



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-050

November 1, 2024

Royal Newfoundland Constabulary

Summary:

The Complainant made an access to information request to the Royal Newfoundland Constabulary seeking records relating to a criminal complaint. The RNC has records responsive to the request but has withheld them pursuant to section 5(1)(m) of the **Access to Information and Protection of Privacy Act, 2015**. The Complainant disagreed with this determination and requested that the RNC's decision be reviewed. Section 5 lists categories of public body records to which ATIPPA, 2015 does not apply, and section 5(1)(m) is one of six subsections for which there is no statutory authority to require that the public body provide the records to the Commissioner for review. This Office was not convinced by the reasons given by the RNC in support of its application of section 5(1)(m), however, in light of the statutory constraints on the Commissioner's ability to review the records, this Office recommended that the RNC maintain its position, leaving the door open to the Complainant to bring the matter to Court should they choose to do so.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 5(1), 97(1) and 97(3).

Authorities Relied On: [Newfoundland and Labrador \(Attorney General\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#), 2010 NLTD 19.

[Report of the 2014 Statutory Review: Access to Information and Protection of Privacy Act, Newfoundland and Labrador](#). Volume II Full Report.

BACKGROUND

- [1] The Complainant made an **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015) request to the Royal Newfoundland Constabulary seeking the following:

Contents of Investigation File [listed file number] and all records pertaining to this file (information gathered in the process of investigation, inquiries, and consultations) including access logs (who and when accessed the file).

- [2] The RNC's search did produce responsive records, however, the RNC has withheld all records citing section 5(1)(m) of ATIPPA, 2015. Section 5(1)(m) is one of six subsections in ATIPPA, 2015 that removes records from the jurisdiction of the Act while also denying this Office the ability to require production of the records in order to review them and provide oversight of the public body's decision.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of ATIPPA, 2015. Acting Commissioner Jacqueline Lake Kavanagh has delegated this matter to me pursuant to section 103 of the Act.

PUBLIC BODY'S POSITION

- [4] The RNC claims that the records sought by the Complainant meet the criteria of section 5(1)(m) of ATIPPA, 2015, which is a record in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation. A record that falls under section 5(1)(m) is not subject to ATIPPA, 2015. The RNC also states that further evidence could be forthcoming and that disclosure would impede any further developments in the investigation.

COMPLAINANT'S POSITION

- [5] The Complainant questions the RNC's application of section 5(1)(m). The Complainant believes that section 5(1)(m) is being used too broadly. The Complainant also specifically argues that the access logs to the records in question – who has accessed the records and when – should not be included in any claim of section 5(1)(m).

ISSUES

- [6] The issue for this Report to address is whether section 5(1)(m) applies to the requested records as claimed by the RNC.

DECISION

- [7] The relevant sections of **ATIPPA, 2015** for this matter are as follows:
- 5.(1) This Act applies to all records in the custody of or under the control of a public body but does not apply to
 - (m) a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.
 - ...
 - 97.(1) This section and section 98 apply to a record notwithstanding
 - (a) paragraph 5 (1)(c), (d), (e), (f), (g), (h) or (i);
 - ...
 - (3) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.

- [8] ATIPPA, 2015 provides a right of access by the public, to public body records, with specific mandatory and discretionary exceptions set out in sections 27 through 41. There are, however, certain classes of records described in section 5(1) to which the Act does not apply. These excluded records cover a wide range of subject matter, from constituency records to police files. The categories of records described in section 5(1) can be further divided into two groups: those records which this Office can compel production of, during the course of our review function, pursuant to section 97 of ATIPPA, 2015, and those where there is no statutory authority for this Office to compel production of records to facilitate our review function. The records contained in this second category include the communications of judges, and matters involving ongoing police investigations and Crown prosecutions. Descriptions of this class of record are set forth in section 5(1)(a) to (b) and 5(1)(j) to (m).

[9] Section 5(1)(m) was added to the list of records to which the Act does not apply upon the recommendation of the 2014 **Statutory Review of the Access to Information and Protection of Privacy Act**. That report stated at page 134:

There is, however, one category of police investigation record that ought to be on the list and is not there. During a normal police investigation of crime, investigators may express suspicion that an individual, or several individuals, may be responsible for the crime. Frequently, reports are prepared expressing those suspicions. As the investigation continues, the police narrow the list of suspects, and ultimately charges are laid and the guilt or innocence of the charged person is decided by court processes. Those records that expressed suspicion of guilt of persons whom the investigation determined to be innocent, to the extent that they are retained in police or prosecution files, can never be disclosed even after prosecution and conviction of the person ultimately charged. Such documents may express suspicion of totally innocent persons, usually with detailed reasons for that suspicion. No principle of access could ever justify making such records accessible to any person who might make a request under ATIPPA.

[10] The implications for this Office when addressing a claim such as section 5(1)(m) that ATIPPA, 2015 does not apply to a record and that the record is outside of this Office's authority to review was addressed in [Newfoundland and Labrador \(Attorney General\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#). That decision addressed this Office's right to compel production of RNC files during an ongoing investigation. In the decision, Justice Fowler wrote at paragraph 48:

[48]...I find therefore that the commissioner as empowered by the Access to Information and Privacy Act of this province does not have the authority as a preliminary jurisdictional issue to determine for himself whether or not the section 5(1)(k) information or record sought is outside the jurisdiction of the Commissioner as alleged in the matter before this Court. If the Commissioner was requesting, for example, access to a judge's notes, there is no authority that I am aware of that could override the right of the judge to not disclose notes or records related to an ongoing court matter.

[11] In the same decision, Justice Fowler did suggest that in some instances an affidavit from the public body about the records being withheld could suffice as evidence to prove the application of some provisions under section 5(1). However, Justice Fowler did note that a public body could not be compelled to take such a step.

[12] This Office is constrained in our role when a public body applies section 5(1)(m) of ATIPPA, 2015. The RNC even stated in its correspondence with the Complainant that the “records are not capable of being the subject of review by the Information and Privacy Commissioner.” However, one of the mandates of this Office is to provide oversight of ATIPPA, 2015 and it is incumbent upon this Office during a complaint investigation to make our best efforts, within the statute, to ensure that the rights of applicants are being respected and that public bodies comply with the Act.

[13] In this case, our Office did request that the RNC submit a summary description of the records that are being withheld and the RNC did so. The records relate to a criminal complaint made in the summer of 2023. The criminal allegation was investigated and the RNC reached certain conclusions but determined that it was not prepared to lay a charge in the matter at that time. The RNC also stated that the investigation may not be complete and that disclosure could impede any future investigation. It is unclear from the RNC submission whether the investigation is formally closed. The summary does not state that the records withheld by the RNC explicitly express a suspicion of guilt of any particular individual. The RNC indicated that such a direct statement is unnecessary and that any ambiguity on this matter should be resolved in favor of the person protected by section 5(1)(m).

[14] As noted above, this Office has not been provided with the records to review. We know there was a criminal complaint, that the complaint was complex, that it was investigated, and that certain conclusions were drawn. The information provided to this Office by the RNC did not contain sufficient evidence to establish whether or to what extent the responsive records are captured by section 5(1)(m) and thus excluded from the Act.

[15] Our assessment of the evidence provided by the RNC has been done in the context of the words of the statute in section 5(1)(m), and also, importantly, in the context of the purpose of this particular provision, as excerpted above from the authors of the Bill (subsequently passed into law by our Legislature). To emphasize the point again, they explicitly state that section 5(1)(m) is intended to cover:

Those records that expressed suspicion of guilt of persons whom the investigation determined to be innocent, to the extent that they are retained in police or

prosecution files, can never be disclosed even after prosecution and conviction of the person ultimately charged. Such documents may express suspicion of totally innocent persons, usually with detailed reasons for that suspicion.

[16] As noted in that excerpt, only a specific subset of investigative records was intended to be captured by section 5(1)(m). Importantly, that does not mean that investigative records that are not captured by 5(1)(m) must necessarily be released to an access to information applicant. As the RNC is aware, there are other exceptions, both discretionary and mandatory, which may apply to some or all of the records if section 5(1)(m) is not applicable. The very real and perhaps likely possibility that some or all of the records in question might qualify for such an exception is the basis for the recommendation in this Report.

[17] Although it is far from clear whether section 5(1)(m) applies to some or all of the responsive records, the most practical way forward in this case, should the Complainant seek to have the matter adjudicated, would be, as Justice Fowler suggested, to bring the matter before the Court. Section 54 of ATIPPA, 2015 allows an access to information applicant to appeal a decision of a public body in response to a Commissioner's Report. By recommending that the RNC maintain its position on this matter, the door is clearly open to the Complainant to pursue an independent review through that avenue. While this route is far more time consuming and potentially expensive for access to information applicants, it may in this case be necessary in order to ensure that the records are reviewed and an independent assessment has been conducted of the applicability of section 5(1)(m) to those records. The Act, as it is currently constructed, impedes our ability to conduct such an assessment due to our inability to require that the records be provided for our review. The description of the records provided by the RNC was also insufficient for the purpose.

RECOMMENDATIONS

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

[19] 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.

[20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1st day of November 2024.



Sean Murray
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