



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-037

September 21, 2021

Department of Transportation and Infrastructure

Summary:

The Complainant made a request to the Department of Transportation and Infrastructure for information shared with the Transportation Safety Board of Canada. The Department withheld the records, claiming section 31 (disclosure harmful to law enforcement). The Complainant filed a complaint with our Office. During our investigation, the Department refused to provide our Office with some records for which the Department claimed section 30 (legal advice), and also refused to provide a sufficient description of the records. The Commissioner found that the Department was entitled to withhold some records under section 31, but that the Department had not met the statutory burden of proof for establishing that section 30 applied, and therefore recommended that those records be disclosed.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 2, 30, and 31.

[Canadian Transportation Accident Investigation and Safety Board Act](#), SC 1989, c.3, sections 7, and 35.

Authorities Relied On:

NL OIPC Reports [A-2021-025](#), [A-2021-007](#), [A-2019-019](#).

I BACKGROUND

[1] An employee disciplined by the Department of Transportation and Infrastructure (the “Department”) made a request to the Department under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or the “Act”) for:

... a copy of the correspondence and copies of all information shared externally including the positions and details of the individuals contacted and shared the information.

[2] The Department refused access to the records, claiming section 31 of *ATIPPA, 2015* (disclosure harmful to law enforcement), in particular paragraphs (1)(a) (interference or harm to a law enforcement matter), (1)(d) (revealing the identity of a confidential source), and (1)(p) (harm to the conduct of existing or imminent legal proceedings). During the informal resolution process, the Department dropped its reliance on paragraph (1)(d).

[3] The Complainant filed a complaint with our Office. In its response to the complaint, the Department additionally notified our Office that several pages of records, consisting of email correspondence, had been withheld from our Office, claiming section 30 (legal advice) as well as section 31. The Department had not claimed section 30 in its final response to the Complainant.

[4] During the course of our investigation, the Department agreed to provide our Office with partially redacted copies of those pages withheld under section 30, disclosing the identities of the senders and recipients, but continuing to withhold the remainder of the contents.

[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

[6] The Department takes the position that the information referred to the Transportation Safety Board of Canada (the “TSB”) constitutes a “law enforcement matter” within the

meaning of section 2(n) of the Act; that the disclosure of the information could reasonably be expected to interfere with or harm that law enforcement matter under section 31(1)(a); and also that there are “existing or imminent legal proceedings” under section 31(1)(p) of *ATIPPA, 2015*.

[7] The Department also takes the position that *ATIPPA, 2015*, together with the Supreme Court of Canada’s decision in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, does not support mandatory production by a public body to this Office of records for which solicitor-client privilege has been claimed.

[8] Finally, the Department takes the position that the information redacted from the record on the basis of section 30 (and not provided to our Office) is also withheld on the basis of section 31.

III COMPLAINANT’S POSITION

[9] The Complainant takes the position, citing sections of the *Canadian Transportation Accident Investigation and Safety Board Act*, (the “CTAISB Act”) that the TSB is not a law enforcement agency, and so section 31 does not apply to the withheld information.

IV ISSUES

[10] There are two issues to be decided in this Report:

- (a) Whether section 31 applies to the responsive records, and
- (b) Whether section 30 applies to some of the responsive records.

V DECISION

Section 31

[11] The relevant provisions of section 31 of the *ATIPPA, 2015* are:

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

(a) *interfere with or harm a law enforcement matter;*

...

(p) *harm the conduct of existing or imminent legal proceedings.*

[12] The employee was disciplined for conduct that allegedly violated the *CTAISB Act* which is overseen by the TSB. The Department notified the TSB, and forwarded copies of the responsive records to it.

[13] The Complainant argues that the TSB is not a “law enforcement agency” and therefore section 31 cannot apply. However, that is not precisely the issue to be decided. Rather, the issue is whether the “matter” referred by the Department to the TSB is a “law enforcement matter” within the meaning of section 31(1)(a) or, alternatively, whether there are existing or imminent legal proceedings as referred to in section 31(1)(p).

[14] Law enforcement is defined in section 2 of *ATIPPA, 2015* as follows:

2. (n) *"law enforcement" means*

(i) *policing, including criminal intelligence operations, or*

(ii) *investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment;*

[15] Although the *CTAISB Act* states, in section 7, that the TSB does not assign civil or criminal liability, and its findings are not binding in any legal proceeding, it does contain provisions creating various indictable or summary conviction offences. It also contains, in section 35(2), a broad statement that “*Every person who contravenes a provision of this Act or the regulations for which no punishment is specified is guilty of an offence punishable on summary conviction.*”

[16] We are satisfied that the conduct for which the employee was disciplined would be, if proven, a contravention of the *CTAISB Act*. We are also satisfied that the Department was obliged, under the *CTAISB Act*, to report the alleged contravention to the TSB, and that the TSB commenced an investigation as a result. Because that investigation “*could lead to a*

penalty or sanction being imposed under the enactment” within the meaning of section 2(n) and was ongoing at the time of the access request, we are satisfied that the disclosure of the records could reasonably be expected to interfere with or harm a law enforcement matter, within the meaning of section 31(1)(a). Therefore we will recommend that the Department continue to withhold those records from the Complainant.

[17] Having reached the above conclusion it is not necessary to deal with the application of section 31(1)(p).

[18] The above conclusion of course applies only to those responsive records which have been provided by the Department to our Office and which we have therefore had an opportunity to review. As noted earlier, the Department has refused to provide those records to which it also claims that section 30 applies. It is therefore necessary to assess the impact of that refusal.

Section 30

[19] Our Office has dealt with this issue in a number of previous Reports. In Report A-2021-025 our position on the issue, and the alternative means by which public bodies may attempt to meet the burden of proof, was summarized as follows:

[34] As we have stated in several Reports, our Office strongly disagrees with that interpretation of the Act. Our position is that ATIPPA, 2015 gives this Office the statutory authority to compel production of all relevant records for review, including those for which solicitor-client privilege is claimed. If a public body does not meet the statutory burden of proving that the exception applies, that will result in a recommendation to disclose the information (See Reports A-2021- 007, A-2019-019).

[35] However, this issue is currently before the courts as a result of an application by another public body, and will be decided in due course. Meanwhile, our Office has taken the position that in some cases, if the public body provides a sufficiently detailed description of the records, it may be an alternative basis on which our Office can determine whether or not the section 30 exception has been properly claimed.

[36] In the present case, while Memorial has chosen not to provide to our Office the redacted information that it claims is legal advice, it has however provided, without redaction, a portion of each record that identifies the sender and recipient, the date, and other relevant information. In its submissions, Memorial has also provided to our Office a detailed description

of the redacted portion of each record and an explanation of why Memorial believes the redacted information falls under section 30. On reviewing the redacted records, the descriptions, and the submissions, we have concluded that Memorial has in this case met the burden of proof.

[20] In the present case, our Office requested that, as an alternative, the Department provide the header and signature block information for each email, to identify the sender and recipient; the subject line, to show that the communications were about legal advice; a description of the content confirming that the entire redacted portion was indeed the seeking or giving of legal advice; and an explanation of how the exception applies, particularly if it was not clear from the first three items. While this approach would not necessarily be sufficient for the Department to discharge its burden of proof, and further steps such as an affidavit or ultimately production of the records might be required, the provision of this level of information would at least be a first step.

[21] Following this request, the Department provided our Office with the names and titles of the senders and recipients of the email correspondence which had been withheld, but no more. Although some of the individuals are lawyers, this was not enough information to support a conclusion that the contents are privileged. The test for solicitor-client privilege has three parts: the communication must be between a solicitor and the client; the contents must be requesting or providing legal advice; and it must be intended to be confidential. All three parts must be satisfied.

[22] The information before us is not enough to support a conclusion that section 30 applies to the redacted information. Therefore, the Department has not met the burden of proof set out in section 43 of the Act to establish that the exception applies. Consequently, we have no recourse but to recommend that the Department disclose to the Complainant the records for which section 30 is claimed to apply.

[23] We must note that although the Department states that section 31 also applies to the records withheld from our Office, without being able to review those records we likewise cannot determine whether that exception may also apply. Therefore the Department has failed to meet the burden of proof for that exception as well.

[24] In normal circumstances our Office would also discuss, for completeness, whether a public body's failure to claim a discretionary exception (such as section 30) in its final response to the applicant should preclude it from claiming that exception in the complaint stage. Under the circumstances it would seem superfluous to do so in the present case.


VI RECOMMENDATIONS

[25] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Transportation and Infrastructure:

- a. disclose to the Complainant all of the information withheld from the Complainant and from our Office, which the Department has withheld under sections 30 and 31 of the *Act*, and
- b. continue to withhold from the Complainant all of the information withheld from the Complainant solely under section 31 of the *Act*, and which was provided to our Office for review.

[26] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Transportation and Infrastructure 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.

[27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of September 2021.


Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador