



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2025-005

February 3, 2025

Department of Fisheries, Forestry and Agriculture

Summary:

Following a previous complaint about the reasonableness of the public body's search for records, the Complainant received additional responsive records from the Department, which withheld some information based on sections 29 (policy advice and recommendations) and 40 (disclosure harmful to personal privacy) of the **Access to Information and Protection of Privacy Act, 2015**. The Commissioner concluded most of the Department's redactions in relation to sections 29 and 40 were appropriate and recommended the Department continue to withhold that information. However, the Commissioner concluded that the application of section 40 to a statement in one email record was incorrect and that information should be disclosed to the Complainant. Both the Complainant and Department made late submissions, arguing the applicability of sections 33(3) and 37(1)(a), respectively, however the Commissioner concluded neither of these sections are applicable to the responsive records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 9, 29(1)(a), 33(3), 37(1)(a), and 40(1).

Authorities Relied On: NL OIPC Reports [A-2021-033](#); [A-2023-045](#), and [A-2024-039](#).

BACKGROUND

- [1] The Complainant made an access request under the **Access to Information and Protection of Privacy Act, 2015** (the “Act”) to the Department of Fisheries, Forestry and Agriculture. The request sought the following information:

Please supply the entirety of the investigation your department conducted into [Complainant], the review conducted by your department following the receipt of his complaint, as well as the formulation and various drafts of the department's response letter dated 24-06-10.”

- [2] The Department provided the responsive records, and the Complainant filed a complaint with this Office seeking our review of the Department’s response. That complaint was resolved when the Department located and provided additional records to the Complainant. The additional records total approximately eight pages, and the Department redacted some information pursuant to sections 29(1)(a) and 40(1). The Complainant then filed a new complaint to this Office seeking our review of the application of these redactions to the additional records.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of the Act.

PUBLIC BODY’S POSITION

- [4] When it released the additional records to the Complainant, the Department withheld some information pursuant to sections 29(1)(a) that the information was exempted from disclosure as policy advice or recommendations, and 40(1) that disclosure of the information could expose a third party to financial, reputational, or other harm. In response to the complaint to this Office, the Department made submissions on both exceptions to access, while also raising another discretionary exception to access, section 37(1)(a). With respect to the late application of section 37(1)(a), the Department submitted the disclosure of some information could be harmful to the mental health of an individual and proposed that the OIPC

consult with the Director of HR Advisory Services with responsibility for Disability Management who, it argued could, “further meet the burden of proof in the application of this section.”

COMPLAINANT’S POSITION

[5] The Complainant believed the records to be part of a law enforcement investigation and made submissions to this Office arguing that section 29 cannot apply to records related to a law enforcement investigation because, the Complainant, submits, law enforcement should be separate from policy making.

[6] The Complainant also made arguments in relation to section 9 arguing that there is a public interest in knowing whether the Department fairly and impartially investigates offences under its jurisdiction.

[7] Finally, late in our investigation, the Complainant sought to apply section 33(3) to demand disclosure in full of not just the records responsive to this complaint, but also to the related original access request and complaint. This Office informed the Complainant that if they wished to provide further evidence as to the applicability of this section, this Office would accept for late consideration an additional submission. The Complainant submitted that they believed the records related to an investigation of a complaint made by the Complainant about the conduct of staff within the Department and that, therefore, what followed was a workplace investigation of the interactions between a public body employee and a member of the public (the Complainant).

ISSUES

[8] At issue in this report is the application of sections 29(1)(a) (policy advice or recommendations), 9 (public interest override), 33(3) (workplace investigation), 37(1)(a) (mental or physical harm to a person), and 40(1) (personal information).

DECISION

Section 29(1)(a)

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;

[9] Section 29(1)(a) has been applied to withhold information that includes policy advice, and recommendations. Determining the correct application of this section requires consideration of its purpose, which this Office interpreted in Report [A-2021-033](#):

This exception is intended to provide public servants with a “safe space” in which to hold discussions or debates around courses of action and to provide advice or recommendations about policy or procedural matters, without being concerned that their views and opinions will be made public. The extensive jurisprudence on this topic, including court decisions, confirms that the exception covers drafts of documents and the discussions around them.

[10] This Office also considered the application of section. 29(1)(a) in Report [A-2024-039](#):

Section 29(1)(a) addresses the need for public bodies to withhold records that document internal discussions and debates that are needed to develop and implement policies and plans.

[11] In this case, what has been redacted are portions of email discussions and debates between members of the Department around the course of action to take in relation to the inner workings of the Department and more specifically the Newfoundland and Labrador Beekeeping Association and concerns about a member’s bee practices. Advice and recommendations are being provided back and forth about policy and procedural matters, as this section is intended to allow. The Department very clearly conducted a line-by-line assessment in redacting this information, and this Office is satisfied it has done so as minimally as possible, only redacting those portions of the records that fall within the above-noted exception.

[12] The Complainant also raised section 9 with respect to the information redacted under section 29. Section 9 states:

(1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

...

(b) section 29 (policy advice or recommendations);

[13] The Complainant has not demonstrated that the records in question attract a public interest, but rather these appear to be of private interest to the Complainant. As noted above, section 29(1)(a) applies to protect the full and frank discussion of policy alternatives within government, which this Office is satisfied the records in question trigger. The interest of the Complainant in obtaining the information is a private interest, and therefore the public interest override does not apply.

Section 40(1)

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.

...

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

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

...

(e) the third party will be exposed unfairly to financial or other harm;

...

(g) the personal information is likely to be inaccurate or unreliable;

(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;

[14] Upon review of the records, Section 40 has, in most cases, been used appropriately by the Department to withhold personal information. None of the section 40(5) factors weighing in favour of disclosure would apply to rebut the presumption the information should not be disclosed as being personal information.

[15] There is, however, one application of section 40 within the responsive records that is contested by the Complainant which is the Department's decision to redact a brief statement in a single email on page four of the responsive records. The Department, in applying section 40, relied upon sections 40(5)(e), (f) and (h) to favour withholding the information, while the Complainant has suggested subsection 40(5)(a) is applicable to favour disclosure.

[16] Having reviewed the record, this Office has determined the comment in question is an opinion about the Complainant, making it the personal information of the Complainant and not the employee who wrote it. Section 2(viii) of the Act sets out that personal information of an individual includes the opinions of a person about the individual. Section 40 does not operate to withhold the personal information of the applicant themselves. Therefore, the Department's application of section 40 was incorrect and none of the factors under section 40(5) need to be assessed. The Complainant is entitled to disclosure of this portion of the records as it is their own personal information.

Section 37(1)(a)

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

(a) threaten the safety or mental or physical health of a person other than the applicant; or

[17] In response to our investigation, the Department later raised section 37(1)(a) as an exception to access to withhold the statement made by an employee addressed above, under section 40. This discretionary exception allows a public body to withhold information – including personal information of an access to information applicant – where the information could threaten the safety or mental or physical health of a person other than the applicant. As it is not a mandatory exemption, this Office is not required to consider the late application of a discretionary exemption under the Act. In its initial submissions, the Department provided no grounds for the application of this exception.

[18] Despite raising the issue late in the investigation, the Department was offered the opportunity to provide additional supporting evidence with the understanding that this section has a high threshold to discharge its burden. Section 37(1)(a) cannot be applied simply where the outcome contemplated “might” occur, but rather it is incumbent upon the public body seeking its application to provide some evidence that demonstrates its outcome could reasonably be expected. In this case, the Department failed to provide sufficient evidence when invited to do so. The submission provided to this Office declined to go into detail. While the Department indicated its proof was sensitive and could be shared only “on a need-to-know basis,” an investigation by this Office and our review of its application of this section is such a situation.

[19] Without sufficient proof, this Office cannot accept the application of section 37 and, having found that it is the personal information of the Complainant, the passage in question ought to be disclosed.

Section 33(3)

[20] 33. (1) For the purpose of this section

(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.

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

[21] The Complainant also asked this Office to consider the late application of section 33(3), arguing for full disclosure of the responsive records for both this complaint and their previous complaint as well.

[22] In their submissions, the Complainant argued that their complaint to the Department sought its review of how employees of the Department had treated them, and alleged that an investigation had been wrongly initiated against them. On review of the records, it is clear the Department was reviewing its conduct at large and at no time was the Complainant's complaint to the Department treated as a workplace investigation. Given this, and the late point at which this notion was raised, we cannot conclude that what transpired here fits within the definition of a workplace investigation as contemplated by the Act. As this Office previously noted in Report [A-2023-045](#):

[27] While not raised by the parties, it is also worth noting that section 33 of ATIPPA, 2015 creates a right of access to information gathered for a workplace investigation. The Complainant is both a party and a witness and is therefore entitled to their own witness statements and information as per section 33(4). It should be noted that this section does not override the privacy protections in section 40. As noted in *College of the North Atlantic (Re)*, [2021 NLSC 120](#), a

party's right to investigative records is qualified by section 40 to the extent that disclosure cannot result in an unreasonable invasion of a third party's privacy.

Conclusions

[23] Given the above analysis, I find that the information withheld under section 29(1)(a) has been withheld appropriately and section 9 does not operate to override that exception.

[24] I further find that the one passage on page four that is at issue is the personal information of the Complainant and cannot be withheld. The Department has not met its burden of demonstrating that it would be appropriate to withhold this information under section 37. Except for this passage, I find the other personal information withheld under section 40 has been appropriately withheld.

[25] Finally, I find that there was no workplace investigation within the meaning of section 33 and that provision of the Act does not operate to create any additional right of access in this case.

RECOMMENDATIONS

[26] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend as follows:

- 1) that the Department of Fisheries, Forestry and Agriculture disclose the statement at page four of the responsive records (previously redacted pursuant to sections 40(1) and 37(1)(a)).
- 2) that the Department of Fisheries, Forestry and Agriculture maintain its position with respect to all other applications of section 40, as well as all applications of section 29(1)(a).

[27] As set out in section 49(1)(b) of the **Access to Information and Protection of Privacy Act, 2015**, the head of the Department of Fisheries, Forestry and Agriculture 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.

[28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of February 2025.



Kerry Hatfield
Information and Privacy Commissioner
Newfoundland and Labrador