

Exemption Policy and Process

For employees of the Government of Newfoundland and Labrador and Public Sector Bodies

Background

The *Public Sector Compensation Transparency Act* (the Act) requires an annual public listing of all employees in the Provincial Government and specified public bodies including agencies, boards, commissions, health care bodies, educational bodies and Crown Corporations who receive total compensation of over \$100,000 a year.

- The Act can be found at: <http://www.assembly.nl.ca/Legislation/sr/statutes/p41-02.htm>
- The public sector bodies subject to the Act are listed in the *Public Sector Compensation Regulations* under the Act which can be found at <http://www.assembly.nl.ca/Legislation/sr/regulations/rc160081.htm>.

The list will include the name of the employee, official job title, name of the department or public body in which they are employed, and will include total compensation as well as a breakdown of base salary, overtime, shift premiums, retroactive pay, and bonuses, as well as severance where applicable. Per the Act and Regulations, it will not include amounts related to Pay in Lieu of Notice or Paid Leave balances for former employees.

Exemption

The Act provides that an individual employee may be exempted from disclosure if the disclosure could reasonably be expected to threaten the safety or mental or physical health of the employee. There are no other grounds for granting individual employees an exemption to disclosure. The process for applying for such exemption is set out below.

Who can make an application?

An application for an exemption may be made by any employee whose compensation information would be subject to being disclosed by the Act. This would include:

- an employee of the Government of Newfoundland and Labrador (including Provincial Government departments and central agencies), as per the departmental list section at <http://www.gov.nl.ca/departments.html>
- an employee of a public sector body identified in the Schedule to the Regulations noted above. This includes most major Crown Corporations and Agencies, Boards and Commissions.

This means the exemption process is only relevant for employees who received \$100,000 or more in total compensation in the calendar year in question. Employees who are not sure whether this applies to them should check with their payroll department or their annual T4 for guidance.

Application for exemption from employees who have clearly made less than \$100,000 in the calendar year in question, and who are as a result not subject to disclosure, will be summarily dismissed without consideration.

Exemption Process

The exemption application process commences with a notice from the Deputy Minister of a department or the Chief Executive Officer of a public body. The Act requires that employees be given at least 60 days' notice prior to a planned release date of salary disclosure. **Employees have to apply for an exemption for release within 14 days of receiving this notification** from the Deputy Minister, or Chief Executive Officer.

The Test for Exemption

The Act provides that the Deputy Minister, or Chief Executive Officer may exempt information from being disclosed where it is believed that disclosure of the information could reasonably be expected to threaten the safety or mental or physical health of the employee. No other grounds for individual exemption for an employee are permitted.

Application Process

A written application must be submitted by an employee, or by another person on behalf of the employee (an "applicant"), within 14 days of receiving the notification from the department or public body that the information will be disclosed as noted above.

The application must be made to:

- (i) the Deputy Minister of the department where the employee is employed, or
- (ii) the Chief Executive Officer of the public body where the employee is employed.

Application Form for Public Sector Bodies

The Deputy Minister or Chief Executive Officer shall provide a decision within 14 days of receiving the application for exemption.

Notes:

- The personal information that you provide on the exemption application form for individuals will be used for the purpose of a determination by your Deputy Minister or Chief Executive Officer (as applicable), and the President of Treasury Board upon any appeal, pursuant to subsections 7(1), (2) and (3) of Act. It is collected under the authority of section 61(c) of the *Access to Information and Protection of Privacy Act*, and is protected by the privacy provisions of that act. If you have any questions about the collection of this information, you can contact the assigned official for your department or public sector body.
- Where an employee or applicant is applying for an exemption based on job-related safety circumstances, the Deputy Minister, or Chief Executive Officer, may require additional information from the employee or applicant.
- The Act permits an applicant other than an employee to apply on behalf of an employee. Where such an application is submitted, it must be accompanied by a Proof of Authority form to confirm that the applicant has the consent of the employee for such an application. The applicant will be required to submit the same level and detail of information in support of an application as the employee would be required to submit. If it is determined that the applicant has not obtained consent from the employee in question to make an application on the employee's behalf, the application will be rejected.

What happens once an application is reviewed and a decision made?

Whether an application is granted or denied, the following process will take place:

- **Government employee** - the Deputy Minister will notify the employee (and applicant if applicable), and the employee's department of the decision.
- **Public sector body employee** – the Chief Executive Officer will notify the employee (and applicant if applicable), and the public sector body employing that individual.

Where an application is approved, the Deputy Minister or head of the public body will be responsible for also notifying individuals within the organization as necessary to ensure the exemption is reflected in preparation of the disclosure list. Once an exemption has been granted, it is the responsibility of the relevant public sector body to ensure that disclosure is not made in relation to that employee. Exemptions from disclosure for individual employees will be complete – all information about the employee will be exempted.

How to appeal a decision

If an employee or applicant is not satisfied with the decision of the Deputy Minister or Chief Executive Officer to deny an application, he/she may appeal the decision to the Minister of Finance and President of Treasury Board by submitting the appeal via email to HRSinfo@gov.nl.ca

The process is as follows:

- the employee or applicant must submit an appeal within 14 days of receiving the decision by the Deputy Minister or Chief Executive Officer of the public body
- the employee or applicant must include a copy of the rejection notification (i.e. original application that indicates that it has been rejected)
- the President of Treasury Board shall provide his/her decision within 14 days of receiving the appeal

The decision of the President of Treasury Board is final and there is no opportunity for the applicant to provide additional information after the decision.

Note: An employee or applicant who is denied an exemption, is entitled to re-apply in a subsequent year, if the employee's facts or circumstances change.

What could be considered a threat to a person's safety or mental or physical health?

The onus is on the employee or applicant to set out, in the application form, facts and circumstances that demonstrate the potential reasonable threat of disclosure to the safety or mental or physical health of the employee, as well as a link between the disclosure and the threat.

Determination of a threat will depend on the facts and circumstances in each particular case. In order to meet the test set out in legislation, the Deputy Minister or Chief Executive Officer has to find that the employee has shown a "reasonable expectation of probable harm", which requires providing evidence well beyond or considerably above a mere possibility of harm.

The language used in the Act is similar to that used in a number of access to information regimes in Canada. In those contexts the Supreme Court of Canada has confirmed that any such analysis is contextual, and that "how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue

and 'inherent probabilities or improbabilities or the seriousness of the allegations or consequences'."¹

Some examples of circumstances that may justify an exemption include:

- the employee having long-standing harassment, spousal abuse or stalking issues
- the employee having received specific and credible threats against their personal safety where the disclosure could be linked to the threat

Generally, exemptions are less likely to be granted when:

- a potential threat appears to be purely speculative
- it is unlikely disclosure will contribute to safety risks a person already faces in their position
- the application is grounded in a philosophical disagreement with compensation disclosure and / or is founded on a concern for potential public embarrassment as a result of the disclosure
- the person's name is already published on an employee list, particularly where the organization's salary ranges are also public or readily accessible

These examples are for illustration purposes only and are not binding on the Deputy Minister, the Chief Executive Officer, or the President of Treasury Board, who will decide applications on an individual basis.

Timing of Disclosure

The deadline to disclose compensation information for the prior calendar year is 30 June of each year, but the Provincial Government or a public body may plan to release the information earlier than that date.

It is essential that employees follow the timelines identified in the regulations to ensure that their application can be considered prior to the disclosure.

An exemption received later than the deadline may be accepted if extraordinary circumstances prevented the individual from making an application on time. However, given the strict timelines indicated in regulations, late applications may not be completed in time to avoid the disclosure for that year.

¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94.

Where an Employee must Re-apply for Exemption

If the employee leaves a public sector body or a department of the Provincial Government and moves to another public sector body, or to another department of the Government, the employee must re-apply for an exemption. This is because, in accordance with the Act, the exemption is granted by the employer in relation to the employee, and if the employer changes, the exemption no longer applies.

What happens if an exemption is granted after the information has been disclosed?

If an exemption is granted after the public sector body or Provincial Government has already made its disclosure for that year, the information will be removed as soon as possible from the disclosure information for the current year.

Communication to the public regarding exemptions

One of the following statements, as applicable, is required to be included by the Provincial Government and each public sector body in the disclosure information, as a summary of an exemption that may have been granted to employees. The purpose of such statements is to provide notice to the public of the extent exemptions from the public list have been granted. The list will be required to contain one of the following statements:

- No exemptions of employees or category of employee - a statement that no information was exempted from disclosure under section 7 of the Act;
- One exemption - a statement that information regarding one employee, or category of employee was exempted from disclosure under section 7 of the Act, or;
- Where more than one exemption (individual employee or category of employee) - a statement indicating the number of employees whose information was exempted from disclosure under section 7 of the Act and the aggregate total compensation exempted from disclosure.