



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-044

November 3, 2023

Department of Justice and Public Safety

Summary:

The Complainant made eight related access to information requests to the Department of Justice and Public Safety, seeking records on the costs and expenses of several individuals employed or paid for by the Crown in a criminal matter for which a prosecutorial stay had been entered in March 2023. For seven of the requests, the Department claimed that section 5(1)(j) of *ATIPPA, 2015* applied and therefore the requested records were outside of the jurisdiction of the Office of the Information and Privacy Commissioner. For one of the requests, JPS did disclose some records with redactions made pursuant to sections 30(1)(a) and 40(1) of *ATIPPA, 2015*. Given the constraints placed by a claim of section 5(1)(j), this Office refrained from making a recommendation on that particular issue, though the Commissioner did offer comments on the applicability of section 5(1)(j) in this case. Upon review of the records disclosed to the Complainant, the Commissioner concurred with the Department's use of section 30(1)(a) to withhold information that is subject to solicitor-client or litigation privilege and the application of section 40(1) to protect personal information.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 5(1)(j), 30(1)(a), 40(1), and 97(1)(a).

[Provincial Offences Act](#), SNL 1995, c. P-31.1, section 7.

Criminal Code RSC, 1985, c. C-46, sections 579(1), and 579(2).

Authorities Relied On: NL OIPC Reports [A-2023-22](#) and [A-2018-019](#).

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

R v. D.N 2004 NLCA 44 (CanLii).

“Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador” Office of the Director of Public Prosecutions, October 2007.

Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken, 2005.

BACKGROUND

[1] The Complainant submitted eight related access to information requests to the Department of Justice and Public Safety (“JPS”):

1. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid (including salaries, wages, disbursements, invoices, and expenses invoiced and/or paid, and the cost of expert reports invoiced and/or paid) by the Government of Newfoundland and Labrador and/or department of Justice and Public Safety relating to [six court matters] between January 1, 2014 and June 16, 2023. (OIPC File 0005-084-23-081)*
2. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid to [named individual], by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and June 16, 2023. (OIPC File 0005-084-23-082)*
3. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid to [named individual], including salaries, wages, disbursements, invoices and expenses paid to [named individual] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and June 16, 2023.(OIPC File 0005-084-23-083)*
4. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid to [named individual], including salaries, wages, disbursements, invoices and expenses paid to [named individual] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and June 16, 2023. (OIPC File 0005-084-23-084)*
5. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid to [named individual], including salaries, wages, disbursements, invoices and expenses paid to [named individual] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and June 16, 2023. (OIPC File 0005-084-23-085)*

6. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid to [named individual], including salaries, wages, disbursements, invoices and expenses paid to [named individual] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and June 16, 2023. (OIPC File 0005-084-23-086)*
7. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid to [named individual], including salaries, wages, disbursements, invoices and expenses paid to [named individual] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and June 16, 2023. (OIPC File 0005-084-23-087)*
8. *All records, comments, assessments meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same, relating to costs and expenses invoiced and/or paid to [named individual], including salaries, wages, disbursements, invoices and expenses paid to [named individual] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and June 16, 2023. (OIPC File 0005-084-23-088)*

[2] The search conducted by JPS did produce responsive records, however for seven of the eight requests, JPS asserted that section 5(1)(j) of *ATIPPA, 2015* applied to all responsive records and therefore they would not be released. With respect to the remaining request (number 3, above), there were records released to the Complainant with redactions made pursuant to sections 30(1)(a) and 40(1) of the Act. Nonetheless, JPS asserted that some responsive records in request number 3 are also subject to section 5(1)(j).

[3] The Complainant requested that this Office determine whether section 5(1)(j) applies to the records. The Complainant also requested that this Office review the exceptions applied to the records disclosed by JPS and assess whether they were properly claimed.

[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] It is the position of JPS that this Office has no statutory right to make any determination on the records for which section 5(1)(j) of *ATIPPA, 2015* is claimed, as these records are not subject to the *Act*. As such, the OIPC has no jurisdiction to make any recommendation on whether records should be released, partially released, or withheld. JPS also asserts that section 30 and section 40 redactions in the responsive records provided to the Complainant are necessary to ensure the protection of personal privacy and to maintain solicitor-client privilege or litigation privilege.

COMPLAINANT'S POSITION

- [6] The Complainant asserts that section 5(1)(j) is misapplied by JPS and that the requested information should be released after being properly reviewed. Section 5(1)(j) applies in circumstances where there is an ongoing prosecution and not all proceedings are complete. The Complainant argues that there is no ongoing prosecution given the manner in which the Crown dispensed with the criminal proceedings. Further, the Complainant argues that even if the Crown sought to reinstate criminal proceedings, the Crown would be legislatively barred from doing so. Therefore, the Complainant submits that section 5(1)(j) does not apply as there is no possibility of a future prosecution and all proceedings in respect of the prosecutions should be considered to be completed.

DECISION

- [7] The sections of *ATIPPA, 2015* relevant to this matter is as follows:
5. (1) *This Act applies to all records in the custody of or under the control of a public body but does not apply to*
- (j) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.*
30. (1) *The head of a public body may refuse to disclose to an applicant information*

(a) That is subject to solicitor client and client privilege or litigation privilege of 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.

97.(1) This section and section 98 apply to a record notwithstanding

(a) Paragraph 5(1)(c), (d), (e), (f), (g), (h), or (i)

97.(3) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.

The following section of the *Provincial Offences Act* is also relevant to this matter:

7. An information or complaint under this Act may be laid before a day 12 months from the day when the matter of the information or complaint arose unless another time limit is provided for the enactment.

The following sections of the *Criminal Code of Canada* are also relevant to this matter:

579(1) The Attorney General or counsel instructed by the Attorney General for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by the Attorney General's or counsel's direction, as the case may be, and the entry shall then be made, at which time the proceedings shall be stayed accordingly and any undertaking or release order relating to the proceedings is vacated.

579(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is earlier, the proceedings shall be deemed never to have been commenced.

[8] In general, *ATIPPA, 2015* provides a right of access to most public body records. There are, however, certain classes of records described in section 5(1) of the Act to which *ATIPPA*,

2015 does not apply. These excluded records cover a wide range of issues, from constituency records to police files. The records described in section 5(1) can be further divided into two groups: those records which this Office can review to ensure they are indeed exempt from the application of *ATIPPA, 2015* and those records which this Office has no right to review. The records contained in this second category include the communications of judges and matters involving ongoing police investigations and Crown prosecutions. Descriptions of this class of records are set forth in section 5(1)(a) to (b) and 5(1)(j) to (m) of *ATIPPA, 2015*.

[9] In the present case, JPS is claiming that most of the records requested by the Complainant are covered by section 5(1)(j) of *ATIPPA, 2015* as they are records relating to prosecutions where all proceedings in respect of those prosecutions have not been completed and are not subject to the Act. Such claims do present a challenge to this Office. We are not able to compel JPS to provide us with copies of the records for which it claims section 5(1)(j) and therefore we have no ability to actually confirm that the JPS assertion is accurate. Instead, this Office can assess the context surrounding the records and assertions from a public body that it has properly applied the provisions under section 5(1).

[10] The limitations placed on this Office by a claim of section 5(1)(j) were addressed in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*. This 2010 decision addressed this Office's right to compel RNC files during an ongoing investigation, which the RNC claimed were exempt from the former *Access to Information and Protection of Privacy Act* pursuant to a provision that is akin to section 5(1)(j) under consideration in this Report. In the decision, 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 outside of 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.

- [11] In the same decision, Justice Fowler did suggest that in some instances an affidavit from the public body about the records being withheld could suffice as evidence to prove the application of some provisions under section 5(1). Justice Fowler did note that a public body could not be compelled to take such a step. The Justice also noted at paragraph 51 that the Commissioner could seek a declaration from the court to seek access to records to which a public body has claimed section 5(1) applies.
- [12] This Office is constrained when a public body applies section 5(1)(j) of *ATIPPA, 2015*. We have no jurisdiction to recommend that the records in question be released or that they be provided to this Office for review. However, one of the mandates of this Office is to provide oversight of *ATIPPA, 2015*, of which section 5(1)(j) is a provision and it is incumbent upon this Office during a complaint investigation to make our best efforts to ensure that the rights of applicants are being upheld and that public bodies comply with the *Act*.
- [13] The records at issue involve the prosecution of several individuals under the *Provincial Offences Act*. The prosecution was ongoing for several years and in March 2023, the Crown stayed the proceedings, pursuant to section 579(1) of the *Criminal Code of Canada*. Pursuant to section 579(2) of the *Code*, the Crown has one year from the date of issuing a stay to recommence proceedings from the point at which they were stopped. It is this one-year period that JPS argues constitutes a proceeding under *ATIPPA, 2015*.
- [14] A prosecutorial stay of proceeding is now rare in Newfoundland and Labrador and this is the first instance in which this Office has considered a stay in relation to section 5(1)(j). This Office asked JPS to provide a legal opinion on how the issuance of a stay relates to the conditions needed to support the application of section 5(1)(j), but JPS refused. This Office asked JPS to confirm that those subject to the prosecutorial stay were still accused of a crime; JPS did not provide an answer to that question.
- [15] A prosecutorial stay may be issued for specific reasons and is an exceptional step to be taken. According to the “Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador,” a Crown Attorney in the province must consider two issues when deciding to prosecute:

1. *Whether there is sufficient admissible evidence to justify the initiation or continuation of proceedings; and*
2. *Whether the public interest is served by the initiation or continuation of a prosecution.*

The Guide Book goes on to note that:

If a Crown Attorney determines there is insufficient evidence OR that the public interest is not served by a prosecution, then proceedings should be terminated.

The Guide Book goes on to list a prosecutorial stay under the section for “Termination for Proceedings.”

[16] Case law from this province suggests that when a prosecutorial stay is issued, the accused is no longer charged with a crime. In *R v. D.N* 2004 NLCA 44, D.N. sought to have the Crown Prosecutor’s decision to enter a stay rescinded and that the court enter an acquittal instead. When D.N. made this motion to the trial judge, the trial judge replied that he was *functus*, meaning that the judge no longer had any authority over the proceeding. If the trial of D.N. was merely on pause, which is how JPS has described the stay in the case at hand, the judge would not be *functus*. According to every source reviewed by this Office on stays of proceedings, the accused in the files for which section 5(1)(j) of *ATIPPA, 2015* has been applied are actually no longer accused or subject to a criminal charge. As noted, JPS was provided an opportunity to put forward evidence, case law, or analysis on this point.

[17] This Office also questions JPS’s interpretation that the one-year period after a prosecutorial stay has been entered constitutes a proceeding. At the end of this one-year period, there is no hearing to make a final determination on the charges previously laid against the accused. Instead, the formerly accused is treated as if they were never charged in the first place. However, the accused can still be charged with the same crime in the future, though the prosecution process would have to start again from the beginning. In the 2005 *Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, former Supreme Court of Canada Chief Justice Antonio Lamer was critical of the use of prosecutorial stays in this province, as the cases subject to the stays were rarely recommenced and the one-year period merely lapsed. As Chief Justice Lamer noted on pages

327 and 318:

If the accused is acquitted, he is immune from any future prosecution of the same conduct. After a stay has expired, the former accused may be charged with the same offence for the same conduct at any time. This makes the stay of proceedings a much easier choice for the Crown. There is “nothing to lose” by entering a stay so the Crown is relieved of the burden of having to assess the evidence and determine whether a subsequent prosecution is a realistic possibility.

But there is a downside for the accused. A stay of proceedings may leave an impression with the public that the charge is merely being “postponed” or the “authorities”, in a broad sense, still believe in the validity of the charge.

[18] In assessing Chief Justice Lamer’s critique of the use of stays, and the decision of the Newfoundland and Labrador Court of Appeal in *R v. D.N.*, it is more likely that the one-year period after a stay has been entered is a privilege provided to prosecutors in the use of their discretion and not an actual proceeding. After all, the accused has no legal right to intervene in the decision to issue a prosecutorial stay, which contravenes the manner in which all other proceedings are conducted in a criminal prosecution where a defendant is entitled to challenge the position of the prosecution.

[19] In considering the circumstances that must be present for section 5(1)(j) to apply, this Office questions whether they exist in this case as there must be:

- An accused;
- A prosecution, and
- A future proceeding.

Given the impact of a prosecutorial stay on a criminal case, it is uncertain whether any of these three circumstances are present in this matter.

[20] In OIPC Report A-2023-22, this Office addressed the application of section 5(1)(m), which places the same limitations to access (and to this Office’s ability to compel and review records) as the section 5(1)(j) claim in this matter. In Report A-2023-22, the Royal Newfoundland Constabulary were forthcoming on why the application of section 5(1)(m) was appropriate and provided adequate information that allowed this Office to state with confidence the section was properly applied. Such information was not provided by JPS in this case, as it instead focused on this Office’s lack of jurisdiction in the matter as opposed to why a section 5(1)(j) was appropriate. Given this Office’s mandate to oversee *ATIPPA, 2015*, and its responsibility

towards both the Complainant and the Public Body, supplying this Office with reasons based around the facts of the records in questions is the preferred approach in dealing with records subject to section 5(1) where the Public Body does not supply records.

[21] It should be noted that the Complainant submitted a strong legal argument as to why the one-year period to reinstate the charges when stayed by the prosecutor is not applicable in this case. In most cases where a stay is applied by the prosecutor, the charges are made pursuant to the *Criminal Code* and there are few limitation periods for laying the charge. In this case, the charges were laid pursuant to the *Provincial Offences Act (POA)* which has a limitation period of 12 months for the laying of a charge. The Complainant argues that, given the language in section 579(2) of the *Criminal Code*, in combination with the 12-month limitation period in the *POA*, the one-year timeframe for the reinstatement of charges in a prosecutorial stay has already been exhausted. This is a worthwhile legal position to consider, however, this Office's inability to contest a section 5(1)(j) claim does not allow us to fully do so.

[22] As a result of the limitations imposed by a section 5(1)(j) of *ATIPPA, 2015* claim, this Office will refrain from making any recommendation on records that JPS claims are covered by that section of the *Act*. However, given one-year limitation period in the *Criminal Code* for a stay, and other possible limitation periods under the *Provincial Offences Act*, the Complainant may wish to consider a new access to information application in March 2024.

[23] JPS did provide the Complainant with many pages of invoices and expenses related to one of the prosecutors. The Claimant's request for information on total expenses incurred by this Crown Prosecutor was not confined to the particular criminal matter in the first access request listed above.

[24] Some of the information provided to the Complainant is redacted pursuant to section 30(1)(a) of *ATIPPA, 2015*. In OIPC Report A-2018-019, this Office recommended that information such as legal fees and expenses could be released so long as it was done so in a manner that would not disclose the particulars of a legal matter and potentially violate solicitor-client privilege. In this instance, most of the applications of section 30(1)(a) redact

single sentences stating the legal matter for which an expense is claimed. In these instances, the use of section 30(1)(a) appears to be appropriate, as disclosing the purpose of the expense could allow an assiduous inquirer to derive some insight into the particulars of a legal matter and potentially breach solicitor-client or litigation privilege.

[25] There is one page in the responsive records where section 30(1)(a) is cited to redact nearly all information listed under the heading “Description.” In keeping with the reasoning in Report A-2018-019, redacting the description of the activity taken by the Crown Prosecutor is reasonable as releasing the description of the activity would likely violate solicitor-client privilege.

[26] While this Office cannot recommend that JPS create a new record to disclose to the Complainant, we do note that in Report A-2018-019, the information on legal bills was released showing the quantum of expenditures with no breakdown of individual matters or expenses. This is an approach that JPS may want to consider in the future if it receives a similar access request.

[27] With respect to the information withheld from the responsive records pursuant to section 40(1) of *ATIPPA, 2015*, a review of these redactions finds that the information – personal financial information, addresses, email addresses, and similar – is properly withheld.

RECOMMENDATIONS

[28] Under the authority of section 47 of *ATIPPA, 2015*, I find that the information currently withheld by the Department of Justice and Public Safety is in accordance with section 30(1)(a) and section 40(1) of *ATIPPA, 2015* has been withheld appropriately and I recommend that the Department continue to withhold this information.

[29] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Justice and Public Safety 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.

[30] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of November 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador