide.

[14] In this case, the RNC has been responsive to this Office's questions regarding the application of section 5(1)(m) and the contents of the records which have been withheld. The RNC has not provided an affidavit, nor could we compel them to do so, but they have provided

documentation that explains the issues outlined in the withheld information and how such information meets the requirements of section 5(1)(m) of *ATIPPA, 2015*. Upon review of these documents, this Office is satisfied that section 5(1)(m) is properly applied in this case.

RECOMMENDATIONS

- [15] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Royal Newfoundland Constabulary maintain its position with respect to the applicability of section 5(1)(m) of the Act to the records sought by the Complainant.
- [16] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Royal Newfoundland Constabulary 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.
- [17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of May 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador