



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

Report A-2021-007

February 10, 2021

## Department of Fisheries, Forestry and Agriculture

### Summary:

The Complainant filed an access to information request to the Department of Fisheries, Forestry and Agriculture for records relating to his property and, in particular, a historical land issue involving a neighbouring property and Crown Lands. The Department provided access to some of the records but withheld others under section 30 (Legal advice). The complainant asked this Office to review and ensure the records were properly withheld. During the investigation, the complainant also described records which he indicates would not have fallen under section 30, but were also not provided. The Complainant questioned whether these records may have been improperly withheld. The Department refused to provide this Office with the records subject to section 30, or descriptions of them. As such, the Department failed to discharge the burden of proof and the Commissioner recommends the release of all records.

### 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:

NL OIPC Reports, [A-2019-019](#), [A-2020-028](#)

## I BACKGROUND

- [1] The Department of Fisheries, Forestry, and Agriculture (the “Department”) received an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) for records related to a historic property issue between private property owners and Crown Lands.
- [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 asking that the withheld records be reviewed to determine whether the exception was correctly applied.
- [3] This Office notified the Department of the complaint and requested that the Department provide the records responsive to the request for our review. The Department responded that all of the redactions were made pursuant to section 30(1)(a) and as such the records would not be provided.
- [4] In response, this Office responded to the Department and reiterated that, as per section 43, the burden of proof rested with the Department. The Department was provided an alternative to discharge the burden of proof and advised that descriptions of the withheld records in the form of an affidavit or at minimum a description of the records may be accepted. The Department responded and refused to provide affidavits or any description of the records.
- [5] The Complainant was advised that the Department had not provided this Office with records, and asked whether he wished to proceed to the formal phase of the investigation. The Complainant indicated in very clear terms that he would like this Office to proceed with the investigation and questioned what the purpose of our Office would be if public bodies could claim section 30 without being subject to review. The Complainant also raised the issue of responsive records which had not been provided to him and to which the Complainant did not believe section 30 applied as the records were correspondence between himself and officials at Crown Lands. The Complainant indicates that these may have been improperly

withheld under section 30. However, it may be the case that the wording of the request was too narrow for these records to have been responsive. The Department did confirm that the records mentioned by the Complainant were not included in the redacted records.

[6] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

[7] In our letter notifying the Department of formal investigation, this Office noted that the records withheld under section 30 were not peripheral to this investigation, but rather the essence of the complaint. The Department was advised that if descriptions of the records were not provided, this Office could not consider the Department to have discharged its burden of proof, and would be bound to recommend that the Department release all withheld records. The Department indicated that no further response in this respect would be forthcoming.

## II PUBLIC BODY'S POSITION

[8] The Department's position was that the redactions made under section 30 were done in consultation with the Department's solicitor(s) and as such the records would not be provided to this Office. In a subsequent response, the Department, in part, stated:

*It is our position that solicitor-client privilege cannot be set aside by inference but only be legislative language that is clear, explicit and unequivocal. See Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53. The Department is not prepared to waive its privilege with respect to these documents. Furthermore, the Province is not prepared to exercise its discretion under Section 97(5)(a) of the Access to Information and Privacy Act, 2015 ("ATIPPA, 2015"). Accordingly, the Department is not prepared to provide the documents to the OIPC.*

*It is the Department's view that ATIPPA, 2015 does not support mandatory production by a public body to the OIPC of solicitor-client privileged records. Rather, in accordance with the SCC decision, the language in ATIPPA, 2015 is not sufficiently explicit and unequivocal that solicitor-client privilege has been abrogated. Further, even if this legal interpretation were incorrect and there was a clear and unambiguous legislative intent to require mandatory production to the OIPC of solicitor-client privilege records, the OIPC would then*

*be required to exercise discretion in requiring production of solicitor-client privilege records.*

### III COMPLAINANT'S POSITION

[9] The Complainant is concerned that section 30 was not applied properly, and requested that this Office review the withheld records to verify whether or not the exception was correctly used. The Complainant also refers to records which he suggests should have been provided, but were not, as evidence that section 30 was improperly applied.

[10] With respect to records subject to section 30 not being provided to this Office for review, the Complainant questioned how oversight can be said to exist if a public body could simply claim section 30 without that claim being subject to independent review.

### IV DECISION

[11] Previous reports (most recently Report A-2020-028) have covered this same issue: records that the public body claims should be withheld from disclosure based on section 30 of *ATIPPA, 2015* were withheld from the Commissioner's review.

[12] Without repeating all of the analysis in previous reports, 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. Report A-2019-019 states:

*[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.*

[13] 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.

[14] 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.*

[15] As discussed in previous reports, 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 the present matter, as in previous investigations, 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.

[16] 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 or otherwise, it will not succeed in meeting the required burden of proof. We would also note that in this case, the Department had the opportunity to provide a description of the records without an affidavit, and the Department nevertheless refused to do so.

[17] As noted above, during the course of our investigation the Complainant referred to the existence of certain records which were not contained in the Department's final response to his access to information request and provided this Office with a description of the records. The Complainant therefore believed that section 30 had been improperly applied to withhold

these records which in his view would not contain legal advice. The Department advised that the records described by the Complaint were not amongst the records withheld under section 30 and we will accept their statement.

[18] As the Complainant described specific records which were not provided to him, this Office also asked the Department to provide a description of its search. The description demonstrates a reasonable search, and highlights that while additional related records may exist but would not have been responsive to this request. As the Department points out, the parameters of the request were specific and the search conducted was in accordance with the wording of the request. The Department indicates they would accept an additional request from the Complainant for items which may have been non-responsive given the wording of the request at issue

[19] *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 regarding any such exceptions, then all of the requested records must be provided to the applicant.

[20] This Office appreciates that solicitor-client privilege is a fundamental principle of Canadian law which must be safeguarded and held in the highest regard. Accordingly, the significance of recommending disclosure of solicitor-client records is not lost on us. However, this Office is bound by legislation which places the burden of proof on the public body. In this case, the Department declined the offered alternative of providing an affidavit or descriptions of records 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 can only 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. Regretfully, I have no option under the *Act* but to recommend that the withheld records be disclosed.

[21] Having found the search to be reasonable, we will not make a recommendation about that aspect of the complaint, however we suggest it may be mutually beneficial for both parties if the Department would reach out to the Applicant to offer assistance in structuring a subsequent request for records not captured by this request.

## V RECOMMENDATIONS

[22] 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*.

[23] 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.

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10<sup>th</sup> day of February 2021.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador