



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-040

October 12, 2021

Treasury Board Secretariat

Summary:

The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) to the Treasury Board Secretariat for records related to the merger of the Newfoundland and Labrador Centre for Health Information into the Department of Health and Community Services. The Treasury Board withheld the records on the basis of section 29 (policy advice or recommendations), section 30 (legal advice), and section 38 (disclosure harmful to labour relations interests of public body as employer). The Complainant asked that the redactions be reviewed. The Commissioner noted that the Treasury Board had applied the exceptions to the entirety of the records; however, the exceptions claimed should have been applied to the information contained in the records on a line-by-line basis. The Commissioner concluded that while it appeared that some of the information could be withheld based on the exceptions, the Treasury Board will need to conduct a line-by-line review and apply the exceptions as intended by *ATIPPA, 2015*.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 9, 29, 30, and 38.

Authorities Relied On:

NL OIPC Reports [A-2017-024](#), [A-2021-018](#), and [A-2021-033](#).

I BACKGROUND

- [1] The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) to the Treasury Board Secretariat (“*TBS*”) as follows:

All records related to the merger of the Newfoundland and Labrador Centre for Health Information (NLCHI) into Health and Community Services.

- [2] *TBS* responded to the Complainant advising that the records had been refused in accordance with sections 29(1)(a), 30(1)(a), and 38(1)(a) of *ATIPPA, 2015*.
- [3] The Complainant was not satisfied with *TBS*’s response and filed a complaint with this Office.
- [4] 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

- [5] *TBS* takes the position that the exceptions claimed were properly applied.
- [6] *TBS* submits that section 29 of *ATIPPA, 2015* applies to the entirety of the responsive records as they are drafts of a final document, and that they contain discussions regarding policy analysis.
- [7] *TBS* also submits that the entirety of the records are subject to solicitor-client privilege under section 30 of *ATIPPA, 2015* as these draft records were shared with legal counsel for the purpose of seeking legal advice.
- [8] Finally, regarding section 38 of *ATIPPA, 2015*, *TBS* states that the responsive records are related to the employment of unionized staff and have been developed in confidence. Furthermore, *TBS* explained that the analysis of the collective bargaining process and union

discussions is always treated as confidential information and that while the final decisions will be made public, the analysis and considerations in making the decisions are not released.

[9] TBS considered the public interest override and did not believe it applied. TBS argued that full and frank discussions are necessary for government functionality and that protecting communications of a public body and its solicitor as well as communications of a public body and unions representing its employees is also necessary.

[10] TBS does not believe releasing the information would be helpful to the public and that the risk of harm resulting from releasing the records is also high. TBS advises that disclosing the deliberations before they are finalized could lead to unnecessary confusion, concerns about future employment, and incorrect speculation by the public.

[11] TBS advises that upon completion of analysis and discussions, the final decision regarding any merger within government will be available to the public.

III COMPLAINANT'S POSITION

[12] The Complainant felt that the access request was refused on very broad application of a few sections of *ATIPPA, 2015* and therefore asked our Office to review the redactions to ensure that they complied with the Act.

IV DECISION

[13] The relevant portions of section 29 of *ATIPPA, 2015* read 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;

...

(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

[14] As discussed in Report A-2021-033 at paragraph 9:

This exception is intended to provide public servants with a “safe space” in which to hold discussions or debates around courses of action and to provide advice or recommendations about policy or procedural matters, without being concerned that their views and opinions will be made public. The extensive jurisprudence on this topic, including court decisions, confirms that the exception covers drafts of documents and the discussions around them. (See John Doe v. Ontario (Finance)).

[15] TBS has taken the position that the entirety of the responsive records fall under section 29 and all information can be withheld. As noted in the text of the exception, quoted above, section 29 applies to “information”. Other exceptions under *ATIPPA, 2015* reference “records” and allow an entire document to be withheld by virtue of containing qualifying information (see, for examples, section 27 (cabinet confidences), section 41 (disclosure of House of Assembly service and statutory office records), and the non-application of the Act to certain records in section 5). This distinction between these information-level and record-level exceptions to access is relevant: the legislature clearly intended for certain exceptions to be applied differently, and where an exception applies to “information”, the public body is required to conduct a line-by-line review of the record, only severing that information which qualifies for the exception. Only in limited circumstances will it be accepted that an information-level exception allows a public body to withhold a record in its entirety (see, for example, A-2021-018).

[16] Similarly, section 30 (legal advice), is also an information-level exception:

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;

[17] However, it has also been applied to withhold all records on the basis that they had been shared with legal counsel to seek advice and comments.

[18] Finally, section 38 is also an information-level exception which allows a public body to withhold information that would reveal confidential labour relations information or harm the competitive or negotiating position of the public body as an employer:

38. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or

(b) labour relations information the disclosure of which could reasonably be expected to

(i) harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer,

(ii) result in significant financial loss or gain to the public body as an employer, or

(iii) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.

(2) Subsection (1) does not apply where the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Similar to the above exceptions, section 38 was claimed for the entirety of the responsive records.

[19] Upon review of the withheld records, we find that they contain information to which section 29 does not apply, such as factual information which is not analysis or discussion. One record, labelled "Appendix A", contains a list of bargaining units associated with various organizations along with the status of their collective agreements. This information is available online through the Department of Immigration, Skills and Labour. In addition to some of the information contained in Appendix A, there are a number of emails setting up meetings and advising that revisions of a document were made. This, again, is not an analysis or discussion with respect to policy advice. The advice public servants provide would fall under section 29,

but not the factual information underlying that advice or discussions or the various emails regarding scheduling meetings or other administrative matters.

[20] At the same time, there does appear to be information to which one or more exceptions do apply. For example, a memo from legal counsel which provides comments and legal considerations regarding labour and employment matters could be properly claimed under section 30(1)(a).

[21] As it is apparent that TBS has applied these exceptions to access on a record level, without conducting an appropriate line-by-line analysis, it is difficult to provide a further recommendation on what information should be released and what can be withheld. Rather, it would be most appropriate for TBS to conduct a further review of the responsive records, applying sections 29, 30 and 38 only to information within the records to which they apply, and then provide the Complainant with a new response to his access to information request. In doing so, TBS must also consider whether any information that would otherwise qualify for an exception must be released in accordance with the public interest test in section 9.

V RECOMMENDATIONS

[22] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Treasury Board Secretariat re-review the responsive records for the application of the claimed exceptions, section 29, 30 and 38, and provide a new response and records to the Complainant with appropriate redactions within 10 business days.

[23] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Treasury Board Secretariat 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 12th day of October 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador