OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

# Report A-2017-001

## January 11, 2017

## Department of Justice and Public Safety


**Summary:** The Applicant requested from the Department of Justice and Public Safety records relating to his dispute with a government department. The Department located one record but withheld it on the ground of section 30 (solicitor-client privilege). The Applicant filed a complaint with this Office. The Commissioner found that the Department properly applied section 30, including consideration and application of the public interest override, and recommended that the Department continue to withhold the record.


**Statutes Cited:** *Access to Information and Protection of Privacy Act, 2015,* SNL 2015, c. A-1.2, sections 9, 30.

**Authorities Relied On:** *Criminal Lawyers' Assn*. v. *Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23;

*Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, 2015 CanLII 83056 (NL SCTD);

*Mastropietro* v. *Newfoundland and Labrador (Education*), 2016 NLTD(G) 156;

*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.

**Other Resources:** *Access to Information: Policy and Procedures Manual,* NL Access to Information and Protection of Privacy Office, November 2015;

*Guideline for Public Interest Override,* NL Office of the Information and Privacy Commissioner, June 2015.

*File # 0005-084-16-038*

## I BACKGROUND

[1] The Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* ("the *ATIPPA, 2015*" or "the *Act*") to the Department of Justice and Public Safety ("the Department") which read, in part, as follows:

> *I ask now for the Department of Justice, civil division or criminal or whatever staff lawyer or civil servant has been involved to provide me with any letters, memorandums emails or notes including a precis of any verbal conversations they have had with SNL, staff, the premiers staff or anyone regarding myself and particularly in relation to my current complaint with the Citizens Representative and my land issue….*

[2] The Department responded that there was one record responsive to the request in its custody or control, and that it refused access to that record in accordance with the exception for solicitor-client privilege in paragraph 30(1)(a) of the *ATIPPA, 2015*.

[3] The Applicant was not satisfied with this response, and filed a complaint with this Office. The complaint could not be resolved informally, and was referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

## II THE DEPARTMENT'S POSITION

[4] The Department takes the position that it searched for any records responsive to the access request and determined that it had only one record in its custody or control, a legal opinion prepared by a departmental solicitor for an employee of another government department. The Department states that the record was appropriately withheld under paragraph 30(1)(a) of the *ATIPPA, 2015.*

## III THE COMPLAINANT'S POSITION

[5] The Complainant states that he has an ongoing dispute with Service NL over restrictions on the development of his property that he claims are not equally applied to other property owners. He states that Service NL claims to be relying on an interpretation of the regulations

that it received from the Department. He argues that therefore he should be allowed to see the opinion that Service NL relies upon.

## IV DECISION

[6] The sole issue in this complaint is whether the record responsive to the Complainant's access request was properly withheld under the provisions of section 30 of the *ATIPPA, 2015*:

> *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.*

[7] The record at issue is a two-page e-mail message from a solicitor employed by the Department of Justice and Public Safety, Civil Division, to an employee of another government department. While it is not determinative of the issue, the subject line of the message states that it is a legal opinion, and the next line states that it is "Solicitor-Client Privileged."

[8] The test for determining whether a record is subject to a valid claim of privilege is long been settled and was recently summarized by Justice Orsborn of the Supreme Court, Trial Division in *Newfoundland and Labrador (Information and Privacy Commissioner)* v. *Eastern Regional Integrated Health Authority*:

> *[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.*

[9] Applying these principles, I find that the record at issue has all of the necessary elements of a valid claim of privilege: it is a communication between a solicitor acting in her

professional capacity, and her client; it consists entirely of legal advice; and, from the context and content, it was clearly intended to be confidential. None of the other distinctions or limitations referred to by Justice Orsborn, above, apply so as to limit the applicability of the privilege to the record or to any part of it. I am therefore satisfied that the record is covered by paragraph 30(1)(a) of the *ATIPPA, 2015* as asserted by the Department and can be withheld pursuant to section 30(1)(a) of the *ATIPPA, 2015*.

[10] That does not entirely end the matter. On one hand, as the Department pointed out in its submissions, the Supreme Court of Canada has held on numerous occasions that solicitor-client privilege is all but absolute, in recognition of the significant public interest in maintaining the confidentiality of the solicitor-client relationship. On the other hand, section 30 is a discretionary exception to access. That means that the public body can decide to disclose the record, even though it falls within the exception. This is a judgment that the head of the public body must exercise in every case involving a discretionary exception. It is described as follows in the *Access to Information: Policy and Procedures Manual* issued by the ATIPP Office:

> *Exercising discretion is not simply a formality where the public body considers issues before routinely saying no. The public body must consider whether or not to exercise discretion to disclose information with respect to each request, taking into consideration the information requested and the particular circumstances of the case. The public body must not replace the exercise of discretion with a blanket policy that information will not be released, simply because it can be withheld under one of the discretionary exceptions. A public body may develop guidelines on exercising discretion but should not treat them as binding rules – in exercising discretion the public body must "have regard to all relevant considerations" and to the spirit and purposes of the Act.*

[11] In the present case, I am satisfied that the Department followed that process. It has consciously considered, taking into account all of the circumstances, whether or not it should exercise its discretion to disclose the record. In the result, it has concluded that it would not be appropriate to do so.

[12] As well as the general requirement to explicitly decide whether to apply a discretionary exception, the public interest override in section 9 of the *ATIPPA, 2015* applies to section 30:

> *9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.*
>
> *(2) Subsection (1) applies to the following sections:*
>
> *. . .*
>
> *(c) subsection 30 (1) (legal advice);*

[13] The Guideline issued by this Office on the public interest override includes the following:

> *The purpose of adding this public interest override includes promoting democracy by increasing public participation in order to facilitate better informed decision-making. As well, it can increase scrutiny, discussion, comment and review between citizens and the government. Fundamentally, it is grounded in the idea that government information is managed for public purposes and that the public are the owners of the information. Under ATIPPA, 2015, there is a directive in section 9 that discretionary exceptions "shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception". Therefore, each and every time a discretionary exception to which the public interest override is considered, the public body must go through the following exercise….*

[14] The Guideline goes on to list some factors that support withholding information, factors that support release, factors that should not be considered and the process of assigning weight to the various factors. The Guideline notes that while the process is necessarily inexact, the test should be carried out as objectively as possible.

[15] The public interest override was recently discussed by the Supreme Court, Trial Division in *Mastropietro* v. *Newfoundland and Labrador (Education*). The Court noted that the public interest assessment is an objective one, and commented that the advancement of a private interest militates against a finding of public interest.

[16] I am satisfied that the Department has applied the test in section 9 appropriately. In particular, the Department notes that the Complainant is taking issue with a decision made by government about his private property. It argues that this is a private matter which does not clearly engage the public interest, and I agree. Although there may be a general issue of the enforcement of regulations affecting private properties, any potential public interest in disclosure of this particular record must "clearly outweigh the reason for the exception." In the present case it does not.

[17] This is particularly so when the exception in question is solicitor-client privilege. As stated by Justice Orsborn above, solicitor-client privilege is quasi-constitutional in nature, and therefore should not be unduly restricted.

[18] In *Criminal Lawyers Assn.* v. *Ontario (Ministry of Public Safety and Security)* the Supreme Court of Canada considered the absence of a similar public interest override provision in *Ontario's legislation:*

> *[54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document.*

[19] The *ATIPPA, 2015* differs from Ontario's legislation by requiring consideration of the public interest override where there is a claim of solicitor-client privilege. However, significant and exceptional circumstances would have to exist for the public interest to prevail over that privilege, as it is a principle of fundamental justice. This deference is required given the importance of solicitor-client privilege in our system of justice, as recently commented upon in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53:

> *[41] Following Descôteaux, this Court has found solicitor-client privilege to apply in circumstances outside the courtroom, including search and seizure of documents in a lawyer's office (Lavallee; Maranda v. Richer, 2003 SCC 67 (CanLII), [2003] 3 S.C.R. 193; Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7 (CanLII), [2015] 1 S.C.R. 401) and disclosure of documents in the context of access to information legislation (Blood Tribe; Goodis v. Ontario (Ministry of Correctional Services), 2006 SCC 31 (CanLII), [2006] 2 S.C.R. 32; Criminal Lawyers' Association). In its modern form, solicitor-client privilege is not merely a rule of evidence; it is "a*

> *rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" (Lavallee, at para. 49).*

[20] For these reasons I conclude that the Department has properly applied section 30 and is entitled to refuse to disclose the record at issue.

## V RECOMMENDATIONS

[21] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Justice and Public Safety continue to withhold the record it originally withheld from the Complainant.

[22] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Justice and Public Safety 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 (in this case, the Complainant) within 10 business days of receiving this Report.

[23] Please note that within 10 business days of receiving the decision of the Department of Justice and Public Safety under section 49, the Complainant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of January, 2017.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador