OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-019

September 16, 2022

Office of Women and Gender Equality

Summary: The Complainant made an access to information request to the Office of Women and Gender Equality ("WGE") for records relating to "pay equity." WGE provided records to the Complainant, but withheld some information pursuant to sections 29(1)(a) (policy advice or recommendations), 30(1)(a) (legal advice), and 40(1) (disclosure harmful to personal privacy). During the complaint investigation, WGE agreed to release some additional information it had previously withheld pursuant to section 29(1)(a). The Commissioner found some information withheld pursuant to section 29(1)(a) to be factual material within the meaning of section 29(2)(a) and recommended its release. The Commissioner found WGE did not provide sufficient evidence to support its application of section 30(1)(a) (legal advice) and recommended release of this information. The Commissioner recommended the remaining information continue to be withheld pursuant to sections 29(1)(a) and 40(1).

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, sections 29(1)(a), 30(1), and 40(1).

Authorities Relied On: NL OIPC Reports A-2005-005, A-2016-009, A-2022-010, A-2022-11, A-2022-012, and A-2021-033.

NL OIPC Guidance Documents: Section 9, Section 29, and Section 30.

Mastropietro v. Newfoundland and Labrador (Education), 2016 NLTD(G) 156.

BACKGROUND

[1] The Complainant filed an access to information request pursuant to the *Access to Information and Protection of Privacy Act,* 2015 ("*ATIPPA, 2015*" or the "*Act*") seeking:

> *Any emails sent or received by Minister Pam Parsons, Deputy Minister Judith Hearn, and Manager of Economic Policy Andrea Barnes which include in the body of the email, subject of the email, or in email attachments the phrase "pay equity". Please include all email attachments. Please limit the search to the time period: June 1, 2021 to present.*

[2] In response to the access request, the Office of Women and Gender Equality ("WGE") released information to the Complainant, making redactions pursuant to sections 29(1)(a) (policy advice or recommendations), 30(1)(a) (legal advice), and 40(1) (disclosure harmful to personal privacy). WGE advised our Office it would not provide the information withheld under section 30(1) (legal advice) for our review. WGE otherwise released all of the other records to our Office.

[3] During the informal resolution process, WGE agreed to release some additional information to the Complainant which had previously been withheld pursuant to section 29(1)(a) (policy advice or recommendations).

[4] As informal resolution was unsuccessful with respect to the remaining information withheld under sections 40(1), 29(1)(a) and 30(1) the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

ISSUES

[5] Did WGE properly apply sections 29(1)(a), 30(1)(a), and 40(1)? And, if either of sections 29(1)(a) or 30(1)(a) have been properly applied, does section 9 apply?

DECISION

Section 29 (policy advice or recommendations)

[6] WGE withheld information under section 29 of *ATIPPA, 2015* which states:

> *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;*

[7] 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)).*

[8] Under section 29(2)(a), the head of a public body shall not refuse to disclose "factual material" when claiming section 29(1)(a).

[9] Section 29(1) is an information-level exception whereby a public body must conduct a line-by-line review of the information to determine whether it is applicable. Factual material, if it does not set out or imply options or recommended courses of action, is not subject to section 29(1). In accordance with section 8(2), if it is reasonable to do so a public body must disclose any information in a record to which an exception does not apply.

[10] The ATIPP Office, under the Department of Justice and Public Safety ("JPS") has released an *Access to Information Policy and Procedures Manual* to assist public bodies in their application of *ATIPPA, 2015*. This Manual offers the following assistance to public bodies as it relates to assessing the factual material exclusion of section 29(2):

> *Background methodology, data, analyses, questions, and factual information of all reports, studies or information in the scope of subsection 29(2) must not be withheld under subsection 29(1).*
> *…*
> *Factual material means information which does not set out or imply options or recommended courses of actions. Such information is factual and cannot be*

> *withheld under subsection 29(1) [BC Order 02-38 Footnote]. The context of factual information is not relevant when considering applying this exception. Specifically, the location of factual information (for example, factual information contained in key messages in a briefing note) does not itself reveal advice. [OIPC NL Report 2005-005 Footnote]*

[11] During informal resolution efforts, our Office recommended release of some information that was factual in nature and WGE did agreed to release most of this information to the Complainant. While I agree with WGE that the majority of the remaining information withheld pursuant to section 29(1)(a) does contain opinions, policy advice, and recommendations, there is one passage within the records that I am recommending for release. This information consists of an opening statement, regarding another public body having advised of particular information it sets out in a series of bullets. I find that the opening statement and a portion of bulleted information does not contain opinions, advice, or recommendations in and of themselves, nor can any be inferred. Rather, this information is a listing of factual material within the meaning of section 29(2)(a) of *ATIPPA, 2015* and I therefore recommend it be released to the Complainant.

Section 40 (disclosure harmful to personal privacy)

[12] WGE 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.*

[13] Information WGE withheld under section 40(1) (disclosure harmful to personal privacy) consisted of third party email addresses and third party names. I recommend that this information continue to be withheld pursuant to section 40(1).

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

[14] WGE withheld information pursuant to section 30(1)(a) 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;*

[15] 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. 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.*

[16] Reports A-2022-010 and A-2022-011 acknowledge that due to a recent court decision, which is under appeal, our Office is currently unable to compel public bodies to provide records for our review that have been claimed as solicitor-client privileged and, as noted therein, this has led to gaps in our Office's independent oversight capacity. A public body may volunteer such records for our Office's review; but when it refuses to do so, our Office requires alternative evidence consisting of a sworn statement with sufficient detail necessary to ground the claim of solicitor-client privilege. However, 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 where it merely consists of assurances that amount to "trust me" or "believe me" statements, or where there is evidence of suspicious circumstances or falsely claimed privilege.

[17] The information claimed by WGE as solicitor-client privilege is located in a document created by/for the Interdepartmental Committee on Pay Equity, under a section titled "PAY EQUITY CHALLENGES SPECIFIC TO NL" and below a summary of a 2004 Supreme Court of Canada Decision. The document confirms the roles of all of the departments that form this Committee, stating that the role of JPS is one that "provides legal advice as needed and support for drafting legislation".

[18] WGE provided the following assurances to our Office within its submissions:

> *WGE completed a line-by- line review of the responsive records and released information that was not privileged in nature. However, when reviewing the remaining information, WGE determined that each of the three elements listed above were met, and therefore fell under the exception for legal advice.*
> *WGE has consulted with our solicitor at the Department of Justice and Public Safety, and the ATIPP Office, and we have been directed to not remove the redactions made under section 30 as part of our response to your office.*
> ...
> *WGE is not prepared to provide the information that was withheld under subsection 30(1)(a), however our office can confirm that the information withheld on page 9 (part 11) was analysis provided by a JPS solicitor at the request of WGE's Deputy Minister. Based on the information previously provided and the context of the records, it is WGE's position that it has met its burden under the Act.*

[19] Our Office requested WGE voluntarily provide the records for our review and WGE refused. Our Office indicated to WGE that an affidavit with sufficient details to establish the claim for solicitor-client privilege is required where records are not provided for our review. WGE did not provide any sworn statement. Notwithstanding JPS's role as part of the Committee or its role within government at large, our Office cannot accept that anything and everything said, written, and done by JPS meets the criteria for legal advice. Even if legal analysis does exist within the withheld information, section 30(1)(a) is a line-by-line exception and there could very well be information therein that does not meet the criteria for legal advice and should be released.

[20] I find that WGE has provided our Office with assurances and, in the absence of our review of the records, assurances are not enough for a public body to meet its evidentiary burden under section 43(1). I therefore recommend that WGE release the information it withheld pursuant to section 30(1)(a) to the Complainant.

Section 9 (Public interest override)

[21] 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.*
>
> *9. (2) Subsection (1) applies to the following sections...*
>
> *(b) section 29 (policy advice or recommendations);*
> *(c) subsection 30 (1) (legal advice);*

[22] The OIPC's *Guidelines for Public Interest Override* explains why *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.*

[23] 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 section 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).

[24] 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).

[25] The Complainant in this matter has requested information pertaining to pay equity and provided a case for release of information under section 9 stating:

> *-There is a general public interest in more transparency about the issue of pay equity legislation and the work government is doing on it. In order for government to be held accountable to its unanimously agreed upon and much publicized goal of enacting pay equity legislation, there needs to be public understanding about what work government has done so far, and its rationale for being sluggish to take meaningful action on the file. For the public to be involved in the democratic process of providing input to government on matters of public policy, it needs to be informed.*
>
> *-Any decision government makes about pay equity legislation affects almost everyone in the province either directly or indirectly. Women, especially marginalized women, will be most profoundly affected in a positive way, according to available research. Moreover, the business community will also be affected and will need time to prepare for such a change, and will also want to have input on what this legislation looks like.*
>
> *-Given the widespread and significant impact such legislation can have, any information about it — especially information which contains legal advice sought out by the departmental lead on this file, and which describes challenges to the legislation in Newfoundland and Labrador — would help the public understand their legal rights when it comes to what this legislation could mean for them. Moreover, several advocacy groups have said further delay in enacting this legislation (other Atlantic provinces have had pay equity legislation since the 1980s) is an infringement on human rights. In 2021, Marie-Claude Landry, Chief Commissioner of the Canadian Human Rights Commission said, "Pay equity is an internationally recognized human right." Pay equity legislation is also supported by the Canadian Labour Congress and the Supreme Court of Canada. People whose human rights are affected deserve to have a complete understanding of why. Releasing as much information government has about this as possible will be to the benefit of women, gender diverse individuals, and marginalized groups for whom a lack of proactive pay equity legislation has negatively impacted the most.*
>
> *-Many advocates question why government has delayed action on pay equity legislation for so long, and there is public concern about this. Any legal advice government may have sought out that might clarify this inaction should be made public. Releasing as much information that government has about this issue as possible will help to present a full picture to aid the public in fully understanding the reasons for government's decisions and actions.*
>
> *-Section 30(1) exists to protect communications between the public body and its solicitor. If there are elements of this redacted section which contains communication that is particularly sensitive, but also contains information which is in the public interest to be released, it is possible that parts of the*

> *redacted section could be released, while keeping only the very necessary bits redacted. If the government believes the information may be misunderstood, it can release information with an explanation, rather than withhold it.*

[26] While I can confirm that the remaining information withheld by WGE pursuant to section 29(1)(a) (policy advice or recommendations) did not meet the threshold for release as set out in the public interest override of section 9, I cannot make any such definitive statement as it relates to the information WGE claims as solicitor-client privilege under section 30(1)(a) (legal advice).

[27] While 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. I acknowledge that given the reasons for the exception of solicitor-client privilege, it may be only rare cases where the public interest override could be met.

[28] Whereas WGE failed to establish that section 30(1)(a) applied to the withheld information, our Office must recommend release of that information and therefore a section 9 analysis is not necessary. However, I find it 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 as it relates to this portion of the records.

[29] While the within matter may offer a compelling case for these extraordinary circumstances, the determination of the public interest override must be made and based upon the content of the actual records being withheld. Unfortunately, at present there is no ability for our Office to make a proper assessment of the public interest override over records claimed as solicitor-client privilege. 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. As confirmed in Reports A-2022-010, and A-2022-011, at present, our inability to compel production of records 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, as made clear in the within matter, such gaps extend to the public interest override of section 9.

[30] If WGE decides to accept our recommendation to release information withheld pursuant to section 30(1)(a), then the statutory goal of transparency will have been served. If WGE 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 applies to the information and, if such this exception does 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.

RECOMMENDATIONS

[31] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that WGE release information it withheld pursuant to section 29(1)(a) and 30(1)(a) that is highlighted in the records attached to WGE's copy of this Report and continue to withhold the remaining information redacted pursuant to sections 29(1)(a), and 40(1).

[32] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of WGE 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.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of September 2022.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador