



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-010

May 3, 2019

Office of the Premier

Summary:

The Applicant sought records involving correspondence between the Premier, the Office of the Premier, a Minister, Executive Council, the Department of Justice and the Commissioner for Legislative Standards. The Public Body provided some records, but withheld most responsive records, asserting because they were excluded from the *ATIPPA, 2015* under section 5, or were excepted from disclosure by section 41. Part of the complaint was resolved informally, and for the remainder the Commissioner determined that section 41(c) mandated withholding the correspondence with the Commissioner for Legislative Standards and that correspondence between a Minister and the Premier's Chief of Staff regarding caucus business was a caucus record and not subject to the *ATIPPA, 2015* by virtue of section 5(1)(d).

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015, SNL 2015, c A-1.2](#), sections. 5 and 41; [House of Assembly Accountability, Integrity and Administration Act, SNL 2007, c H10.1](#), sections 2, 36 and 37.

Authorities Relied On: NL OIPC Reports [2005-005](#); [A-2018-008](#) and [A-2019-004](#)

Other Resources:

[Ontario Ministry of Government and Consumer Services, Information, Privacy and Archives Division: Premier's Office Records Schedule, March 2015.](#)

I BACKGROUND

- [1] The Office of the Premier received an access request pursuant to the Access to Information and Protection of Privacy Act, 2015 (the “ATIPPA, 2015”) seeking the following records:

All correspondences from the Premier and the Premier's office to Bruce Chaulk, Commissioner of Legislative Standards, from April 25, 2018 to and including October 19, 2018 including emails, text, letters, etc asking Bruce Chaulk for an opinion regarding bullying and harassment allegations. All correspondences from April 25th, 2018 to April 26th, 2018 between the Premier's Office, the Premier, Executive Council and the Department of Justice concerning the Public Service Harassment policy that was suppose to take place June 1, 2018. All emails, texts, letters and any type of correspondence between Minister [name] and the Premier's Office between April 8, 2018 and July 13, 2018 and all texts, messages, etc. between Minister [name] and [name], Chief of Staff, from April 8, 2018 to July 13, 2018.

- [2] In its final response to the Applicant, the Office of the Premier disclosed some of the responsive records but withheld most others. The Office of the Premier relied on the grounds that the remaining records were subject to solicitor-client privilege (section 30); or the ATIPPA, 2015 did not apply because the records were personal or constituency records of a member of the House of Assembly (section 5(1)(c)) or a minister (section 5(1)(e)), or the records of a registered political party or caucus (section 5(1)(d)).
- [3] Following receipt of the final response from the Office of the Premier, the Applicant filed a complaint with this Office and submissions were received by both parties. In the course of our investigation, the Office of the Premier further submitted that correspondence between the Office of the Premier and the Commissioner for Legislative Standards was also required to be withheld as records connected with the investigatory functions of a statutory office (section 41(c)).
- [4] The complaint regarding responsive records subject to solicitor and client privilege as well as those designated as constituency records was resolved informally. An informal resolution could not be reached on the remaining items: correspondence between the Premier and the Commissioner for Legislative Standards and text messages between a

Minister and the Premier's Chief of Staff. That portion of the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II COMPLAINANT'S POSITION

[5] In October 2018, the Commissioner for Legislative Standards issued a report in relation to the Complainant's conduct. The Complainant contends that the Premier's Office must disclose the Premier's correspondence with the Commissioner for Legislative Standards in order for him to respond to the subsequent investigation and report. The Complainant also notes that the October 2018 report states that it was based on a complaint received May 10, 2018 from a member of the House of Assembly, and it is his belief that the Commissioner for Legislative Standards' investigation was not prompted by the withheld correspondence from the Premier.

[6] As to the text messages between the Minister and the Premier's Chief of Staff, the Complainant alleges that the correspondence discusses government business and cannot be excluded by section 5 of the *ATIPPA, 2015*. The Complainant also states that while the Minister is a member of the House of Assembly, the Premier's Chief of Staff is not and the two parties to the text messages do not qualify as a "caucus". The Complainant also alleges that the Office of the Premier has released similar records in response to past access to information requests.

III PUBLIC BODY'S POSITION

[7] The Office of the Premier initially advised the Complainant in its final response that the correspondence between the Premier and the Commissioner for Legislative Standards was classified as "constituency records, and records of a registered political party or caucus". However, in its submissions to this Office, the Office of the Premier further argued that section 41(c) of the *ATIPPA, 2015* requires it to withhold such correspondence between it and the Commissioner for Legislative Standards.

[8] With regard to the text messages between the Minister and the Premier's Chief of Staff, the Office of the Premier states that they relate to the relationship between members of the Liberal Party of Newfoundland and Labrador caucus. While the Premier's Chief of Staff is not a member of the House of Assembly and therefore not a member of any caucus, the Office of the Premier notes that this position is a political appointment made by the Premier and is required to deal with both government business as well as party business. The Office of the Premier is of the position that the Chief of Staff was acting in his partisan capacity when corresponding with the Minister regarding concerns about another member of the caucus, and therefore the records relate to caucus business and are excluded from the operation of the *ATIPPA, 2015* by section 5(1)(d).

IV DECISION

Statutory Office Records

[9] When the Office of the Premier first informed the Complainant on January 16, 2019 that access to correspondence between that public body and the Commissioner for Legislative Standards had been denied, it cited sections 5(1)(c) and 5(1)(d). Later, on February 20, 2019, when it made its submissions to this Office as part of our investigation, the Office of the Premier relied on section 41, a mandatory exception.

[10] Normally, a public body cannot introduce a new exception for disclosure after it has made its final response to the applicant. Where exceptions to disclosure are discretionary, the public body will be deemed to have already considered all possible exceptions and, if an exception has not been applied, to have elected not to apply it. However, the present issue is that of a mandatory exception to disclosure, which imparts on a public body a statutory obligation not to release a record. This Office shares the responsibility of ensuring that any information protected by a mandatory exception is appropriately withheld, whether or not the public body has invoked the exception at the time of its response to an applicant. Therefore, submissions regarding mandatory exceptions will always be considered throughout the course of our investigation. For a further discussion of the differences between mandatory and discretionary exceptions, please see [Report 2005-005](#).

- [11] Section 41(c) of the *ATIPPA, 2015* is a mandatory exception to disclosure and applies to records connected with the investigatory function of a statutory office. This Office dealt with the application of section 41 to the Commissioner for Legislative Standards recently in [Report A-2019-004](#), wherein it was determined that the Commissioner for Legislative Standards was a statutory office to which section 41(c) applied and that it was required to withhold all records relating to its investigation. Section 41 not only applies to statutory bodies themselves, but also to any other public body which may have records connected with the investigatory function of a statutory body in their custody or control. As a result, the Office of the Premier is also required to withhold such records.
- [12] The investigatory functions of the Commissioner for Legislative Standards are set out in Part IV of the *House of Assembly Accountability, Integrity and Administration Act* (ethics and accountability), in particular sections 36 (request for opinion) and 37 (inquiry). The Commissioner for Legislative Standards may conduct an inquiry on either the Commissioner's own initiative or on receiving a request for an opinion from a member of the House of Assembly, the House of Assembly as a whole, or the Premier.
- [13] This Office has considered the scope of the term "investigatory functions" in [Report A-2018-008](#) and determined that it encompass all of the activities that a statutory office is authorized or obliged to carry out under its governing legislation, that can affect the rights or responsibilities of individuals or public bodies. This includes initial applications to the statutory office or requests for an investigation or, in the present matter, requests for an opinion.
- [14] Having reviewed the correspondence between the Premier and the Commissioner for Legislative Standards, I am satisfied that it is connected with, and in fact directly related to, the investigatory functions of the Commissioner for Legislative Standards and the Office of the Premier is therefore required by the *ATIPPA, 2015* to withhold these records.

Records of a Registered Political Party or Caucus

[15] Section 5(1)(d) of the *ATIPPA, 2015* states: “This Act applies to all records in the custody or control of a public body but does not apply to records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act.*”

[16] In the *House of Assembly Accountability, Integrity and Administration Act*, a registered political party and a caucus are defined as:

2. In this Act

...

(d) "caucus" means a group of 2 or more members who belong to the same registered political party;

...

(o) "registered political party" means an organization formed for the purpose of contesting an election of members to the House of Assembly and which is registered in the register of political parties under section 278 of the *Elections Act, 1991*;

I note that the Liberal Party of Newfoundland and Labrador is a registered political party and that the Minister is a member of that party's caucus within the House of Assembly.

[17] The Complainant contends that the Minister and the Chief of Staff are not both members of the Liberal Party caucus and therefore section 5(1)(d) cannot apply. However, section 5(1)(d) states that it applies to records of a political party or caucus. This can reasonably include records of correspondence between a caucus member and a political appointee such as the Chief of Staff if the subject matter relates directly to the political party or caucus, or belongs to the political party or caucus. It is not necessary for the correspondence to be strictly between members of the caucus.

[18] Political party or caucus records have received little to no interpretation or analysis in reports issued by this or other Commissioner's Offices in Canada. Ontario's Information,

Privacy and Archives Division within the Ministry of Government and Consumer Services (the “Archives of Ontario”) provides some guidance in its records schedule for Premier’s Office. Although not determinative, such sources can be of assistance. It defines political records as:

- The Party’s participation in elections;
- Matters related to the organization, function, and leadership of the Party, including fundraising and financial matters, conventions, conferences, leadership contests and reviews; and riding nominations; and
- Election campaign records and publications.

And defines Caucus records as:

- Caucus deliberations related to the business of the Legislative Assembly;
- Records relating to the Premier’s participation in caucus in the course of carrying out his or her responsibilities as a member of the party; and
- Records prepared by or in the possession of the Government House Leader’s Office (“GHLO”) that relate solely to the GHLO’s roles and responsibilities in managing the general business of the Legislative Assembly and supporting the work of the governing party’s caucus in the Assembly and its committees.

[19] The correspondence in question discusses the relationship between members of the Liberal Party caucus, their respective participation in caucus, and how the members have carried out their respective responsibilities as members of the party. Therefore, based on my review of the records and my interpretation of section 5(1)(d), and in consideration of the guidance from the Archives of Ontario, I am satisfied that the text messages sought by the Complainant are “records of a caucus”.

[20] The Complainant believes that the text messages discuss government business and therefore must be subject to disclosure. The access provisions of the *ATIPPA, 2015* are predicated on giving the public a right of access to all records in the custody or control of a public body, however this right is subject to the application provisions at section 5 and the

various mandatory and discretionary exceptions enumerated in the Act. I offer no opinion as to what constitutes “government business” in this case; however, based on my analysis the records are exempt from the Act under section 5, and once such a determination has been made there is no basis for further analysis or consideration of the contents of the record.

[21] In conclusion, I am satisfied that the *ATIPPA, 2015* does not apply to the text messages between the Minister and the Premier’s Chief of Staff, and the Office of the Premier is not required to disclose them.

VI RECOMMENDATIONS

[22] Under the authority of section 47 of the Access to Information and Protection of Privacy Act, 2015, I recommend that the Office of the Premier continue to withhold the information that it had originally withheld from the Complainant in its final response.

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

[24] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 3rd day of May 2019.



Victoria Woodworth-Lynas
Information and Privacy Commissioner (A)
Newfoundland and Labrador