OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-021

August 30, 2018

Newfoundland and Labrador English School District

Summary: The Applicant requested from the Newfoundland and Labrador English School District a settlement agreement and correspondence related to a lawsuit arising from the cancellation of a school bus contract. The District refused disclosure of all of the records, citing common law settlement privilege, sections 28 (closed meetings of the board), 29 (advice and recommendations), 30 (solicitor-client privilege), 35 (prejudice to financial and economic interests of a public body) and 40 (unreasonable invasion of personal privacy). The Commissioner concluded that all of the records could be withheld pursuant to one or more of the enumerated exceptions in the *Act*. There was no need to decide whether common-law settlement privilege applied.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c.A-1.2, ss. 28, 29, 30, 35, 40.
Access to Information Act, RSC 1985, c. A-1

Authorities Relied On: *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, *2015 CanLII 83056, (NL SC)*; *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135 (CanLII).

File #: 0020-072-18-019

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 Newfoundland and Labrador English School District ("the District") as follows:

> *Carey's Bus Service Limited and ATC Enterprises Ltd. sued the NLESD in May 2015. That lawsuit, over the cancellation of busing contracts on the southern shore of the Avalon Peninsula has recently been discontinued. I kindly request a copy of the settlement agreement and/or any correspondence related to the settlement.*

[2] The District refused to provide any records to the Applicant claiming that all responsive records were exempt pursuant to one or more exceptions to access under the *Access to Information and Protection of Privacy Act, 2015* and common law settlement privilege.

[3] The Applicant 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 THE DISTRICT'S POSITION

[4] The District takes the position that common law settlement privilege exempts all of the responsive records from disclosure.

[5] The District also argues that some of the records may be withheld on the basis of the following exceptions in the *ATIPPA, 2015*:

- section 28(1)(c) – deliberations of closed meetings of the Board or a committee;
- section 29(1)(a) – advice or recommendations;
- section 30(1) or (2) – solicitor-client privilege;
- section 35(1)(g) – prejudice to the financial or economic interests of a public body;
- section 40 – personal information – unreasonable invasion of privacy.

For some records, the District claims that more than one exception applies.

III DECISION

[6] The District, in its response to the Applicant, acknowledged the existence of responsive records, and provided some details about what they contained. The records may be grouped as follows:

(a) a 4-page Final Release and Non-Disclosure Agreement;

(b) 36 pages of correspondence between the District's solicitor and the Plaintiff's solicitor;

(c) spreadsheets analyzing the Plaintiff's claim for damages, created by District staff;

(d) 288 pages of correspondence, a portion being between the District and its solicitors, and another portion being correspondence to or from employees of the provincial government;

(e) records relating to the deliberations in closed meetings of the District Board or of a committee of the Board.

Section 28

[7] Some of these records are clearly within the *Act's* exceptions. For example, the relevant provisions of section 28 of the *Act* are:

> *28.(1) The head of a local public body may refuse to disclose to an applicant information that would reveal*
>
> . . .
>
> *(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.*

[8] A few pages of the responsive record, referred to in paragraph 6(e) above, are either minutes of such meetings, or other records that reproduce the deliberations of such meetings. I am satisfied that the District is entitled to withhold those pages.

Section 29

[9] Section 29 of the *Act* reads, in part, as follows:

> *29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;*

[10] The records referred to in paragraph 6(c) above are spreadsheets that break down and analyze the Plaintiff's claim for damages. I am satisfied that District staff created those spreadsheets for purposes of advising the District and the District's solicitor on its response to the claim. These records fall into the categories of advice or analyses and the District is entitled to withhold those pages.

Section 30

[11] As set out in paragraph 6(d) above, there are many pages of correspondence between employees of the District and its solicitor, which the District claims it is entitled to withhold pursuant to solicitor-client privilege. That exception is found in section 30 of the *Act*:

> *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.*

[12] In *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority [2015]*, Justice Orsborn extensively reviewed the elements of solicitor-client privilege. The Court first set out the necessary elements of a valid claim of privilege:

> *(i) a communication between a solicitor, acting in his or her professional capacity, and the client;*
>
> *(i) the communication must entail the seeking or giving of legal advice, and*
>
> *(iii) the communication must be intended to be confidential.*

[13] The Court further explained that

> *…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.*

[14] Having reviewed the correspondence between the District and its solicitor related to this matter, I am satisfied that all such records properly fall within the "continuum of communication" in which legal advice was sought or tendered. The District is entitled to withhold those pages.

[15] Of particular note is the correspondence between the District and certain employees of the provincial government. It does not consist of communications directly between a solicitor and his or her client, and therefore it would not normally meet the test for solicitor-client privilege. However, as the Court in the *Eastern Health* decision (above) confirms:

> *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.*

[16] Whether a particular communication falls into such a category will depend on the content of the communication and the context in which it is found, and the decision must be made on a case by case basis. Some of these records satisfy the above test and are subject to solicitor-client privilege. Any communications between employees and the government that are not protected by solicitor-client privilege are exempt pursuant to section 35(1)(g), as discussed below.

[17] The records referred to in paragraph 6(b) above consist of correspondence between the District's solicitor and the solicitor for the Plaintiff. The district also relies on section 30 to withhold these records. Such records are not covered by solicitor-client privilege. They are not between the solicitor and his or her own client, and they are not for the purpose of seeking or providing legal advice.

[18] The District argues that the correspondence between its solicitor and the Plaintiff's solicitor represents negotiations that they reviewed with their respective clients before a final agreement was reached. The District contends this correspondence is protected under section 30 as part of the "continuum of correspondence" to which Justice Orsborn referred.

[19] In my view the "continuum of communication" concept applies to communication between the solicitor and client, which as a whole entails the seeking and giving of legal advice. While it may include a third party who can be considered a "conduit" for the communication, or who is essential to the operation of the solicitor-client relationship, the continuum of communication cannot be further expanded to include the opposing party in litigation. Indeed, providing otherwise privileged information to a third party, and especially to a party opposed in interest, could constitute a waiver of the privilege.

Section 35

[20] The District claims section 35(1)(g) applies to the settlement agreement and much of the other information, including the correspondence between the two parties' solicitors:

> *35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*
>
> *. . .*
>
> *(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body;*

[21] A recent Federal Court of Appeal decision, *Canada (Office of the Information Commissioner) v. Calian Ltd*. concisely describes evidence capable of demonstrating a reasonable expectation of prejudice to financial or economic interests. While third party

business interests were involved in that case, the language of the respective provisions is similar as it relates to harm. At paragraph 50, the Court states:

> *For many of the same reasons spelled out earlier in the context of paragraph 20(1)(c), I find that the interference with contractual or other negotiations that would result from the disclosure is not merely speculative but rests on cogent, credible and reliable evidence … Having carefully considered the case law marshalled by the appellants in support of their argument,* ***I have not been convinced that the level of specificity that they have insisted upon to establish a reasonable expectation of probable harm is warranted. As frequently mentioned in those cases, there is an element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm. As long as the prediction is grounded in ascertainable facts, credible inferences and relevant experience, it is unassailable.*** *Accordingly, it was open to the Judge to find that Calian could rely on the paragraph 20(1)(d) exemption to request the redaction of its personnel rates.* [emphasis added]

[22] In the present case, the District is currently in litigation with another plaintiff bus company after unilaterally cancelling its contract. The District has also cancelled a number of contracts with other bus companies in the past two years, and anticipates litigation in some or all of those cases.

[23] In order to apply section 35(1)(g) some background is necessary. The companies that operate school buses in various parts of the Province under contract with the District are not competitors in the usual sense of the word, since their service areas do not overlap. They may be competitors in the bidding stage, but once the multi-year contracts are signed each successful bidder must have its own buses, parking and servicing facilities, administrative and maintenance personnel and drivers in order to provide the contracted services.

[24] In the present case, the Plaintiff met all of those requirements when it won the contract and began to provide bus services. After the District cancelled the contract, the Plaintiff had to dispose of all of its buses, lay off the drivers and sell the garage and property. It appears from the records that the company that took over the contract acquired most of those assets. The Plaintiff alleged that it suffered considerable financial loss in what it characterized as a “forced sale”.

[25] Other bus companies in the Province, including those whose own contracts were cancelled, are well aware of those circumstances, since they are familiar with the terms of bus contracts around the Province and with each other's operations, especially since there was a fair amount of media coverage of the cancellation. They also have access to the public court documents, so they will be able to find out how much the Plaintiff claimed and the detailed breakdown of the claim. They do not know, however, the amount of the agreed settlement, and in particular they do not know how that figure was arrived at by the District (which of the claimed items may have been rejected, which amounts may have been reduced, and which amounts may have been accepted).

[26] The amount of the agreed settlement is contained in the settlement agreement. The settlement amount, and more importantly, the negotiating strategy that led to it and the way in which the figure was set, are evident from the settlement correspondence between the lawyers for the District and the Plaintiff. A discussion of some of those details, and some analysis, are also contained in other internal records of the District, and in correspondence between the District and government officials, all of which are part of the records responsive to the present request.

[27] The District states that in the past, there were relatively few bus services contracts cancelled by predecessor school boards. The District terminated the contract involved in the present request on February 2, 2015. Since then, the termination of two other contracts, with a different company, resulted in the commencement of litigation in April, 2017 by that company. While the termination of other contracts has yet to result in litigation, the two-year limitation period for the commencement of legal action has not expired for any of those cases.

[28] The newly created District has little experience with the repercussions of cancelling these contracts. Litigation commenced in two of those cases (in May 2015 and April 2017). This lends weight to the District's anticipation of further litigation in the other cases. These contract disputes are not minor. The claim advanced by the Plaintiff bus company in the present case, from public court records, is in the hundreds of thousands of dollars.

[29] One of the considerations in taking a decision to terminate a contract is, of course, the likelihood of resulting court action. A related consideration is the anticipated likelihood of settling such litigation through negotiation. The District maintains that a current or future claimant could view the settlement details of the present case as a "baseline" by which to pursue its own settlement negotiations. This, it states, would prejudice the District's ability to defend individual claims, or to negotiate reasonable settlements, and thereby put the public purse at risk. The District is of the view that this meets the standard of "reasonable expectation of probable harm".

[30] I agree with this reasoning. As the Court in *Calian* observed, while there is an element of forecasting and speculation involved, the District "grounded its prediction in ascertainable facts" and has therefore met the requirements of section 35(1)(g). I am satisfied that disclosing the details of the present settlement could reasonably be expected to result in prejudice to the financial or economic interests of the District.

[31] I therefore conclude that the settlement agreement, the inter-party correspondence and attached documents that led to the settlement, and other records containing any of that information, are exempt from disclosure as their release can reasonably be expected to result in prejudice to the financial or economic interests of the District.

Section 40

[32] The District applied section 40 (unreasonable invasion of personal privacy) to redact certain items of personal information of identifiable individuals, such as home addresses or telephone numbers. The District properly applied section 40.

Settlement Privilege

[33] The District claimed that it is entitled to withhold all of the requested records on the basis of common law settlement privilege. It is unnecessary to address that argument as I find that all of the responsive records in the present case are properly withheld on the basis of exceptions in the *ATIPPA, 2015*.

IV CONCLUSION

[34] For the above reasons I conclude that all of the responsive records in the present case may properly be withheld by the District on the basis of one or more of the exceptions to access set out in the *Act*.

V RECOMMENDATIONS

[35] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the Newfoundland and Labrador English School District continue to withhold the records previously withheld from the Complainant.

[36] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Newfoundland and Labrador English School District 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 30th day of August, 2018.

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