



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2022-011

June 30, 2022

Office of Women and Gender Equality

Summary:

The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* to the Office of Women and Gender Equality for records relating to an employment issue. The Public Body provided records to the Complainant, but withheld some information claiming section 30 (legal advice). During the complaint investigation, the Public Body refused to provide the withheld information to the Commissioner for review, and declined to take part in an alternative process of providing a description of the information and an explanation of how the exception applied. The Commissioner concluded that the Public Body had not met the burden of proving that section 30 applied, and recommended that the withheld information be provided to the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 3, 30, 43, 100.

Authorities Relied On:

NL OIPC Reports A-2022-010, [A-2020-020](#), [A-2016-009](#).
[Newfoundland and Labrador \(Justice and Public Safety\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#), 2022 NLSC 59;
[Newfoundland and Labrador \(Information and Privacy Commissioner\) v. Eastern Regional Integrated Health Authority](#), 2015 NLTD(G) 183;
[Newfoundland and Labrador \(Indigenous Affairs and Reconciliation\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#), 2021 NLSC 79;
[Newfoundland and Labrador \(Indigenous Affairs and Reconciliation\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#), 2021 NLSC 161

BACKGROUND

- [1] The Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or the “Act”) to the Office of Women and Gender Equality (“WGE”) for “...any and all correspondence (including e-mails) regarding pay equity/gender equality/request for compensation review...” involving a Government of Newfoundland and Labrador agency employer during a two-year period.
- [2] WGE located and provided to the Complainant some 30 pages of records, with some information redacted on the basis of section 30 (legal advice). The Complainant filed a complaint objecting to the redactions.
- [3] Our Office notified WGE of the complaint and, in accordance with our standard procedure, requested that WGE provide our Office with a copy of the responsive records without redactions for our review. In response, WGE provided redacted records to our Office, and did not provide an unredacted copy disclosing the information it had withheld from the Complainant. As a consequence our Office could not see what has been withheld from the Complainant and thus could not assess whether the exception had been properly applied.
- [4] Our Office wrote to WGE explaining the background to the issue of providing our Office with records for which section 30 had been claimed, and our position on that issue.
- [5] WGE confirmed that their decision resulted from advice from the Department of Justice and Public Safety (“JPS”) that “in accordance with Justice MacDonald’s recent decision, solicitor-client records will not be provided.”
- [6] We then wrote to WGE explaining that, as an alternative to providing our Office with the unredacted records, it could provide a description of the records and an explanation for the application of section 30.

[7] WGE, after consulting with JPS, responded that “WGE will not be following the proposed alternative suggested by your Office. However, can advise that the departmental solicitor has again confirmed that the information in question was properly redacted under section 30.”

[8] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

[9] Apart from the statements referenced above, WGE provided no further submissions to our Office.

ISSUES

[10] The sole issue to be determined in this Report is whether WGE, in claiming the application of section 30, has satisfied the burden of proving that the exception applies.

DECISION

[11] *ATIPPA, 2015* provides in section 8, underscored by the purpose of the statute in section 3, a statutory right of access to records in the control or custody of public bodies. That right of access is broad, and is only limited by the exceptions specified in the *Act*. Our Office is the statutory oversight body that provides, through our complaint investigation process, independent review of decisions made by public bodies under *ATIPPA, 2015*. This includes reviewing decisions to redact and withhold information from requested records on the basis of various exceptions to access, including section 30 (legal advice). We cannot adequately fulfil that function if we have no way of assessing the content of the information that has been withheld in order to determine if the exception applies.

[12] 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 (*Newfoundland and Labrador (Justice*

and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner) (the “MacDonald decision”). While that decision is under appeal, it is the law at the present time.

[13] In case there was any uncertainty on the part of the public body about whether records could be disclosed to this Office, the MacDonald decision does not, however, require public bodies to withhold records. It only addresses whether our Office has the power to compel a public body to produce certain records to our Office for review.

[14] Even if the records are properly subject to solicitor-client privilege, the privilege belongs to the client, which is the public body (in this case, WGE). The head is therefore empowered to disclose them to our Office.

[15] Accordingly, our Office requested that WGE provide us with the records in unredacted form for review. We advised WGE that section 100 of *ATIPPA, 2015* provides that solicitor-client privilege is not affected by production to the Commissioner. Therefore, our review does not operate as a waiver of any privilege. The request to provide the unredacted records was declined.

[16] While we can accept the decision of the public body to decline to provide us with the actual redacted text in accordance with the MacDonald decision, we must have something to review. The *Act* says, at section 43(1), and as discussed in further detail below, that the burden of proof to demonstrate the applicability of an exception rests with the public body and the MacDonald decision does not change that. While it may be short of the record or information itself, we must have something to assess rather than a simple assurance. We therefore proposed an alternative method of providing us with the information we needed to assess the application of section 30 and the claim of solicitor-client privilege: a description of the content of each redacted passage; details of the roles of the sender and recipient of the communication; and an explanation for why the exception applies. We asked that this description be accompanied by a signed statement from a solicitor who has examined the records stating that, in their opinion, the redactions meet the test for solicitor-client privilege.

[17] We proposed that alternative because, if the description were sufficiently detailed, it might have been a basis on which our Office could conclude whether the section 30 exception applies. This has proved to be an acceptable alternative in other cases. WGE, however, declined to follow that alternative. Without the records, and without any alternative information being provided by WGE to discharge its burden of proof, we must therefore proceed with this investigation on the basis of the information and evidence that we have before us.

[18] Section 43 of *ATIPPA, 2015* provides as follows:

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.

[19] The burden of proof under section 43 applies equally to all public bodies, and it applies uniformly to all of the exceptions to access in Division 2 of *ATIPPA, 2015*, including solicitor-client privilege (section 30). The burden of proving that an exception justifies withholding information from an applicant is not affected by the MacDonald decision. Section 43 has not been abrogated.

[20] The standard of proof that must be met under section 43 is accepted to be the civil standard of proof, which is proof on a balance of probabilities. Section 30 is a class-based, not a harm-based, exception to access. What is to be proved, to show that section 30 applies, is that the information at issue belongs to that class. That is a question of fact (see *Newfoundland and Labrador (Indigenous Affairs and Reconciliation) v. Newfoundland and Labrador (Information and Privacy Commissioner)* 2021 NLSC 79, at paragraph 34).

[21] To establish such a fact under the civil standard there is a threshold test to be met, which is that there must be sufficient evidence, on which a trier of fact could reasonably rely, in support of the argument on the issue to be determined. Under section 43(1) of *ATIPPA, 2015*, the public body bears the burden of providing the evidence to meet this threshold. On review of the background, the context, the records themselves and the submissions of the public body, the question for this report is whether this threshold been met.

- [22] The responsive records in the present case consist of around 30 pages of correspondence from the Complainant to the Minister responsible for WGE, the Premier, and others, requesting assistance to resolve the Complainant's gender equality and pay equity issue; replies to some of that correspondence; and internal correspondence regarding the above.
- [23] The withheld information consists of three redacted passages, totalling six lines of text, in three email messages, all withheld on the basis of section 30. All are internal emails among WGE staff, all on the same date.
- [24] The first of these messages (in chronological order) is from the Minister to the Secretary to the Minister, the Deputy Minister and the Executive Assistant in the WGE Office. The subject line reads: "Gender Pay Inequality, [Name of Employer] Newfoundland and Labrador." It consists of 8-9 lines of text, of which three are redacted.
- [25] The second message is from the Deputy Minister to the Secretary to the Minister and the Executive Assistant, with the same subject line. It consists of two lines, fully redacted.
- [26] The third message is from the Deputy Minister to the Secretary to the Minister, with the subject line: "[Name of Employer]." It consists of one line, fully redacted.
- [27] The test for determining whether information is subject to solicitor-client privilege has been set out in numerous reports from this Office, including Report A-2016-009, citing the decision in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, which provides an in-depth overview of solicitor-client privilege.
- [28] As the court stated in that decision, the necessary elements of a valid claim to privilege are:
- 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.*

[29] This leads us to the following considerations. First, it is apparent from the information that WGE has disclosed to us that none of the authors or recipients of the redacted emails is a solicitor. As such, these communications are not between a solicitor and client.

[30] Nevertheless, it is still possible that a communication may contain legal advice that is subject to the privilege. As the court in *Eastern Health* further stated:

...to be privileged, at particular communication need not specifically request or offer advice provided that it may reasonably be considered as part of a 'continuum of communication' in which advice is sought or tendered. Within such a continuum, the privilege may extend to the communication of legal information.

[31] In the present case, the subject lines of the emails do not, even implicitly, refer to legal advice. While the background to these communications is a gender equality, pay equity dispute, which is a potential legal issue, it is also a current political issue, and there is no indication in the content of the responsive emails that the issue has reached a point where legal advice has been sought by any of the parties to these communications. There is nothing in the context to suggest that the redacted portions of the emails are likely to constitute legal advice, or that the redacted information is about legal advice, as a part of an internal "continuum of communication". Rather, the discussion in these emails is about a request for direction, on how to respond to the Complainant's correspondence with "appropriate messaging" and who is going to do the responding.

[32] Finally, there is nothing in the context to suggest that the redacted information was intended to be confidential. Our conclusion must therefore be that, at least on the face of the records, there is nothing to support the claim of solicitor-client privilege.

[33] WGE has provided no further information about the content of the redacted passages. In the absence of any kind of description of the redacted information and an explanation for how section 30 applies, which WGE has declined to provide, the burden of proof has not been met. There has to be evidence to support it, and here there is none.

[34] The second-hand statement provided by WGE, referenced in paragraph 7, above, and attributed to an unidentified solicitor, does not constitute evidence about the redacted information. It is not even hearsay evidence, since the solicitor is neither quoted nor identified. It is simply argument. (See Report A-2020-020; *Newfoundland and Labrador (Indigenous Affairs and Reconciliation) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2021 NLSC 79 and 161.)

[35] If WGE had provided an affidavit, or even a signed statement, from a solicitor who had examined the records, together with a sufficiently detailed description of the records, that would have constituted evidence. Conceivably, it might even have been a sufficient evidentiary basis for our Office to assess whether the burden of proof has been met. However, in the absence of any foundational or supporting evidence, our Office cannot rely upon a statement attributed to an unidentified solicitor to conclude that the redacted information meets the section 30 test.

[36] Section 30 is a discretionary exception. The public body must exercise that discretion consciously and reasonably, taking into account all of the circumstances. The exception is also one to which section 9 of the Act (the “public interest override”) applies and public bodies have an obligation to consider the public interest when applying such exceptions.

[37] Our Office has the statutory responsibility of overseeing the compliance of public bodies with *ATIPPA, 2015*, and of ensuring that the rights of individuals under the Act are protected. The Complainant in the present case has been denied access to information, and WGE has failed to meet the burden of proving, under section 43, that the claimed exception entitles it to withhold that information.

[38] As WGE has not established that an exception to access applies to the withheld information, our Office has no choice but to recommend that the public body disclose the withheld information to the Complainant.

[39] If the public body decides to accept our recommendation, then the statutory goal of transparency will have been served. If the public body decides not to accept our

recommendation, then it must apply to the Supreme Court 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 applies to the information. 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. This is consistent with the purposes of *ATIPPA, 2015* as expressed in section 3.

RECOMMENDATIONS

[40] Under the authority of section 47 of *ATIPPA, 2015* I recommend that the Office of Women and Gender Equality disclose to the Complainant the information it has withheld on the basis of section 30 of the *Act*.

[41] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Office of Women and Gender Equality 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.

[42] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30th day of June, 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador