

Information from a Workplace Investigation (Section 33)

Section 33 of the *Access to Information and Protection of Privacy Act, 2015* (ATIPPA, 2015) states as follows:

33. (1) For the purpose of this section

- (a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;*
- (b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and*
- (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).*
- (4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.*

Section 33 is a mandatory section in two respects: It serves as a mandatory *exception* that requires that relevant information from a workplace investigation be withheld from an applicant who is *not* a party as defined in section 33(1)(b) (i.e. where the applicant is a complete “outsider” to the investigation). However, it also provides for a mandatory *right* of access to relevant information created or gathered for the purpose of a workplace investigation if the applicant is a party to an investigation. Witnesses in a workplace investigation are only entitled to relevant information related to their own witness statement.

Two recent decisions from the Supreme Court of Newfoundland and Labrador have substantially affected how section 33 is to be interpreted in relation to other exceptions under *ATIPPA, 2015*.



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Section 33 – Information from a Workplace Investigation

When responding to access to information requests, Coordinators will find it essential to determine the status of the Applicant with respect to the investigation, as section 33(2) and 33(3) read together requires that all relevant workplace investigation information be withheld from everyone except parties to the investigation, to whom disclosure of certain information becomes mandatory. Section 33(4) allows for a witness to receive information related to their own statements. As a result, the role of the Applicant in the workplace investigation must be known.

Section 40

Section 40 relates to the disclosure of personal information. Section 40 is also a mandatory exception to disclosure under *ATIPPA, 2015*. In *College of the North Atlantic (Re), 2021 NLSC 120*, the Court held that,

Section 33(3) of the Act does not override the provisions of section 40 of the same Act. In the context of a workplace investigation the employer is bound to provide all relevant material to the personal being investigated subject to the reasonable protection of privacy rights, under section 40, of complainants and third parties.¹

Neither section 33(3) nor section 40(1) can be read in isolation. As both are mandatory exceptions, where personal information is concerned, both sections must be read together in context with section 40(5).

Section 40(5) states:

- (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;*
 - (b) the disclosure is likely to promote public health and safety or the protection of the environment;*
 - (c) the personal information is relevant to a fair determination of the applicant's rights;*
 - (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;*
 - (e) the third party will be exposed unfairly to financial or other harm;*
 - (f) the personal information has been supplied in confidence;*
 - (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;*
 - (i) the personal information was originally provided to the applicant; and*

¹ *College of the North Atlantic (Re), 2021 NLSC 120*

Section 33 – Information from a Workplace Investigation

(j) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

Multiple factors come into play in determining what relevant information must be disclosed to an Applicant, including whether the disclosure is relevant to a fair determination of the Applicant's rights; whether a third party will be unfairly exposed to financial or other harm, including reputational harm; whether the information has been provided in confidence (or if a third party had a reasonable expectation of confidentiality); and whether the information has already been provided to the Applicant.

Where personal information (for example, the names of investigation witnesses) was likely supplied in confidence as part of a workplace investigation, the disclosure of that information may also be an unreasonable invasion of personal privacy in consideration of Section 40(5)(f).

A careful balancing of the Applicant's access rights and a third party's privacy rights is required. The Applicant who is a party to a workplace investigation is entitled to all relevant information created or gathered for the purpose of a workplace investigation, subject to restrictions placed on that disclosure through the application of section 40, and in particular, the balancing provision of section 40(5). However, for a party to a workplace investigation, attempting to obtain the information necessary to achieve full answer and defense to any allegations solely through a request under *ATIPPA, 2015* will necessarily come with potential limitations, in light of the Court's ruling.

A fair investigative and adjudicative process of workplace complaints should ideally ensure that procedural fairness for all parties is designed into the process. However, in some cases parties may need to resort to the courts to obtain information that may not be obtainable through an access request.

Often, applicants seek to use the access to information process as a replacement for other traditional methods for obtaining information relating to investigations. The purpose of *ATIPPA, 2015* is not to provide access to all information necessary to allow for a full defense, or to ensure public bodies provide disclosure as would be provided during a discovery process. Workplace investigations that lead to an adjudication should allow for this type of natural justice. In the final report of the *ATIPPA, 2015* Statutory Review 2020, the Hon. David Orsborn noted that, "[t]o do so would be to introduce unnecessarily the notion of individual benefit into a statute intended to protect personal information and to advance and protect the public interest in democratic, transparent and accountable governance."²

When responding to access to information requests, Coordinators will find it essential to determine the status of the Applicant with respect to the investigation, as section 33(2) and 33(3) read together requires that all relevant workplace investigation information be withheld from everyone except parties to the investigation, to whom disclosure of certain information becomes mandatory. Section 33(4) allows for a witness to receive information related to their own statements. As a result, the role of the Applicant in the workplace investigation must be known.

Section 30

Section 30 is an exception relating to legal advice:

30. (1) The head of a public body may refuse to disclose to an applicant information

² *Access to Information and Protection of Privacy Act, 2015* Statutory Review 2020, p. 148.

Section 33 – Information from a Workplace Investigation

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

Another recent decision determined that section 33(3) does not override section 30, nor does it abrogate solicitor-client or litigation privilege:

[89] Solicitor-client privilege is fundamental to the proper functioning of our legal system. It is in the public interest that people can freely discuss their problems with a lawyer with an assurance of confidentiality “as close to absolute as possible”: *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44, at para. 9.

[90] Clear statutory language is required to abrogate solicitor-client privilege. The Supreme Court of Canada has consistently reiterated: “To give effect to solicitor-client privilege as a fundamental policy of law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so”: *Alberta (Information and Privacy Commissioner)*, at para. 28. Open textured language governing production of documents will not include solicitor-client documents, unless expressed specifically to include solicitor-client privilege documents.”³

This exception to disclosure does not, however, prevent applicants or complainants from contesting the application of section 30. The burden remains on the Public body to establish that solicitor-client privilege attaches to the records.

Other Exceptions

Notwithstanding these recent decisions regarding the interaction of sections 30 and 40 with section 33, courts have not yet determined whether this approach will apply to other disclosure exceptions.

“Relevant”

When releasing information under this section, it is imperative that careful consideration be given to the word “relevant”. In the course of workplace investigations, a lot of information may be created or gathered that is ultimately not relevant to the investigation. Examples of such information might include medical diagnoses unrelated to the issue or specifics of medical treatment. While a general diagnosis or description of a medical condition may be relevant in some situations, sometimes detailed treatment notes or plans are not relevant.

Information that is not relevant to the investigation which is also an unreasonable invasion of personal privacy is protected and should not be disclosed.

³ *Oleynik v. Memorial University of Newfoundland and Labrador*, 2021 NLSC 51. The reference in para. 90 is to the Supreme Court of Canada decision in *Blood Tribe*, at para. 11.

Section 33 – Information from a Workplace Investigation

Decisions with respect to relevance are case specific, and as a result certain types of information may be disclosed in one case but not another. The relevance of the information is a decision that must be made by the public body given the specific circumstances of each file, and release of information in one instance should not be seen as a “precedent setting