



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Report A-2023-042

October 25, 2023

ArtsNL

Summary:

The Complainant made an access to information request to ArtsNL for the names of the peer assessors linked to each specific grant category for the Spring and Fall 2022 granting sessions. ArtsNL responded by denying the Complainant access to the information, citing sections 32(a) and 40(1) of *ATIPPA, 2015* as justification. In response, the Complainant filed a complaint with this Office. After reviewing submissions from both parties, the Commissioner disagreed that the exceptions to access applied to the requested information and recommended ArtsNL disclose the information to the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, Sections 32 and 40.

Authorities Relied On:

Newfoundland and Labrador v Newfoundland and Labrador Teachers' Association, [2018 NLCA 54](#).

BACKGROUND

- [1] On June 16, 2023, the Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”) to ArtsNL for the following:

For the sake of transparency, accountability and credibility, I am requesting the names of the peer assessors for each specific grant category for the Spring and Fall granting sessions of 2022 with ArtsNL. Every other granting agency in Canada (including the Canada Council and Ontario Arts Council) provides the names of its peer assessors for each category, for the sake of accountability, transparency and credibility. This is done to help ensure the elimination of assessors giving grants to their friends and business associates. It is an imperative measure to ensure transparency.

- [2] On June 28, 2023, ArtsNL provided its final response to the Complainant and denied access to the responsive records, applying the exceptions to access at sections 32(a) and 40(1) of *ATIPPA, 2015*. On July 21, 2023, the Complainant 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*.

COMPLAINANT’S POSITION

- [4] The Complainant submits that releasing the requested information would be in the spirit of transparency and accountability and thus in the spirit of *ATIPPA, 2015*. Furthermore, they state that disclosure of which peer assessors judged which artistic category would reduce the likelihood of a conflict of interest. They also submit there is no evidence that potential harassment might arise from the disclosure of this information.

PUBLIC BODY’S POSITION

- [5] ArtsNL does publish an annual list of all peer assessors involved in judging grants, but it does not disclose which category a particular assessor judges. ArtsNL’s position is that disclosing which artistic category each peer assessor judged would harm the process of

awarding grants and discourage others in the artistic community from becoming assessors. ArtsNL further claims revealing which categories the assessors worked on would constitute an unreasonable invasion of privacy as per section 40 of *ATIPPA, 2015*. More specifically, ArtsNL states: “[w]ithout guaranteed privacy protection from potential harassment or other negative outcomes, the task of recruiting peer assessors will become a major challenge for ArtsNL, and the agency will not be able to process public arts funding effectively.”

- [6] ArtsNL states further that revealing each peer assessor’s link to each artistic category constitutes ‘evaluative or opinion material’ compiled for determining suitability for a public benefit and thus can be withheld under section 32.

ISSUES

- [7] The issues to be addressed in this Report are whether ArtsNL was correct in its use of sections 32 and 40 to deny access to the requested records.

DECISION

- [8] The relevant sections of *ATIPPA, 2015* are as follows:

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. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

(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;*
- ...
- (4) *A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where*
- ...
- (f) *the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;*
- (g) *the personal information consists of the third party's name where*
- (i) *it appears with other personal information about the third party;*
- ...
- (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*
- ...
- (c) *the personal information is relevant to a fair determination of the applicant's rights*
- ...
- (e) *the third party will be exposed unfairly to financial or other harm;*
- (f) *the personal information has been supplied in confidence*

[9] ArtsNL is a Crown agency created by the *Arts Council Act* to promote local artistic projects in Newfoundland and Labrador. ArtsNL receives an annual grant from the Province to support funding of local projects. It supports artists in creating dance, film, music, theatre, visual arts, writing, and multidisciplinary works. For each category of artistic discipline there are three to five assessors assigned to assess suitability for grants. In this particular case, the Complainant had submitted a project but had been denied funding two years in a row. The

Complainant therefore made their access to information request to learn who assessed their project. The Complainant states who judged which category should be revealed as it would be in the spirit of transparency and would reduce the likelihood of conflicts of interest. The Complainant further states ArtsNL had previously allowed access to the information they requested, and that ArtsNL's refusal of access to the information is a recent change.

[10] ArtsNL states a list of peer assessors is published annually in alphabetical order. However, it does not disclose which category each peer assessor assessed. This is done, it states, to provide the individuals a degree of privacy protection. This policy ensures peer assessors are not linked to specific assessment committees in order to protect the individuals from harassment and to ensure assessors are comfortable reviewing applications honestly and openly within their committees, without fear of their assessments negatively affecting interactions with their peers in the wider community.

[11] With respect to how artistic projects are graded, each assessor in a category scores the project out of 10 based on artistic merit, merit of the activity, and feasibility of the activity. The assessors' independent scores are then added together and divided by the number of assessors in the group to create an average score. Therefore, while assessments are done individually, decisions are made based on the group's total score and not by any one individual.

[12] The "evaluative or opinion" material referenced in section 32 would potentially cover any notes made by the assessors. However, the notes are not at issue as they are already provided to the grant applicants. The applicants, however, cannot ascertain who wrote the notes. The Complainant is interested in knowing which peer assessors judged each category and, therefore, the identities of the peer assessors who judged the Complainant's artistic work. While section 32 does not apply, section 40 requires analysis and consideration.

[13] Peer assessors are not staff of ArtsNL but they are paid for their work (up to \$500 per day). As the community of peer assessors are doing work on behalf of ArtsNL, then section 40(2)(f), which states that disclosure is not an unreasonable invasion of privacy if the

information is about a third party's functions as an employee of a public body, merits consideration.

[14] Section 2(i) of *ATIPPA, 2015* states an "employee," in relation to a public body, includes "a person retained under a contract to perform services for the public body." Peer assessors are recruited by ArtsNL from the arts community and compensated by ArtsNL for their evaluation of applications for funding. In my view, peer assessors clearly meet the definition of employee for the purposes of *ATIPPA, 2015* and it follows that what specific artistic disciplines an assessor reviews is "information about a third party's . . . function" and thus section 40(2)(f) is applicable. Therefore, revealing which artistic discipline peer assessors judge is not an unreasonable invasion of privacy.

[15] The Newfoundland and Labrador Court of Appeal considered the operation of section 40 in *Newfoundland and Labrador v Newfoundland and Labrador Teachers' Association*, [2018 NLCA 54](#) and concluded that "[i]f section 40(2)(f) applies, the information must be disclosed, and that is final." (at paragraph 50).

RECOMMENDATIONS

[16] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that ArtsNL provide the complainant with the requested information within 10 business days.

[17] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of ArtsNL 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 25th day of October 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador