OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-056

December 16, 2024

Department of Justice and Public Safety

Summary: The Complainant made an access to information request to the Department of Justice and Public Safety seeking correspondence between the Minister of Justice and Public Safety and the Chief Justice of the Supreme Court of Newfoundland and Labrador. The Department's search produced 92 pages of responsive records, many of which were withheld pursuant to section 29(1)(a) of the **Access to Information and Protection of Privacy Act, 2015.** The Department later claimed that section 5(1)(a) of the Act also applied to several records. The Complainant challenged the use of these exceptions and claimed that the Department did not meet its duty to assist as set forth in section 13(1) of the Act. A review by this Office determined that the Department did meet its duty to assist, but that a further search for the final versions of some documents should be conducted. This Office also held that section 29(1)(a) did not apply to some of the information and recommended it be disclosed but concluded the remainder of the information or records withheld pursuant to sections 5, 29, 30. And 40 could continue to be withheld.

Statutes Cited: Access to Information and Protection of Privacy Act, 2015, SNL 2015, c. A-1.2, sections 5(1), 13(1), 29(1), 29(2), 30(1), and (40(1).

Authorities Relied On: Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner), 2020 NLTD 19

NL OIPC Reports A-2020-020; A-2021-003; and A-2024-051

BACKGROUND

[1] The Complainant filed an access to information request with the Department of Justice and Public Safety:

> All records pertaining to meetings and exchanges between JPS and the Chief Justice of the Supreme Court of Newfoundland and Labrador, including but not limited to the meeting acknowledged by the Minister of Justice when introducing the House of Assembly Bill 54 "An Act to Amend the Judicature Act. Period covered 8 April 2021 to date.

[2] A search by the Department produced 92 pages of responsive records, some of which were withheld in their entirety pursuant to section 29(1)(a) of the **Access to Information and Protection of Privacy Act, 2015** (the "**Act**"). There was also a small number of redactions pursuant to sections 31(1)(l) and 40(1) of the Act. The Department also claimed that several of the responsive records were excluded from the Act as they were covered under section 5(1)(a).

[3] The Complainant disagreed with the application of sections 5(1)(a), 29(1)(a), 31(1)(l), and 40(1) to the responsive records. As well, the Complainant asserted that the Department did not meet its duty to assist as set forth in section 13(1) of the Act. As a result, the Complainant filed a Complaint with this Office.

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

PUBLIC BODY'S POSITION

[5] It is the Department's position that it properly applied all sections of the Act to the responsive records. The Department also asserts that it performed a reasonable search and met its duty to assist.

COMPLAINANT'S POSITION

[6] With respect to the duty to assist, the Complainant notes that there were no documents provided relating to a meeting between the Minister of Justice and Public Safety and the Chief Justice of the Supreme Court of Newfoundland and Labrador, though the meeting certainly occurred. The Complainant also states that the Department's use of section 29(1)(a) was overly broad and that, at the very least, some of the information withheld under this section could be released.

ISSUES

[7] There are three issues to be addressed in this report:

1. Did the Department meet its duty to assist as required by section 13(1) of the Act?
2. Should this Office accept the Department's late submission that several pages of records are exempt from the Act pursuant to section 5(1)(a) and does that section apply to the records in question?
3. Did the Department properly apply sections 29(1)(a), 31(1)(l) and 40(1) to the responsive records?

DECISION

[8] The sections of the Act relevant to this matter are as follows:

> 5.(1) This Act applies to all records in the custody of a public body but does not apply to
>
> (a) a record in a court file, a record of a judge of the Court of Appeal, Trial Division, or Provincial Court, a judicial administration record relating to support services provided to the judges of those courts;
>
> . . .
>
> 13.(1) The head of a public body shall make every reasonable effort to assist an application in making a request and to respond without delay to an applicant in an open, accurate, and complete manner.

. . .

29.(1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister.

. . .

29.(2) The head of a public body shall not refuse to disclose under subsection (1)

(a) factual material;

. . .

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

. . .

(l) reveal the arrangements for the security of property or a system a record in a court file, a record of a judge of the Court of Appeal, Trial Division, or Provincial Court, a judicial administration record relating to support services provided to the judges of those courts;

. . .

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.

Section 13 – Duty to Assist

[9] As has been stated in numerous reports from this Office, the duty to assist is a fundamental pillar of the Act as it ensures that the legislation can fulfill its purpose. One component of the duty to assist is that the public body must conduct a reasonable search for responsive records.

[10] This Office has several times (for example, recently in Report A-2024-051) that the standard is "reasonableness, not perfection." That Report also noted:

> . . . A reasonable search is organized and conducted using appropriate search terms, carried-out by individuals who would be in the best position to know if records exist, and supervised by the ATIPP coordinator.

[11] The Act does not require the public body to prove with absolute certainty that records do not exist. The public body must provide evidence to show that it has made a reasonable effort to locate records responsive to the request.

[12] In its submission to this Office, the Department provided a detailed breakdown of its search for responsive records. The Department states that its search included records in its records management software, shared drives, and physical notebooks and records. Relevant search terms were used to guide the search. The Department also identified 12 individuals with possible information related to the request. These individuals ranged from the Deputy Minister to various directors and managers. The emails of these individuals were searched using relevant search terms. To this Office, the search for responsive conducted by the Department was reasonable.

[13] It is the position of the Complainant that a new search for responsive records should be conducted by the Department, as they assert that additional records must exist and were not disclosed. With respect to the Complainant's position, this Office's Practice Bulletin on reasonable search states:

> Complainants must establish the existence of a reasonable suspicion that a public body is withholding a record, or has not undertaken an adequate search for a record. Sometimes, this takes the form of having possession of or having previously seen a document that was not included with other responsive records or media reports regarding the documents.

[14] In this case, the Complainant's claim is based on a confirmed meeting between the Minister and the Chief Justice that the Complainant believes would have produced some form of written record. The Complainant provided no further proof to substantiate this claim. This lack of proof, combined with the reasonable search of the Department, leads this Office to support the position of the Department that it did meet its duty to assist as set forth in section 13(1) of the Act.

Section 29 – Policy Advice or Recommendations

[15] There were several redactions made pursuant to section 29(1)(a) of the Act. This exception allows for information to be withheld if it would disclose advice, proposals, analyses or policy

options developed by or for the public body. The discretion to withhold this information exists to protect open discussions and debates on policy options and recommendations. Section 29(1)(a) is an information-level (as opposed to a record-level) exception. It is therefore necessary to conduct a line-by-line review of a record. There are also specific limitations placed on the exception. For example, factual information cannot be withheld under this exception.

[16] In this instance, there is part of one record withheld by the Department according to section 29(1)(a) that should be disclosed. Page 7 of the responsive records is a document that was clearly drafted for advice and it does contain specific recommendations on how to proceed on a specific matter. However, the top section of that document provides an explanation as to how a particular piece of legislation functions. It is a statement of fact and does not include any of the forms of information that are exempted by section 29(1)(a) of the Act. Section 29(1)(a) is also not applicable to the second section of the record, as it is also a statement of fact. Finally, in the third section of that same record, the third and fifth bullets should also be disclosed as they contain only factual material.

[17] The record listed on page 75 of the responsive record package should also be disclosed. This record is currently withheld in its entirety pursuant to section 29(1)(a) but it does not meet any of the criteria set out in that section to justify withholding the information. The record is an acknowledgement of a statement of fact related to the nomination of an individual to a statutory committee. We recommend the record be released in its entirety.

[18] In this case, there is also the issue of applying section 29(1)(a) to draft documents. In general, this Office has agreed that section 29(1)(a) can be applied to draft documents under the reasoning that it is an expression of a policy or opinion that is not yet made official. Moreover, a draft could change before it is finalized and the change between the draft and final versions may reflect the policy discussions that took place. At the same time, it is a reasonable presumption that a draft is simply a version of a record that was later finalized and the existence of a draft points to the likely existence of a final version.

[19] In total, the Department properly withheld eight pages of responsive records as being drafts under section 29(1)(a). This Office has inquired of the Department whether these drafts were finalized but did not receive a response. It seems from other responsive records that a final version may have been completed and sent to the intended recipients but did not form part of the package of responsive records disclosed to the Complainant. It is reasonable for this Office to recommend to the Department that it conduct a further, limited, search specifically for final versions of these records and, if these records are located, to disclose them to the Complainant.

Section 5 – Application

[20] Relatively late in the complaint investigation process, the Department also asserted that section 5(1)(a) applied to pages numbered 50 to 56, 59 to 62, and 76 of the responsive record package. These pages were previously withheld pursuant to section 29(1)(a) and this Office agrees with the use of that exception for pages 50 to 56 and 59 to 62. As a result, the consideration of how section 5(1)(a) applies to these records is not necessary. The section 5(1)(a) analysis in this report applies only to page 76.

[21] Normally, this Office does not accept a public body changing the application of an exception late in the process. The reason for taking this approach was set out in Report A-2020-020:

> 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.

[22] However, in Report A-2021-003 this Office concluded that a jurisdictional claim – that is, whether section 5 operates to remove the record from the application of the Act altogether – must always be addressed, even if raised late in the proceeding.

[23] The Act provides a right of access by citizens to public body records, with certain exceptions. 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 the Act, 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 certain judicial records and matters involving ongoing police investigations and Crown prosecutions. Descriptions of this class of record are set forth in section 5(1)(a) and (b) and 5(1)(j) to (m).

[24] The implication for this Office when addressing a claim under section 5(1)(m) is that the record is exempt from the Act. This was confirmed in **Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner** where Justice Fowler opined 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.

[25] However, in this instance we have been provided with the record over which section 5(1)(a) is being claimed. For a record to be exempted from the application of the Act under section 5(1)(a), it must be one of four types of records:

- A record in a court file,
- A record of a judge of the Court of Appeal, Trial Division, or Provincial Court,
- A judicial administration record, or
- Or a record relating to support services provided to the judges of those court.

[26] The Department has not clarified under which part of section 5(1)(a) this record applies. It is clearly not a judicial record or a record related to support services for judges. From the perspective of this Office, the record would appear to be a judicial administration record, as it is a communication about membership on a committee that serves an important function in maintaining the integrity of the administration of justice. As such, the record is captured by the exemption claimed by the Department.

Section 30 – Legal Advice and Section 40 – Disclosure Harmful to Personal Privacy

[27] This Office has reviewed the Department's application of section 30(1)(l) and 40(1) and takes no issue with how these exceptions were applied.

RECOMMENDATIONS

[28] Under the authority of section 47 of the **Access to information and Protection of Privacy Act, 2015** (the "**Act**"), I recommend that the Department of Justice and Public Safety:

i) Conduct within 10 business days a search for the non-draft copies of the records contained on pages 29 to 33 and 37 to 41 of the responsive records package. If this search produces any non-draft copies, that these records be disclosed to the Complainant within 10 days of the end of the search, and

ii) Disclose within 10 business days sections 1 and 2, and the third and fifth bullet of section 3, of the record on page 7; and the entirety of the record on page 75 of the responsive record package.

[29] As set out in the Act, 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.

[30] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of December 2024.

Kerry Hatfield
Information and Privacy Commissioner
Newfoundland and Labrador