



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2024-011

March 19, 2024

### Royal Newfoundland Constabulary

**Summary:**

The Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015* to the Royal Newfoundland Constabulary for the contents of an RNC investigation file. The RNC provided the records, with some information redacted claiming section 30 (legal advice), section 31 (disclosure harmful to law enforcement) and section 40 (disclosure harmful to personal privacy). The Complainant filed a complaint with our Office. The Commissioner found that the RNC had conducted a reasonable search, had reasonably refused to allow the Complainant to view part of the record in person, and had properly withheld some of the information under sections 30 and 31. However, the Commissioner disagreed that section 31 or section 40 applied to other redacted passages, and declined to consider the applicability of other exceptions that were claimed by the RNC late in the investigation process. The Commissioner recommended that the RNC continue to withhold some of the redacted information, but disclose the remainder to the Complainant.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 20, 30, 31, 40, and 43.

**Authorities Relied On:**

NL OIPC Reports [2005-005](#), [A-2009-010](#), [A-2015-001](#), [A-2020-020](#), [A-2021-025](#), and [A-2021-030](#).

## BACKGROUND

- [1] The Complainant made an access request to the Royal Newfoundland Constabulary (RNC) under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* for the contents of an RNC investigation file involving a complaint that the Complainant had made. The RNC provided the entire file, with some information redacted pursuant to section 30 (legal advice), section 31 (disclosure harmful to law enforcement), and section 40 (disclosure harmful to personal privacy). The Complainant filed a complaint with our Office, arguing that the RNC had not conducted a reasonable search for records, that it had improperly withheld information, and that it had refused to give the Complainant an opportunity to view in person a notebook containing handwritten notes.
- [2] During the investigation the RNC provided additional records to the Complainant. It provided, as separate complete records, a group of emails, including their headers and subject lines, the partial contents of which had previously been copied and pasted into the body of the investigation report. The RNC also answered some questions raised by the Complainant, confirming that there were no other email exchanges with other bodies that had not been provided. The RNC also released some additional information that was previously redacted under section 40.
- [3] The RNC continued to refuse to release some other information that it continued to withhold under sections 40(1) and 40(4)(b), and sections 31(1)(a), 31(1)(n), and 31(2)(b).
- [4] The RNC also maintained its refusal to allow the Complainant to view the notebook. However, it agreed to produce both a more legible copy and a transcript.
- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

## ISSUES

- [6] The issues to be dealt with in this Report include whether the RNC has met its duty under section 13 of the Act to conduct a reasonable search for records, whether the RNC is justified in its refusal to permit the Complainant to view certain records, and whether the exceptions to access claimed by the RNC have been properly applied.

## DECISION

### Reasonable Search

- [7] The search conducted, as described by the RNC, appears to have been reasonable and thorough. This issue was simplified by the nature of the request, which was for the complete contents of a specific investigation file. The RNC has responded adequately to questions raised by the Complainant, confirming that there were no relevant communications with other public bodies that were not documented in the file.

### Request to View Records

- [8] Section 20(1) of the Act provides:

*20. (1) Where the head of a public body informs an applicant under section 17 that access to a record or part of a record is granted, he or she shall*

*(a) give the applicant a copy of the record or part of it, where the applicant requested a copy and the record can reasonably be reproduced; or*

*(b) permit the applicant to examine the record or part of it, where the applicant requested to examine a record or where the record cannot be reasonably reproduced.*

- [9] The notebook in question contains hand-written notes made by the investigating officer, not only for the requested file, but for other investigative files as well, all of which are highly confidential. Therefore, the RNC is unwilling to provide the Complainant an opportunity to personally examine the notebook pages. However, the RNC has provided a darker, more legible photocopy of the pages, and also has provided a transcript of the handwritten

information made by the officer who wrote the notes. We conclude that this is a reasonable response and complies with section 20.

### Redactions

[10] A number of passages in the responsive records have been redacted under section 30. The RNC did not provide our Office with the unredacted information to review, but provided a table of the redacted passages with page numbers and an explanation of why the RNC believed that the information is subject to solicitor and client privilege. From the explanation and the context in which the information appears and, in particular, from the fact that the investigating officer's contemporaneous notes stated that they were seeking legal advice, we are satisfied that the redacted information consists of summaries of communications between the officer and a solicitor, seeking and obtaining legal advice. Therefore those passages should remain redacted.

[11] Further information was withheld pursuant to section 31. Upon review we conclude that some of the information withheld under this exception consists of information about other police investigations that are not part of the present matter. Therefore such information should remain redacted.

[12] A great deal of information, however, was redacted from several pages of the RNC investigation file on the basis of various provisions of section 31 and section 40. It consists of summaries of communications between the investigating RNC officer and other individuals outside the RNC organization.

[13] The relevant provisions of section 40 read as follows:

*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.*

*(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where*

...

(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;*

...

(4) *A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where*

...

(b) *the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation;*

[14] Personal information is defined in section 2(u) of the Act as follows:

(u) *"personal information" means recorded information about an identifiable individual, including*

...

(i) *the individual's name, address or telephone number.*

[15] Without going into detail, we conclude that none of the information to which the RNC has applied the above provisions is anyone's personal information. Rather, it is information provided by others in their employment capacity and is therefore about their position and functions, and about the organization to which they refer. Therefore, it cannot be an unreasonable invasion of personal privacy to disclose that information, whether under section 40(1) or section 40(4)(b).

[16] The RNC also applied, to the same passages of information described above, several provisions of section 31:

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

(a) *interfere with or harm a law enforcement matter;*

...

*(n) adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;*

...

*(2) The head of a public body may refuse to disclose information to an applicant if the information;*

...

*(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record.*

[17] Those were the provisions originally claimed by the RNC in its response to the access request, and again in the RNC's response to our Office following notification of the complaint. The RNC has provided no evidence to support the application of these provisions or to suggest how the disclosure of the redacted information could reasonably be expected to lead to the interferences, adverse effects, or exposure to civil liability that these provisions are intended to prevent. Under section 43 of the Act the burden of proving that an exception applies falls on the public body. In the present case, the RNC has not met the burden with respect to the above provisions of the Act, and therefore we conclude that the information cannot be withheld on that basis.

[18] However, the RNC has belatedly claimed several additional exceptions to access in an attempt to bolster its insistence that the above-referenced passages should remain redacted. On March 5, 2024, the RNC advised our Office that it now wished to apply a new, additional exception to the withheld information. Then on March 11, 2024, in its final submission after this complaint was referred to formal investigation, the RNC advised that it wished to apply yet another, different exception to access.

[19] Our Office has dealt with this issue in several previous reports. It is worth repeating, in its entirety, the portions of Report [A-2020-020](#) in which we described our position:

*[43] The long-standing position of our Office, going back to Report 2005-005 (Labrador and Aboriginal Affairs) is that it is normally inappropriate to claim additional exceptions at a late stage in the complaint process. The*

complaint received by this Office from an applicant is, necessarily, a complaint about the decision to refuse access made by the public body in its final response to the applicant's access request. Pursuant to section 17 of the Act, where access to any information is refused, the public body's final response must contain "...the reasons for the refusal and the provision of this Act on which the refusal is based." That decision, and the reasons for it, as claimed by the public body at the time of its response to the applicant, are what this Office is required to investigate.

[44] This is particularly so in the case where the refusal is based on discretionary exceptions to access. In the case of discretionary exceptions, as Report 2005-005 stated, it should be presumed, and an applicant is entitled to expect, that a final response from a public body to the applicant is the result of the consideration of all applicable exceptions:

*Discretionary exceptions, on the other hand, provide a statutory "option" rather than an obligation. Even though a public body may not release the information, they have the option of exercising their discretion and releasing the material. In my opinion, if the public body did not invoke a specific discretionary exception in its original denial to the Applicant, it is reasonable to assume that they considered the exception, reviewed all relevant factors and decided that it was appropriate to release the information to the Applicant.*

[45] Another significant consideration here is that no effort was made to notify the applicant of the public body's subsequent decision to claim additional exceptions. Section 13 of the Act requires a public body to respond to an applicant without delay, in an open, accurate and complete manner. This means it has a duty to identify and consider all exceptions and to provide a complete response within the statutory time limits. The final response is what gives the applicant a right to file a complaint with this Office, or to seek relief from the courts, and ATIPPA, 2015 requires that the final response be both accurate and complete. A failure to identify and consider all applicable exceptions and notify the applicant of the exceptions claimed until late in the complaint process is therefore an interference with the applicant's rights.

[46] There may be occasions when, through exceptional circumstances, inexperience or inadvertence, a public body may be justified in claiming additional exceptions that were not set out in its final response to an applicant. At the very least, however, we would expect that this would be done in a reasonable time, and be fully communicated to the applicant as soon as possible.

[20] As noted in the above and other previous reports, the claiming of late exceptions is an issue of procedural fairness that can seriously interfere with an applicant's rights. In some previous cases, our Office has accepted late claims of additional exceptions in two circumstances: first, where the exception is a mandatory exception; and second, if a discretionary exception, only where the claim was made early in the investigation and the applicant and our Office have the time to review and consider its applicability. One of the benefits of the *ATIPPA, 2015* system is that the Act provides strict time limits for the completion of the complaint investigation process. However, it can only work successfully and fairly if public bodies are diligent in meeting their statutory duties throughout the process. Further, at the start of an access complaint investigation, public bodies are advised by this Office:

*Normally, all exceptions claimed should be claimed at the time a response to the access request is provided to the Applicant. Should a Public Body wish to invoke any additional discretionary exceptions under the ATIPPA, 2015, it must inform the Applicant and this Office of its intention to do so within 10 business days of receipt of correspondence from this Office notifying the Public Body that the Applicant has filed a Complaint. Any discretionary exceptions claimed after this period will not be considered by this Office.*

[21] The Act provides that a complaint investigation must be completed within 65 business days. In the present case the public body waited until day 54 to claim an additional exception to access, well past the deadline for referring the complaint to formal investigation; and until day 58 to claim another additional exception. There was no opportunity for the Complainant to address such a late claim, nor for our Office to do so. Therefore we decline to accept those late-claimed exceptions, and they will be given no consideration.

[22] It should be noted that, as with the earlier-claimed exceptions, there is no evidence provided by the RNC to suggest that any of the information in the redacted record is actually information that falls within any of the newly-claimed exceptions. Moreover, these exceptions are also not evident on the face of the record itself.

[23] Therefore, as we have rejected the applicability of the exceptions originally claimed, and we have chosen not to accept the newly-claimed exceptions, we conclude that the information to which they relate should be disclosed to the Complainant.



## RECOMMENDATIONS

[24] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Royal Newfoundland Constabulary:

1. continue to withhold the information previously redacted under section 30 of the *Act*;
2. continue to withhold those passages of information previously redacted under sections 31 and 40 of the *Act* which we have agreed, above, should remain withheld, as highlighted on the copy of the responsive record accompanying this Report;
3. maintain its position on denying the Complainant an opportunity to personally view the notebook; and
4. disclose to the Complainant the remainder of the redacted information, as highlighted on the copy of the responsive record accompanying this Report.

[25] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Royal Newfoundland Constabulary 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.

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19<sup>th</sup> day of March, 2024.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador