



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-024

May 29, 2024

Department of Education

Summary:

The Complainant submitted an access request to the Department of Education for any records about complaints against an employee as well as any information the public body may have forwarded to police regarding the employee. The Department relied on section 17(2) of the **Access to Information and Protection of Privacy Act, 2015** to neither confirm nor deny whether responsive records exist. This Office found that the Department correctly applied section 17(2)(b).

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 17(2), 40, and 43.

Authorities Relied On:

NL OIPC Reports [A-2019-025](#).

BACKGROUND

[1] The Complainant submitted an access request to the Department of Education (Department) for:

[E]mails and records relating to any complaints made about former Newfoundland and Labrador English School District [employee] [employee's name]. [Employee's name] was [an employee] within the district between [year] and [year]. I'm looking for information that pertains to any incidents that resulted in discipline or were forwarded to police. Thank you.

[2] The Department relied on section 17(2) of the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015) to neither confirm nor deny whether responsive records exist.

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

PUBLIC BODY'S POSITION

[4] The Department submits that, per section 17(2) of ATIPPA, 2015, it should neither confirm nor deny the existence of records that the Complainant is seeking. The Department is of the view that any statement about the existence or non-existence of complaints would improperly disclose personal information of its employee.

ISSUES

[5] The issue to consider is whether the Department properly applied section 17(2) of ATIPPA, 2015.

DECISION

[6] Initially, the Department provided very little justification for its application of section 17(2) of ATIPPA, 2015, neither to the Complainant nor to this Office. In its final response to the Complainant, the Department stated:

Please be advised that the Deputy Minister of Education has reviewed this request and the department is neither confirming or denying the existence of the information you are requesting. This is in accordance with subsection 17(2) of the Access to Information and Protection of Privacy Act, 2015 (the Act):

17. (2) Notwithstanding paragraph (1)(c), the head of a public body may in a final response refuse to confirm or deny the existence of
- (a) a record containing information described in section 31;
 - (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy under section 40;
 - (c) a record that could threaten the health and safety of an individual.

[7] In its initial submission to this Office, the Department provided no additional reasons or explanations. While it is understandable that the Department may have been unable to provide a detailed rationale in its final response to the Complainant, given its intention to neither confirm nor deny the existence of records, under section 43 of ATIPPA, 2015 the Department nevertheless bears the burden of proof once our Office receives a complaint and begins an investigation.

[8] Our Office sought further clarification from the Department: first, clarification for what subsections of section 17(2) it was relying on and second, for an explanation as to why confirming or denying that the records exist would lead to harm, which we addressed in Report [A-2019-025](#).

[9] The Department indicated that subsections 17(2)(a) and (b) applied to the matter at hand. The Department did not elaborate any further on why it believed subsection 17(2)(a) applied.

Accordingly, it has not met its burden of proof to establish that confirming or denying the existence of the records would be harmful to law enforcement.

[10] The Department did, however, eventually elaborate on how subsection 17(2)(b) applies. It referenced our Report [A-2019-025](#) in which we confirmed our Office's adoption of a two-part test from Ontario that deals with these types of provisions:

1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[11] Regarding the first part of the test, the Department addressed the type of information the Complainant sought and stated that, "disclosure of information about an employee outside what is permissible under s. 40(2)(f) would be an unjustified invasion of personal privacy." Section 40(2)(f) of ATIPPA, 2015 allows a public body to release certain information about its employees:

- (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;

[12] Regarding the second part of the test, the Department distinguished the matter at hand from the facts in Report [A-2019-025](#):

The applicant is not requesting statistical information or any other type of information that gives rise to a question of whether it is information about an identifiable individual. They are specifically requesting information about an individual that they have identified by name.

[13] The Department further stated that not only would it have to withhold the information per section 40 if the information does exist, but that confirming whether it existed would inform the Complainant "whether the named employee was the subject of complaints/allegations

and whether we referred any such complaint/allegation to the police” which would itself be harmful to the employee’s personal privacy.

[14] We agree that the information sought goes above and beyond the permissible disclosure under section 40(2)(f). Further, the Complainant did not request their own personal information or claim to be a witness or a party to any of the information the Department may or may not have. Therefore, any potential records presumably would not contain the Complainant’s own personal information that they would be entitled to receive.

[15] Based on the foregoing, we conclude that the Department was correct in its application of subsection 17(2)(b).

RECOMMENDATIONS

[16] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015), I recommend that the Department of Education maintain its position on this matter.

[17] As set out in section 49(1)(b) of ATIPPA, 2015, the head of the Department of Education must give written notice of their decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within ten business days of receiving this Report.

[18] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 29th day of May 2024.



Jacqueline Lake Kavanagh
Information and Privacy Commissioner (Acting)
Newfoundland and Labrador