



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-020

September 23, 2022

Newfoundland and Labrador Centre for Health Information

Summary:

The Newfoundland and Labrador Centre for Health information received an access to information request for emails related to the 2021 cyber attack. The Centre released three pages of records and withheld 208 pages, claiming sections 29 (policy advice and recommendations), and 30 (legal advice). The Complainant argued that there was sufficient public interest to engage section 9 (public interest override). The Commissioner considered the application of section 30 and determined that the Centre had met the burden of establishing that the exception applied. However, the Commissioner was unable to determine whether the public interest override in section 9 applies to the records. Nonetheless, the Commissioner recommended continued withholding.

Statutes Cited:

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

Authorities Relied On:

NL OIPC Reports [A-2022-010](#) and [A-2022-011](#).

[Canada \(Privacy Commissioner\) v. Blood Tribe Department of Health](#) [2008] 2 S.C.R. 574, 2008 SCC 44.

[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.

[Lewisporte \(Town\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#), 2022 NLSC 130.

BACKGROUND

- [1] The Complainant filed an access to information request with the Newfoundland and Labrador Centre for Health Information (“NLCHI”) under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or the “Act”). The Complainant requested the following records:

Emails sent by, received by, and/or copied to NLCHI vice-president Blair White with any of these keywords – "privacy breach". Date range of request is Nov. 1, 2021 to Nov. 15, 2021.

- [2] NLCHI provided a final response to the Complainant stating they were withholding 208 of 211 pages of responsive records on the basis of both sections 29 and 30 of *ATIPPA, 2015*. Section 40(1) was also applied to withhold information from some of the records that were released.
- [3] The Complainant disagreed with the decision to withhold the records and filed a complaint with this Office regarding the application of sections 29 and 30, and raised the issue of the application of section 9.
- [4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [5] NLCHI declined to provide this Office with an unredacted copy of the responsive records, citing the recent court decision in *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*. In that decision, which is under appeal, the Honourable Justice MacDonald determined that *ATIPPA, 2015* did not grant this Office the power to compel records over which solicitor-client privilege was claimed.
- [6] NLCHI did, however, provide a detailed description of the records, including the type of records, parties involved, dates, and brief descriptions of the contents. This was in the form of an unsworn statement from the public body’s ATIPP coordinator. NLCHI later did provide a

sworn affidavit setting out the details of the records and basis for its application of section 30.

- [7] NLCHI did not specifically address the application of section 29 to the records, other than to note that the policy advice or recommendations were in relation to the legal advice contained in the records.

COMPLAINANT'S POSITION

- [8] The Complainant questioned the extent of the records that were withheld, noting that 208 of 211 pages were withheld. This is particularly important given that section 30 is not a record-level exception, and its application therefore requires a line-by-line analysis.

- [9] Additionally, the Complainant argued that section 9 of *ATIPPA, 2015* is relevant in this matter. The records are in relation to the cyber attack and subsequent breach of both the personal information and the personal health information of a large proportion of the population of Newfoundland and Labrador. Therefore, there is a high degree of public interest in how NLCHI handled this matter, both as a custodian under the *Personal Health Information Act* and a public body under *ATIPPA, 2015*.

ISSUES

- [10] Did NLCHI properly apply section 30? And, if section 30 has been properly applied, does section 9 apply?

DECISION

- [11] As a result of the decision in *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2022 NLSC 59, it is very difficult to provide meaningful oversight pursuant to section 3 of the Act of the public's right to access to records claimed by a public body to be subject to section 30. The comments at paragraphs 33 through 37 in Report A-2022-010 continue to apply:

[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).*

[12] Given the inability of our office to compel production of records claimed to be subject to solicitor-client privilege, it was determined in Report A-2020-010 that this Office would adopt the civil law evidentiary standard on a case-by-case basis in determining whether the public body has met the burden of proof at section 43 to deny access to records based on section 30. The requirements of that standard are as follows:

- a) the party asserting the privilege must establish an evidentiary basis for it;
- b) sufficient evidence requires an affidavit must be filed with sufficient details to establish the claim for solicitor-client privilege;
- c) 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);
- d) an affidavit making vague reference to solicitor-client privilege and numbered documents without any other establishing details will not be sufficient; and
- e) the requirement to file an affidavit can be averted where the actual records are provided for review in its place.

[13] As noted above, NLCHI did provide this Office with a sworn affidavit setting out the particulars of the records, including the type of records, parties involved, dates, the presence of any confidentiality notice or agreement, and a brief description of the contents or topic for each record. As such, NLCHI has provided sufficient evidence in this case to satisfy the burden of proof under section 43 that section 30 applies.

[14] It is important to note that the public body bears the burden to demonstrate that section 30 applies and if the evidence is insufficient, then the Act requires release of the records. For example, if the affidavit does not contain sufficient particulars to ground the claim, or there is evidence that the section has been incorrectly applied, it may still be necessary to review the records to determine if the exception was applied correctly. In a recent decision of the Supreme Court of Newfoundland and Labrador, the Honourable Justice O’Brien rejected the Town’s claim that an affidavit from the lawyer was sufficient, noting that the affidavit did not

contain sufficient evidence to ground a claim of solicitor-client privilege (*Lewisporte (Town) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, at paragraph 43).

[15] As section 30 is subject to the public interest override at section 9, the analysis in this matter must continue. Section 9 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.*

[16] The Complainant has noted that the records relate directly to the breach of personal health information and personal information of residents of this province and, as such, there is a high degree of public interest in their release.

[17] In order to determine if section 9 should override an exception to the right of access, the public interest in release must be weighed against the reason for the exception. In this case, solicitor client records are afforded a very high degree of confidentiality. The Supreme Court of Canada stated in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*:

[9] Solicitor-client privilege is fundamental to the proper functioning of our legal system.[...] It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.

[18] The burden of proof for establishing that the public interest clearly outweighs the reason for the exception in the context of section 30 is high given the nature of solicitor-client privilege in our legal system. The burden is on the Complainant to demonstrate that section 9 applies. In *Mastropietro v. Newfoundland and Labrador (Education)* (at paragraph 47), the Honourable Justice Murphy discussed the burden and that it must be a relaxed burden in light of the fact that the Complainant has not seen the content of the withheld records and is therefore disadvantaged in bringing forth argument and evidence. Justice Murphy also explored other factors that could be considered in assessing the public interest, although he stopped short of placing any burden on the public body whatsoever.

[19] While we acknowledge that there is considerable public interest in records relating to the 2021 cyber attack, and that the burden of proof is diminished by the Complaint's inability to review the records, we are unable to confirm that the public interest outweighs the reason for the exception. This decision is primarily based on our inability to review the records to confirm that the public interest would be served by releasing the records.

[20] The position this Office finds itself in with respect to our ability (or current lack thereof) to compel records over which solicitor client privilege has been claimed, seriously diminishes our ability to provide meaningful oversight for *ATIPPA, 2015* and in turn has a detrimental effect on the access rights of the people of this province. This is particularly true in the assessment of the application of section 9 to section 30 records. Review of the records is essential, as the actual *content* of the records, including any legal advice, must be assessed to determine whether such records can potentially be released pursuant to the public interest override. Unfortunately, our current inability to review the records does not allow for the kind of analysis required when considering whether the public interest in disclosure of the information outweighs the purpose of the exception.

[21] The accountability and oversight previously provided by our Office has been lost as it applies to claims of solicitor-client privilege and the public interest override at section 9. In previous reports, such as A-2022-10 and A-2022-11, I have recommended release of the records because the public body did not meet its burden of proof that the section 30 exception applied. In this instance, NLCHI has met that burden, and what remains to be established is the application of section 9. However, because *Mastropietro* establishes that the burden of proof rests primarily (though in tempered fashion) with the Complainant rather than the NLCHI, I find myself unable to recommend release of the records in this particular instance.

[22] In the above-mentioned matters and certain other reports going back to 2019, I have been uncomfortable with recommending release of documents, which I had not seen, to which the solicitor-client and other exceptions may apply. I am even more uncomfortable now. At least in the former instances, it was reasonably foreseeable that the public bodies would not agree with the recommendations and seek declarations from the Court, and thus there would be further opportunities to have the records examined. The public bodies are the parties who are compelled to go to Court and bear the associated costs. In this instance, I am compelled to

recommend that NLCHI withhold documents, which I have also not seen, but which could potentially meet the threshold for the public interest to override the solicitor-client exception. NLCHI is likely to agree with this recommendation. While it is true that the Complainant can still appeal this decision by pursuing it in Court, practically speaking the costs of going to Court are prohibitive for a significant portion of citizens. A lone citizen should not be forced to bear the costs of going to Court in an effort to uncover something that may so clearly be in the public's interest to warrant its release, or alternatively could have been easily confirmed as being justifiably withheld, had our Office been able to review the records. We look forward to having this unfortunate circumstance addressed by the Court of Appeal in the coming months or, even better, by the legislature per the recommendation of the Report of the 2020 Statutory Review of *ATIPPA, 2015*.

RECOMMENDATIONS

- [23] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Newfoundland and Labrador Centre for Health Information continue to withhold the records.
- [24] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Newfoundland and Labrador Centre for Health Information 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.
- [25] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of September 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador