



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-049

December 21, 2021

Treasury Board Secretariat

Summary:

The Complainant submitted an access request to the Treasury Board Secretariat for records related to his workplace investigation, per section 33 of the *Access to Information and Protection of Privacy Act, 2015*. The Public Body provided the Complainant with a number of responsive records, withholding some information pursuant to sections 30(1)(a) (legal advice), 31(1)(a) and (l) (disclosure harmful to law enforcement), and 40(1) (disclosure harmful to personal privacy). The Complainant objected to some of these redactions. The Commissioner recommended that the Treasury Board Secretariat release some of the information withheld under sections 30(1)(a) and 31(1)(l), and that the Treasury Board Secretariat continue to withhold information under section 31(1)(a).

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 30, 31(1), 33(3), 40(1), and 43(1).

[Management of Information Act](#), SNL 2005, c M-1.01, section 6.

Authorities Relied On:

[Oleynik v Memorial University of Newfoundland and Labrador, 2021 NLSC 51 \(CanLII\)](#).

[Newfoundland and Labrador \(Information and Privacy Commissioner\) v Eastern Regional Integrated Health Authority, 2015 CanLII 83056 \(NL SC\)](#).

NL OIPC Reports [A-2020-001](#), [A-2020-020](#), [A-2020-024](#), [A-2021-025](#), [A-2021-040](#), and [A-2021-046](#).

OIPC Guidance: [Section 30 – Legal Advice Guidance](#).

[College of the North Atlantic \(Re\), 2021 NLSC 120 \(CanLII\)](#).

OIPC Guidance: [Section 33 – Information from a Workplace Investigation](#).

I BACKGROUND

- [1] The Complainant made an access request to the Treasury Board Secretariat (“TBS”) for:

All information created and gathered for the purpose of a workplace investigation formally commencing with a letter of notification issued on [specific date] and concluding with a letter of termination issued on [specific date]. This is to include but not limited to all information, all correspondence both internal and external, investigators notes, related emails, and any other supporting documentation used in determining the outcome.

- [2] The Complainant was the subject (or respondent) of the workplace investigation in question. Accordingly, section 33(3) (information from a workplace investigation) of the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”) applied to this request:

33(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation [all relevant information created or gathered for the purpose of a workplace investigation].

- [3] TBS located a large number of records related to this workplace investigation, and divided them into three parts: Part 1 (Emails and Documents), Part 2 (Investigation Notes and Findings), and Part 3 (Browser and ... Access Logs). TBS provided some, but not all, of the requested records to the Complainant. TBS redacted information under sections 30(1)(a) (legal advice), 31(1)(a) and (l) (disclosure harmful to law enforcement), and 40(1) (disclosure harmful to personal privacy).

- [4] Through informal resolution efforts, the Parties were able to resolve all issues relating to the redactions under section 40(1), most redactions in Part 3 of the responsive records to which TBS applied redactions under sections 31(1)(l) and 40(1), and most of the issues relating to section 31(1)(l).

- [5] As informal resolution was unsuccessful with regard to TBS’s redactions under sections 30(1)(a), 31(1)(a), and some redactions under section 31(1)(l), the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

Section 30

[6] TBS has made a number of redactions under section 30(1)(a):

*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*

...

[7] TBS referenced the Supreme Court of Newfoundland and Labrador's decision in *Oleynik v Memorial University of Newfoundland and Labrador*. In that decision, Justice Noel found that section 33(3) of *ATIPPA, 2015* does not override solicitor-client privilege.

[8] TBS also correctly stated the three-part test for solicitor-client privilege as the Supreme Court of Newfoundland and Labrador's decision held in *Newfoundland and Labrador (Information and Privacy Commissioner) v Eastern Regional Integrated Health Authority*:

4. The necessary elements of a valid claim to privilege:

- 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 (para 24).*

[9] TBS claims that they have met all three parts of the test, stating:

...there was a great deal of correspondence directly with the departmental Solicitor at the time ([named individual]) and many comments throughout the records stating questions for the Solicitor for when the document was provided for their review. These questions are also seeking legal and are therefore privileged information. Additionally, full page redactions of the emails with the Solicitor were removed as indicated by the response letter. Furthermore, pages 503-505 contain meeting notes from a meeting held with further legal counsel where legal advice was clearly sought and given.

Section 31(1)(a)

[10] TBS redacted some information under section 31(1)(a), which allows a public body to withhold information where the disclosure of that information could reasonably be expected to interfere with or harm a law enforcement matter. It says that releasing this information, “*would have potential to cause interference with the investigation and undermine the authority of ... law enforcement*”. TBS has also confirmed that the investigation is ongoing.

Section 31(1)(l)

[11] TBS made a number of redactions under section 31(1)(l), which allows a public body to withhold information where the disclosure of that information could reasonably be expected to reveal arrangements for the security of a property or system. Only some of these redactions are still at issue. TBS said that it made these redactions after consulting, “*with subject matter experts in this field (OCIO IT security professionals)*”. TBS stated that:

The redacted information contains video conferencing information internal to government, links to internal web based platforms that are not publically available, IP addresses, internal file paths, and program names.

Due to the nature of the records, OCIO recommended that details regarding vendor / technology names and/or versions, details about IT Infrastructure (i.e., file paths, IP addresses, directory structures), network addresses or host/server name and credentials (i.e., user ID's) be redacted since if disclosed, will increase unauthorized access attempts.

[12] TBS further referred to section 6 of the *Management of Information Act*, stating that it, “*requires a public body to protect government records. The disclosure of IT security related information would be contrary to the requirement to protect government records*”.

III COMPLAINANT'S POSITION

Section 30

[13] Not having access to the information in question, the Complainant requested that the Commissioner review the information to determine whether or not it fell under true solicitor-client privilege. The Complainant further stated that, “*There are over 51 full pages redacted per S. 30(1)(a) ... I find it very difficult to accept that over 51 pages of information relates to legal opinion regarding my information as requested*”.

Section 31(1)(a)

[14] The Complainant, again not having access to this particular information, has asked the Commissioner to review the information and determine whether it “[satisfies] the test of a true law enforcement matter vs just the [opinion] of the author”. The Complainant further suggests that, “in looking at the federal guidance material an injury test should be included. As the involved party and not a public request additional disclosure rights need to be considered including an injury test”.

Section 31(1)(l)

[15] The Complainant does not believe that section 31(1)(l) applies in every instance that TBS claims this exception. He believes that some of the information is public information and does not properly fall under section 31(1)(l). The Complainant states:

Some of the redacted cases refer to a name or email address. If that is my name or email address under section 40 it does not constitute a S 31(1) (l) refusal. This has now been identified as the case in a few instances after additional review.

Web site address’s [sic] and applications are public domain accessible by anyone and should not fall under this clause.

Page 4 of 342 in Part 2 Blocks out web based applications. The revealing of such information would not constitute “reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system...”

IV ISSUES

[16] This Report will address the following issues:

- (i) whether TBS properly applied section 30(1)(a);
- (ii) whether TBS properly applied section 31(1)(a); and
- (iii) whether TBS properly applied section 31(1)(l).

V DECISION

Section 30

[17] As TBS noted, per the decision of *Oleynik v Memorial University of Newfoundland and Labrador*, section 33(3) does not override the section 30 exception. Accordingly, TBS may redact information that properly falls under the legal advice exception.

[18] Upon review of the information, some of TBS's redactions under section 30(1)(a) meet the test for solicitor-client privilege, while others do not.

[19] There are a number of categories of information to which TBS has applied section 30(1): communications with counsel, notes throughout the investigative documents, references to claimed legal advice, drafts, attachment, and records relating to counsel for an entirely different entity.

Communications with Counsel

[20] TBS has redacted a number of pages in their entirety under section 30(1)(a). Some of the contents of these pages are entirely covered by solicitor-client privilege.

[21] However, TBS has redacted other pages in their entirety where not all of the contents fall under solicitor-client privilege. For example, while there may be some emails on a page that are to or from a lawyer, some of the emails are between non-lawyers. Section 30(1)(a) does not apply to these emails.

[22] Our Office has reported on information-level redactions as opposed to record-level redactions (see, for example, Reports A-2021-040 and A-2021-046). Specifically, in Report A-2021-040, this Office dealt with another complaint against TBS wherein that public body had not conducted a line-by-line review of records that contained information that fell under section 30(1)(a). We would once again remind TBS that section 30 applies to "information". Only those exceptions under *ATIPPA, 2015* which apply to "records" (such as section 27 (Cabinet confidences)) allow public bodies to withhold an entire document. Accordingly, TBS

must conduct a line-by-line review of the audited version of the records and withhold only the information that falls under section 30(1)(a).

Notes Throughout the Investigative Documents

[23] TBS redacted information under section 30(1)(a) throughout the workplace investigators' documents. The information is notes and questions that the workplace investigators included throughout their disciplinary considerations document. On their face, these notes and questions appear to pose legal questions. It would be logical to believe that the workplace investigators reviewed these documents with legal counsel, at which point they may have asked for legal advice in response to these questions.

[24] However, upon a detailed review of the responsive records, it appears as though the workplace investigators removed these legal questions from the documents *before* they sent these documents to counsel. Accordingly, TBS has not produced any evidence that the workplace investigators ever put these particular legal questions to legal counsel.

[25] Per section 43(1) of *ATIPPA, 2015*, TBS has the burden to prove that it has properly refused access to the Complainant under *ATIPPA, 2015*:

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.

Accordingly, TBS would have had to satisfy this Office that these investigators put this information to a lawyer for the purposes of receiving legal advice. TBS has not done this. They have simply said that, "*all documents sent to [named individual] were for the purpose of seeking legal advice*" but they have not confirmed that a lawyer actually received this information or this question, even after this position was specifically put to them. Therefore we find that they have not properly applied section 30(1)(a) to this information.

References to Claimed Legal Advice

- [26] TBS redacted additional information under section 30(1)(a) throughout various email exchanges between non-lawyers, being the individuals who appeared to conduct the workplace investigation. These redactions occur in Part 1 and in Part 2 of the records.
- [27] None of these emails are communications to or from counsel. However, we acknowledge that the Court stated in the *Eastern Regional Integrated Health Authority* decision that solicitor-client privilege may protect a communication that falls into a “*continuum of communication*” even if the communication itself does not strictly seek or give legal advice.
- [28] We accept that some of the redactions may fall on the continuum of communications relating to a request for legal advice.
- [29] However, in relation to the first redaction on pages 298 and 302 in Part 1, TBS has not provided any indication or confirmation that the investigators in these email exchanges sought legal advice from a lawyer relating to this information. Accordingly, there is no evidence to suggest that it may fall under the category of solicitor-client privilege. At most, this seems to be an open discussion between individuals who are not lawyers, who contemplated seeking legal advice on a particular matter. But there is nothing to show that they acted on this. As we addressed above, TBS has the burden of proof per section 43(1). Since they have not met this burden of proof in this instance, we cannot find that section 30(1)(a) applies.
- [30] The second redaction on pages 298 and 302 of Part 1 does not identify any legal question the investigators may ask of counsel. The information in Part 1 on page 464 (audited version, and page 446 of the redacted version) and in Part 2 on page 511 of the audited version (page 508 of the redacted version) does not contain a request for legal advice. TBS is using an overbroad application of section 30(1)(a) in these instances. Accordingly, TBS cannot exempt this information from disclosure under section 30(1)(a).

Drafts

[31] TBS redacted some draft letters in their entirety under section 30(1)(a), though they released the draft letters in other areas throughout the records.

[32] Only one copy of this draft properly falls under section 30(1)(a), since a lawyer provided amendments to this draft. TBS must release the remaining drafts, as a lawyer did not write or amend the others, and there is nothing within them to indicate any request for legal advice. Further, it is not evident, when viewing the drafts alone, that anyone sent these drafts to a lawyer.

Attachment

[33] TBS redacted an attachment to an email that a lawyer received from the workplace investigators. This attachment contained statements of facts and information relating to the Complainant's workplace investigation and, on its own, it simply forms part of the responsive records of the workplace investigation. TBS has redacted the attachment in its entirety.

[34] The attachment does not seek or give legal advice and, therefore, section 30(1)(a) does not apply to it. Page 3 of our Section 30 Guidance Document explains how this type of attachment is not captured by solicitor-client privilege:

5. In assessing a claim for privilege, a distinction between facts and communication is not helpful. Providing an otherwise non-privileged document to a lawyer in order to obtain legal advice does not cause privilege to attach to the document. A client's internal communication that does not constitute the passing on of confidential legal advice or directly involves the seeking of legal advice will be not privileged. Accordingly, an attachment to an otherwise privileged e-mail may or may not be privileged in and of itself.

The privilege and therefore the exception only applies to the advice itself which may include supporting documents but will not include documents that are attached but are otherwise not related to obtaining legal advice. All three elements of the test must be met in order for the exception to apply. In the example given above, the element of the seeking of advice is the defining characteristic. We sometimes see public bodies treat all communication with lawyers as privileged. This presumption is flawed as it ignores step 2 of the test.

Records Relating to Counsel for an Entirely Different Entity

[35] TBS redacted in their entirety further pages under section 30(1)(a) relating to communications and a meeting with legal counsel for another entity outside of the Government of Newfoundland and Labrador.

[36] This information does not properly fall under section 30(1)(a). The counsel in question was employed to provide legal advice to this outside entity – not to the Government of Newfoundland and Labrador or its employees. Accordingly, the counsel in question was not acting as a solicitor for TBS or any other public body subject to *ATIPPA, 2015*.

[37] Further, they were not revealing information that would fall under solicitor-client or litigation privilege for their own entity. They were more so providing information as to what this separate entity's position on the matter may have been. Accordingly, section 30(2) does not apply here, either:

30(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

[38] TBS seems to have accepted that this information does not properly fall under section 30(1)(a), and have since said that they will apply 31(1)(a) and (p) and continue to redact this information. However, the exceptions under section 31 are discretionary, not mandatory. OIPC generally will not consider redactions under a new, discretionary, exception beyond an early stage in the investigation. It has been a long-standing position of our Office that we will only consider exceptions claimed in a public body's final response or additional exceptions that a public body raises within ten business days of receiving notification of an access complaint, per our Guidelines for Responding to an Access Complaint and Report A-2020-020.

[39] Nevertheless, we have accepted one other redaction under section 31(1)(a), as we outline below, and there is one piece of information in these records that is similar to that other redaction. Accordingly, we shall highlight the one piece of information in these records to redact under section 31(1)(a).

Section 31(1)(a)

[40] The relevant portions of section 31(1)(a) read as follows:

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;

...

[41] As noted above, the Complainant proposes that an injury-based test be adopted regarding section 31, based on federal guidance with respect to the *Access to Information Act*, RSC 1985, c A-1. As this guidance is about different legislation and not applicable to *ATIPPA, 2015*, it would not be appropriate for this Office to apply this guidance in the present matter. We are satisfied that TBS has properly applied section 31(1)(a) to this information. Further, this particular piece of information is not relevant to the workplace investigation. Accordingly, section 33(3) does not override this exception in this instance.

Section 31(1)(l)

[42] Upon review of the redacted information that still remains at issue, we do not find that all the redactions meet the requirements of section 31(1)(l).

[43] There are several instances in Parts 1, 2, and 3 of the records where TBS has redacted a computer file path stating that it is, “*an internal file path to the shared network of [Government Department]*”.

[44] On review of this file path, it appears to reveal the computer’s hard drive path, which is on every computer with a Windows operating system, and not a Government Department’s shared file path. Accordingly, this would not reveal any security arrangements for a public body, and section 31(1)(l) does not apply.

[45] The Complainant has agreed to resolve the remaining redactions under section 31(1)(l) informally.

VI RECOMMENDATIONS

[46] Under the authority of section 47 of *ATIPPA, 2015*, I provide a highlighted copy of the records to the Public Body and recommend that the Treasury Board Secretariat:

- (i) continue to withhold the following information under section 30(1)(a):
 - a. all of the redacted information in Part 1 of the audited records on pages 416, 459, 460, 467, 470, 478, 479, 480, 481, 485, 492, 495, 509, 515; and in Part 2 of the audited records on pages 510 and 515;
 - b. only the portions of the redacted information that we have highlighted in yellow in Part 1 of the audited records on pages 440, 441, 457, 458, 473, 476, 477, 484, 488, 489, 498, 499, 500, 501, 504, 505, 506, and 507;
- (ii) release all other information to the Complainant that the Public Body had previously withheld under section 30(1)(a);
- (iii) continue to withhold the following information under section 31(1)(a):
 - a. all of the redacted information in Part 2 of the audited records on page 510;
 - b. only the portions of the redacted information that we have highlighted in yellow in Part 2 of the audited records on page 504;
- (iv) release the following information to the Complainant that the Public Body had previously withheld under section 31(1)(l):
 - a. all of the redacted information relating to the computer file path in Part 1 of the audited records on page 230; in Part 2 of the audited records on pages 435 and 525; and in Part 3 of the audited records on pages 2, 6, 16, 21, 37, 51, 55, 63, 68, and 83, and 90.

[47] 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.

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



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador