Mandatory Exception:
Information from a harassment, personnel or university investigation

Section 20 of the *Right to Information and Protection of Privacy Act*

Summary and purpose of the exception

The purpose of this exception is to protect the integrity and confidentiality of the investigation process in the context of a harassment, personnel or university investigation conducted by a public body. Due to the sensitivity of these kinds of investigations, they need to be conducted in a confidential manner and access to investigation information is prohibited under s. 20(1). The only exception to this general principle is that parties to such an investigation have a limited right of access to some information about that investigation as per s. 20(2).

Harassment and personnel investigations

20(1) The head of a public body shall refuse to disclose information to an applicant that would reveal

(a) the substance of records made by an investigator providing advice or recommendations of the investigator in relation to a harassment investigation or a personnel investigation,

(b) the substance of other records relating to the harassment investigation or the personnel investigation, or

(c) the substance of records made pursuant to a university's academic or non-academic by-laws or regulations with respect to conduct or discipline of a student.

20(2) The head of a public body may disclose to an applicant who is a party to the harassment investigation or personnel investigation the information referred to in paragraphs (1)(b) and (c) by allowing the applicant to examine the records, but the head may refuse to provide the applicant copies of the record.

Application of s. 20(1): Mandatory exception

This provision is a mandatory exception to disclosure, meaning that the public body is not lawfully permitted to disclose information that falls within its scope.

To properly rely on a mandatory exception to disclosure, a public body must demonstrate the following:

1) that the information in question falls within the scope of the claimed exception to disclosure; and
2) if so, that there are no other provisions that serve as an override to the exception that nevertheless allow or require access to occur.

The burden of proof is on the public body to show that the applicant has no right of access (s. 84(1)). In conducting a complaint investigation, the Commissioner's Office will review the information in question to determine whether it falls within the scope of the exception and that there are no provisions that would otherwise permit or require that access be granted.

If the information at issue falls within the scope of the exception and there are no other provisions that would otherwise grant a right of access, we will uphold the public body's decision to refuse access.

If we do not find it falls within the scope of the exception, the information in question should be disclosed, unless another exception under the *Act* would precludes its disclosure.

Definitions

"harassment"

The word "harassment" is not defined in the *Act.* In looking to other Canadian jurisdictions' access and privacy legislation, we found that Newfoundland and Labrador's *Access to Information and Protection of Privacy Act, 2015* (SNL 2015, SNL 2015, c. A-1.2) has a similar exception in s. 33. This statute defines "harassment" as follows in s. 33(1)(a):

> (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"

"personnel"

The word "personnel" is also not defined in the *Act*, but it is clear in this context that it includes matters relating to the workplace, particularly employee conduct and relations amongst staff members. Again, in looking to the Newfoundland and Labrador's public sector access and privacy legislation, its related exception to disclosure is found in s. 33. This provision refers to workplace investigations and includes the following definition at s. 33(1)(c):

> (c) "workplace investigation" means an investigation related to
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> (i) the conduct of an employee in the workplace,
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> (ii) harassment, or
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> (iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public
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> which may give rise to progressive discipline or corrective action by the public body employer.

The above definitions from the Newfoundland and Labrador statute are useful to illustrate the kinds of situations that are contemplated by this exception.

"investigation"

"Investigation" in this context, while not specifically defined in the *Act*, means a formal process that involves the public body appointing someone to investigate a harassment or personnel matter. The investigator may be a person internal to the public body or someone who is independent and external to the public body. In conducting a harassment or personnel investigation, the investigator will gather the relevant information, interview the parties and witnesses, and review the public body's applicable policies and procedures with a view to provide the public body with advice and/or recommendations on how to manage the situation.

Interpretation of the exceptions found in ss. 20(1)(a) to (c)

(a) the substance of records made by an investigator providing advice or recommendations of the investigator in relation to a harassment investigation or a personnel investigation

This exception requires public bodies to protect not only records, but the substance of records, prepared by an investigator tasked with providing advice or recommendations in the context of a harassment or personnel investigation.

The purpose of this exception is to allow an investigator in this context to conduct his or her work in a thorough, candid, and frank manner, and to provide his or her advice and/or recommendations on a particular situation to the public body in confidence. This protects the integrity and confidentiality of the investigation process and encourages those involved to speak freely and candidly during the investigation process without fear of others later learning what they have shared. Given that harassment and personnel investigations are by their very nature sensitive matters, this protection is integral to the investigation process.

Information that falls within this provision cannot be disclosed, as this is a mandatory exception to disclosure and the override provision in s. 20(2) does not apply.

It is important to note that the 20(1)(a) exception only protects the investigator's records. It does not apply to the public body's decision on how to proceed in a particular situation after receiving the investigator's advice and/or recommendations.

(b) the substance of other records relating to the harassment investigation or the personnel investigation

This exception requires public bodies to protect the substance of other records (i.e., other than records made by the investigator) relating to a harassment or personnel investigation. This could include information gathered by the investigator during an investigation, such as witness statements and other contextual information. The public body's related records and documentation about the investigation, including the public body's decision on the investigator's advice and/or recommendations may also fall within this provision. Information that falls within the scope of s. 20(1)(b) cannot be disclosed, except in keeping with the override under s. 20(2).

(c) the substance of records made pursuant to a university's academic or non-academic by-laws or regulations with respect to conduct or discipline of a student.

This exception applies in the context of a university investigating student conduct or discipline in keeping with its by-laws or regulations. All information generated by this kind of investigation falls within the scope of this exception and cannot be disclosed, except in keeping with the override under s. 20(2).

Override: limited right of access for the parties under s. 20(2)

If a public body determines that information falls within the scope of the s. 20(1)(b) or (c) exception, the public body must also consider whether s. 20(2) of the *Act* applies so as to require disclosure of that same information. As a general rule, public bodies are not permitted to grant access to information of this nature, except in very limited circumstances

as set out in this provision:

> **20**(2) The head of a public body may disclose to an applicant who is a party to the harassment investigation or personnel investigation the information referred to in paragraphs (1)(b) and (c) by allowing the applicant to examine the records, but the head may refuse to provide the applicant copies of the record.

The purpose of this provision is to create a limited right of access for the parties to these kinds of investigations, as they have the right to know the outcome and what steps are to be taken to address the situation in question. Parties to an investigation include the person(s) who made the complaint that give rise to the investigation and those who were the subject of the complaint. Witnesses are not parties to an investigation.

Where an applicant is a party to the investigation in question, he or she has a right of access to information that falls within ss. 20(1)(b) or 20(1)(c), as the case may be. The public body has the option of granting access by providing a copy of the information or by making it available for the applicant's review.

Witnesses and witness statements

As indicated above, witnesses who take part in a harassment, personnel, or university investigation should not be considered as parties for the purposes of the limited access rights granted under s. 20(2) of the *Act*.

A person who is a witness and provides input and/or a witness statement during a harassment, personnel or university investigation has the right to access his or her own personal information provided during such an investigation, but has no right of access to any other information about an investigation that falls within the scope of ss. 20(1)(a), (b). or (c).

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