



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-045

November 10, 2023

College of the North Atlantic

Summary:

The Complainant submitted an access to information request to the College of the North Atlantic for records relating to a workplace investigation involving the Complainant. The College responded by providing the Complainant with some records, but made redactions pursuant to sections 30(1)(a), 37(1)(a), and 40(1) of *ATIPPA, 2015* and withheld most records citing the same exceptions. The Complainant disagreed with the exceptions and filed a complaint with this Office. After review of the responsive records and submissions, the Commissioner agreed that the investigative report was created for the dominant purpose of and in contemplation of litigation and thus agreed with most of the College's application of section 30. Furthermore, the Commissioner agreed a reasonable expectation of harm exists if the information withheld under section 37 was to be disclosed. As such, the Commissioner recommended the College maintain its position on the section 30 and 37 records, but did recommend release of the Complainant's own provided information and statements as required by section 33 of *ATIPPA, 2015*.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 30, 33, 37, 40, and 43.

Authorities Relied On:

NL OIPC Reports [A-2023-043](#), [A-2023-039](#), [A-2021-026](#), [A-2012-006](#), BCIPC Report [2021 BCIPC 70](#).

Lizotte v. Aviva Insurance Company of Canada, [2016 SCC 52](#), *Corner Brook (City) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, [2020 NLSC 37](#), *College of the North Atlantic (Re)*, [2021 NLSC 120](#).

BACKGROUND

- [1] On June 27, 2023, the Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* to the College of the North Atlantic (CNA) for the following:

I submitted/filed 5 harassment [sic] complaints to [the public body solicitor] on November 19, 2021. I submitted/filed another 2 harassment complaints to [the public body solicitor] on April 24, 2022. I was interviewed by [a workplace investigator] during several sessions in the month of April 2022. I was informed [sic] by [a staff member] that the investigation report on the 7 harassment complaints has been completed on April 20, 2023. I am requesting a full copy of this report.

- [2] On July 25, 2023, CNA responded to the request by providing to the Complainant an 82-page investigative report (the “CNA Report”), with redactions throughout pursuant to sections 30(1)(a), 37(1)(a), and 40(1) of *ATIPPA, 2015*. CNA also withheld another 472 pages of appendices from the Complainant entirely citing the same sections.
- [3] On August 10, 2023, the Complainant filed a complaint with this Office, requesting we review the redactions made to the responsive records they received.
- [4] On September 8, 2023, CNA responded to the complaint. During the investigation, CNA provided to this Office all responsive records including the records over which privilege was being claimed. The CNA Report is referred to as an “Independent Workplace Investigation” prepared by outside counsel for CNA’s in-house counsel in response to several allegations by the Complainant.
- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with Section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY'S POSITION

- [6] It is the public body's position that the CNA Report is subject to the section 30 exception for litigation privilege as it was created for the dominant purpose of and in contemplation of litigation which was reasonably likely:

The underlying issues addressed in this report have been a source of dispute between the parties for a significant period of time. This report is itself a result of multiple unsuccessful dispute resolution processes between the Applicant, their Union, and the college. Future litigation between the parties is considered likely. The information given as evidence by various witnesses is therefore subject to litigation privilege and was redacted accordingly. CNA similarly also redacted assessments and analysis provided by the investigator over which CNA maintains litigation privilege.

CNA Response, September 8, 2023

- [7] CNA states further that some of the content of the CNA Report is highly sensitive and, if disclosed, would threaten the mental health of the person the information is about. CNA has therefore redacted information pursuant to section 37, an exception where disclosure could be reasonably expected to threaten the mental health of a person other than the applicant.
- [8] CNA also used section 40 to protect identifiable information of witnesses involved in the investigation as they state identifying individuals would amount to an unreasonable invasion of privacy.

COMPLAINANT'S POSITION

- [9] In their complaint, the Complainant noted they sought a copy of the CNA Report free from redactions, but did not provide submissions specific to why the redactions should not apply.

ISSUES

- [10] This Report will address the question of whether CNA has properly applied sections 30, 37, and 40 to withhold some of the requested information and records.

DECISION

[11] The relevant portions of *ATIPPA, 2015* read as follows:

30. (1) *The head of a public body may refuse to disclose to an applicant information*

(a) *that is subject to solicitor and client privilege or litigation privilege of a public body*

...

33. (1) *For the purpose of this section*

...

(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).*

(4) *Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.*

...

37. (1) *The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to*

(a) *threaten the safety or mental or physical health of a person other than the applicant*

...

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.*

...

43. (1) *On an investigation of a complaint from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*

Section 30

- [12] The majority of the redactions in this complaint have been applied by CNA pursuant to sections 30(1)(a), 37(1)(a), and 40(1). In many cases, multiple exceptions – and often all three – have been applied to the same information. In our view, the public body has met the burden in proving that litigation privilege and therefore section 30 of *ATIPPA, 2015* applies to most of the claimed records.
- [13] In this particular case, CNA is claiming litigation privilege over the withheld information, not solicitor-client privilege as has been commonly claimed in recent cases: see recent Report [A-2023-039](#). While both types of legal privilege are covered in section 30(1)(a), litigation privilege requires proof of different elements.
- [14] As stated in the Supreme Court of Canada case *Lizotte v. Aviva Insurance Company of Canada*, [2016 SCC 52](#), a document is subject to litigation privilege where it has been created in contemplation of litigation or litigation which is “in reasonable prospect” and for the “dominant purpose” of use in litigation. A bald assertion of litigation privilege is insufficient to ground a claim of litigation privilege.
- [15] In *Corner Brook (City) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, [2020 NLSC 37](#), the City applied for a declaration that it did not have to comply with a recommendation from the Information and Privacy Commissioner to disclose to a complainant documents over which the City claimed solicitor-client or litigation privilege. In that matter, the complainant felt “passed over” as a private contractor due to discrimination and was denied access to relevant documents after the fact. The Court agreed with the City and found litigation privilege applied from when the City first started to deal with the complaint but lapsed after the Human Rights Commission dismissed his complaints.
- [16] In Report [A-2012-006](#), which also dealt with CNA, this Office considered records subject to litigation privilege. There, the applicant requested records containing instructions from CNA’s Vice-President and General Counsel to staff in relation to a court order. CNA withheld

some records claiming they were subject to litigation privilege. This Office agreed that the withheld documents met the test for litigation privilege.

[17] In [2021 BCIPC 70](#), British Columbia's Information and Privacy Commissioner handled a complaint regarding the refusal of an investigative forensic report regarding an employee wrongfully collecting fees from developers. In that case, the report itself was not provided to the British Columbia OIPC, but an affidavit from one of the public body's solicitor's was. The commissioner agreed the report was subject to litigation privilege from the time when the public body commissioned the report and agreed it was properly withheld in its entirety. It is worth noting that in the present complaint, while CNA states section 30 is applicable to the entire CNA Report, it did provide some information in the CNA Report in response to the access request. Section 30 is a discretionary exception, and a public body need not apply it in every instance.

[18] In Report [A-2021-026](#), this Office determined that section 30 did not apply to a workplace investigative report made for the Town of Lewisporte as the investigator was not providing legal services. The present case is distinguishable on two grounds: first, CNA is claiming litigation privilege over the CNA Report, not solicitor-client privilege as was the case in [A-2021-026](#). Also, in the Town of Lewisporte complaint, and later at Court, the Town provided insufficient evidence that the purpose of the report was for prospective litigation and, further, the dispute between the parties was settled at the time of our Report.

[19] The cover page of the CNA Report states clearly "Privileged and Confidential". Within the copy of the CNA Report provided to the Complainant, there are various redactions citing section 30 as justification. Pages 94-140 (appendix 3), 167-179 (appendix 6), and 553-554 (appendix 14) of the responsive records contain "documents provided by the respondents and witnesses to this investigation" and were also withheld entirely from the Complainant under this section. In the CNA Report, assessments of the Complainant's demeanor, behavior and credibility generally were redacted under section 30.

[20] CNA states future litigation between the parties is likely. CNA's submissions indicate that there is a real possibility of future disputes with the Complainant regarding their employment

with the College. While mere speculation of litigation is insufficient, it does not need to be the case that litigation will occur with absolute certainty. In this case, there is a history of dispute between the parties, several claims of harassment detailed in the CNA Report against multiple employees, and an active proceeding at the Human Rights Commission. We agree that litigation was “in reasonable prospect” at the time the CNA Report was created and therefore the first part of the test is met.

[21] With respect to the “dominant purpose” aspect of this file, the CNA Report was created by external counsel for CNA’s in-house counsel. The CNA Report is clearly marked “privileged” and was commissioned in response to numerous claims by the Complainant while they were on leave. Given the background of dispute between CNA and the Complainant as noted above, I am satisfied that the CNA Report’s primary or dominant purpose would be to prepare CNA in anticipation of future claims or litigation from the Complainant.

[22] There are only a few instances in the CNA Report where CNA claimed section 30 alone and not in conjunction with sections 37 or 40. Paragraphs 20 and 226 of the CNA Report contain assessments of the Complainant’s credibility and can be reasonably said to have been created to assist in litigation. Paragraph 212, however, paraphrases a statement made by the Complainant themselves. There is no analysis of the credibility of the Complainant or their statement. Given this is the Complainant’s own statement, we do not find that section 30 applies and recommend its release.

Section 37

[23] Section 37 is a discretionary exception to access where disclosure could reasonably be expected to threaten the safety or mental or physical health of a person. For the most part, the application of section 37 throughout the CNA Report overlaps with the section 30 and it was applied to the witness-provided appendices as well.

[24] In Report [A-2023-043](#), this Office considered section 37 in the context of a workplace issue. There, it was found that there was sufficient evidence that individuals’ mental health would be threatened if the withheld information were to be released. Similarly here, based on information in the records regarding the Complainant’s behavior, if the records withheld under

section 37 were to be released, such disclosure could reasonably be expected to cause harassment or mental harm to the witnesses involved. We are satisfied that section 37 is applicable to the withheld information in the CNA Report and I recommend CNA maintain its position on this issue.

Section 40

[25] CNA conducted a line-by-line review of the 82-page CNA Report and redacted information which could reveal the identities of the parties and witnesses involved. In my view, these redactions were applied appropriately.

[26] However, hundreds of other pages were withheld in their entirety from the Complainant with section 40 cited as justification. The refused records include complaints and documents provided by the Complainant and were refused to “protect the personal privacy of the identifiable individuals throughout”. In the responsive records, these include appendices 2, 4, 5, and 7-13.

[27] While not raised by the parties, it is also worth noting that section 33 of *ATIPPA, 2015* creates a right of access to information gathered for a workplace investigation. The Complainant is both a party and a witness and is therefore entitled to their own witness statements and information as per section 33(4). It should be noted that this section does not override the privacy protections in section 40. As noted in *College of the North Atlantic (Re)*, [2021 NLSC 120](#), a party’s right to investigative records is qualified by section 40 to the extent that disclosure cannot result in an unreasonable invasion of a third party’s privacy.

[28] In this case, the Complainant was not the subject or respondent to the investigation but rather the complainant. As such, they are a witness and were interviewed and therefore only entitled to their own submitted information. As they already have had this information in their possession, providing the information back to them would not amount to an unreasonable invasion of privacy.

[29] During the investigation, this Office asked CNA to disclose these withheld appendices back to the Complainant. While CNA indicated it would provide these records, as of the date of this Report, it has not yet done so.

[30] In conclusion, given that the appendices withheld entirely under this section were the Complainant's own provided information, and in light of sections 33 and 40, I recommend CNA provide appendices 2, 4, 5, 7, 8, 9, 10, 11, 12, and 13 back to the Complainant.

RECOMMENDATIONS

[31] Under the authority of section 47 of *ATIPPA, 2015*, I recommend CNA disclose paragraph 212 of the CNA Report and appendices 2, 4, 5, 7, 8, 9, 10, 11, 12, and 13 to the Complainant but otherwise maintain its position on the records withheld under sections 30 and 37.

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

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of November 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador