May 9, 2008 **A-2008-005**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2008-005

Department of Transportation and Works

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records relating to the investigation of his allegation that he was harassed by his supervisor during his employment with the Department of Transportation and Works (the "Department"). The Department disclosed some of the records, including a report prepared following the investigation, but refused to release the records containing the notes taken by the investigator during interviews with witnesses. The Department relied on the exceptions to disclosure in paragraphs (c) and (d) of section 22(1) of the *ATIPPA* claiming that the interviews were conducted with an understanding of confidentiality and to breach this assurance of confidentiality would prejudice future similar investigations The Commissioner found that the Department was not entitled to rely on the exceptions set out in paragraphs (c) and (d) of section 22(1) and determined that the *ATIPPA* does not contain a separate provision which specifically excepts from disclosure confidential information gathered during a workplace investigation. The Department also relied on the mandatory exception to the disclosure of personal information set out in section 30(1). In relation to that exception, the Commissioner concluded that certain information did constitute the personal information of a third party and should not be disclosed. The Commissioner recommended that most of the information in the records at issue should be released to the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(i), 2(o), 22(1)(c), 22(1)(d), 30, 46, 47, 49, 50, 60, and 64.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-001, 2007-003, and 2007-004; British Columbia OIPC Order 01-07.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 15 June 2007 to the Department of Transportation and Works (the "Department"), wherein he sought disclosure of records as follows:

> *On March 26, 2007, a complaint of harassment was filed with the Dept. of Transportation & Works by myself,* [*Applicant's Name*]*, against supervisor* [*Name of Supervisor*]*. An investigation was conducted and compiled by* [*Name*]*, Manager of Employee Relations, with the Dept. of Transportation and Works, Gov't of NL. I am requesting a copy of the investigation that was done on my behalf. My allegations were deemed to be founded but a copy of the report was denied.*

[2] The Department by correspondence dated 11 July 2007 notified the Applicant that it was granting his access request and indicated that a copy of the investigator's report entitled *Harassment Complaint Report* was attached. The correspondence also indicated that as per the Applicant's discussion with the Department's Access and Privacy Coordinator (the "Coordinator"), "the handwritten notes have been excluded at this time."

[3] In an e-mail dated 16 July 2007 to the Coordinator, the Applicant stated:

> *Thank you for supplying me with a copy of the written report of my Harassment Complaint. I am now requesting a copy of the handwritten notes. We both agreed that they would be excluded until I decided whether or not I required them or not. I apologize for any extra workload that I have caused you, but I feel that I need these handwritten noted* [sic] *to get a full appreciation of the report.*

[4] In response to the Applicant's e-mail, the Department sent correspondence dated 27 July 2007 to the Applicant indicating that the hand-written notes "are considered personal views/opinions obtained during an official investigation" and stating that disclosure of the notes was being denied in accordance with the exceptions set out in paragraphs (c) and (d) of section 22(1), in section 30(1), and in section 30(2)(h).

[5] In a Request for Review dated 1 August 2007 and received in this Office on that date the Applicant asked for a review of the decision of the Department to deny access to the handwritten notes.

[6] During the informal resolution process the Department agreed to release additional records consisting of the following:

(a) Two written statements given by the Applicant,
(b) Notes taken by the investigator during three interviews with the Applicant, and
(c) A written statement provided by the Respondent to the harassment complaint.

[7] As a result of the additional disclosures, the responsive record to which the Department is denying access and which is at issue in this Report consists of the notes taken by the investigator during three interviews with the Respondent to the harassment complaint and during the interviews with four management employees of the Department.

[8] Attempts to resolve this Request for Review by informal means were not successful and by letter dated 20 November 2007 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 pursuant to section 47.

II APPLICANT'S SUBMISSION

[9] The Applicant contacted this Office by e-mail dated 24 November 2007 to indicate that he did not wish to make any additional written submission other than to state that he believed he had an agreement with the Coordinator to be provided with full disclosure of the information he was requesting, as was indicated by his e-mail exchange with the Coordinator. The Applicant also pointed out that he believed that "all information that the employer has regarding this investigation pertains to me and is my personal information." In addition, the Applicant

requested that all other information and correspondence previously forwarded to my Office be considered in the preparation of this Report.

[10] Therefore, in order to accurately set forth the Applicant's position I will quote from correspondence he has sent to this Office. As part of his Request for Review, the Applicant attached correspondence in which he stated:

> *In my discussions with* [*the Coordinator*], *(copies of emails attached), she had contacted me by email requesting that we have a telephone conversation concerning the appendix of my request. The discussion revolved around providing me with the information I requested but she would need more time to provide me with a copy of the handwritten notes of the individual who conducted the investigation. She stated that the handwriting was poor and difficult to read. She asked if I would be willing to accept the typed portion of the report and if need arose that I felt I needed a copy of the handwritten notes, she would provide it at a later date. This I agreed to.*
>
> *After receiving the copy of the typed report, I decided that I would like a copy of the handwritten notes (emails attached). On July 27, 2007, I received notification from the Dept. that they would not be providing me with these handwritten notes.*
>
> *I believe that the emails provide you with proof that there was such an agreement for the Dept. to provide me with all the information requested.*
>
> *The excuse given to me for not providing the information seems illegitimate. Under section 22-C (copy provided), it states they might reveal investigation techniques, but I would like to point out that I already have a copy of the report with a lot of the relevant information provided.*
>
> *Section 22-D – states that it may reveal the identity of confidential sources, but the copy of the report provided by the Dept. (and I quote "a total of four witnesses were interviewed in person, all four were management employees. . . . Witnesses were interviewed and notes taken but there were no written statements taken from them." Therefore, there are no confidential sources, I already have that information.*
>
> *Section 30.1 – This is information concerning me – an investigation that I initiated.*
>
> *Section 30.2(h) – This is all information once again pertaining to my case. I initiated the complaint. The ruling was in my favor. As stated earlier, handwritten notes were promised to me. (I think this can be proven by copies of emails provided).*

III PUBLIC BODY'S SUBMISSION

[11] The formal submission of the Department is set out in correspondence dated 29 November 2007, from which I will quote in order to accurately set forth the position taken by the Department:

> *Access to records . . . were refused in accordance with Section 22(1)(c) and (d). These records are notes taken by the Investigator during meetings with witnesses while pursuing the investigation process. The interviews with witnesses were conducted on the implicit understanding that the information revealed and the source of that information would be confidential within the context of the law enforcement matter then being pursued.*
>
> *The Department is of the view that to release these records would likely prejudice future harassment investigations since the potential witnesses would be reluctant to co-operate with the investigator without assurances of confidentiality particularly in sensitive or serious allegations where personal safety issues might arise. If these records were to be released, future investigators would be obliged to advise witnesses that their statements would be available under an access to information request and could not be held confidential. The Department would be very concerned if the effect of revealing the information and its source were to prevent full and effective investigation of serious allegations of wrongdoing in matters which cannot presently be accurately foreseen. Such a result would be contrary to the general public interest in the proper management of the public service as well as the private interests of the employer in maintaining a respectful work environment and conducting effective investigations which in some circumstances could lead to discipline of an employee.*
>
> *It is further our opinion that in all investigations of this sort there is a reasonable expectation of privacy and confidentiality held by witnesses whether or not witnesses are formally so advised during the investigation process.*

IV DISCUSSION

[12] Before beginning my discussion of the sections of the *ATIPPA* upon which the Department relied to deny disclosure, I would like to comment on the Applicant's statement that he had an agreement with the Coordinator regarding the possible release of the handwritten notes at issue. The Applicant states that it was his understanding from discussions with the Coordinator that

there was an agreement with the Coordinator that she would initially provide him with a copy of the investigation report and that "if the need arose that [he] felt [he] needed a copy of the handwritten notes, she would provide it at a later date." The Applicant indicated in this Request for Review that the e-mails forwarded to my Office provide proof that such an agreement was in place.

[13] In order to determine if there was, indeed, such an agreement between the Applicant and the Coordinator I have reviewed the correspondence between the Department and the Applicant. The Department received the Applicant's access request on Friday, 15 June 2007. On Monday, 18 June 2007 the Coordinator sent an e-mail to the Applicant asking: "Is it possible to call me Tuesday . . . Just a quick call to discuss the appendix to the report." In response to that e-mail, the Applicant on Wednesday, 20 June 2007 sent an e-mail to the Coordinator stating: "I apologize for the delay in getting back to you . . . I will do my best to try and contact you early this morning to discuss the topic in your previous email."

[14] In a letter dated 11 July 2007 sent to the Applicant by the Department's Deputy Minister enclosing a copy of the *Harassment Complaint Report* there is the following statement: "As per your discussion with our Access Coordinator . . . **the handwritten notes have been excluded at this time**." [Emphasis added]

[15] Following the receipt of the letter from the Deputy Minister, the Applicant on 16 July 2007 sent an e-mail to the Coordinator stating:

> *Thank you for supplying me with a copy of the written report of my Harassment Complaint. I am now requesting a copy of the handwritten notes. We both agreed that they would be excluded until I decided whether or not I required them or not. I apologize for any extra workload that I have caused you, but I feel I need these handwritten noted* [sic] *to get a full appreciation of the report.*

[16] On Wednesday, 25 July 2007 the Applicant sent a follow-up e-mail to the Coordinator stating:

> *As attached, you will see my email of July 16, 2007 requesting the handwritten notes. I am wondering if you received this email. Can you please respond and let me know if you received this request.*

[17] In response, the Coordinator sent an e-mail dated 25 July 2007 to the Applicant stating that she had "[r]eceived your e-mail on July 16, 2007 and you should have a response by the end of the week."

[18] On 27 July 2007 the Department sent a letter to the Applicant denying access to the handwritten notes and stating:

> *Further to your email dated July 16, 2007, please be advised that the hand-written notes forming part of the report previously disclosed are considered personal views/opinions obtained during an official investigation . . .*

[19] My review of the exchange of correspondence between the Applicant and the Department leads me to the conclusion that there was an agreement between the Applicant and the Coordinator that he would receive a copy of the *Harassment Complaint Report* and that the handwritten notes would be provided if he required them following his review of the report. However, there is no provision in the *ATIPPA* which would require the Department to comply with the terms of this agreement. Therefore, any recommendation I may make in relation to the release of the handwritten notes is not made pursuant to the terms of any agreement between the Applicant and the Coordinator.

[20] I now wish to comment upon the sections relied upon by the Department to refuse access.

[21] The Department has denied access to the records at issue on the basis of paragraphs (c) and (d) of section 22(1) of the *ATIPPA*, which provide as follows:

> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> . . .
>
> *(c) reveal investigative techniques and procedures currently used, or likely to be used, in law enforcement;*

> *(d) reveal the identity of a confidential source of law enforcement information or reveal information provided by that source with respect to a law enforcement matter;*

[22] The basis for the Department's claim for exception under section 22(1) is that to disclose the records at issue would be a breach of the confidentiality afforded witnesses in investigations and that without the capacity to assure witnesses of confidentiality there would be a prejudice to future investigations of a similar nature. The Applicant, on the other hand, disagrees with the Department's reliance on paragraphs (c) and (d) of section 22(1). He states in relation to the likelihood that disclosure would reveal investigation techniques as per paragraph (c) that he already has a copy of the investigation report revealing much of the relevant information and in relation to the possibility of the disclosure revealing a confidential source as per paragraph (d) he states that there was no information from a confidential source included in the investigation report.

[23] In addition to relying on the exception set out in section 22(1), the Department in its letter to the Applicant dated 27 July 2007 stated that the handwritten notes are considered personal views/opinions obtained during the official investigation and indicated that it was relying on sections 30(1) and 30(2)(h) to deny disclosure of the records at issue.

[24] Section 30(1) of the *ATIPPA* provides for a prohibition against the disclosure of personal information as follow:

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

[25] Section 30(2)(h) is found in a provision which sets out a number of exemptions to the prohibition against the disclosure of personal information in section 30(1) as follows:

> *(2) Subsection (1) does not apply where*
>
> *(a) the applicant is the individual to whom the information relates;*

> *(b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;*
>
> *(c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;*
>
> *(d) an Act or regulation of the province or Canada authorizes the disclosure;*
>
> *(e) the disclosure is for a research or statistical purpose and is in accordance with section 41;*
>
> *(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;*
>
> *(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*
>
> *(h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;*
>
> . . .

[26] In relation to the Department's reliance on the mandatory exception in section 30(1), the Applicant states that he is the person who initiated the investigation and the information gathered pertains to his complaint.

[27] I will first discuss the Department's claim for exception under section 22(1) which deals with the disclosure of information which would be harmful to law enforcement.

[28] Section 2(i) defines the term "law enforcement" as follows:

> *2. (i) "law enforcement" means*
>
> *(i) policing, including criminal intelligence operations, or*
>
> *(ii) investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed;*

[29] My predecessor discussed the meaning of law enforcement in Report 2007-003 and stated at paragraph 97:

> *[97] The definition of law enforcement contains two distinct categories. The first category is specifically limited to policing activities, while the second category includes a much broader list of activities. It is this second category that is at issue in the case at hand. I note that within this category, there are two distinct elements. An activity must fall within the scope of an investigation, inspection or a proceeding, but it must also lead or have the potential to lead to some penalty or sanction. . . .*

[30] The investigation leading to the production of the responsive record in this matter was initiated by the Applicant when a grievance was filed alleging a violation of a collective agreement as a result of the Applicant having been harassed by his supervisor. I have reviewed the report produced by the investigator entitled *Harassment Complaint Report* and note that the investigator found that there had been personal harassment of the Applicant by his supervisor. As a result, the investigator recommended that an Adverse Report documenting the unacceptability of the supervisor's actions be placed on his personnel file and that the supervisor attend a course entitled *Creating a Respectful and Harassment Free Work Place.*

[31] I am not convinced that an investigation of alleged harassment in a workplace constitutes a "law enforcement matter" within the meaning of section 2(i). However, it is not necessary for me to decide in this case whether or not we are dealing with a law enforcement matter. Even if I had found that the investigation in question was a law enforcement matter, it is my opinion that paragraphs (c) and (d) of section 22(1) are not applicable to the facts of this Request for Review. I will leave for another time a decision as to how broadly to interpret the term "law enforcement matter."

[32] If the investigation in question was a "law enforcement matter," then in order to rely on the exception in section 22(1)(c) the Department must show that the disclosure of the records could reasonably be expected to reveal investigative techniques and procedures currently used or likely to be used in law enforcement.

[33] The investigative techniques and procedures employed in the investigation of the Applicant's harassment complaint are set out in the *Harassment Complaint Report*, which has already been released to the Applicant. The investigator described his procedure as consisting of a number of interviews with the Applicant and the Respondent, the obtaining of written statements from the Applicant and the Respondent, and the interviewing of four management employees. Based on the information obtained in the statements and interviews, the investigator prepared a report containing his findings and recommendations. The procedures and techniques utilized appear to be those routinely used by investigators and would be recognized as the standard and expected methods employed to investigate complaints of workplace harassment. Given the customary nature of the procedures used, I have great difficulty accepting that the release of the records at issue would reveal any specialized or covert investigative techniques or procedures. Furthermore, an Investigator with my Office contacted the Coordinator by e-mail dated 5 September 2007 and specifically asked what other investigative techniques or procedures were used in addition to those outlined in the *Harassment Complaint Report* and inquired as to which portions of the records at issue would reveal those techniques or procedures. However, the Department did not provide any information in response to the Investigator's questions.

[34] In conclusion, I find that the Department is not entitled to deny release of the records at issue by relying on the exception to disclosure set out in section 22(1)(c).

[35] Next, I will discuss whether the Department has a right to refuse disclosure of the records at issue by claiming the exception provided for in section 22(1)(d). In order to rely on this section the Department must show that the disclosure of the records could reasonably be expected to reveal the identity of a confidential source of law enforcement information or reveal information provided by that source with respect to a law enforcement matter.

[36] As indicated above, the investigator's report entitled *Harassment Complaint Report* clearly sets out the sources of the information gathered in the investigation. The report does not indicate that there was a confidential source of information. Furthermore, an Investigator with my Office in an e-mail dated 5 September 2007 specifically asked the Coordinator for information on the confidential source and inquired as to which portions of the records at issue would reveal the

identity of the confidential source. The Department did not provide that information to my Office. In addition, I have reviewed the records at issue and there is no mention in these records that any of the information was provided by a confidential source.

[37] Therefore, I am left with no alternative but to agree with the Applicant when he states "there are no confidential sources" and to conclude that the Department has not shown that it is entitled to refuse access to the records at issue by relying on the exception to disclosure in section 22(1)(d).

[38] I note that the Department, in its reliance on the exception set out in section 22(1)(d), appears to be confusing the importance it attaches to confidentiality in workplace investigations with the protection provided to confidential informants by section 22(1)(d). The Department has revealed to the Applicant all the sources of information for the workplace investigation it has conducted; there are no confidential sources of information. However, in light of the Department's comments on confidentiality with respect to investigations, I will discuss the issue of confidentiality in the context of an access to information request.

[39] In Order 01-07, the British Columbia Information and Privacy Commissioner discussed the issue of confidentiality in the context of workplace investigations and access to information requests. In that Order the facts were similar to those I am dealing with in this Report. There, the applicant had requested a copy of confidential investigation reports and confidential witness statements relating to two investigations into the applicant's complaint about a manager's behaviour. Given the similarity of the facts in Order 01-07 and the thorough analysis conducted by the British Columbia Commissioner, I will quote extensively from that Order.

[40] The British Columbia Commissioner in Order 01-07 made instructive comments at paragraphs 5 to 9:

> *[5] 3.1 Workplace Investigations and the Act - Many public bodies covered by the Act conduct workplace investigations into employees' behaviour toward each other, toward members of the public (or customers), toward students and so on. Investigations may be required by a collective agreement or may be voluntary.*

Regardless of their nature, or their origins, such investigations are an almost everyday fact of life for public bodies. They can involve serious allegations - such as sexual harassment or racial discrimination - or address less serious matters. Whatever their focus, workplace investigations are often conducted in an emotionally charged atmosphere. The consequences for the person being investigated can be serious; witnesses and complainants may also have a great deal to lose. Entire workplaces can become unbearable and an employer can find it difficult to restore harmony (not to mention productivity).

[6] Workplace investigations ordinarily require discretion, tact and professionalism. All relevant facts must be ascertained and appropriate factual findings must be made. One way in which the investigation process may be enhanced is by conducting it in confidence, in which case witnesses will be interviewed, and investigators will deliberate and deliver findings, entirely or partly in confidence.

[7] Some of the arguments advanced by the Ministry in this case focus less on the personal privacy interests of the third parties than on the Ministry's interest in preserving, generally, the confidentiality of its investigations. It argues that its ability to conduct investigations would be harmed by disclosure of the disputed information. In its initial submission, the Ministry relies on Order No. 144-1997, [1997] B.C.I.P.C.D. No. 26, in which my predecessor agreed there should be a "cloak of confidentiality" with respect to the work of public bodies that conduct complaint investigations. In that case, my predecessor agreed, at p. 8, that ...it is essential to the effective conduct of complaint investigations, especially for sensitive matters, that staff of public bodies charged with such responsibilities should have a cloak of confidentiality to do their work.

[8] The disputed records enjoy no greater protection under the Act because they are the product of a workplace investigation. Whether or not one refers to a 'zone' or 'cloak' of confidentiality, the issue of whether information can or must be withheld has to be addressed on an exception-by-exception basis in the circumstances of each case. As I noted in Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37, it may well be that one or more of the Act's exceptions to the right of access will - alone or in combination - lead to the same result as the application of a 'zone' or 'cloak' of confidentiality. But there is no discrete disclosure exception under the Act known as a zone or cloak of confidentiality. Although I am alive to the sensitivity of investigation reports and related records, the same principles apply in these cases as apply in other cases.

[9] I am not persuaded by the Ministry's argument that disclosure here will harm its ability to conduct other investigations of this kind. Such an argument has, in the employment investigation context, been rejected in a number of labour arbitration cases, where investigation reports and materials have been ordered disclosed despite such an argument. I also rejected such a 'chilling' argument in

> *Order 00-11, [2000] B.C.I.P.C.D No. 13, where a self-regulating body made the same submission.*
>
> [Emphasis added]

[41] I find the comments of the British Columbia Commissioner to be quite appropriate for this Review and I adopt his reasoning. In particular, I will state that there is no separate exception to disclosure under the *ATIPPA* regarding confidential information provided during a workplace investigation. However, as the British Columbia Commissioner indicated, there may be exceptions to disclosure in the *ATIPPA* that alone or in combination could lead to the same result as the application of the so-called "cloak" or "zone" of confidentiality. For example, in its submission the Department expresses a concern that "potential witnesses would be reluctant to co-operate with the investigator without assurances of confidentiality particularly in sensitive or serious allegations where personal safety issues might arise." In the type of situation described by the Department section 26(1) of the *ATIPPA* may be applicable. It provides as follows:

> *26. (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, or*
>
> *(b) interfere with public safety.*

I wish to make it clear that there is no evidence that section 26(1) of the *ATIPPA* would apply in the case before me and I refer to it only as an example of the type of exception that could be used in certain circumstances to produce the same result as the so-called "cloak" or "zone" of confidentiality.

[42] I now wish to discuss the Department's reliance on section 30(1) to deny access to the information at issue. As indicated, the Department in correspondence dated 27 July 2007 advised the Applicant that disclosure to the handwritten notes was being denied because they are considered personal views/opinions obtained during an official investigation and, therefore, access was refused in accordance with a number of sections, including section 30(1) and 30(2)(h). The Applicant, on the other hand, has taken the position that it was he who initiated the

investigation that lead to the creation of the responsive record and the information in the record is his personal information. In reference to the Applicant's position, it must be noted that section 30(2)(a) provides that the mandatory prohibition in section 30(1) does not apply where the applicant is the individual to whom the personal information relates. Therefore, I must now discuss the applicability of section 30 to the records at issue.

[43] As noted above, section 30(1) provides a prohibition against the disclosure of personal information and paragraphs (a) to (l) of section 30(2) set out a number of exemptions to the prohibition in section 30(1).

[44] The definition of what constitutes personal information is found in section 2(o) 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;*

[45] Given the statement by the Department that the handwritten notes contain personal views/opinions obtained during an official investigation, it is necessary to discuss paragraphs

(viii) and (ix) of section 2(o). These two paragraphs provide that personal information consists of both "the opinions of a person about the individual" and "the individual's personal views or opinions." The interaction of these two paragraphs, and section 30(2)(a), was discussed in Report 2007-001 where my predecessor dealt with a denial of access to copies of written complaints against the applicant on the basis that the written complaints were the personal information of the complainants.

[46] In Report 2007-001, my predecessor discussed the paradox created by paragraphs (viii) and (ix) of section 2(o) and stated at paragraphs 35 to 36 and at paragraph 40:

> *[35] . . . In other words, the way the ATIPPA is worded, the Applicant would have a right of access to another person's opinion about him, because it is an opinion about him, yet at the same time he does not have a right of access to the same opinion because it is also the personal information of the person who expressed the opinion, according to the ATIPPA definition.*
>
> *[36] This leaves public bodies in a quandary when attempting to determine whether an Applicant in such a circumstance would have a right of access to the personal information. As noted above, section 2(o)(viii) and (ix) of the ATIPPA say that personal information includes both opinions about the individual, and the individual's personal views or opinions, thus leading to the paradox of the same information being considered the personal information of two different individuals. A public body must start with the premise that applicants have a right of access to their own personal information. In order to disclose the information to one of them, the public body must violate the right of the other not to have his or her personal information disclosed.*
>
> . . .
>
> *[40] As Commissioner, it is my role to make recommendations in order to ensure compliance with the ATIPPA. The contradiction inherent in the definition of personal information in the ATIPPA as I have outlined above means that I am forced to decide, because of the paradoxical wording of the legislation, whether the opinion of person A about person B is the personal information of person A or person B. The mandatory prohibition against the disclosure of another person's personal information as found in section 30 of the ATIPPA prevents me from interpreting it as being the personal information of both.*

[47] I note that in its letter dated 27 July 2007 the Department indicated to the Applicant that one of the bases on which it was denying access was section 30(2)(h). As I have indicated, section

30(2)(h) is one of the exemptions to the mandatory prohibition against the disclosure of personal information in section 30(1).

[48] In Report 2007-001, my predecessor discussed section 30(2)(h) in attempting to resolve the paradox created by the operation of paragraphs (viii) and (ix) of section 2(o) and stated at paragraphs 44 to 45:

> *[44] One potential source of clarification in the ATIPPA which might be useful in slightly different circumstances is found in section 30(2)(h):*
>
> > *… the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual.*
>
> *[45] This clarifies that a public body cannot withhold the personal information of an applicant if the personal information constitutes the opinions or views of a person given in the course of performing services for a public body. The "except" in this provision refers to a situation where the person giving the opinion or view is doing so about a person other than the Applicant, ie, a third party. I do not see this as resolving the current matter, however, because a complaint of harassment, even if it involves an expository element which recounts things that happened in the course of performing services for the public body, this particular account of those events was compiled for the specific purpose of making a complaint. I do not believe that making a harassment complaint is a service performed for a public body, but instead, something of a more personal nature entailing human resources policies, employee discipline, and the like.*

[49] Likewise, I do not believe that section 30(2)(h) is applicable in the circumstances with which I am dealing in the present Review. The information provided by the management employees and the Respondent may have been "opinions or views of a third party," however, these were not "given in the course of performing services for a public body." As with the situation described in Report 2007-001, the opinions or views were given as "something of a more personal nature entailing human resources policies, employee discipline, and the like." As such, section 30(2)(h) has no application to the facts of the present Review.

[50] In his resolution of the paradox created by the operation of paragraphs (viii) and (ix) of section 2(o), in Report 2007-001 my predecessor stated at paragraph 50:

> *[50] In terms of my decision regarding the definition of personal information, the necessity of introducing this interpretation is an unavoidable consequence of a contradiction inherent in the legislation. I have chosen to resolve this contradiction in favour of deciding that an opinion about the Applicant is the Applicant's personal information, rather than the personal information of the person offering the opinion. I believe this to be consistent with the purpose of the ATIPPA, the overall legislative context of access legislation in other jurisdictions, as well as relevant case law.*

[51] In relation to the opinions and views expressed in the responsive records at issue in this Review I will adopt the reasoning of my predecessor in Report 2007-001 and find that any views or opinions expressed about the Applicant are the personal information of the Applicant, rather than the personal information of the person offering the views or opinions. By the same reasoning and bearing in mind that section 3(1)(b) provides that one of the purposes of the *ATIPPA* is to give "individuals a right of access to . . . personal information about themselves," I find that any views or opinions expressed by the Applicant about another individual are the personal information of the Applicant and not the personal information of that other individual.

[52] I will now provide my comments on whether the individual documents that make up the responsive record should be released to the Applicant.

[53] As I have indicated, the Department has already released to the Applicant the report completed as a result of the investigation and released the two written statements of the Applicant and the one provided by the Respondent. In addition, the notes taken by the investigator during the three interviews of the Applicant have also been released. The only documents in the responsive record that have not been disclosed are the notes taken during the investigator's three interviews with the Respondent and those taken during the interviews of the four management employees.

[54] I have already indicated that the Department is not entitled to deny access on the basis of paragraphs (c) and (d) of section 22(1). The only other section claimed by the Department to deny disclosure is section 30(1) which provides that "a public body shall refuse to disclose personal information to an applicant."

[55] In summary, I have made the following findings in relation to the Department's reliance on section 30(1):

> (1) Pursuant to section 2(o)(ix), any opinions or views expressed by the Applicant constitute his personal information and should be released to the Applicant,
>
> (2) Pursuant to section 2(o)(viii), any opinions expressed by a person about the Applicant constitute the Applicant's personal information and should be released to the Applicant, and
>
> (3) Pursuant to section 30(2)(a), where the Applicant is the individual to whom the personal information relates, section 30(1) is not applicable and the personal information should be released.

[56] I now wish to discuss these three findings in relation to the documents to which the Department has denied disclosure. I will indicate that I have highlighted on a copy of the responsive record to be given to the public body those portions of the documents which should be severed and not disclosed to the Applicant.

[57] The Department has denied access to all the information in a one-page document containing the handwritten notes of the investigator taken during an interview of the Respondent on 3 April 2007. This interview was the initial contact of the investigator with the Respondent and served as an introduction of the Respondent to the investigation process. As such, the document contains notes of what the investigator told the Respondent about the conduct of the investigation and does not contain any personal information. Therefore, all the information in this document should be released to the Applicant.

[58] The Department has denied access to all the information in a three-page document containing the handwritten notes of the investigator taken during an interview of the Respondent on 12 April 2007. I find that there is some personal information of a third party on all three pages of

this document, which should be withheld pursuant to section 30(1). The rest of the information should be disclosed to the Applicant.

[59] The Department has denied access to all the information in a two-page document containing the notes of the investigator taken during an interview of the Respondent on 24 April 2007. The name that appears in the last line of page 1 constitutes personal information and should be withheld pursuant to section 30(1). The rest of the information on these two pages should be released to the Applicant.

[60] The Department has denied access to all the information in a two-page document containing the notes of the investigator taken during an interview of a management employee on 20 March 2007. There is personal information of a third party on page 2 of the document which should be withheld pursuant to section 30(1). The rest of the information on these two pages should be released to the Applicant.

[61] The Department has denied access to all of the information in a two-page document containing the notes of the investigator taken during the interview of a management employee on 5 April 2007. There is personal information of a third party on page 2 of the document which should be withheld pursuant to section 30(1). The rest of the information in the document should be released to the Applicant.

[62] The Department has denied access to all of the information in a two-page document containing the notes of the investigator taken during the interview of a management employee on 12 April 2007. This document does not contain any personal information of a third party and all of the information in it should be disclosed to the Applicant.

[63] The Department has denied access to all of the information in a three-page document containing the notes of the investigator taken during the interview of a management employee on 18 April 2007. There is personal information of a third party on page 1 of the document which should be withheld pursuant to section 30(1). The rest of the information in the document should be released to the Applicant.

V CONCLUSION

[64] I have concluded, without deciding whether or not an investigation into an allegation of workplace harassment is a "law enforcement matter," that the Department is not entitled to deny access on the basis of paragraphs (c) and (d) of section 22(1) of the *ATIPPA*.

[65] I have determined that there is no separate exception to disclosure under the *ATIPPA* dealing with confidential information provided during a workplace investigation.

[66] I have reached the conclusion that any personal information found in the records at issue can only be withheld if it meets the following criteria:

> (1) The information does not constitute the opinions or views expressed by the Applicant,
> (2) The information does not contain an opinion about the Applicant expressed by another person, and
> (3) The Applicant is not the individual to whom the personal information relates.

[67] By applying the three criteria set out above, I have concluded that there is certain personal information that should not be disclosed. However, I have further concluded that most of the information in the records at issue should be released to the Applicant.

VI RECOMMENDATIONS

[68] Under the Authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Department release to the Applicant the information I have indicated should be disclosed. For convenience, I have highlighted on a copy of the record to be provided to the Department which information should **not** be released to the Applicant. All other information should be released.

[69] 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 Department's final decision with respect to this Report.

[70] Please note that within 30 days of receiving a decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[71] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9th day of May, 2008.

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