



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-017

August 6, 2019

Department of Justice and Public Safety

Summary:

The Complainant sought the amounts paid out by the Government of Newfoundland and Labrador to settle three claims and the date they were settled. The Department of Justice and Public Safety advised the Complainant that the responsive records would be withheld pursuant to settlement privilege. In response to this Office's investigation, the Department further cited sections 31 (disclosure harmful to law enforcement), 35 (disclosure harmful to the financial or economic interests of a public body) and 40 (disclosure harmful to personal privacy). The Commissioner found that the *ATIPPA, 2015* is a complete, exhaustive code, and common law settlement privilege does not exist as a freestanding exception overriding the *ATIPPA, 2015*. The Commissioner also found that the Department failed to discharge its burden of proof in establishing that sections 31 or 35 applied to the responsive records. The Commissioner further found that the settlement amounts and dates should be withheld as they could reasonably be expected to reveal personal information. The Commissioner therefore recommended that the Department continue to withhold the responsive records from the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015, SNL 2015, c A-1.2](#) sections 2(u), 31, 35 and 40(1).

Authorities Relied On:

NL OIPC Reports [A-2018-022](#), [A-2018-021](#), [A-2008-002](#), [Report 2007-003](#), and [Report 2007-008](#).

I BACKGROUND

[1] In 2018, the Government of Newfoundland and Labrador and Eastern Health settled claims brought by three plaintiffs in relation to abuse they experienced while their family was in receipt of services. The parties did not disclose the dollar amounts of the settlements or any other terms.

[2] The Applicant made an access to information request to the Department of Justice and Public Safety (the “Department”) seeking:

The amounts paid by the government to the following plaintiffs in each of the lawsuits listed below, and the date each case was settled.

Jane Doe #21 (2013-01G-3944, 2014-01G-2179)

Jane Doe #22 (2013-01G-3940, 2014-01G-2180)

John Doe #114 (2013-01G-3943, 2014-01G-2178)

[3] The responsive record consists of a table prepared by the Department that lists the matter numbers, the amount for which a cheque was issued in each matter, and the date the cheque was issued.

[4] These claims concerned the failure of government officials to intervene or otherwise address mental and physical abuse of the three litigants while their family was in receipt of support services from the Government of Newfoundland and Labrador and Eastern Health.

[5] The Department responded denying the Applicant’s request, stating that “access to these records has been refused in accordance with common law settlement privilege”

[6] The Applicant filed a complaint with this Office. As informal resolution was unsuccessful, the complaint proceed to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

[7] The Department originally cited as its sole grounds for denying access the common law principle of settlement privilege. However, following the commencement of our investigation, in addition to its claim of settlement privilege, the Department added the exceptions in sections 31(1)(p) and 35(1)(g):

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

(p) harm the conduct of existing or imminent legal proceedings.

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body;

[8] In support of these exceptions to disclosure, the Department noted that the provincial government has ongoing litigation in many areas, including active litigation regarding institutional physical and sexual abuse. The disclosure of the requested information would harm the ability of the province to negotiate or settle other claims and would reveal to other litigants the province's litigation strategy.

[9] The Department has also raised concerns regarding disclosure of personal information under section 40 and the potential for the plaintiffs to be identified by the disclosure of the information.

III APPLICANT'S POSITION

[10] The Complainant has submitted that there is public interest in the requested information and that disclosure is necessary to further government accountability. The Complainant submits that through media coverage of this matter, the details of these claims – and the alleged negligence of government – are already public. However, the Complainant submits, the public would have a further interest in knowing the monetary amount of the settlements and the cost to the public for this negligence.

[11] The Complainant further submits that pursuant to section 43 of the *ATIPPA, 2015*, the Department bears the burden of proving that the information should be withheld and that the Department has not met that burden.

IV DECISION

[12] In Report A-2018-022, this Office was clear that the *ATIPPA, 2015* is a complete, exhaustive code, and common law settlement privilege does not exist as a freestanding exception overriding the *ATIPPA, 2015*. Therefore, a public body cannot invoke settlement privilege as justification for denying access to responsive records. At the same time, in Report A-2018-022 and in A-2018-021, this Office clarified that while settlement privilege does not exist as a distinct exception to access, a public body is able to rely on provisions within the *ATIPPA, 2015* which accomplish similar goals. Such provisions are likely to be, but are not limited to, sections 30 (legal advice) and 35 (disclosure harmful to the financial or economic interests of a public body). As noted above, the Department raised the application of sections 31 and 35 in its submissions in response to our investigation. These are both discretionary exceptions to access. Normally, a public body cannot introduce discretionary exceptions after it has made its final response to the applicant. However, this Office is prepared to hear additional discretionary exceptions to access provided that the public body has notified this Office and the complainant within 10 business days of receiving notice of our investigation. Discretionary exceptions will not be considered beyond this period.

[13] As noted in its submissions to this Office, the Department claimed that disclosure of the settlement amounts could harm the conduct of existing or imminent legal proceedings and prejudice the financial or economic interest of the government of the province.

Section 31

[14] In Report 2007-003 and Report 2008-002, this Office stated that a public body relying on section 31(1)(p) must prove that releasing the records would result in a reasonable expectation of probable harm to the conduct of the legal proceedings and to do so must

present clear and convincing evidence over and above the mere fact that a legal proceeding exists.

[15] In its submissions, the Department has made general reference to other ongoing litigation, including litigation involving claims of institutional physical and sexual abuse. The Department was requested to provide this Office with further details of the nature of its other litigation and its relation to the matters that are the subject of the access complaint. However, no further information was received.

[16] While the Department did not elaborate on the nature of its active litigation, we note that the Department specifically framed this litigation as involving institutional physical and sexual abuse. Respectfully, such litigation is significantly different from the settled claims, which concern government inaction in response to abuse suffered at the hands of the plaintiffs' own family. The legal liability of the public body in these two types of circumstances are very different. In one, the liability of government arises from its status as the employer of the primary actor in the abuse; and in the other, government's liability arose from a failure to address abuse which was being perpetrated by a family member.

[17] Under section 43(1), in an investigation of a complaint from a decision to refuse access to a record, the burden is on the public body to prove that the applicant has no right of access. As the Department has not provided clear and convincing evidence of harm, we can only conclude that the Department has not met the burden of proof of proving that section 31(1)(p) is applicable to the requested information.

Section 35

[18] This Office accepted in Report A-2018-021 that while settlement privilege does not exist as an exception to access, a public body may nonetheless protect information regarding the settlement of litigation under section 35(1)(g).

[19] In Report A-2018-021 this Office adopted the reasoning of the Federal Court of Appeal in *Canada (Office of the Information Commissioner) v. Calian Ltd.* In doing so, it was accepted

that there will always be a degree of speculation inherent in any attempt to establish a reasonable expectation of probable harm, and that it is sufficient that the “prediction is grounded in ascertainable facts, credible inferences and relevant experience”.

[20] In that Report, the public body had settled a claim regarding its cancellation of a contract to provide bussing services. The public body had cancelled similar contracts with other companies and was anticipating similar litigation in response. The public body submitted that a party could compare the settlement amount against such publicly available information as the value of the contract and the amounts claimed in the statement of claim. Further, the responsive records included the actual settlement agreement between the public body and the plaintiff and correspondence between the parties. Such information would allow another plaintiff to ascertain the public body’s negotiating strategy. This Office accepted that given these circumstances, the disclosure of the details of the settlement could reasonably be expected to result in prejudice to the financial or economic interests of the public body.

[21] As noted above, the Department has made only a general reference to ongoing litigation involving institutional physical and sexual abuse and when asked to provide specific details of the nature of its other, allegedly related litigation, it did not do so. We find that the Department has not met the burden of establishing that section 35(1)(g) applies to the request information.

Section 40

[22] The Department submits that the information relating to the settlement is information belonging to the plaintiffs and it would be possible to determine the names of the individuals associated with the settlements. However, the Department also notes that the three matters were subject to a publication ban. Further, the individuals are referred to using pseudonyms in the responsive records.

[23] Section 40(1) states: 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. Section 2(u) defines “personal information” as “recorded information about an identifiable individual”.

[24] The settlement amounts and dates are not, on their face, personal information due to the publication ban in effect over the legal proceedings. But this information may still qualify as personal information if it “contains information about an identifiable individual when there is a reasonable expectation that the information in the record by itself, or in combination with information from sources otherwise available, can lead to an identification of the individual involved” (see Report 2007-008). In other words, it must be reasonable to expect that knowing the dollar figure of the settlement amount and the date it was issued, one could identify the plaintiffs.

[25] We find that this information does in fact lend itself to identifying the individuals because when the information in it is combined with information from sources otherwise available, the individual can be identified. Also, we are considering “the number of people in the group to which the individual belongs and to which the information relates” as recommended in Report 2007-008.

[26] Not all settlement figures will have this result. It is the specific facts of this case that create the risk that disclosing the settlement amounts may lead to the identification of the victims of this abuse and therefore should be withheld pursuant to section 40.

V CONCLUSIONS

[27] As established in Report A-2018-022, settlement privilege does not exist as an exception to access for public bodies subject to the *ATIPPA, 2015*.

[28] The Department has failed to discharge its burden of proof in establishing that either section 31(1)(p) or 35(1)(g) apply to the requested information.

[29] The settlement amounts and dates do not qualify as personal information on their own, but, in the context of the specific facts of this case, the risk of identification is too real to be ignored and therefore qualify for the mandatory exception under section 40.

VI RECOMMENDATIONS

- [30] Under the authority of section 47 of the *ATIPPA, 2015*, we recommend that the Department of Justice and Public Safety continue to withhold the records (the table prepared by the Department of Justice and Public Safety) from the Complainant.
- [31] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Justice and Public Safety must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.
- [32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of August, 2019.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador