



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-010

June 21, 2016

Department of Health and Community Services

Summary:

The Applicant requested from the Department of Health and Community Services (the “Department”) all records relating to complaints of bullying, harassment and a human rights complaint involving Central Health and the Department. The Department released a number of records but withheld information relying on sections 29 (policy advice or recommendations), 30 (legal advice), 38 (disclosure harmful to labour relations interests of public body as employer) 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 the Department had performed a reasonable search for records and that the Department had applied all exceptions to disclosure properly in accordance with the *ATIPPA, 2015*.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015,
S.N.L. 2015, c. A-1.2, ss.29, 30, 38, 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 A-2016-009, A-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 the Department of Health and Community Services (the “Department”) seeking disclosure of records as follows:

Please provide all briefing notes, memorandums, and anything in writing provided to, or prepared for, the Minister of Health, and/or members of the Executive of the Department of Health, including the Deputy Minister, Assistant Deputy Ministers and Directors, in the last 9 months in relation to complaints of bullying and harassment, a human rights complaint and a complaint set out in detail in a letter to the Minister of Health dated December 15, 2016 [sic] involving Central Health, the Department of Health and [named person], [named person] and [named person], radiologists at the James Paton Memorial Hospital in Gander.

I would also ask that I be provided with all e-mails, text messages, Blackberry messenger, and Blackberry pins between any employee of the Department of Health and the Executive Committee of the Department, the Minister and/or any employee of Central Health.

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

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

- [2] Following receipt of the request, the Department 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), section 38 (disclosure harmful to labour relations interests of public body as employer) and section 40 (disclosure harmful to personal privacy).

- [3] The Applicant was not satisfied with the Department's response and filed a complaint with this Office. Through the informal resolution process the Department disclosed further information that was initially withheld based on sections 29 and 30 and performed a second search for records which did not result in any new records being located.
- [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*. The Applicant did not provide a submission. The Public Body provided a brief submission at the formal investigation stage outlining its position on litigation privilege and explaining why certain information should be withheld based on this exception to disclosure.

II DECISION

- [5] The Applicant raised the issue of the search performed by the Department in response to his access request, believing that additional records existed between December 22, 2015 and January 25, 2016 (the date of his access request) that were not located. The Applicant based this belief on the fact that he had sent correspondence to the Department's Minister on December 15, 2015 and received a reply on January 12, 2016, however, there were no records provided which were dated after December 22, 2015. Based on this, the issue to be decided is whether the Department conducted a reasonable search.
- [6] As previously stated in Report A-2016-009, the public body must 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.
- [7] The Department addressed the Applicant's search concerns by performing a second search for the timeframe specified by the Applicant (December 22, 2015 to January 25, 2016), however, no new records were located. During the second search, the Department

did locate further records, which consisted of official correspondence relating to the Applicant's access request. The Department advised that those records were originally going to be released to the Applicant, however, they were removed at the Applicant's request as he indicated he already had them on file. The Department provided these records to the Applicant as a result of the second search to ensure he was given all records the Department had located.

[8] Although no new records were located, the Department did make the effort to perform a second search. The employee who conducted the search checked a second time for records with all individuals involved and their respective assistants, performed a second comprehensive search on the Department's document management system, and she personally searched the computers and outlook accounts of the Department's Minister and the Department's Deputy Minister. 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. The test is one of reasonableness, not perfection, and the Department made a reasonable effort to identify and locate responsive records thereby conducting a reasonable search for records.

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

[10] In his complaint, the Applicant questioned all exceptions to disclosure relied upon by the Department, however, the Applicant had specific concerns regarding the records withheld based on sections 29 and 30. He indicated that there were approximately 40 pages of records completely withheld based on these sections. He was concerned that the phrase "policy advice or recommendations" was interpreted too broadly. He also had concerns regarding the application of section 30.

[11] Through the informal resolution process the Department disclosed a number of records that were previously withheld under sections 29 and 30. It was determined that approximately 20 pages of the records initially withheld in full were draft versions of

documents. These draft records were properly withheld, however, the final versions of these records were disclosed. There was also information contained in two records withheld based on section 30, which was recommended for release during the informal resolution process, and which the Department disagreed with.

[12] I have reviewed section 30 and solicitor and client privilege, including litigation privilege, in detail in Report A-2016-009, which included an extensive review of both solicitor and client privilege and litigation privilege by the Court in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority, 2015 NLTD(G) 183*. The application of section 30 to the records in this Report is very similar to that in Report A-2016-009 and therefore I will not review that subject in depth here.

[13] During the formal investigation process the Department provided further evidence and an explanation of why litigation privilege applied to the information contained in the two records in question and I accept their reasoning in this instance. Based on this, it is my opinion that the information in question was properly withheld based on section 30 of the *ATIPPA, 2015*.

[14] Overall, I find that the Department conducted a reasonable search for records and the Department applied the exceptions to disclosure properly in accordance with the *ATIPPA, 2015*.

III RECOMMENDATIONS

[15] Under the authority of section 47 of the *ATIPPA, 2015* I have no recommendations for the Department.

[16] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department must give written notice of his or her decision with respect to this recommendation to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of June 2016.

Sean Murray
Director of Special Projects

