OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-26

June 7, 2021

Town of Lewisporte

Summary: The Town of Lewisporte (the "Town") received an access to information request under the *Access to Information and Protection of Privacy Act, 2015*, ("*ATIPPA, 2015*") for records relating to a workplace investigation. The Town denied access to the records based on section 30(1)(a) (legal advice) of *ATIPPA, 2015*. The Complainant argued that as a party to the workplace investigation as described in section 33 of *ATIPPA, 2015* he is entitled to all relevant information created or gathered for the purpose of that investigation. The Commissioner determined that section 30 does not apply to the Investigation Report because the person who conducted the workplace investigation and authored the Report was not retained to provide legal advice. The Commissioner therefore found that section 30 does not apply to the Report and it should be released to the Complainant. The Commissioner found that section 30 does apply to most of the communications between the Town and its legal counsel and that those records should continue to be withheld.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, sections 30, 33, 37 and 40.

Authorities Relied On: NL OIPC Reports A-2021-019, A-2020-013.

Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority, 2015 NLTD(G) 183.

Oleynik v Memorial University of Newfoundland and Labrador, 2021 NLSC 51;

File 0025-122-21-002

Hogan v. Brunswick News Inc., 2017 NBQB 198

Corner Brook (City) v. Newfoundland and Labrador (Information and Privacy Commissioner), 2020 NLSC 37

Provincial Health Services Authority (Re), 2016 BCIPC 44;

Richmond (City), Re, 2005 CanLII 48297 (BC IPC);

Whistler (Resort Municipality) (Re), 2014 BCIPC 32;

I BACKGROUND

[1] The Complainant submitted an access to information request pursuant to the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*") to the Town of Lewisporte (the "Town") seeking a number of records, as follows:

> *All records of information in any form, including but not limited to any dataset, information that is machine readable, written, photographed, recorded or stored in any manner, text messages, minutes, unofficial minutes, notes, statements, etc including on members of council personal devices regarding:*
>
> 1. *All information created or gathered since August 9, 2020 for the purpose of the workplace investigation re [Complainant],*

[2] The Town initially responded advising that there was no information created or gathered by the Town since August 9, 2020 for the purposes of the workplace investigation.

[3] The Town went on to advise that the workplace investigation was conducted by an investigator who was retained by the Town's legal counsel. The Town stated that the investigator's report, as well as any communications of the Town involving either the report or any advice provided to the Town by its legal counsel, are excepted from disclosure under section 30(1)(a) (legal advice) of *ATIPPA, 2015*. The Town therefore withheld all responsive records based on section 30(1)(a).

[4] The Complainant filed a complaint with this Office requesting an investigation into the Town's refusal to provide the Complainant with the relevant information from the workplace investigation as he is a party to the workplace investigation.

[5] 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

Section 30 - Legal Advice

[6] It is the Town's position that the records requested are communications which meet all three parts of the test for solicitor-client privilege and are therefore subject to section 30(1)(a) of *ATIPPA, 2015* and can be withheld from the Complainant. To qualify for solicitor-client privilege, a communication must contain three essential criteria: it must be between a solicitor, acting in his or her professional capacity, and a client; the communication must involve a request for legal advice or the provision of legal advice; and the communication must have been intended to be confidential.

[7] The Town explained that the Complainant was allegedly involved in a motor vehicle accident involving the Town vehicle assigned to him. It was further alleged that the Complainant was in possession and control of the vehicle during this motor vehicle accident. The Town advised that it contacted its legal counsel to seek legal advice in relation to this accident.

[8] The Town's legal counsel retained a third party lawyer (the "Investigator") to investigate the Complainant's possible involvement in the alleged incident. The Investigator was asked to make findings of fact as to the Complainant's involvement into the alleged incident, apply those facts to relevant policies, and make determinations of whether the Complainant breached any of those policies.

[9] The Investigator advised the Town that during the workplace investigation, they became aware of allegations of breaches of other workplace policies by the Complainant. The Investigator was instructed to investigate, in addition to the motor vehicle accident, any and all allegations brought against any party during the course of their investigation.

[10] The responsive records consist of a workplace investigation report (the "Report") and certain communications between the Town and its legal counsel (the "Communications").

[11] The Town submits that all Communications between the Town and its legal counsel are confidential and for the purpose of obtaining legal advice in relation to the accident and the Complainant's employment. The Town further submits that some of the Communications are marked "Privileged and Confidential".

[12] The Town submits that the Report was sent to the Town for the purposes of providing advice to the Town in relation to the Complainant's employment and was accompanied by legal recommendations of the Town's counsel. The Town states that the Report contains legal analysis and that it is marked "Confidential and Privileged".

[13] The Town argues that the Report is the result of the Town seeking legal advice from its solicitor and that legal counsel determined that the first step in providing that advice was the investigation.

[14] The Town also argues that the second part of the test for solicitor-client privilege, which asks whether "the communication entails the seeking or giving of legal advice," is not applied to each and every communication, but rather it is applied to the relationship between the parties.

[15] The Town states that the Report is within the continuum of communication between the Town and its legal counsel. It is the Town's position that the Report was commissioned by the Town's legal counsel after it had been engaged to provide the Town with legal advice in relation to the Complainant's employment and the Report was the primary basis upon which the Town's legal counsel provided advice to the Town.

[16] The Town states that solicitor-client privilege is broad and all-encompassing and the Report falls under solicitor-client privilege because it is the result of the Town's initial request for legal advice from its lawyer. The Town acknowledges that had it hired the Investigator itself, then the analysis of whether the Report is legal advice would be different. However, in this instance, the Report was commissioned by the Town's legal counsel.

[17] The Town states that it did not waive privilege and that the responsive records qualify for solicitor-client privilege under section 30(1)(a) of *ATIPPA, 2015* and are therefore excepted from disclosure.

[18] The Town also relied on litigation privilege, stating that the dominant purpose of the responsive records was to deal with the Complainant's liability arising from the accident and his employment status. The Town advised that, given the fact that the Complainant obtained legal counsel, it was clear that litigation was reasonably apprehended by the Town at the time the Report was commissioned. The Town also notes, however, that the matter has since been settled.

Section 37 – Disclosure harmful to individual or public safety

[19] The Town also submits that section 33(3) should not operate to deny the public a reasonable expectation of safety.

[20] The Town argues that disclosure of parts of the Report that make it possible to identify a witness could reasonably be expected to threaten the safety and mental and physical health of the witness.

[21] The Town submits that some witnesses were fearful of reprisals if identified. The Town advised that the fear ranged from fear of damage to their property, fear of verbal abuse, fear that rumors would be spread and fear regarding future employability

Section 40 – Disclosure harmful to personal privacy

[22] The Town responded to the Complainant's access to information request by withholding all information pursuant to section 30. In the alternative, the Town submits that some of the information should also be severed in accordance with section 40 of *ATIPPA, 2015*.

III COMPLAINANT'S POSITION

[23] The Complainant's position is that as a party to the workplace investigation as described in section 33(3) of *ATIPPA, 2015* he is therefore entitled to all relevant information created or gathered for the purpose of the workplace investigation.

[24] The Complainant stated that had the Investigator not been a lawyer, which many investigators are not, then the issue of section 30 would not have been raised by the Town.

[25] Furthermore, the Complainant's position is that while the Town may not have directly gathered the information for the purposes of the workplace investigation, the Town has control of the records as well as custody of the Report.

[26] The Complainant does not accept that the information can be withheld under section 30(1)(a) of *ATIPPA, 2015.* He states that withholding this information based on section 30 is misguided, inaccurate and contrary to *ATIPPA, 2015*. Furthermore he stated that withholding this information contradicts the overall intent of *ATIPPA, 2015* as well as the intent of section 33.

[27] The Complainant argues that while some information related to a workplace investigation, such as a legal opinion, may be subject to an exception to access, the information that was requested in this case, such as statements, reports, and other information, does not meet the test of legal advice under section 30(1)(a) of *ATIPPA, 2015*. The Complainant argues that the information created or gathered for the purpose of a workplace investigation forms the basis for the legal opinion but is not itself a legal opinion therefore it should not be subject to section 30(1)(a) of *ATIPPA, 2015*.

IV ISSUES

[28] There are two questions to be determined:

a) Are the records subject to section 33 of *ATIPPA, 2015*?

b) Are the records subject to section 30 of *ATIPPA, 2015*?

V DECISION

Section 33

[29] Section 33 of *ATIPPA, 2015* is as follows:

> *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;*
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> *(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.*

[30] Section 33 provides for a mandatory right of access to all relevant information created or gathered for the purpose of a workplace investigation if the applicant is a party to an investigation. In some cases, it serves as a mandatory exception requiring that relevant information from a workplace investigation be withheld where the applicant is not a party to the investigation.

[31] In this case, the Complainant is a party to the workplace investigation and under section 33 of *ATIPPA, 2015*, he would have a right to access "all relevant information created or gathered for the purpose of a workplace investigation."

[32] I find that the Report comprises relevant information created or gathered for the purpose of a workplace investigation. Some of the Communications would fall into that category as well.

[33] Past decisions of this Office have concluded that the mandatory requirement to disclose information as set out in section 33(3) and (4) overrides all other exceptions to access, including section 30; however, a recent decision of the Supreme Court of Newfoundland and Labrador has come to a different conclusion regarding the interaction of section 30 with section 33. In *Oleynik v. Memorial University of Newfoundland and Labrador*, 2021 NLSC 51, the Supreme Court of Newfoundland and Labrador stated that section 33(3) does not abrogate solicitor-client or litigation privilege. Justice Noel stated at paragraphs 88-92, 95 and 98 as follows:

> *[88] I have a sufficient comfort level to decide that section 33(3) does not abrogate solicitor-client privilege or litigation privilege; however, I am less comfortable in deciding the section is paramount to all other exceptions to access under the Act without the specific circumstances and evidence being before the Court. I will explain my reasoning commencing first with solicitor-client privilege and litigation privilege, and then other exceptions to access to records under the Act.*
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> *[89] Solicitor-client privilege is fundamental to the proper functioning of our legal system. It is in the public interest that people can freely discuss their problems with a lawyer with an assurance of confidentiality "as close to absolute as possible": Blood Tribe Department of Health v. Canada (Privacy Commissioner), 2008 SCC 44, at para. 9.*
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> *[90] Clear statutory language is required to abrogate solicitor-client privilege. The Supreme Court of Canada has consistently reiterated: "To give effect to solicitor-client privilege as a fundamental policy of law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so": Alberta (Information and Privacy Commissioner), at para. 28. Open-textured language governing production of documents will not include solicitor-client documents, unless expressed specifically to include solicitor-client privilege documents: Blood Tribe at para. 11.*

> *[91] The Supreme Court of Canada confirmed that litigation privilege is also of fundamental importance to the functioning of our legal system, and that litigation privilege, like solicitor-client privilege, requires "clear, explicit and unequivocal language" in order to lift it: Lizotte c. Aviva Cie d'assurance du Canada, 2016 SCC 52, at para. 64.*
>
> *[92] Oleynik maintains that "all relevant information" in subsections 33(2) and 33(3) is intended to abrogate solicitor-client and litigation privilege. Section 30 is the provision that allows a public body to refuse to disclose to an applicant solicitor-client or litigation privilege information. I accept the submissions of counsel for Memorial that the authorities of our highest court directly contradict Oleynik's argument.*
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> *…*
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> *[95] It is a question of mixed law and fact - the application of the appropriate legal test to the particular factual situation - that governs whether the privilege arises.[5] The determination of solicitor-client privilege depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: Pritchard v Ontario (Human Rights Commission), 2004 SCC 31, at para. 20. Only communications made for "the legitimate purpose of obtaining lawful" legal advice or assistance are privileged: R. v. McClure, 2001 SCC 14, at para. 37.*
>
> *…*
>
> *[98] To accept the position of Oleynik and the Commissioner, the wording of section 33(3) would require specific language in the nature of 'notwithstanding section 30 of the Act' to abrogate solicitor-client and litigation privilege. No such explicit language is employed, so I conclude the Legislature did not intend to abrogate this fundamental privilege embedded in our law. As important as it is for Oleynik to have all relevant information in a workplace investigation for the purpose of defending his professional security, Memorial remains entitled to assert the protection of solicitor-client and litigation privilege.*

[34] As the Town is claiming that all records can be withheld under section 30(1)(a) *of ATIPPA, 2015*, this Office must determine if all the records withheld are solicitor-client or litigation privileged. Therefore, the tests for solicitor-client privilege and litigation privilege must be reviewed and applied to these records.

[35] If the records are found to be subject to section 30(1)(a) then based on the decision above, the records should be withheld as section 33 does not abrogate solicitor-client or litigation

privilege. However, records that are not subject to section 30(1)(a), must be further assessed to determine what can be disclosed to the Complainant.

Section 30

[36] As noted above, the test for solicitor-client privilege consists of three elements, as articulated by the Supreme Court of Newfoundland and Labrador in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority* at paragraph 24:

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.

[37] The Town relied on the law as stated in Adam Dodek, *Solicitor Client Privilege*, Ontario, Canada, Lexis Nexis Canada (2014) ("*Dodek*"):

> *The privilege applies as soon as a putative client takes the first steps to obtain legal advice. The Supreme Court has stated that the privilege attaches "as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice"….*
>
> *….The privilege applies generally to confidential legal communications between a lawyer and a client. As discussed in Chapter 5, the term "confidential" is given broad interpretation to include any information about the putative client or their case; any communications beyond those being purely administrative will attract the protection of solicitor client privilege…*
>
> *…Generally, courts focus on the solicitor client relationship, rather than engaging in communication-by-communication analysis of the "legal" character of such communication. Much deference is afforded to the existence of the solicitor client relationship…*

[38] Furthermore the Town states:

> *Dodek* cites *Samson Indian Nation and Band v Canada* [1995] 5CJ No. 734 ("*Samson*") as the case that decided Canada's "broad view of privilege":
>
> *…it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.*

[39] Finally the Town relies on *Hogan v. Brunswick News Inc.*, 2017 NBQB 198 which also assess solicitor-client privilege in the context of a workplace investigation:

> 17 It is my view that the law is quite clear on the issue of solicitor-client privilege. If the documents listed as having solicitor-client privilege has a descriptor which provides that the document or documents were prepared for the purpose of obtaining or providing legal advice, this is usually sufficient. Once established, it is broad and all-encompassing. Solosky, supra, sets out the three elements of a claim of solicitor-client privilege…

[40] While the overall relationship between the Town and its counsel is important, so too is the Investigator's role in the workplace investigation.

[41] The Investigator was retained to conduct a workplace investigation into the Complainant's involvement in the alleged accident. The Investigator was asked to make findings of fact in relation to this incident, apply those facts to the relevant Town policies, and make determinations of whether the Complainant breached any of those policies. The Investigator was not asked to provide legal advice.

[42] Not all communications between a solicitor and their client are protected by solicitor-client privilege, as lawyers may be retained to provide other services which do not necessarily require the giving and seeking of legal advice. The Investigator in this case was not providing legal advice: they were retained only to make findings of fact and determine whether policies were breached.

[43] There is no solicitor-client relationship between the Town and the Investigator. It was the Town's lawyer that gave the Town legal advice based on the results of the investigation and this is where the communication between a solicitor and their client lies.

[44] In *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority* it was found that documents must be assessed separately and, furthermore, there is no assumption that the purpose of a communication is to seek or give legal advice simply because a communication was to or from counsel:

> *[35] Most of the documents over which solicitor client privilege are claimed are e-mails – including forwarded e-mails – and previously-created documents attached to e-mails. Each document must be separately assessed. In this context and in the absence of adequate evidence, privilege claims may well fail because, on an objective assessment, the factors of expectation of confidentiality and/or legal advice purpose have not been established.*
>
> *[36] I have assessed all the documents and redactions for which solicitor client privilege is claimed. I do not propose to provide separate reasons for each decision.*
>
> *[37] However, I did not assume that the purpose of a communication was to seek or give legal advice simply because a communication was to or from counsel. I considered the legal advice component of the privilege to be less likely to be established if a communication was simply copied to counsel.*

[45] In *Provincial Health Services Authority (Re)*, 2016 BCIPC 44, the British Columbia Information and Privacy Commissioner reviewed the public body's claim of solicitor-client privilege to withhold a workplace investigation. In that case, a lawyer was retained to conduct a workplace investigation and also to provide legal advice. The Adjudicator stated;

> *[28] It is settled principle that where a lawyer provides advice other than legal advice, those communications are not caught by privilege.[27] Accordingly, where a lawyer acts only as an investigator and not as a legal adviser, there is no solicitor client privilege.[28] I am also mindful of the comments of the Court of Appeal in College of Physicians of BC v. British Columbia (Information and Privacy Commissioner) regarding investigations conducted by lawyers:*
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> *[32] Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client (see Gower at paras. 36-42)...[29]*
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> *[29] As previously mentioned, I am constrained in my ability to describe the underlying facts because much of the evidence was submitted in camera. However, I am satisfied that PHSA retained the lawyer to provide legal advice and not merely investigate. In the present case, the Terms of Reference that outline the lawyer's retainer are consistent with the Executive Vice-President's evidence that she retained the lawyer to both investigate and provide legal advice. The affidavit evidence of the investigating lawyer further supports the conclusion that her role was that of legal advisor. I note the Terms of Reference explicitly state the lawyer was retained "to provide legal advice and recommendations."[30],[31] I have reviewed the Reports and it is evident that they contain legal advice. Based on the foregoing, I*

conclude the final part of the four-part test is met and both Reports are subject to legal advice privilege.

[46] In *Richmond (City), Re*, 2005 CanLII 48297 (BC IPC), a lawyer was retained to conduct an investigation of an employee. It was determined that the report could be withheld based on solicitor-client privilege due to the lawyer's role being not only to investigate facts but additionally provide legal advice on those facts:

> *[14] The lawyer was retained to conduct an investigation of the City employee's allegations against the City for the purpose of providing the City with the lawyer's factual assessments and legal advice based on those assessments. The report is a communication from the lawyer to the City that provides legal advice formulated on the basis of his assessment of information from City employees.*

[47] In *Whistler (Resort Municipality) (Re)*, 2014 BCIPC 32, a lawyer was retained to investigate a workplace harassment complaint. A request was made for the report the lawyer had produced and it was determined that the report was privileged and could be withheld, again, because the lawyer was retained not only as an investigator but also to provide legal advice. Due to the nature of the retainer, the Adjudicator determined that the entire report was related to the seeking, formulating or giving or legal advice:

> *A clear mandate to provide legal advice*
>
> *[24] Courts have established that the terms under which a client retains a lawyer, while not conclusive, will have a bearing on whether the information the lawyer produces is subject to solicitor-client privilege.[9] In Order F05-35, former Commissioner Loukidelis determined that the entire report prepared by a lawyer retained by the City of Richmond to investigate an employee's allegation of wrongdoing was subject to solicitor-client privilege. In that case, it was central to the Commissioner's finding that the terms of reference between the City and the lawyer it retained stipulated that the report was to include legal advice and was to be confidential between the lawyer and the City.[10] In that case, as here, the lawyer gathered and assessed factual information in order to write the report and to render legal advice as set out in the terms of reference. This is in contrast to Order F10-18, where former Acting Commissioner Fraser determined that there was no evidence that the public body intended to establish a solicitor-client relationship.[11] It is also in contrast to Slansky v. Canada (Attorney General),[12] where the terms of reference between the Canadian Judicial Council and the lawyer it retained did not include an express provision to provide the Council with legal advice.*

> *[25] In the present case, based on the in camera materials, I am satisfied that Whistler retained the Investigating Lawyer to provide a privileged and confidential report that included legal advice.[13] Although Whistler may not have told the complainant that the investigator it hired was a lawyer, it is not necessary to the existence of the solicitor-client relationship between the Investigating Lawyer and Whistler that she disclosed this to the applicant. In any event, it is clear from the parties' submissions that the applicant knew the investigator was a lawyer at the time she interviewed him.[14]*
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> *Dual role of Investigating Lawyer*
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> *[26] Previous decisions have determined that if a client hires a lawyer to do the work of an investigator only, then records produced in those circumstances are not privileged.[15] However, when a client hires a lawyer to investigate and provide legal advice, the records are privileged so long as they meet the other parts of the test for either legal advice privilege or litigation privilege. This includes the legal advice a lawyer provides as well as the information the lawyer uses to prepare the advice. In College of Physicians, the Court held that "[l]awyers must often undertake investigative work in order to give accurate legal advice. In this respect, investigation is integral to the lawyer's function".[16] Once Whistler made the decision that the applicant's complaint should be investigated, it had several choices about how to proceed. It did not have to hire a lawyer. What the evidence clearly shows is that Whistler decided to hire a lawyer to investigate and provide legal advice. My review of the Investigation Report confirms that this is exactly what the Investigating Lawyer did. These facts lead me to conclude that the entire Investigation Report is privileged.*

[48] The Alberta Court of Appeal in *Alberta v. Suncor Inc.*, 2017 ABCA 221 also articulates that one must consider the purpose behind the creation of a record or communication, and the involvement of legal counsel does not automatically lend a record or communication the protection of solicitor-client privilege:

> *[34] 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."*

[49] It is clear from the above cases that whether a lawyer has been instructed to provide legal advice with respect to a workplace investigation report helps determine if that report is solicitor-client privileged. In this case, the Investigator was not asked to provide legal advice and did not provide legal advice.

[50] Some other decisions from this jurisdiction include Report A-2020-013, which concluded that a workplace investigation could be disclosed to the complainant who was a party to the workplace investigation. The facts of that case are similar to the present matter as the City of Mount Pearl's legal counsel arranged for another lawyer to conduct a workplace investigation. Section 30 was not claimed by the City of Mount Pearl and this Office found that the City had custody or control of records related to the workplace investigation and recommended their disclosure. As well, in *Corner Brook (City) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2020 NLSC 37, the Supreme Court of Newfoundland and Labrador touched on the parameters of a workplace investigation as well as litigation privilege and solicitor-client privilege. However, in this instance, the Court determined that the investigation was not a workplace investigation:

> *[87] Overall, I am satisfied that the City Solicitor's investigation and report to City Council was not a workplace investigation. It was first and foremost a rigorous assessment of the liabilities that the City might have to Mr. Jesseau because of his threatened legal actions.*

[51] In the present case, the Report was prepared by a lawyer retained by the Town's legal counsel. That lawyer, the Investigator, was, based on the terms of their engagement as well as the content of the Report itself, not acting in their capacity as a lawyer. While the decisions cited above have found that workplace investigations were covered by solicitor-client privilege, it did so on the basis that the lawyer conducting the investigation was also providing legal advice. That additional role is absent in the preset matter. In *Eastern Regional Health Authority*, above, the Supreme Court of Newfoundland and Labrador clearly acknowledged that lawyers may perform duties on behalf of a public body other than providing legal advice.

[52] Section 33 imposes on a public body a positive obligation to disclose all relevant information to a party to a workplace investigation. This obligation has only been recently

tempered by the Supreme Court of Newfoundland and Labrador in *Oleynik* when a workplace investigation contains information that is subject to solicitor-client privilege. Here, solicitor-client privilege has been claimed over the entire workplace investigation. I am not convinced that solicitor-client privilege has been determined to be so broad as to apply to the Report simply because the Investigator who prepared the Report is a lawyer or because the initial engagement of the Investigator was through the Town's legal counsel. Based on the above, the workplace investigation is not solicitor-client privileged and the Report should be disclosed.

[53] The issue of access to records of a workplace investigation is an evolving area of jurisprudence in this jurisdiction, particularly within the context of *ATIPPA, 2015*. In addition to recent matters relating to Memorial University, the City of Corner Brook, and the City of Mount Pearl, there is currently a matter before the Newfoundland and Labrador Supreme Court in which an access to information applicant sought access to the report of an investigator engaged by the Commissioner for Legislative Standards that was carried out by outside legal counsel into the conduct of an elected Member of the House of Assembly. One of the grounds upon which access to the responsive records was refused was section 30 (legal advice privilege). The access to information applicant appealed the refusal of access, arguing among other things that the individual who carried out the investigation was engaged specifically to conduct an investigation, rather than to provide legal advice. That matter was heard on July 7, 2020 and a decision was pending at the time of issuance of this Report.

Sections 37 and 40

[54] As noted above, the Town has claimed other exceptions, including section 37 (disclosure harmful to individual or public safety), section 40 (disclosure harmful to personal privacy) and litigation privilege under section 30, in addition to solicitor-client privilege. From evidence presented to us in the course of our investigation, it is apparent that any litigation, or apprehended litigation, has been settled. Litigation privilege expires on the conclusion of the matter and is therefore no longer applicable. With regard to sections 37 and 40, the language of section 33 is clear that it imposes on a public body a positive obligation to disclose information. Section 30 is the only exception to this disclosure that has been identified to date. The potential for information which may be harmful to individual or public safety to be

disclosed pursuant to section 33 is a concern for my Office and the Office of the Information and Privacy Commissioner has made representations to this effect to the recent *Access to information and Protection of Privacy, 2015* Statutory Review Committee; however we must interpret the law as it presently stands. This said, it is notable that the Investigator did, at the requests of certain witnesses, effectively protect the identities of people who were sufficiently concerned about reprisal to provide anonymous statements. Other witnesses who did not insist on making anonymous statements also expressed fear of reprisal, and the Town did ask the Investigator to take steps to shield the identities of these individuals by removing names. Finally, the Town did not provide evidence that, as required by section 37, threat of harm would be "reasonably expected" and thus would not have met the burden of proof, even if this section applied.

[55] The Communications surrounding the Report, including discussions between the Town and its counsel regarding an earlier draft of the Report, meet the test for solicitor-client privilege and can be withheld from the Complainant.

[56] One further record that the Town submitted as subject to solicitor-client privilege is its Policy & Procedure Manual. In the course of seeking advice from counsel, the Town provided the entire manual – 125 pages documenting employee benefits, administration, financial matters, the operations of the Town's fire department, and garbage collection, among other matters involved in running the Town. The Town submits that this document was forwarded to counsel in order to allow counsel to provide advice and that it was sent under the broad protection of privilege. It is possible to accept that if the Town sent a particular policy to its counsel to comment on and provide advice on, then disclosure of that specific policy would disclose the nature of the advice being sought. Indeed, there are communications where excerpts are sent to counsel for specific advice. However, we cannot accept that the disclosure of the entire manual would risk disclosing the specific nature of the advice. Where advice was sought on specific policies, then that does qualify for protection under solicitor-client privilege.

[57] The Town has provided a list of pages for which it takes no position and has not cited any exceptions to access. Much of these records consist of the Complainant's own personal

information; communication between the Town or its counsel and the Complainant's lawyer; questions put to the Complainant during the investigation by the Investigator; as well as the Complainant's answers.

VI RECOMMENDATIONS

[58] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town of Lewisporte:

1. Release pages 207, 216, 217, 221, 227, 228, 240-262, 309, 310, 311, 312, 313, 315, 372, 373, 375;
2. Release the Town Policy & Procedure Manual (pages 70 to 194 of the responsive records), and
3. Release the Workplace Investigation Report (pages 1 to 44 of the responsive records); and
4. Continue to withhold the Communications.

[59] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town of Lewisporte 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.

[60] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of June 2020.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador