



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-001

January 14, 2020

College of the North Atlantic

Summary:

The College of the North Atlantic (“CNA”) received an access request for any records mentioning the Complainant relating to investigations conducted by CNA. The investigations were initiated after allegations about the Complainant were brought to CNA’s attention. CNA provided records to the Applicant with significant redactions under sections 29, 30, 37, and 40 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*. The Complainant stated that he was entitled to the records in order to respond to the allegations about him. The Commissioner determined that most of the records were created or gathered for the purposes of a workplace investigation under section 33. The Commissioner found that section 33 prevailed over the other exceptions where the information was relevant to the investigation and recommended disclosure of some additional information to the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, section 30, 33, 40.

Other Resources:

[Section 33: Information from a Workplace Investigation](#): OIPC-NL Guidance Document, 2016.

I BACKGROUND

[1] The Complainant made an access to information request to the College of the North Atlantic (“CNA”) pursuant to the *Access to Information and Protection of Privacy Act, 2015* (ATIPPA, 2015) seeking:

All documents with [the Complainant] mentioned since January 2019. Including written and electronic communication as well as any meeting minutes.

Also would like a copy of.

1. OHS audit (2019) conducted at [campus location] by [investigator].

2. Copy of KPMG audit report for [campus location] that started March 2019, including transcripts of all interviews conducted throughout this investigation.

[2] CNA responded to the Complainant, providing over 500 pages of responsive records. These records consisted of correspondence sent to and from the Complainant, allegations against the Complainant, as well as the audit reports created as a result of the complaints. However, many of the records were partially or fully redacted. CNA cited sections 29, (policy advice or recommendations), 30 (legal advice), 37 (disclosure harmful to individual or public safety), and 40 (disclosure harmful to personal privacy).

[3] Upon receipt of the records from CNA, the Complainant filed a complaint with this Office. During the course of informal investigation, CNA disclosed to the Complainant most of the information previously withheld under sections 37 and 40. CNA continued to withhold some information under sections 29, 30, 37, and 40.

[4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II COMPLAINANT'S POSITION

- [5] When the Complainant initially filed his complaint with this Office, he took the position that he was entitled to any information about him in relation to allegations made by another employee of CNA which resulted in a workplace investigation. The Complainant stated that he made an access request for full disclosure of this information, including details of the allegations made against him, but this information was not disclosed to him. CNA provided the Complainant with a substantial number of records, however much of the information was redacted.
- [6] Although CNA disclosed to the Complainant a significant amount of additional information, the Complainant takes the position that he is entitled to know the identities of the individuals involved in the investigation in order to make a response to the allegations against him.

III PUBLIC BODY'S POSITION

- [7] CNA takes the position that the personal information of the employee who made the complaint was not relevant to the investigation:

The allegations raised against the [Complainant] were serious, so they were taken at face value and investigated accordingly. No assessment of the credibility of the [employee] was performed, and that person's identity had no impact on the investigation process undertaken.

- [8] CNA also states that the personal information of any witnesses were not relevant:

Similarly, it is also CNA's position that the names of the witnesses interviewed during the investigation process are not relevant to this workplace investigation. [...] Their evidence was anonymized by the third-party investigator and provided to CNA in its report. This report has been provided to the [Complainant] in anonymized form. The names of the witnesses had no impact on the investigation process undertaken.

- [9] CNA submits that the investigation process did not rely on the personal credibility of any individuals, as the investigation did not focus on subjective evidence from witness, but relied primarily on physical evidence, such as internet logs, email and accounting records, inventory purchasing and asset forms, human resources documents, and occupational health and

safety records. CNA states that, “by design, the investigation process sought to validate with physical evidence all statements received.”

IV ISSUES

[10] Issues relating to the College’s claim of section 29 were resolved during informal resolution as the Complainant agreed with this information being withheld.

[11] The remaining issues are:

1. Did CNA appropriately apply section 40 of *ATIPPA, 2015*?
2. Did CNA appropriately apply section 30 of *ATIPPA, 2015*?

V DECISION

Section 40

[12] CNA continues to withhold information of several individuals under section 40 of *ATIPPA, 2015*.

[13] Section 40(1) of *ATIPPA, 2015* is a mandatory provision:

40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

[14] Section 33(3) of *ATIPPA, 2015* is a mandatory disclosure provision requiring the head of a public body to disclose to an Applicant who is a party to a workplace investigation all relevant information created or gathered for the purpose of a workplace investigation. Information which might otherwise be exempt from disclosure under other provisions of *ATIPPA, 2015* may therefore be subject to mandatory disclosure if created or gathered during a workplace investigation and relevant to the investigation.

[15] Per OIPC Guidance “Section 33 – Information from a Workplace Investigation”, where a workplace investigation under section 33 has occurred:

...other exceptions (including section 40 – disclosure harmful to personal privacy) should not be applied when releasing information to parties under this section.

Much of the information collected in a workplace investigation is personal information. If a situation does not fit within section 33, decisions with respect to the disclosure of personal information would be made in accordance with section 40, as are all other decisions respecting the disclosure of personal information. Section 33 was included in the legislation to give complainants and respondents to a workplace investigation a greater right of access to personal information (in the narrow context of a workplace investigation) than what might otherwise be available under section 40 to a non-party applicant.

[16] Based on the available evidence, our assessment is that the investigations by CNA amounted to workplace investigations. Pursuant to section 33(1)(c) of ATIPPA, 2015,

(c) "workplace investigation" means an investigation related to

- (i) the conduct of an employee in the workplace,
- (ii) harassment, or
- (iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public which may give rise to progressive discipline or corrective action by the public body employer.

[17] The investigations by CNA were undertaken as a direct result of allegations made about the Complainant's conduct in the workplace. As a direct result of those investigations, progressive discipline steps were taken by the employer.

[18] The OIPC reviewed the information withheld by CNA. Although certain information about employees was relevant to the investigation, with one exception, their identities are not. Therefore, disclosure of these names of the individuals would amount to an unreasonable invasion of personal privacy of the witnesses.

[19] The noted exception concerns one particular allegation made by an employee concerning the Complainant's actions toward that employee. In this particular instance, the identity of the individual is relevant to the workplace investigation.

[20] Therefore, this Office finds that the identity of that employee should be disclosed in relation to that particular allegation.

[21] Further, the identity of the one individual whose allegation against the Complainant is indeed relevant to the workplace investigation is already known to the Complainant, as the allegations and complaint were originally sent to the Complainant himself to address directly. This Office is of the view that disclosure of the individual's name through this process is unlikely to result in an unreasonable invasion of personal privacy.

Section 30

[22] CNA applied section 30 to three pages of the records. This issue was not resolved during the information investigation.

[23] Section 30 of *ATIPPA, 2015* states:

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

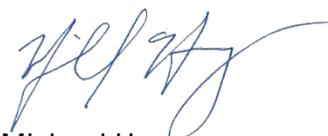
(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

[24] The OIPC reviewed the information to determine whether the information would otherwise be considered legal advice under section 30 of *ATIPPA, 2015*. We accept that there is a small section of the information that is subject to solicitor-client privilege contained within these records. However, this information was not gathered or created for the purposes of a workplace investigation and therefore is not captured by section 33. The remaining information is not subject to solicitor-client privilege. With the exception of the small section of the information that is subject to solicitor-client privilege, which should be withheld, the information should be disclosed to the Complainant.

VI RECOMMENDATIONS

- [25] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that College of the North Atlantic disclose to the Complainant information identified in the records provided to CNA along with this Report.
- [26] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the College of the North Atlantic 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.
- [27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of January 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador