



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-009

June 20, 2016

Central Health

Summary:

The Applicant requested from Central Health all records relating to complaints made by certain individuals against Central Health relating to bullying, harassment and a human rights complaint. Central Health released a number of records but withheld information relying on sections 29 (policy advice or recommendations), 30 (legal advice) and 40 (disclosure harmful to personal privacy) of the *Access to Information and Protection of Privacy Act, 2015*. The Applicant filed a Complaint with this Office. It was found that, even though Central Health did not locate all responsive records initially, that overall Central Health did perform a reasonable search. It was also found that Central Health had applied all exceptions to disclosure properly with the exception of approximately 36 pages of records initially withheld under section 30 and which was recommended be released.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, ss.29, 30, 40.

Authorities Relied On:

Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority, 2015 NLTD(G) 183. Newfoundland and Labrador OIPC Reports 2015-001, A-2013-004, A-2012-006, A-2012-003, A-2010-010, A-2008-014.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015”) the Applicant submitted an access to information request to Central Health seeking disclosure of records as follows:

Please provide all briefing notes, memorandums, and anything in writing prepared by any employees of Central Health and sent to the Minister of Health, and/or members of the Executive of the Department of Health, including the Deputy Ministers, Assistant Deputy Ministers and Directors, in the last 9 months in relation to complaints made by [named person], [named person] and [named person], against senior leadership at Central Health and [named person]. These complaints include complaints of bullying and harassment, a human rights complaint and a letter to the Minister of Health asking him to direct Central Health to implement the recommendations of the [named] Report.

I would ask that I be provided with copies of any briefing notes, memorandums or any written documents prepared for, and/or provided to, the CEO of Central Health or any member of the Senior Leadership Team, including [named person], in relation to the abovenoted matters.

I would also request copies of all e-mails, text messages, Blackberry messages, and Blackberry pins of all Central Health employees in relation to this matter, and especially [named person], [named person] and [named person].

Also I would further ask that I be provided with copies of all letters/correspondence, notes (handwritten and typed), minutes from meetings, and anything in writing in relation to the abovenoted matters and, especially anything in writing prepared by, or on behalf of, Central Health relating to the reports prepared by [named person] dated July 30, 2015, [named person] dated September 11, 2015 and a letter sent to the Minister of Health by counsel for [named person], [named person] and [named person] dated December 15, 2015.

To be perfectly clear I am requesting copies of all documents in the possession of Central Health which relate to the abovenoted matter in any way.

- [2] Following receipt of the request, Central Health informed the Applicant that it had decided to provide partial access to the records but withheld information based on section

29 (policy advice or recommendations), section 30 (legal advice) and section 40 (disclosure harmful to personal privacy). Of note, the records withheld based on section 30 comprised 250 pages of records fully withheld.

- [3] The Applicant was not satisfied with Central Health's response and filed a complaint with this Office. Through the informal resolution process Central Health disclosed some further information that was initially withheld based on sections 29 and 40 and performed a second search for records which resulted in further records being located and disclosed to the Applicant.
- [4] Attempts to resolve this complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [5] Central Health's position is that all exceptions to disclosure were properly applied in accordance with the *ATIPPA, 2015*. Central Health performed a second search after the Applicant questioned the completeness of the search performed as he believed more records should have been located. Central Health located further records in the second search and disclosed these records to the Applicant with some exceptions to disclosure claimed.

III APPLICANT'S POSITION

- [6] The Applicant expressed concern over the exceptions to disclosure claimed by Central Health, specifically with regard to the large volume of records (250 pages) withheld based on section 30. The Applicant was also concerned that the records disclosed by Central Health were incomplete. The Applicant believed that more records existed that were responsive to his access request based on information contained in two e-mails that were initially disclosed.

IV DECISION

- [7] The Applicant raised the issue of the search performed by Central Health in response to his access request, believing that additional records existed that were not located. Therefore, the issue to be decided is whether Central Health conducted a reasonable search.
- [8] While the *ATIPPA, 2015* does not speak directly to the issue of reasonable search, it has been determined that a reasonable search does not require the public body to prove with absolute certainty that further records do not exist. The public body must simply provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.
- [9] The Applicant believed further records existed based on two e-mails he received from the initial disclosure. Central Health addressed this issue by performing a second search and located further records. Some of the additional records were responsive to the Applicant's request, and missed initially by Central Health, however, some records located were not responsive to the request. Central Health disclosed all these additional records to the Applicant.
- [10] During the formal investigation stage, Central Health advised that it had located further information responsive to the Applicant's access request. This information, while minimal, was located while Central Health was performing a search for records in response to an unrelated access request. Central Health advised that it would disclose the additional responsive information to the Applicant.
- [11] Although Central Health did not locate all responsive records on the first search, Central Health did make the effort to perform a second search and even advised the Applicant of

further information responsive to his access request when it was located in a separate search in response to a different access request. I find that the search was conducted by an experienced employee, who was knowledgeable in the subject matter of the request, and who expended a reasonable effort to locate records. Taking into account the fact that the Applicant's access request was quite detailed and covered a broad range of individuals and areas to be searched, I find that Central Health made a reasonable effort to identify and locate responsive records. The test is one of reasonableness, not perfection, and overall Central Health conducted a reasonable search for records.

[12] With regard to the exceptions to disclosure claimed by Central Health, the burden of proof is on Central Health under section 43 to prove the Applicant has no right of access to the record or part of the record.

[13] The Applicant raised a specific concern regarding the 250 pages of records withheld based on section 30 of the *ATIPPA, 2015*. Section 30 states:

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

(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.

[14] I have reviewed solicitor and client privilege, including litigation privilege, in previous reports and the decision in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority, 2015 NLTD(G) 183* provides an in depth overview of solicitor and client privilege, including litigation privilege.

[15] In that decision, the Court conducted a detailed review of records that were withheld based on solicitor and client privilege and litigation privilege. The Court reviewed both forms of privilege at length at paragraphs 24 and 25 as follows:

[24] As I assess the current state of the law, I consider the following principles and considerations to apply to my review:

Solicitor-Client Privilege

1. *The privilege is defined by the classic formulation of John Henry Wigmore – adopted by the Supreme Court of Canada in 1927 in Howley (the gender-specific language is of course dated):*

[w]here legal advice of any kind is sought from a professional legal adviser, in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the privilege be waived.

2. *The privilege belongs to the client and is a fundamental right as a matter of substantive law.*
3. *The primary rationale for the privilege is to enable full and candid communication between the solicitor and client so that the client may obtain fully-informed and effective legal advice in order to exercise his or her legal rights in an informed manner. An individual's right to obtain such advice promotes both access to justice and the efficiency of the adversarial process.*
4. *The necessary elements of a valid claim to privilege:*
 - i) *a communication between a solicitor, acting in his or her professional capacity, and the client;*
 - ii) *the communication must entail the seeking or giving of legal advice, and*
 - iii) *the communication must be intended to be confidential.*
5. *In any given circumstance, the determination of the scope of the privilege must be informed by both the particular context and the rationale for the privilege. Considerations which might influence the determination of the scope of the privilege in the context of a criminal investigation or prosecution may not necessarily influence*

to the same extent a determination in the context of civil litigation or, as here, an access to information request pursuant to statute.

6. *Because of the fundamental and quasi-constitutional nature of the privilege, the scope should not be unduly restricted.*
7. *The capacity in which a party sends or receives a communication is not determinative of the privilege; in each case the context of the communication must be assessed.*
8. *The communication must relate to the giving or seeking of legal advice. There is a difference between legal advice – advice on legal rights and duties in order to assess past conduct or guide future conduct – and legal information – information about the law generally and relevant legal procedure. However, to be privileged, at particular communication need not specifically request or offer advice provided that it may reasonably be considered as part of a ‘continuum of communication’ in which advice is sought or tendered. Within such a continuum, the privilege may extend to the communication of legal information.*
9. *In assessing a claim for privilege, a distinction between facts and communication is not helpful. Providing an otherwise non-privileged document to a lawyer in order to obtain legal advice does not cause privilege to attach to the document. A client’s internal communication that does not constitute the passing on of confidential legal advice or directly involves the seeking of legal advice will be not privileged. Accordingly, an attachment to an otherwise privileged e-mail may or may not be privileged in and of itself.*
10. *The client must subjectively intend that the communication be kept confidential. Further, the intention must be objectively reasonable in all the circumstances, thus requiring an assessment of intention not unlike the analysis required to assess a reasonable expectation of privacy.*
11. *Communications within an employer’s organization between in-house counsel and employees enjoy the privilege, assuming of course that the employee can reasonably be considered to represent the client; however, whether the privilege attaches to any particular communication depends on the nature of the relationship, the subject matter of the communication and advice and the surrounding context and circumstances.*
12. *Communications between a third party and a lawyer will be protected by the privilege if the third party can be considered to be a*

'channel of communication' between the lawyer and the client and if the communication would be privileged if directly between the client and the lawyer. Further, although the law is less clear on the point, if, functionally, the third party's role is essential to the operation or existence of the solicitor-client relationship, privilege remains available to protect communications with the solicitor.

13. *The privilege exists to protect the confidentiality of communication between solicitor and client, not the solicitor client relationship. The privilege is distinct from a solicitor's ethical duty of confidentiality.*

Litigation Privilege

[25] *The principles may be briefly stated:*

1. *The purpose of litigation privilege is to provide a protected private zone of communication and work in order to facilitate investigation and preparation for a proceeding in the adversarial system.*
2. *The litigation which establishes the boundaries of the privilege may extend to proceedings related to the 'primary' litigation.*
3. *The privilege expires with the litigation although it may continue if related litigation remains pending or may reasonably be apprehended.*
4. *To enjoy litigation privilege, it is not necessary that a communication be either confidential or be between a solicitor and client; indeed, it is not necessary that a solicitor client relationship exist. The privilege is available to all litigants, whether or not represented by counsel, and extends to communications with third parties.*
5. *Two requirements are necessary to establish a privilege over any particular document:*
 - i. *The dominant purpose for the preparation of the document must be the litigation in question. This requires an assessment of the context and circumstances in which the document was created.*
 - ii. *Litigation must have been in reasonable contemplation at the time of preparation of the document. This requires an objective assessment of the circumstances at the time – it is not a matter of opinion.*

[16] The Court made some general comments regarding privileged documents and commented on some specific records which were not considered to be privileged at paragraphs 37-39, which bear repeating here:

[37] However, I did not assume that the purpose of a communication was to seek or give legal advice simply because a communication was to or from counsel. I considered the legal advice component of the privilege to be less likely to be established if a communication was simply copied to counsel.

[38] Further, unless the content and context – insofar as they could be gleaned – clearly established otherwise, I have not found to be privileged internally-generated documents – including e-mail attachments.

[39] I have not considered as privileged:

- i. communications which, although sent or copied to or from counsel, involve operational or logistical issues such as security for staff, meeting attendance or dealing with the media;*
- ii. communications between counsel and the police;*
- iii. generally, communications concerning a request for information by the Citizens Representative;*
- iv. communications with Crown counsel;*
- v. generally, communications forwarding ‘operational’ documents originally created by hospital staff for transmission to other non-counsel hospital staff, and*
- vi. communication of otherwise public documents such as court pleadings.*

[17] Almost all the records claimed under section 30 are e-mails with many e-mail strings being duplicated causing a repetition of the records being withheld. In reviewing the records, I find that the majority of records excepted from disclosure by Central Health based on section 30 fit within the description of solicitor and client privilege. These records involve direct communications between Central Health’s solicitors and Central Health. These records involve the seeking or giving of legal advice and many of these communications are marked confidential. Even where the correspondence is not specifically marked as confidential, I find the intention of confidentiality to be objectively reasonable in the circumstances.

[18] Furthermore, in reviewing the records I did not simply assume that a communication to or from counsel was for the purpose of seeking or giving of legal advice as the Court noted above. I specifically assessed the content of the communication in determining whether the records fit within section 30 and should be withheld based on solicitor and client privilege. I also considered litigation privilege when reviewing the records and find that there are records that would fit within the description of litigation privilege as outlined above and these records should also be withheld.

[19] There remain a number of records or portions thereof that do not fit within solicitor and client privilege or litigation privilege under section 30. These records provide factual information, some involve operational issues at Central Health, some involve individuals requesting status updates on certain issues and some records were previously disclosed to the Applicant. Even though a number of these records were sent to Central Health's solicitor or copied to Central Health's solicitor, I am unable to conclude they fit within solicitor and client privilege or litigation privilege. I am therefore recommending that approximately 36 pages of such records be disclosed in full or in part.

[20] Central Health advised that the Applicant did not want any or his own correspondence. In reviewing the records withheld based on section 30, there were approximately 20 pages that involved correspondence to or from the Applicant. I make no recommendation for disclosure of these records based on the Applicant's statement to Central Health.

[21] The Applicant questioned all exceptions to disclosure claimed by Central Health. During the informal resolution period there was further information provided to the Applicant that was initially withheld based on sections 29 and 40 of the *ATIPPA, 2015* and I find that Central Health properly relied on these exceptions to withhold the remaining information.

[22] Overall, I find that Central Health conducted a reasonable search for records given the Applicant's broad access request and that Central Health applied the majority of the exceptions to disclosure properly in accordance with the *ATIPPA, 2015*. Central Health has not met the burden of proof to withhold the entire 250 pages of records under section 30 of

the *ATIPPA, 2015* and therefore certain records or portions thereof, initially withheld, should be released.

V RECOMMENDATIONS

[23] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Central Health release the information that is highlighted in yellow, attached to this Report, to the Applicant. I am providing Central Health with a copy of the records, approximately 36 pages, and the areas highlighted in yellow are the areas that should be released.

[24] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Central Health 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.

[25] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20th day of June 2016.

Sean Murray
Director of Special Projects