



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-028

November 27, 2020

Department of Transportation and Infrastructure

Summary:

The Department of Transportation and Infrastructure received a request for information relating to two conveyances between a company and a municipality. The Department provided access to some records but withheld other records on the basis of section 30 (Legal advice). During the complaint investigation the Commissioner requested copies of the responsive records for review, but the Department refused to provide records that it claimed were subject to the section 30 exception. The Department also refused to provide a sufficient description of those records. The Commissioner concluded that in the absence of evidence to support the claim of legal advice, the Department had not met the statutory burden of proving that the exception applied, and therefore recommended that the records be disclosed.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1,2, ss. 30, 43, 97, 100.

Authorities Relied On: OIPC Report A-2019-019.

I BACKGROUND

- [1] The Department of Transportation and Infrastructure (the “Department”) received a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) for records related to two conveyances between a named company and a named municipality.
- [2] The Department provided records to the Applicant but withheld some records on the basis of section 30 (Legal advice) of *ATIPPA, 2015*. The Applicant filed a complaint with this Office, believing that additional responsive records may exist and asking that the decision to withhold records be reviewed. The issue of whether further records exist was resolved informally and will not form part of this report.
- [3] This Office notified the Department of the complaint and included a request that the Department provide a complete copy of the records responsive to the request. The Department’s reply stated that the use of section 30 was reviewed and approved by the Department’s solicitor. The Department further stated that all of the redactions were made pursuant to section 30(1)(a) and they were not included in our package of records.
- [4] Our Office sent the Department correspondence noting that we are aware of section 97(5)(a) of the *ATIPPA, 2015* which provides that:
- (5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where*
- (a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;*
- [5] Our Office advised that if the Department had a reasonable basis for such concerns, we would be willing to go to its office to review the records.

- [6] The Department replied advising that our request to view the records was discussed with its solicitor and the solicitor was not willing to waive privilege on the records unless the OIPC could present evidence that the privilege was falsely claimed.
- [7] Our Office corresponded with the Department again, stating that the OIPC was not asking the Department to waive solicitor-client privilege as section 100(2) of *ATIPPA, 2015* explicitly provides that solicitor-client privilege or litigation privilege of records shall not be affected by production to the Commissioner.
- [8] Our Office reminded the Department that under section 43(1) of *ATIPPA, 2015*, the burden is on the head of the public body to prove the applicant has no right of access to the record or part of a record.
- [9] Our Office advised that in the present case, in order to provide an alternate means of resolving this issue, we would be prepared to consider an affidavit describing the records, from someone who is knowledgeable about the *ATIPPA, 2015* and experienced in the access to information field, and who has reviewed all of the records. The Department replied that it would not be offering an affidavit of the records.
- [10] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [11] The Department took the position that the use of section 30 was reviewed and approved by the Department's solicitor. The Department advised that its solicitor was not willing to waive privilege on the records unless the OIPC could present evidence that the privilege was falsely claimed and the Department refused to provide an affidavit describing the section 30 records.
- [12] The Department provided the following statement:

In circumstances where the public body has applied section 30 to a record, it is incumbent on the applicant and/or OIPC to provide evidence or an argument

to support (or even suggest) that the solicitor-client privilege has been falsely claimed. This is required regardless of the public body's position on the OPIC's [sic] power to compel solicitor-client documents or any perceived reluctance to provide an affidavit. This approach is in accordance with the Supreme Court of Canada decision in the Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53...

III COMPLAINANT'S POSITION

[13] The Complainant's position is that they are concerned about the claim of solicitor-client or litigation privilege and would like the Commissioner to determine whether the exception was properly applied.

[14] The Complainant questions whether the Department has complied with its obligations under the *Act* to produce the remainder of the record where excepted information can be severed.

IV DECISION

[15] Report A-2019-019 covered the same issue as this complaint: records that the public body claimed should be withheld from disclosure based on section 30 (Legal advice) of *ATIPPA, 2015* were withheld from the Commissioner's review.

[16] Without repeating all of the analysis in Report A-2019-019, it was, and still is, the position of this Office that records, including those for which solicitor-client privilege is claimed, must be produced to this Office for review. Paragraphs 20-21 of Report A-2019-019 stated:

[20] Section 97(1)(d) makes it clear that the requirement to produce records to the Commissioner applies notwithstanding a privilege under the law of evidence. It is our position that "a privilege under the law of evidence" in the ATIPPA, 2015 includes solicitor-client privilege. This is evident from the inclusion, in section 97(5) above, of a provision taking into account reasonable concerns about the security of a solicitor-client record, and the inclusion of section 97(6) confirming that there can be no other conditions, other than section 97(5), placed on the ability of the Commissioner to access a record.

[21] Further, section 100 of the Act makes it clear that solicitor-client privilege is not affected by production to the Commissioner – in other words, providing such records to this Office for review does not constitute a waiver of the privilege. This provision would be redundant if public bodies were not required, by section 97, to provide solicitor-client records to the Commissioner.

[17] Without being able to examine responsive records that have been withheld from applicants, our Office cannot assess the legitimacy of the exception claimed and make a recommendation whether or not to disclose. Production of records to this Office for review is central to the Commissioner's oversight role.

[18] The responsibility for demonstrating that a public body has the right to withhold information from an applicant lies with the public body. Section 43(1) of the Act provides:

43. (1) On an investigation of a complaint from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.

[19] As discussed in Report A-2019-019, our Office acknowledged that it might not always be necessary to have such records produced for review if the public body were to provide sufficient evidence to substantiate its reliance on an exception. In Report A-2019-019, and in the present matter, this Office was prepared to consider an affidavit with a sufficiently detailed description of the records so as to discharge the Department's burden of proof and establish that the exception applied.

[20] Whether this Office requires the production of the records or an affidavit, the burden of proof remains on the public body at all times and a public body therefore runs the risk that if it fails either to provide the records or to adequately describe them in an affidavit, it will not succeed in meeting the required burden of proof.

[21] *ATIPPA, 2015* requires that a person who makes an access to information request has the right to be provided with all of the records requested, subject only to the application of any exceptions that have been proven to apply. If the burden of proof is not met, then all of the requested records must be provided to the applicant.

[22] In this case, the Department declined the offered alternative of providing an affidavit and therefore our Office had to proceed with its investigation based on the information available to us. With no records to review and no description of the records in an affidavit, this Office has no other option but to conclude that the Department has not met the burden of proof under section 43 to withhold the information for which the exception under section 30 has been claimed.

V CONCLUSION

[23] This Office again finds itself in the position where it must recommend disclosure of records that it has not examined. This Office is bound by the Act, and regretfully, due to the failure of the Department to discharge its burden of proof, I have no option under the Act but to recommend that the withheld records be disclosed to the Applicant.


VI RECOMMENDATIONS

[24] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend:

- (a) that the Department disclose to the Applicant all of the records and other information withheld from the Applicant under section 30 of the Act.

[25] 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 these recommendations to the Commissioner and any person who was sent a copy of this Report, within 10 business days of receiving this Report.

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27th day of November, 2020.


Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador