



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2023-008

February 17, 2023

Department of Justice and Public Safety

Summary:

The Complainant made a 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 Public Inquiry Respecting Ground Search and Rescue for Lost and Missing Persons. The Department disclosed records but withheld some information pursuant to section 27 (cabinet confidences), section 29 (policy advice or recommendations), section 30 (legal advice), section 31 (disclosure harmful to law enforcement), and section 40 (disclosure harmful to personal privacy). The Complainant asked this Office to review the redactions. The Commissioner concluded that the Department had correctly applied sections 27, 29, 31, and 40; however, the Commissioner also determined that the Department of Justice and Public Safety did not provide evidence to conclude that section 30 applied to the withheld information. The Commissioner recommended that the Department disclose the information it had withheld pursuant to section 30 but to continue to withhold information subject to the other sections.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 27, 29, 30, 31, and 40.

Authorities Relied On:

NL OIPC Reports [A-2021-033](#); [A-2021-034](#), [A-2021-039](#), and [A-2022-010](#).

[Newfoundland and Labrador \(Justice and Public Safety\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\), 2022 NLSC 59.](#)

BACKGROUND

- [1] The Complainant made a request to the Department of Justice and Public Safety (the “Department” or “JPS”) pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) for the following information:

The Government of NL recently concluded a Public Inquiry Respecting Ground Search and Rescue for Lost and Missing Persons. Request copy of all information/records/emails/correspondence relating to 1. the establishment of this inquiry and 2. the establishment of the terms of reference for this inquiry including all records of information between provincial government personnel, the inquiry staff including the inquiry commissioner, correspondence to or from private citizens or lawyers, correspondence to or from federal or provincial politicians or federal government agencies or personnel and the provincial government. This request is to the Department of Justice but is meant to be exhaustive for all of the provincial government.

- [2] JPS advised the Complainant that it would only search within its own department for records relating to the request.
- [3] The Department located several responsive records, releasing some to the Complainant with redactions pursuant to sections 27, 29, 30, 31, and 40 of *ATIPPA, 2015*. The Department also advised that it had withheld approximately 30 pages in their entirety pursuant to section 30.
- [4] Dissatisfied with the Department’s decision to withhold information, the Complainant filed a complaint with this Office asking the Commissioner to review JPS’s response and provide them with the records.
- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY'S POSITION

- [6] JPS' position is that it has appropriately applied all exceptions to access in compliance with *ATIPPA, 2015*. The Department states that it conducted a line-by-line review of the records and the exceptions that have been applied are limited – especially where section 30 is concerned.
- [7] The Department states that the exceptions that were applied – section 27 (cabinet confidences); section 29 (policy advice); section 30 (legal advice); section 31 (disclosure harmful to law enforcement); and section 40 (disclosure harmful to personal privacy) – have been confirmed with Cabinet Secretariat and the legal counsel within the Department. The Department also notes that the Clerk of Executive Counsel reviewed the records to confirm public interest did not outweigh the application of section 27. With regard to the public interest at section 9, generally, JPS takes the position that the onus is on an applicant to demonstrate that the public interest outweighs the reason for the exception rather than any onus on JPS to provide evidence that the public interest does not outweigh the reason for the exception.
- [8] With respect to information withheld as legal advice, JPS advises that its position is that “a copy is not required in order for the OIPC to determine whether section 30 has been appropriately applied and is in keeping with common law which states that solicitor-client privileged information should only be provided where absolutely necessary.” The Department submits that its position is supported by recent decisions by the Supreme Court of Newfoundland and Labrador and the Supreme Court of Canada.

COMPLAINANT'S POSITION

- [9] It is the Complainant's position that the Department did not appropriately apply the exceptions and therefore the records should be released in full.

ISSUES

- [10] This report must assess whether the Department has appropriately withheld information pursuant to sections 27, 29, 30, 31, and 40.

DECISION

Section 27

- [11] Sections 27(1)(i) and (2)(a) relate to cabinet confidences:

Cabinet confidences

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

(i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).

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

- [12] Section 27 is a mandatory exception to access. The one record partially withheld under section 27 concerns the contents of a draft of a cabinet paper as well as comments regarding that draft paper. Having reviewed the record, I am satisfied that the information relates to a cabinet record and the Department is required by section 27 to withhold it.

Section 31

- [13] There was only one instance where section 31(1)(l) was applied to the records. Section 31(1)(l) states:

Disclosure harmful to law enforcement

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

(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;

- [14] The information at issue is the teleconference number for a law firm, as well as the passcode required to enter into the teleconference. Revealing the teleconference number and

passcode would allow anyone with the information to be able to dial into the law firm's communication system and access potentially privileged conversations. We have made recommendations regarding similar information in Reports A-2021-034 and A-2021-039 (among others) and I am satisfied that releasing this information would reveal the arrangements of a communications system in this case. Therefore, I find that the Department appropriately applied section 31(1)(l) to withhold this information.

Section 29

[15] A number of records were partially redacted pursuant to section 29(1)(a):

Policy Advice or Recommendations

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;

[16] As noted in OIPC Report A-2021-033, the purpose of section 29 is to provide protection for public servants to freely engage in discussions and debates, and otherwise provide opinions, advice, or recommendations on policy matters. Section 29 is a discretionary exception under *ATIPPA, 2015* and the exercise of that discretion must be reasonable.

[17] Having reviewed the records, we find that the withheld information clearly covers options, recommendations, proposals, and advice within the meaning of section 29(1)(a) of *ATIPPA, 2015*. Given the sensitivity of the topic of the request, specifically concerning the Public Inquiry Respecting Ground Search and Rescue for Lost and Missing Persons (the "Inquiry"), it is understandable and reasonable that the Department would exercise its discretion to withhold the information subject to section 29(1)(a).

Section 40

[18] The responsive records also contained a number of redactions pursuant to section 40(1). Section 40(1) states that "[t]he 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."

[19] Some information previously withheld from the Complainant related to the Complainant themselves and, as a result, the Department released this information to them.

[20] Other information subject to section 40 included details regarding an employee taking time off, a resume, personal addresses, medical information, and information about an individual's racial identity or ethnic origin. Some information is presumed to be an unreasonable invasion of privacy due to the nature of the information. Other information, where, on its face it might not be presumed to be an unreasonable invasion of personal privacy, the Department engaged in weighing factors in favour of disclosure against those in favour of withholding. The Department ultimately determined that there were no factors in favour of disclosure. Given the personal nature of the information redacted, I am satisfied that the Department was required to withhold this information under section 40 and did so appropriately.

Section 30

[21] The Department advised the Complainant that there were a number of records withheld either partially or in their entirety pursuant to sections 30(1)(a) and (b). The Department also withheld these records from the OIPC's review, citing solicitor-client privilege and litigation privilege.

[22] In its initial submissions to this Office, the Department stated that the information it had withheld included legal advice from the JPS Civil Division, two Assistant Deputy Ministers acting in a legal capacity, as well as the Government of Newfoundland and Labrador's ("GNL") counsel for the Inquiry. The Department provided some minimal additional details regarding five pages of records withheld pursuant to section 30, noting that it had consulted with a solicitor within the Civil Division when assessing the applicability of section 30. The Department's submission states that the contents are legal advice of its Civil Division, Assistant Deputy Ministers, and GNL's legal counsel for the Inquiry. It does not name the solicitors involved in providing legal advice or receiving a request for legal advice, or the solicitor who assessed the records and determined that they were subject to solicitor-client privilege; nor has the Department provided a bare description of the records. This Office

requested the Department to provide further details or an affidavit from a solicitor knowledgeable about the withheld information, but the Department declined to do so.

[23] The Department further relies on the decision of the Supreme Court of Newfoundland and Labrador in [Newfoundland and Labrador \(Justice and Public Safety\) v. Newfoundland and Labrador \(Information and Privacy Commissioner\)](#), noting Justice MacDonald's holding that "the Commissioner has no authority to compel disclosure of solicitor-client records." We have appealed this decision but, in the interim, we respect the ruling.

[24] While the Supreme Court of Newfoundland and Labrador held that *ATIPPA, 2015* is insufficiently clear to allow this Office to compel the production of records over which solicitor-client privilege has been claimed, the burden of proof placed on a public body by section 43 to establish that an exception to access has been properly applied remains unchanged. The Court also did not indicate that the Department would be prohibited from providing the records to us for review, and the statutory protections for any records provided to this Office were noted. In the absence of sufficient evidence to satisfy this Office that the records are subject to solicitor-client privilege, this Office requires more than the Department's assertion that it has properly applied section 30. The Department has withheld over thirty pages pursuant to section 30; however, it has only provided details regarding approximately five pages, and what it has provided does not amount to evidence. As this Office noted in A-2022-010, without the ability to review the records themselves, we will adopt the evidentiary standard found in the context of civil litigation:

[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*

[25] For the above-noted reasons I am not satisfied that the Department has discharged its burden of proof regarding its reliance on section 30. This is consistent with the approach that we have taken in a number of reports going back to 2019 where core government departments have chosen not to discharge their burden of proof by providing us with the records themselves or in any other way. Recommending the release of records that I have not had an opportunity to review is something that makes me uncomfortable. The exception may well apply, in which case the Department is well within its rights to withhold it – but I simply have no basis to conclude that it does because I have not seen the records or any other evidence. Given that the public body has declined to meet its responsibility under section 43 of the Act, I have no other choice but to recommend release.

RECOMMENDATIONS

[26] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Justice and Public Safety continue to withhold the information redacted pursuant to sections 27, 29, 31, and 40. I also recommend that the Department release all information it has withheld pursuant to section 30.

[27] 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.

[28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of February 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador