



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2022-010

June 30, 2022

### Department of Justice and Public Safety

#### Summary:

The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* to the Department of Justice and Public Safety for records relating to the Province's mandatory vaccination policy. The Department provided records to the Complainant, but withheld some information claiming sections 27 (cabinet confidences), 29 (policy advice), 30 (legal advice), 34 (disclosure harmful to intergovernmental relations or negotiations), 35 (disclosure harmful to financial or economic interests), and 40 (disclosure harmful to personal privacy). For some information, multiple exceptions to access were applied. During the complaint investigation, the Department refused to provide all information withheld under section 30 (legal advice) to the Commissioner for review, but did otherwise release a small portion of the responsive records to the Commissioner's Office. The Commissioner recommended that the Department continue to withhold some information under sections 27, 29, 34, and 40. However, the Commissioner concluded the Department had not met the burden of proving that section 30 applied, nor had the Department met the burden for any of the sections claimed that overlapped with section 30 information, and the Commissioner recommended that this withheld information be provided to the Complainant. The Commissioner confirmed that due to a recent court decision, his Office's inability to compel records under section 97(3) that are claimed as solicitor-client privilege has led to significant gaps in his independent oversight capability.

#### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 9, 27(1)(h), 27(1)(i), 27(2)(a),

29(1)(a), 30(1)(a), 30(1)(b), 34(1)(a)(i), 34(1)(b), 35(1)(d), 40(1), 43(1), 97(3) and 100(2).

**Authorities Relied On:** NL OIPC Report [A-2021-033](#).

NL OIPC Guidance Documents: [Section 9](#), [Section 29](#), [Section 30](#).

[\*Alberta \(Information and Privacy Commissioner\) v. University of Calgary\*](#), 2016 SCC 53 (CanLII);  
*Corner Brook Pulp & Paper Ltd. v. Geocon*, 2000 CarswellNfld. 403 (S.C.T.D.);  
[Gordon v. Sexton, 2007 NLTD 216](#);  
*Information and Privacy Commissioner (Newfoundland and Labrador) v. Newfoundland and Labrador (Environment and Conservation)*, 2014 NLTD(G) 90;  
[Mastropietro v. Newfoundland and Labrador \(Education\)](#), 2016 NLTD(G) 156;  
[Newfoundland and Labrador \(Justice and Public Safety\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#), 2022 NLSC 59 (CanLII);  
[Pomerleau Inc v Newfoundland and Labrador \(Transportation and Works\)](#) 2012 CanLII 47470 (NLSC);  
[Quinn v. Federal Business Bank \(1997\)](#), 1997 CanLII 16060 (NL SC), 151 Nfld. & P.E.I.R. 212 (N.L.S.C.(T.D.));  
[University of Saskatchewan v Saskatchewan \(Information and Privacy Commissioner\)](#), 2018 SKCA 34.

## I BACKGROUND

- [1] The Complainant made two multi-faceted access to information requests to the Department of Justice and Public Safety (“JPS”) for information related to the Province’s mandatory vaccination policy.
- [2] JPS located 518 pages of records responsive to the Complainant’s access requests. Of these responsive records, JPS provided 22 pages of records to the Complainant.
- [3] JPS redacted information pursuant to sections 27(1) and (2) (cabinet confidences), 29(1) (policy advice), 30(1) (legal advice), 34(1) (disclosure harmful to intergovernmental relations

or negotiations), 35(1) (disclosure harmful to financial or economic interests) and 40(1) (disclosure harmful to personal privacy).

- [4] Our Office notified JPS of the complaint and requested that JPS provide our Office with a copy of all responsive records for our review. In response, JPS provided our Office with 33 pages of responsive records for review, withholding the remaining 485 pages, indicating that they contained information falling within section 30(1) (legal advice).
- [5] During informal resolution efforts, JPS agreed to release some information to the Complainant that had previously been withheld under section 29(1)(a).
- [6] While reviewing the records that had been provided by JPS, our Office found evidence that JPS had incorrectly applied section 30(1) (legal advice) to information that did not contain legal advice. Given this error, it was therefore necessary for our Office to review the entire set of records. Further, the Complainant had asserted the application of section 9 (public interest) and our Office advised JPS that it was also necessary to review the records in order to assess the public interest in the withheld information.
- [7] JPS did not release any further records to our Office for review. JPS also confirmed that it would not release any additional information to the Complainant and the Complainant was not satisfied to resolve the complaint.
- [8] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *Access to Information and Protection of Privacy Act, 2015*, SNL2015, c. A-1.2 (“*ATIPPA, 2015*”).

## II PUBLIC BODY’S POSITION

- [9] JPS withheld the majority of records pursuant to section 30(1). JPS stated that their role in the vaccine mandate program was primarily to provide legal advice to the Department of Health and Community Services.

### III COMPLAINANT'S POSITION

[10] The Complainant raised a public interest claim in their submissions, asserting that it is in the public interest to release the information requested. The Complainant does not believe that the government should be permitted to deny the requested information on the basis of exceptions to access, including solicitor-client privilege, and they do not believe that the exception claims should be allowed to shield the government from public scrutiny and accountability.

### IV ISSUES

[11] The following are the issues in this matter:

- a) Did JPS apply the exceptions to access properly?
- b) Does section 9 apply?

### V DECISION

#### *Overlapping Exception Claims within Non-Viewable Records*

[12] In addition to claiming section 30, JPS has also applied sections 27, 29, 34, 35, and 40 to the same information. JPS is primarily relying upon section 30 to withhold these records. Without viewing the withheld records, there is no ability to properly assess any of the overlapping exceptions that have been claimed.

[13] While the Supreme Court of Newfoundland and Labrador has currently restricted our capacity to compel the production of records over which solicitor-client privilege has been claimed, no such restriction applies to any other exception to access under *ATIPPA, 2015*. We cannot find that a public body has met the burden of proof on an exception other than section 30 without full production of the records in question.

[14] Given the above, JPS' evidentiary burden has not been met for the additional exceptions that overlap with its application of section 30. Therefore, subject to the applicability of section 30 discussed herein below, I am otherwise recommending release of these records.

***Section 27 (Cabinet Confidences)***

[15] JPS withheld approximately 100 pages of records pursuant to section 27, particularly s.27(1)(h) and s.27(2)(a) which state:

*27.(1) In this section, "cabinet record" means...*

*(h) a record created during the process of developing or preparing a submission for the Cabinet;*

*(2) The head of a public body shall refuse to disclose to an applicant  
(a) cabinet record;*

[16] JPS provided a statement directly from the Executive Council Cabinet Secretariat asserting that the entirety of these records did fall within the scope of section 27 and also that the Clerk of the Executive Council had made a subjective assessment of the public interest in disclosure and were satisfied that the records do not meet the test for disclosure in accordance with subsection 27(3).

[17] Notwithstanding the above-noted statement, I find that JPS' claim of section 27 to those records which we have not seen must fail and, subject to the applicability of section 30, I recommend that those records be released. For those records which were provided for our review, I am satisfied that section 27 does apply and JPS may continue to withhold them.

***Section 29 (policy advice or recommendations)***

[18] Our Office was able to review some of the records to which JPS had applied section 29(1)(a), which states that:

*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;*

[19] 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)).*

[20] During informal resolution efforts, our Office recommended release of two passages severed pursuant to section 29. JPS agreed to release this information to the Complainant.

[21] The remaining information JPS redacted consisted of draft policy language as well as opinions regarding draft policy language. This information clearly falls within the scope of section 29. JPS confirmed that it reviewed whether to use its discretion and determined that applying the exception to withhold the information was appropriate in the circumstances. The information contained within the section 29 redactions was limited and did not meet the public interest override threshold under section 9.

[22] I recommend that that information redacted pursuant to section 29 and reviewed by my Office continue to be withheld and not released. JPS’ claim of section 29 to those records which we have not seen must fail and, subject to the applicability of section 30, I recommend that those records be released.

***Section 34 (disclosure harmful to intergovernmental relations or negotiations)***

[23] JPS also withheld information pursuant to both sections 34(1)(a)(i) and s. 34(1)(b) which state as follows:

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

- (a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*

- (i) *the government of Canada or a province ...*
- (b) *reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*

[24] JPS explained that the information claimed under section 34 related to emails that were with Federal-Provincial-Territorial groups (“FPT groups”), or details in information notes referring to information provided through FPT groups. JPS submitted that correspondence from this group was intended to remain confidential and attachments were provided in confidence. JPS maintains that it was essential for the Government of Newfoundland and Labrador to be included in these groups to ensure it was aware of what was being done across the country in relation to COVID-19, and in assisting with implementing its own policies and mandates. JPS considered its exercise of discretion but decided to withhold information pursuant to section 34.

[25] This information consists of communications between our Province and “the government of Canada or a province” as stated in 34(1)(a)(i). While there is no express request for confidentiality within the reviewed communication, the nature of the contents suggests that confidentiality is implied. I recommend that the information located on page 9 continue to be withheld and not released pursuant to section 34(1)(b). I need not make a determination as to whether there is evidence of harm under section 34(1)(a). JPS’ claim of section 34 to those records which we have not seen must fail and, subject to the applicability of section 30, I recommend that those records be released.

***Section 40 (disclosure harmful to personal privacy)***

[26] JPS also withheld information pursuant to section 40(1), which states:

*40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[27] I recommend that that information redacted pursuant to section 40 and reviewed by my Office continue to be withheld and not released. JPS’ claim of section 40 to those records

which we have not seen must fail and, subject to the applicability of section 30, I recommend that those records be released.

***Section 30(1)(a) (Legal Advice) – Solicitor-Client Privilege***

[28] The majority of records withheld by JPS were withheld pursuant to section 30(1) which states:

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; or*
  - (b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*

[29] JPS claims that the 485 pages of records withheld from our Office, together with all of the fully blacked-out redactions on the 33 pages that were released to our Office, fall under section 30(1)(a). There are also a number of records which JPS claimed overlap with section 30(1)(b) as well.

[30] As noted above, JPS stated that its role in the vaccine mandate program was primarily to provide legal advice. In addition to this, JPS provided our Office with the following assurances in its submissions:

*In OIPC decision A-2016-009, the OIPC outlined the factors to be considered when protecting legal advice:*

*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.*

*JPS completed a line by line review of the responsive records and released information that was not privileged in nature (see records provided for JPS/222/2021). However, in reviewing the remaining information, JPS determined that each of the three elements listed above were met, and therefore fell under the exception for legal advice. While s.30 is a discretionary*



*exception (without a harms test), JPS determined that it was appropriate to use said discretion and not release the records in question.*

*The applicability of section 30 was confirmed by multiple solicitors within the Civil Division, along with the Director. Additionally, the requests were both reviewed by an Assistant Deputy Minister and the Deputy Minister, both of whom are practicing solicitors. Based on the above, it is JPS' opinion that a copy is not required in order for the OIPC to determine whether section 30 has been appropriately applied. Furthermore, a recent court decision has found that public bodies are not legislatively required to disclose records protected by solicitor-client privilege to the Commissioner during an investigation. In Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner), 2022 NLSC 59 (CanLII), Justice MacDonald found that "the Commissioner has no authority to compel disclosure of solicitor-client records".*

[31] It is helpful to review the treatment of solicitor-client privilege within the context of access to information legislation as there have been many Commissioner and court decisions across Canada that have significantly impacted our Office's oversight capacity for information withheld under section 30(1)(a).

[32] Due to the special place that solicitor-client privilege has in our society's legal system, the language used in access to information legislation must be clear and unambiguous to permit a commissioner to compel a public body to produce records that are claimed as solicitor-client privilege (see *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53).

[33] Currently the decision of *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2022 NLSC 59 determined that section 97(3) of *ATIPPA, 2015* does not permit the Commissioner to compel the production of records over which solicitor-client privilege has been claimed. While that decision is under appeal, it is important to note that it did not change or alleviate a public body's burden of proof under *ATIPPA, 2015*. The burden of proof under s. 43(1) is on the public body to demonstrate, on a balance of probabilities, that the records in question, fall within an exception claimed.

[34] In Newfoundland and Labrador, a public body may voluntarily provide solicitor-client records to the Commissioner. The Commissioner is not authorized to release any records and provides only recommendations about whether records, or parts thereof, ought to be released as set out in section 47 of *ATIPPA, 2015*. Further, in providing such records to the Commissioner, the privilege is not breached and wholly preserved in scope and nature pursuant to section 100(2) of *ATTIPA, 2015* which states:

*100. (2) The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner.*

[35] Where a public body refuses to provide records subject to a claim of solicitor-client privilege for the Commissioner's review, and where there is an inability to compel records claimed as solicitor-client privileged, the Commissioner must assess the alternative evidence provided on a case-by-case basis.

[36] Statements that offer nothing more than "trust us" assurances will not be sufficient evidence to ground a claim of solicitor-client privilege and a Commissioner must be able to request information necessary to ground the claim (See *University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 at paragraph 74).

[37] When determining what alternative evidence is necessary to establish records are subject to solicitor-client privilege under access to information legislation, recently some courts have looked to the civil litigation context within the province the exception is claimed (see *Alberta (Information and Privacy Commissioner) v. University of Calgary*, at paragraph 70; and *University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 at paragraph 75).

[38] In the civil litigation context in Newfoundland and Labrador, *sufficient evidence* is required to ground a claim of privilege and where there is a question of whether documents are subject to solicitor-client privileged the courts have determined that:

- the party asserting the privilege must establish an evidentiary basis for it;

- sufficient evidence requires an affidavit must be filed with sufficient details to establish the claim for solicitor-client privilege;
- sufficient details to establish the claim for solicitor-client privilege include documentation being numbered, descriptions of the type of document, date of document, the recipient, the sender together with important supporting details (eg. confirming that the document was marked as “protected” and contains a legal opinion by named position to officers of his employer and relates to a named general matter);
- an affidavit making vague reference to solicitor-client privilege and numbered documents without any other establishing details will not be sufficient; and
- the requirement to file an affidavit can be averted where the actual records are provided for review in its place.

(see *Corner Brook Pulp & Paper Ltd. v. Geocon*, 2000 CarswellNfld. 403 (S.C.T.D.); *Pomerleau Inc v. Newfoundland and Labrador (Transportation and Works)*, 2012 CanLII 47470 (NL SC); *Quinn v. Federal Business Bank (1997)*, 1997 CanLII 16060 (NL SC), 151 Nfld. & P.E.I.R. 212 (N.L.S.C.(T.D.)); where the judge accepted being able to review the records in lieu of an affidavit that should have been filed; and *Gordon v. Sexton*, 2007 NLTD 216: where the court reviewed and determined the documents were solicitor-client privileged but went on to describe some of the details and nature of the solicitor-client privilege (document type, to/from parties involved and general subject matter) demonstrating what type of information can be released).

[39] Sworn affidavit evidence with vague reference to documents by number and bald assertions of privilege are akin to “believe me” assurances and will not be sufficient evidence to ground a claim of solicitor-client privilege (see *Pomerleau Inc. v. Newfoundland and Labrador (Transportation and Works)*, 2012 CanLII 47470 (NLSC) at paragraphs 23 and 27). If suspicious circumstances exist or evidence of a privilege falsely claimed, a sworn affidavit will not be sufficient to establish a claim of solicitor-client privilege (see *Corner Brook Pulp & Paper Ltd. v. Geocon*, 2000 CarswellNfld. 403 (S.C.T.D.); *Pomerleau Inc. v. Newfoundland and*

*Labrador (Transportation and Works)*, 2012 CanLII 47470 (NLSC); and *University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34).

[40] Our Office must adhere to the established place that solicitor-client privilege holds within our legal system. However, our Office is also required to ensure its legislated obligations and duties are met. In the absence of a review of the actual records, the appropriate method of providing meaningful oversight with respect to records over which solicitor-client privilege is claimed is to require evidence that would otherwise be required to establish such a claim before a court. This necessarily requires affidavit evidence, sworn statements, not consisting of broad or vague claims of privilege over page numbers, but consisting of sufficient details necessary to ground the claim of privilege. To accept anything less than evidence of this nature, in the absence of the actual records, would remove the very reason for which our Office exists.

[41] While some courts have recently turned to the civil context for instruction on evidence required for solicitor-client privilege, it is important to note that the civil context is commonly *private* litigation involving *private* interests. This is separate and distinct from the very nature and general purpose of *ATIPPA, 2015* set out in section 3 which is focused on public rights and public interests. In contrast to this civil context, previously our Supreme Court consistently utilized a very different approach for determining solicitor-client privilege in the context of access to information legislation, back when the Commissioner was actually statute barred from viewing records claimed as solicitor-client privilege (see previous legislation: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended).

[42] Under this older legislation, the Complainant was required to appeal a public body's decision, not to the Commissioner, but directly to the Supreme Court of Newfoundland and Labrador. The Court would thereafter conduct an independent review and part of this process included reviewing the *actual records* to which solicitor-client privilege was claimed. The Court was not limited to viewing only affidavit evidence and reviewed the records as part of the ordinary course. After reviewing the records, the Court thereafter made its own objective assessment and did not rely upon whether the records were presumptively privileged as claimed by the public body (see *Information and Privacy Commissioner (Newfoundland and*

*Labrador) v. Newfoundland and Labrador (Environment and Conservation)*, 2014 NLTD(G) 90 at paragraphs 4-10).

[43] While this independent review process existed under the previous ATIPPA legislation, the general purpose of both the older legislation and our current *ATIPPA, 2015* remain consistent. Where public rights and public interests are concerned, review of the actual records over which solicitor-client privilege is claimed allows for meaningful, independent oversight and achieves the purposes set out in section 3 of *ATIPPA, 2015*. Unfortunately, our Office cannot currently compel production of solicitor-client records to provide such independent review.

[44] However, even in the civil context, where there is evidence of suspicious circumstances or falsely claimed privilege, an affidavit will not be sufficient for a public body to meet its evidentiary burden for records over which solicitor-client privilege has been claimed. In such cases, review of the actual records is required to meet the evidentiary burden under section 30(1)(a) and without records being provided for review, the claim of solicitor-client privilege will fail.

[45] In the particular circumstances of this matter, JPS did not provide us with the records for review and JPS did not provide an affidavit with alternative evidence to ground the claim of privilege. When asked, JPS would not even identify which of the Complainant's requests had responsive records and which of the requests had none. JPS did provide a table indicating the pages of responsive records which were withheld from our Office's review, stating that solicitor-client privilege was claimed with respect to these records. Within the limited records provided to our Office, JPS simply listed a section 30(1)(a) claim over its fully blacked-out redactions.

[46] In addition, JPS provided a letter stating that several, unnamed, lawyers had reviewed the records and had made their own determination that the records were subject to solicitor-client privilege. The letter provided by JPS offered assurances that amount to "trust us" or "believe me" statements and broad claims of privilege. This letter is insufficient evidence for grounding a claim of solicitor-client privilege in the civil litigation context and it is insufficient evidence for the purposes of *ATIPPA, 2015*. On that basis alone JPS has failed to meet its evidentiary burden under the *Act*.

[47] However, even if JPS had provided alternative evidence in this matter, there are circumstances that exist in the present case that bring into question the accuracy of the review claimed by JPS in this matter. In review of the 33 pages of records (out of 518 pages) which were provided to us, our Office found evidence that JPS had incorrectly asserted a claim for solicitor-client privilege and had applied it in an overly broad manner over content which was not solicitor-client privileged. This was only revealed through email chains where the same text is repeated later on in the same records. While there were a number of additional administrative errors acknowledged by JPS, this error is substantive in nature. Notwithstanding the purported diligent review of the section 30 redactions by JPS and its various unnamed lawyers, a claim of solicitor-client privilege was incorrectly made thereby requiring us to review the records to ensure the remainder of the claims of solicitor-client privilege were correct. In response to this incorrect claim of solicitor-client privilege, our Office requested JPS provide the records for our review and JPS declined.

[48] As JPS has failed to provide alternative evidence sufficient to ground its claim of solicitor-client privilege and as there is evidence that solicitor-client privilege was incorrectly asserted, I must find that JPS has failed to meet its evidentiary burden under section 43 for the application of sections 30(1)(a) and 30(1)(b). I must therefore recommend these records be released.

**Section 9 (Public Interest Override)**

[49] In applicable circumstances, the Commissioner has the authority to recommend release of certain records, notwithstanding that such records fall within an exception, where it has been clearly demonstrated that the public interest in disclosure outweighs the reasons for the exception. An objective assessment of the public interest in disclosure of a record and the reasons for the exception is required under section 9 of *ATIPPA, 2015* which states:

*9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.*

*(2) Subsection (1) applies to the following sections...*

- (b) section 29 (policy advice or recommendations);
- (c) subsection 30 (1) (legal advice)...
- (e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

[50] The OIPC Section 9 Bulletin explains why our *ATIPPA, 2015* includes a public interest override for records that would ordinarily be excluded from access:

*The purpose of adding this public interest override includes promoting democracy by increasing public participation in order to facilitate better informed decision-making. As well, it can increase scrutiny, discussion, comment and review between citizens and the government. Fundamentally, it is grounded in the idea that government information is managed for public purposes and that the public are the owners of the information.*

[51] The burden of proof to demonstrate that a Complainant has no right of access to a record is on the head of the public body as set out in s. 43(1). Given that section 9 states that a discretionary exception shall not apply if the conditions for the override are met, if there is any reason to think that the public interest in disclosure may outweigh the harm against which the exception protects, then the public body must be able to demonstrate that it has considered the public interest override (see OIPC Section 9 Guidance Bulletin at page 6).

[52] The burden of proof under section 9 is on the Complainant as they are the one asserting the right to access a record on the basis of public interest (see *Mastropietro v. Newfoundland and Labrador (Education)*, 2016 NLTD(G) 156 at paragraphs 42-44). However, recognizing that a Complainant cannot view the records, this evidentiary burden is relaxed somewhat (see *Mastropietro* at paragraphs 46-47). In assessing evidence of public interest, there may be cases where the public interest is so notorious that further evidence is not required and in other circumstances there may be cases where the records themselves provide evidence of a public interest in its disclosure (see *Mastropietro* at paragraph 50).

[53] Our Office had the benefit of viewing a very small portion of records and the information that our Office could view as it relates to sections 29 and 34 did not meet the public interest override burden. Unfortunately, our Office did not have such benefit of viewing the majority of records as they were withheld by JPS pursuant to section 30(1). The subject matter of the ATIPP request may raise to the level of notoriety commented on in *Mastropietro*, such that the

Complainant may not be expected to provide any further evidence in support of their section 9 claim. However, I need not determine this issue.

[54] Whereas JPS failed to establish that section 30 applied to the withheld information, as well as any other exceptions overlapping with its claim of section 30, our Office must recommend release of that information. It is concerning that due to treatment of records for which section 30 has been claimed, that an independent review and objective assessment of the section 9 public interest override could not occur. However, it may be helpful to comment upon the public interest elements in the within matter, and our Office's concerns over withholding of records from our review and oversight within this context.

[55] The Complainant in this matter has requested information pertaining to the province's mandatory vaccination program, including records that would establish if our Government of Newfoundland and Labrador considered, in making its decisions on this program, ethical concerns, the financial impact on those who refused a vaccine mandate, the legality of such a mandate, as well as whether there were criteria used in its decisions for implementation or removal of the vaccine mandate program.

[56] The nature of the information being requested appears to have, at the very least, elements of the public interest. The vaccine program was designed in response to an unprecedented problem in modern times: a global pandemic. This program was broad in scope, having significant impact on a large proportion of citizens within our province and beyond. The nature of records requested, if they exist, could conceivably assist in presenting a more complete picture to the public. There does exist a suspicion of wrongdoing by some as it relates to the vaccine mandate program. In fact, the Complainant in this matter clearly believes this to be the case. There may be a public interest to be served in disproving such suspicions or providing transparency and accountability as well.

[57] Solicitor-client privilege can only be pierced through clear and unambiguous legislative language, even where the public interest may be at stake. *ATIPPA, 2015's* section 9 does provide for the ability to pierce-solicitor client privilege as its language is pointedly clear and



unambiguous. However, given the reasons for the exception of solicitor-client privilege, it may be only rare cases where the public interest override could be met.

[58] The within matter may offer a compelling case for these extraordinary circumstances. However, the determination of the public interest override must be made as it relates to the actual records that exist, and not the nature of records requested. Unfortunately, even if the withheld records had qualified for the exception at section 30, at present there is no ability for our Office to make a proper assessment of the public interest override. In a decision dated March 31, 2022, the Supreme Court of Newfoundland and Labrador determined that our Office does not have the power to compel a public body to produce records for which the section 30 exception is claimed (see *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2022 NLSC 59). While that decision is under appeal, it is currently the law which our Office must follow. At present, our inability to compel has led to significant gaps in our Office's independent oversight capability as it relates to independent review of claims of section 30 (legal advice) and overlapping sections claimed, and this matter demonstrates such gaps extend to the public interest override of section 9.

[59] If JPS decides to accept our recommendation to release that information withheld pursuant to section 30, then the statutory goal of transparency will have been served. If JPS decides not to accept our recommendation, then it must apply to the Supreme Court of Newfoundland and Labrador for a declaration that it is not required to comply. The Court will then be in a position to review the records and determine whether solicitor-client privilege and/or other exceptions apply to the information and, if such exceptions do apply, whether that information should be released pursuant to the section 9 public interest override. This outcome, although time-consuming and burdensome on public resources, at least has the benefit of preserving the Complainant's right to an independent decision on the merits of the case.

## VI RECOMMENDATIONS

- [60] Under the authority of section 47(a) of *ATIPPA, 2015* I recommend the Department of Justice and Public Safety release all records withheld under section 30(1) (legal advice) together with any claims that overlap with section 30(1). I further recommend the information withheld pursuant to sections 27, 29(1)(a), 34(1)(b), and 40(1), provided in records that our Office could view, continue to be withheld.
- [61] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Justice and Public Safety 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.
- [62] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30<sup>th</sup> day of June 2022.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador