



CHILDREN & YOUTH
NEWFOUNDLAND & LABRADOR

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NOV 25 2020

November 27, 2020

Access to Information and Protection of Privacy Statutory Review 2020
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Attention: The Honourable David B. Orsborn – Committee Chair

As an independent statutory officer that regularly obtains personal information with respect to children and youth in the Province, I would like to thank you for extending the invitation to make a submission to the Statutory Review Committee for the **Access to Information and Protection of Privacy Act**.

Section 3 of the **Child and Youth Advocate Act**, S.N.L. 2001 c. 12.01 establishes the office of the Child and Youth Advocate and provides a useful summary of the role and functions it performs. This section states:

3. The Office of the Child and Youth Advocate is established

- (a) to ensure that the rights and interests of children and youth are protected and advanced and their views are heard and considered;
- (b) to ensure that children and youth have access to services and that their complaints relating to the provision of those services receive appropriate attention;
- (c) to provide information and advice to the government, agencies of the government and to communities about the availability, effectiveness, responsiveness and relevance of services to children and youth;

(c.1) to review and investigate matters affecting the rights and interests of children and youth; and

(d) generally, to act as an advocate of the rights and interests of children and youth.

In fulfilling this advocacy mandate, my office works on behalf of some of the most vulnerable children and youth in Newfoundland and Labrador. The matters are highly sensitive, and confidentiality is important for the children, their families, complainants, and for witnesses who are compelled to participate in an investigative process of the Office of the Child and Youth Advocate.

It is against this background and context that the **Access to Information and Protection of Privacy Act, 2015 S.N.L. 2015 c. A-1.2 ("ATIPPA")** must be examined to assure that the advocate can continue to advocate, review, and investigate matters in a complete and thorough manner without information obtained during its investigations being subject to disclosure under the ATIPPA.

Legislative Overview:

Section 2(x)(v) of the ATIPPA defines a public body as "the House of Assembly and statutory offices, as defined in the **House of Assembly Accountability, Integrity and Administration Act**".

Section 2 (r) of the **House of Assembly Accountability, Integrity and Administration Act, 2007 S.N.L. c. H-10.1** defines statutory office as:

(r) "statutory office" means the office and administrative staff directly serving the

(i) Chief Electoral Officer,

(ii) Commissioner for Legislative Standards,

(iii) Child and Youth Advocate,

(iv) Information and Privacy Commissioner,

(v) Citizens' Representative,

(v.1) Seniors' Advocate, and

(vi) other offices of the House of Assembly, with the exception of the office of the Auditor General, that may be established under an Act; and

Section 41 of the ATIPPA is a mandatory exception to access to information entitled, "Disclosure of House of Assembly service and statutory office records" and states:

41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information

(a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;

(b) that is advice or a recommendation given to the Speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; or

(c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, **records connected with the investigatory functions of the statutory office. (emphasis added).**

The origins of the "investigatory privilege" of the statutory offices can be found in the report entitled "Rebuilding Confidence" authored by former Chief Justice Derek Green following the constituency allowance scandal involving the House of Assembly. At page 5-20 he states as follows:

With respect to the statutory offices, I recognize that these offices deal with sensitive and confidential information gained through investigations into the lives of individual citizens who approach them for assistance. That sort of information, often given in an expectation that privacy will be respected, should not be disclosed. Nevertheless, there is no reason why general financial and other information about the operation of the offices themselves and the expense of the heads of the offices and the staff should not be available. [Emphasis Added]

The office of the Auditor General should, however, be put in a separate category. At present there is a general obligation of confidentiality imposed on that office by section 21 of the Auditor General Act with respect to matters that come to the staff's knowledge in the course of their work. The Auditor General occupies a special – some would say unique – place in the government. This is cause for proceeding slowly before wrapping that office into any system of general reform of the legislative branch. Having said that, I believe a case can be made for subjecting the Auditor General to basic access to

information requirements about the financial and administrative organization of the office. The Auditor General is, by law, an officer of the House and is responsible, just as are other officers, for the expenditure of public money. I am aware, however, that some consideration is being given to making substantial revisions to the Auditor General's constituent legislation. The better approach for the present, therefore, is to exempt the office from the reforms being recommended in this report and to recommend that the application of access to information provisions be considered at the time of the general revision of the Act.

At the conclusion of his report, Green J. recommended draft legislation which included consequential amendments to the ATIPPA at s. 67(4) which reads as follows:

The Act is amended by immediately adding after s.30 the following:

30.1 The Speaker of the House of Assembly or the head of a statutory office shall refuse to disclose to an applicant information

(a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member;

(b) that is advice or recommendations given to the speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; and

(c) in the case of a statutory office, as defined in the **House of Assembly Accountability, Integrity and Administration Act**, records connected with the investigatory functions of the statutory office.

I agree that general financial information and other information regarding the operation of this Office and the expense of the head of the office and the staff should be available. This is in keeping with the recommendations of Green J. and promotes accountability and transparency in our democratic institutions. However, consideration should be given to strengthening the prohibition of disclosure with respect to investigatory records contained in s.41(c).

Guidance with respect to the interpretation of s.41 (c) is found in Report A-2010-007 of the Office of the Information and Privacy Commissioner which involved an access to information request received by the Office of the Citizens Representative for information in its investigative file. In response to this request, the Citizens' Representative stated the following with respect to s.41(c):

Crucial to its ability to access information in the course of an investigation is its exemption from disclosing records connected with its investigatory function under the ATIPPA. We contend that the spirit and intent of the exemption was, inter alia, to preserve the integrity of the investigative processes used by Statutory Officers of the House, and to provide a measure of comfort for complainants, respondents, and witnesses participating in investigations that information will not be recklessly or mistakenly dispensed in access requests to OCR flowing from OCR investigations. If OCR cannot ensure respondents and witnesses that information it receives stays within the confines of the investigatory function clause in Section 30.1(c), it would have an excessively difficult time assuring that both full documentary disclosure and candid witness evidence has been given. Its investigative powers would, thus, be fettered. [Emphasis Added].

In Report A-2010-007, the Commissioner concluded that s. 41(c) was applicable to the records in question and provided guidance with respect to the interpretation of the statutory exception to access. The Commissioner noted that this was an exception that appears unique to this Province. The Commissioner also recognized the broad nature of the exception in identifying that s.41(c) protects records "connected with" the investigatory functions of the statutory office. At paragraphs 23 to 26 the Commissioner stated the following:

[23] As noted, the OCR withheld the records from the Applicant on the basis of section 30.1(c). Section 30.1(c) states as follows:

30.1 The Speaker of the House of Assembly or the officer responsible for a statutory office shall refuse to disclose to an applicant information [...]

(c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.

[24] Section 30.1(c) has not yet been considered by this Office, nor could any reference to any comparable provision be found in the reports of any other jurisdiction in Canada. Section 2(p)(v) of the ATIPPA indicates that the definition of a public body includes "the House of Assembly and statutory offices as defined in the House of Assembly Accountability, Integrity and Administration Act. The OCR is clearly a "statutory office" as defined in section 2(r)(v) of the House of Assembly Accountability, Integrity and Administration Act. In respect of what constitutes "investigatory functions", the Concise Oxford English Dictionary defines "investigate" and its derivative "investigatory" as follows:

- *v. carry out a systematic or formal inquiry into (an incident or allegation) so as to establish the truth. › carry out research into (a subject). › make a search or systemic inquiry.*

[25] *It further defines "function" as follows:*

- *n. 1 an activity that is natural to or the purpose of a person or thing [...]*

[26] *These definitions provide useful guidance in this particular circumstance as no relevant jurisprudence or report could be located. This does not mean that further consideration of the definition of "investigatory functions" will not be required in relation to another set of facts in another matter. Furthermore, it is important to note that section 30.1(c) is broad and protects records "connected with the investigatory functions of the statutory office." It encompasses more than actual investigation documents or information and this may necessitate further consideration in another matter.*

The interpretation of s.41(c) provided by the Commissioner in Report A-2010-007 recognizes that in order for a statutory office to effectively carry out an investigation, all records "connected with" the investigatory function of the office must remain confidential and not subject to review by an access to information applicant. To preserve the integrity of a statutory investigation, which often times involve very personal matters, in particular the personal information of vulnerable children and youth, investigatory privilege is necessary to ensure that witnesses remain candid in providing full and complete evidence to the Advocate. To allow an applicant to access such records would have a "chilling effect" upon the manner in which all statutory offices as defined in s.2(r) conduct their investigations and would defeat the purpose of the exception.

While it would be a rare occasion where an applicant would seek access to the investigatory records connected with the Office of the Child and Youth Advocate, there are concerns with the operation of s.33 of the ATIPPA and the impact it could possibly have upon records in the custody or control of the Advocate. Section 33 of the ATIPPA is entitled "Information from a Workplace Investigation" and creates limited access rights to a party involved in such an investigation. It is not unusual for the Advocate in performing its statutory role to obtain information about the conduct of health care professionals, social workers engaged in child protection and related services, youth corrections staff, and other public servants and third parties. Depending on the circumstances it is possible that some of this information could be characterized as information relevant to a workplace investigation. In such circumstances the ATIPPA should be clear, that notwithstanding s.33 of the ATIPPA, no records connected with the investigatory functions of the Advocate should be disclosed to an applicant.

Additionally, it should be noted that not all investigations result in formal reports being prepared. There are any number of reasons why an investigation may not result in a published report. Section 41(c) should be strengthened to make it clear that irrespective of a report being prepared following an investigation, no access will be provided to the investigative file or the report.

In light of the foregoing the Office of the Child and Youth Advocate recommends that s.41(c) be amended as follows:

The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body, notwithstanding s.33, shall refuse to disclose to an applicant information in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records or reports connected with the investigatory functions of the statutory office.

As Child and Youth Advocate, I take the best interests of children very seriously and every effort is made to ensure reports do not identify individual children and youth. Readers are asked to respect the privacy of these vulnerable young people and their families and to not focus on the identities or on specific communities/locations involved. The purpose of the investigative report is to learn from the circumstances described, and to make recommendations for systemic change to prevent future occurrences, and therefore better protect the rights of children and youth.

This Office receives minimal requests/applications for information. The experience has been positive in using ATIPPA, and there are no difficulties in meeting the timelines and operation of the Act.

Thank you for your consideration in reviewing this submission.

Sincerely,



Jacqueline Lake Kavanagh, MSW, RSW
Child and Youth Advocate