OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-017

July 24, 2018

City of Corner Brook

Summary: The City of Corner Brook received an access request from a contractor for records related to City employees having concerns with the service provided by his company. The City refused to disclose the majority of the information on the ground that it was protected by litigation privilege under section 30 (legal advice). The Commissioner concluded that most of the records were created for the purpose of a workplace investigation under section 33 and not for the dominant purpose of litigation. The Commissioner recommended disclosure of the records to the Complainant with the exception of some information that constitutes legal advice under section 30.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, sections 30, 33, 40.

Authorities Relied On: *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319; *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, 2015 CanLII 83056 (NL SC); *Alberta v Suncor Inc*, 2017 ABCA 221.

Other Resources: *Section 33: Information from a Workplace Investigation*: OIPC-NL Guidance Document, 2016.

File #: 0025-098-18-011

I BACKGROUND

[1] The Complainant, who provided services to the City of Corner Brook ("the City") from time to time under contract, made a request to the City under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*" or "the *Act*") for "*All records, emails and correspondence related to [Complainant's company name] for the years 2013 to present*".

[2] The Complainant subsequently agreed to narrow his request to "*records related to employees having concerns with his service*". In addition, the Complainant specifically asked for a copy of a 2006 report. The City provided this report to him in an advisory response and it is not part of the present complaint.

[3] The City sent its final response to the Complainant on April 4, 2018, advising that the City refused to disclose the records responsive to his narrowed request in accordance with section 30 of the *ATIPPA, 2015* on the basis that they were solicitor-client privileged.

[4] The Complainant filed a complaint with this Office. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[5] During the course of informal resolution efforts, the City agreed to disclose a small amount of information, but maintained its position that most of the records were subject to solicitor-client privilege, specifically litigation privilege.

[6] The City states that after July 21, 2014, the date that the applicant advised that he had retained a lawyer and was going to sue the City, it immediately engaged the City Solicitor to handle the matter. The City states that, with one exception, the City Solicitor wrote all handwritten notes in the file after the July 21, 2014 date.

[7] The City's position is that all information gathered by staff in relation to this matter after the July 21, 2014 date was for the purpose of providing it to the City Solicitor, and that it is subject to litigation privilege. In addition, it maintains that direct communication with the City Solicitor respecting this matter is subject to solicitor-client privilege.

III DECISION

[8] Some background is necessary to understand the issues in this matter. The Complainant, although on the list of contractors who provided certain services to the City, was passed over for some work. On July 21, 2014, a City employee noted that the Complainant had threatened to sue the City over the loss of work and on July 23, 2014, the City wrote him a letter explaining that he was not called for some work because of his inexperience and inability to complete some work safely and efficiently.

[9] The Complainant responded by making a complaint to the City on August 1, 2014 of unfair treatment, including allegations of discrimination. On the same day, the acting Chief Administrative Officer of the City wrote the Complainant to advise that the City was commencing an investigation of his complaint, under the oversight of the City's Manager of Corporate Projects. In September, the Mayor wrote to the Complainant with similar advice. In the process of the investigation, which lasted several months, the City conducted interviews with and received statements (including affidavits) from a number of City staff and contractors.

[10] It appears that the City Solicitor also participated in this internal investigation. A report, signed by the Solicitor, was sent to Council on February 10, 2015. The Mayor sent a letter to the Complainant on February 17, 2015, outlining the results of the investigation.

[11] The Complainant subsequently filed a complaint with the Human Rights Commission ("HRC"). The City sent its response to that complaint to the HRC on April 20, 2015. The Complainant filed a second human rights complaint, to which the City responded on May 20, 2015. It appears that the HRC completed its investigation of one complaint but that the

other investigation is still ongoing. The responsive records provided by the City to this Office do not include the entire human rights files, or even the complaints, only the City's responses to the complaints. Apart from the responses, there are no documents among the responsive records created for the dominant purpose of responding to the human rights complaints.

Section 33 – Information from a Workplace Investigation

[12] Was the City's investigation into the Complainant's discrimination complaint a "workplace investigation" within the meaning of section 33 of the *ATIPPA, 2015*? This needs to be considered because if it is determined that records responsive to the request were generated as a result of a workplace investigation, section 33 of the *Act* sets out levels of disclosure according to an applicant's role in the matter:

> *33. (1) For the purpose of this section*
>
> *(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;*
>
> *(b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and*
>
> *(c) "workplace investigation" means an investigation related to*
>
> *(i) the conduct of an employee in the workplace,*
>
> *(ii) harassment, or*
>
> *(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public*
>
> *which may give rise to progressive discipline or corrective action by the public body employer.*
>
> *(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.*

> *(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).*
>
> *(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.*

[13] A workplace investigation is defined, in section 33(1)(c) above, to include "an investigation into the conduct of an employee in the workplace" and "events related to the interaction of an employee in the public body's workplace with another employee or a member of the public". Both apply to the investigation of the Complainant's complaint. In addition, the complaint involved allegations of discrimination, and the City's policies reflect, as the Mayor stated in an e-mail to the Complainant "the City of Corner Brook does not tolerate discrimination in any form." It is clear that this investigation could give rise to discipline or corrective action by the employer. I conclude that the City's investigation constituted a "workplace investigation" within the meaning of section 33 of the *Act*.

[14] The Complainant, as the individual who made the complaint, was a "party" to that investigation within the meaning of section 33(1)(b) above. Under section 33(2) he is entitled to be provided with "…all relevant information created or gathered for the purpose". This includes all of the responsive records that were collected or created during that investigation process, including the statements and affidavits of witnesses.

[15] On the evidence provided to our Office by the City, the workplace investigation began on August 1, 2014 and finished by February 10, 2015. All of the information that is relevant to this workplace investigation, contained in records created between the above dates, is subject to disclosure to the Complainant.

[16] Because the Complainant is a party to the workplace investigation, the names of witnesses may not be redacted, as he is entitled to know who made the statements relied upon by the City. It would however, be appropriate to redact personal information that is not

relevant to the investigation - for example, a witness's personal e-mail address or phone number.

Section 30 – Legal Advice

[17] Solicitor-client privilege is dealt with under section 30(1) 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;*

The City takes the position that after the Complainant referred to hiring a lawyer on July 21, 2014 to sue the City, everything done and every record created by the City after that date is subject to solicitor-client privilege, either legal advice privilege or litigation privilege.

[18] First, not everything that a solicitor does for a client is subject to solicitor-client privilege. The test for the legal advice branch of the privilege is well known, and succinctly stated in many court judgments and in Reports from this Office. In *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority* the Court noted that, in order for communications to be protected, three criteria must be met:

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.

[19] In the present case, we reviewed all of the records for which the City claimed legal advice privilege. With a few exceptions, none of the communications to or from the City Solicitor entailed the seeking or giving of legal advice. Rather, they contain statements of fact, and in their context are not exempt from disclosure. A review of handwritten notes made by the Solicitor leads to a similar conclusion, because in their context, they are not communications between the Solicitor and the client (nor do they record legal advice), and

therefore do not meet the test. The importance of context is referenced in paragraph 24 of *Eastern Regional Integrated Health Authority*:

> *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.*
>
> *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.*
>
> *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.*
>
> *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.*

[20] As for the other branch of solicitor-client privilege, the test for whether a record is protected by litigation privilege is stated at paragraph 25 in *Eastern Regional Integrated Health Authority*:

> 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.*

The records created by the City between August 1, 2014 and February 10, 2015 were created for the dominant purpose of the workplace investigation, and not for any pending or apprehended litigation.

[21] The only reference to 'suing' is in an internal City e-mail dated July 21, 2014, in which a City employee recounts having spoken to the Complainant and alleged that he said, "…he has a lawyer and will be suing the City". In an e-mail to the Mayor on August 1, 2014, the Complainant advised "… I am in the process of taking the City to Court." There is no evidence that the Complainant ever identified his lawyer despite being asked to do so (in correspondence from the City dated July 23, 2014) should he decide to commence legal action. The City provided no evidence of receiving any correspondence from a lawyer in relation to this matter or that the Complainant took any steps to pursue litigation against the City. Instead, the Complainant made a discrimination complaint that gave rise to the workplace investigation.

[22] The evidence shows that the City Solicitor's role focused on investigating the discrimination complaint. The City Solicitor spoke directly with the Complainant to obtain further details regarding his complaint. Counsel engaged in litigation have strictures regarding direct dealings with unrepresented parties. There is no evidence of any qualms with respect to the City Solicitor directly communicating with the Complainant. This is one of many factors rendering it difficult to see how litigation could have reasonably been "apprehended" or expected by the City.

[23] As well, it is evident from a review of the records in question, including:

- notes made by different individuals involved,
- statements or affidavits produced by witnesses, and
- e-mails or other communications made during the process,

that the entire thrust and preoccupation of the investigation was to determine whether employees of the City had made discriminatory comments, or worse, engaged in discriminatory conduct in failing to award work to the Complainant. There is no evidence that any of the participants in this investigation were engaged in a process of preparing for litigation.

[24] This is borne out by the result of the investigation, outlined in a report on February 10, 2015 to Council. While signed by the City Solicitor, it is entitled "Report of Investigative

Findings". It describes the issues to be resolved as whether there had been a violation of the City's Workplace Harassment Policy due to racist comments by City staff, and whether the Complainant's treatment was due to racism on the part of City staff. The report goes into detail summarizing the evidence gathered by the investigation. At no point does the report reference the possibility of litigation.

[25] The letter sent on February 17, 2015 by the Mayor to the Complainant reporting on the outcome of the investigation is entirely consistent with this conclusion. It focuses entirely on the allegation of discrimination and the City's findings with respect to that allegation. This reinforces the conclusion that all of the records created by the City between August 1, 2014 and February 17, 2015 were created for the dominant purpose of the workplace investigation.

[26] For the purposes of this Report, I am prepared accept that the human rights complaints, which were filed by the Complainant after receiving the City's letter of February 17, 2015, could constitute the commencement of "litigation". I conclude that records created after February 17, 2015, for responding to the human rights complaints, might be protected by litigation privilege. These records could be withheld from the Complainant in response to the access request. However, only a few pages of responsive records qualify, namely the initial formal responses to the human rights complaints created by the City and filed with the HRC. Those documents were provided to the Complainant through the HRC's normal processes.

[27] The City takes the position that after it learned of the Complainant's threat on July 21, 2014 to sue the City, everything done and every record created by the City is subject to solicitor-client privilege, either legal advice privilege or litigation privilege. Apart from the City's assertion, there is no evidence to support that position. The City bears the onus of proof. It may be that the City Solicitor's files relating to the human rights complaints contain some or all of the records originally created for the purposes of the workplace investigation. However, if records were created for the purpose of the workplace investigation, they must be disclosed to the Complainant. The fact that some of those records may have subsequently been assembled or copied for the purpose of responding to the human rights

complaint, or provided to the HRC, or were held in a file in the Solicitor's office, does not result in them now being protected by litigation privilege.

[28] As noted in paragraph 24 of *Eastern Regional Integrated Health Authority*:

> *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.*

[29] Fish J. addressed the difference between the forms of privilege in paragraph 60 of *Blank v. Canada (Minister of Justice)*:

> *I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.*

[30] Litigation privilege is not, in its origins and purpose, a part of solicitor-client privilege. Rather, it is a rule of procedure enabling a party to litigation to shield documents from discovery by the other side. It does not automatically exempt from disclosure, in response to an access request, anything placed in a solicitor's litigation file. As the City has not met the burden on it to prove that litigation privilege applies, I conclude that the records are subject to disclosure.

[31] To accept the City's blanket claim would be to allow it to withhold all records related to investigations simply by asserting its Solicitor's affiliation with investigations in any manner. A similar position was rejected by the Alberta Court of Appeal in paragraph 34 of *Alberta v Suncor Inc*:

> *Suncor cannot, merely by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" or "derived from" the internal investigation,*

> *and thereby extend solicitor-client privilege or litigation privilege over them. This Court stated in ShawCor, at para 84, that "[b]ecause the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling." And further, at para 87, the Court stated that "the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her."*

[32] The purpose of the *ATIPPA, 2015* is to facilitate accountability and transparency by giving individuals a right of access to records, subject only to limited exceptions. One such exception is in section 30, for records subject to litigation privilege. In my view, even if litigation privilege applied here, it makes sense to give effect to the purpose of the *Act* by interpreting this exception narrowly, to apply only to records created for the purpose of litigation, and not to apply to records created for another purpose. This is consistent with the conclusion reached in *Eastern Regional Integrated Health Authority*. I conclude that the records originally created for the dominant purpose of a workplace investigation must be disclosed, under section 33, to the Complainant (a party to that investigation) even if those records were subsequently placed in a litigation file.

IV CONCLUSIONS

[33] Under section 43 of the *ATIPPA, 2015* the burden lies with the public body to prove that the exceptions relied upon apply to the records in dispute. The City's submissions with respect to litigation privilege are assertions with little or no supporting evidence. The City has not met the burden placed upon it. All of the records created for the purpose of the workplace investigation ought to be disclosed to the Complainant under section 33 of the *Act*, subject to any necessary redactions of some personal information under section 40. There are a number of records, or parts of records, that may be withheld because they constitute legal advice and exempt from disclosure under section 30.

[34] I am providing to the City, accompanying this Report, a list of the responsive records indicating which records, or parts of records, the City may continue to withhold.

V RECOMMENDATIONS

[35] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the head of the City of Corner Brook continue to withhold some records, or parts of records, as indicated on the list of responsive records accompanying this Report. I recommend that the City of Corner Brook disclose to the Complainant the remainder of the records.

[36] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the City of Corner Brook 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.

[37] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24th day of July 2018.

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