OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-011

August 18, 2010

Department of Justice

Summary: The Applicant applied to the Department of Justice (the "Department") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records regarding the granting of temporary absences and records relating to a specific individual's temporary absence. The Applicant argued that the temporary absence process is akin to parole decisions made by the National Parole Board which can be made available to the public. The Commissioner agreed with the Department and found that the requested information is personal information, and is therefore protected from disclosure pursuant to section 30 (disclosure of personal information) of the *ATIPPA*. Consequently, the Commissioner made no recommendations to the Department.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as amended, ss. 2(o), 6(1), 6(2), 7(2), 30(1) and 31; *Prisons Act*, R.S.N.L. 1990, c. P-21; *Corrections and Conditional Release Act*, R.S.C. 1992, c. 20.

I BACKGROUND

[1] The Applicant submitted an access to information request under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") to the Department of Justice (the "Department") on February 8, 2010 as follows:

> *I request copies of any and all guidelines, policies and criteria pertaining to the granting of Temporary Absences as stipulated by "The Prisons Act".*
>
> *I also request from the Department of Justice all records pertaining to the Temporary Absence granted to* [a named individual]*, aka* [alias of the named individual]. *I make this request under the provisions of the "Access to Information and Protection of Privacy Act." Part III, Section 31 of the Act stipulates personal information maybe released if it is in the public interest.* [The named individual's] *crimes were of a high profile nature and* [nature of crime committed by the named individual] *supercedes his right to privacy as a member of the public.*
>
> *Furthermore, there is no explicit guarantee of privacy under the Prisons Act pertaining to Temporary Absences. I ask you to also consider that parole decisions by the National Parole Board are public information that do not require a formal access request. I suggest the legislation governing the NPB is the only parallel law governing the disclosure of information pertaining to an inmate's release.*

[2] By correspondence dated April 9, 2010 the Department advised the Applicant that access to the requested records had been granted in part. Portions of the information had been severed pursuant to section 30 (disclosure of personal information) of the *ATIPPA*.

[3] In a Request for Review received in this Office on April 21, 2010 the Applicant asked that this Office review the records to determine whether the Department had appropriately applied section 30. The Applicant argued that the *ATIPPA* does not contain an explicit right of privacy for provincial inmates. The Applicant pointed out that neither does this right exist in the *Prisons Act*, which allows for temporary absences. The Applicant further suggested that temporary absences and parole are "parallel processes" given that they both involve the release of a prisoner into the community for some duration with or without an escort. The Applicant noted that decisions of the National Parole Board may be made public.

[4] Attempts at informal resolution of this matter were unsuccessful. By letters dated June 16, 2010 both the Applicant and the Department were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal

investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47 of the *ATIPPA*. Each party provided a short submission.

II PUBLIC BODY'S SUBMISSION

[5] In its submission dated June 28, 2010, the Department maintained that its actions were reasonable and supported by section 30:

> *The remaining records that he requested were denied under section 30 of the Access to Information and Protection of Privacy Act. You are well aware of course that subsection (31)* [sic] *provides that the head of a public body shall refuse to disclose personal information to an applicant.*
>
> *The position of the Department of Justice is that the records which were not released would disclose personal information.*

[6] The Department also referred to its response letter to the Applicant's access request in support of its position. This letter states that the Department is withholding records on the basis of section 30. The Department provided no further evidence or argument in support of its position.

III APPLICANT'S SUBMISSION

[7] The Applicant's submission was received in this Office on June 24, 2010. The Applicant argued that privacy rights are not explicitly guaranteed to those who are convicted of crimes:

> *Although the Department of Justice has stated that details about* [a named individual's] *"Temporary Absence" are subject to protection under the ATIPPA, the aforementioned demonstrates those who are convicted of crimes are not explicitly guaranteed this protection in our justice system. The only act in Canada that specifically addresses an inmate's or prisoner's right to privacy is legislation surrounding the National Parole Board. The NPB ensures the process to release an incarcerated person into the community is a transparent one. The need for transparency in a modern democratic society is well established and irrefutable.*

[8] The Applicant argues that the discrepancies between parole and temporary absences are detrimental and that the two processes have the same intent:

> *…the lack of transparency surrounding the "Temporary Absence" process leaves this system vulnerable to abuse, to the detriment of either the inmate or society. There is no open process in place to publicly evaluate whether these decisions are fair and just, as there are with the courts and parole board. The application and granting of "Temporary Absences" is the only adjudicative process in the justice system that is not transparent. I submit that this is not the intention of privacy legislation.*

[9] The Applicant also refers this Office to the 1938 Royal Commission Report of Mr. Justice Joseph Archambault indicating that the Report "set the groundwork for the policies ensuring openness and fairness in the process overseeing the public release of prisoners."

IV DISCUSSION

[10] The issue to be decided here is whether section 30 of the *ATIPPA* is applicable to any information in the responsive records.

[11] However, before turning my attention to this issue, I must address section 31 (information shall be disclosed if in the public interest) as it forms a part of the Applicant's access request but it is not discussed in either submission.

[12] Section 31(1) of the *ATIPPA* states:

> *31. (1) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.*

[13] Section 31 contains a two-part test. In order for section 31 to apply, the disclosure of the relevant information must not only be in the public interest, but also the information must be "…about a risk of significant harm…."

[14] The information in the withheld records does not meet this test. Despite the potential for the disclosure of the information to be in the public interest, information within the records is not "…about a risk of significant harm…." The information has no relation to the environment and the information relates to the release of a prisoner whose crimes did not result in any injury to the health or safety of the public. As a result, section 31 is not applicable to the records in this matter.

Is section 30 of the *ATIPPA* applicable to any information in the responsive records?

[15] The Department has claimed that some of the information requested by the Applicant is subject to the mandatory exception in section 30(1) which provides as follows:

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

[16] Section 2(o) defines "personal information" as follows:

> *(o)"personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, address or telephone number,*
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
> *(vi) information about the individual's health care status or history, including a physical or mental disability,*
> *(vii) information about the individual's educational, financial, criminal or employment status or history,*
> *(viii) the opinions of a person about the individual, and*
> *(ix) the individual's personal views or opinions;*

[17] While section 30(1) does not explicitly reference prisoners, this does not mean that those persons are excluded from the protection of section 30(1). The scope of section 30(1) is broad and encompasses recorded information about any identifiable individual. The specific examples in section 2(o) are not exhaustive and only serve to illustrate the principal types of information legislators had in mind when enacting the provision. Categories of persons do not need to be specified to receive protection from disclosure of their personal information under the *ATIPPA*.

[18] In support of its reliance on section 30(1) the Department has argued simply that the withheld information is personal information, without going into specific detail about the nature of the personal information involved. Because section 30 is a mandatory exception, this Office must review the records and make a determination as to whether the information in the withheld records is personal information.

[19] Upon review, I have concluded that the information withheld by the Department is personal information. A few examples should suffice to illustrate this conclusion. The withheld records contain the name and address of the named individual who is the subject of the temporary absence. The records also contain information regarding the marital status, family status and employment status of identifiable individuals and opinions about identifiable individuals. Finally, by the very nature of the records (i.e. records relating to temporary absences) they contain information regarding the criminal status or history of an identifiable individual. Other types of personal information may also be contained in the withheld records and these examples merely provide evidence that the Department was correct to conclude that personal information of various types is contained in the withheld records.

[20] Now I must address section 30(2) which lists types of information and circumstances which would override the application of section 30(1). If information which is personal information is found to meet one of the provisions of section 30(2), it must nevertheless be released. My review of the responsive records indicates that the information in the withheld records is not covered by any of the provisions of section 30(2).

[21] Having reviewed the responsive records, I have concluded that the Department correctly applied section 30. Had the Department severed the information in the records to which section 30 applies, the severing would be so extensive that the information left in the records would be meaningless. Where this is so it is not "reasonable" within the meaning of section 7(2) of the *ATTIPA* to sever the information and disclose the rest. Therefore, the public body would be justified in withholding the entire page or the entire record, as is the case here.

Guidance from other legislation and processes

[22] Despite not being a determinative issue in this Report, I believe it is important to discuss the arguments put forth by the Applicant regarding other legislation and processes.

[23] The Applicant has referenced the *Prisons Act* and the lack of privacy rights therein for prisoners as a justification for releasing the requested information.

[24] However, sections 6(1) and (2) of the *ATIPPA* state:

> *6. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.*
>
> *(2)Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.*

[25] The *Prisons Act* is not within the list of provisions contained in section 5 of the *Access to Information Regulations*, NL Regulation 11/07 and, consequently, no guidance can be taken from the *Prisons Act*. The provisions of the *ATIPPA* must apply and the information must be withheld.

[26] The Applicant also points to the transparency of National Parole Board decisions. This transparency is legislated in the federal *Corrections and Conditional Release Act* and is specific to parole decisions. However, the legislated right to access parole decisions in certain circumstances does not extend to temporary absences, which are granted under the provincial *Prisons Act*.

[27] I can take no guidance from the *Corrections and Conditional Release Act* or the parole process. It is not within my powers to extend the application of that legislation to decisions of provincial public bodies under the *ATIPPA* or to the process employed for temporary absences. There is no basis to assume that this was the intention of the legislators. I empathize to some degree with the argument of the Applicant as it does appear that there may be a discrepancy between two very similar processes; however, I must abide by the applicable legislation which is the *ATIPPA*.

V CONCLUSION

[28] Section 30 is a mandatory exception to disclosure. I am therefore somewhat disappointed by the Department's failure to provide any substantive argument to support its reliance on section 30 given the arguments which the Applicant explicitly asked the Department to consider. The Department made no attempt to address these issues or mention them in its submission to this Office.

[29] Nevertheless, upon review I have concluded that the Department has applied section 30 correctly to the withheld records and, as a result, I have found that all of the withheld records have been properly excepted from disclosure by the Department.

VI RECOMMENDATIONS

[30] Having found that the Department has acted in accordance with the *ATIPPA*, I have no recommendation to make.

[31] As I have no recommendation to make, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the Department to the Supreme Court of Newfoundland and Labrador, Trial Division, under section 60. The Applicant must file any appeal within 30 days after receiving a decision of the Department with respect to paragraph 32 of this Report, below.

[32] Under authority of section 50 of the *ATIPPA* I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18th day of August, 2010.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador