



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-011

March 6, 2023

Treasury Board Secretariat

Summary:

Treasury Board Secretariat received an access request for records relating to a workplace investigation involving the Applicant. It provided most of the records, but redacted some information on the basis of sections 29 (advice and recommendations), 30 (solicitor client privilege), 31 (security arrangements), and 40 (personal privacy). The Applicant filed a complaint with our Office. During the informal resolution process, the section 31 and 40 issues were resolved. The Commissioner found that section 29 was properly applied. However, TBS had refused to provide our Office with the records for which section 30 were claimed. The Commissioner found that TBS had not met the burden of proof that section 30 applied, and therefore recommended that the information redacted on the basis of section 30 be disclosed to the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 29, 30, 43, and 97.

Authorities Relied On:

NL OIPC Reports: [A-2022-010](#), [A-2022-011](#), [A-2022-019](#), [A-2022-020](#);

[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 Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) to Treasury Board Secretariat (“TBS”) for all information created and gathered for the purpose of a workplace investigation involving the Applicant, including records relating to discipline and the Applicant’s personnel file.
- [2] TBS provided almost all of the requested information, with a very few redactions pursuant to section 29 (advice and recommendations), section 40 (personal privacy), section 31(1)(l) (security arrangements), and section 30 (legal advice). The Applicant objected to these redactions and filed a complaint with our Office.
- [3] During the course of informal resolution discussions, the complaints regarding redactions made under sections 31 and 40 were resolved, leaving only the issues of sections 29 and 30 for this report.
- [4] With respect to information redacted pursuant to section 30, TBS refused to provide those records to our Office for review. TBS has also refused to consider, as an alternative to production of the records, providing us with a sufficiently detailed description of the records to enable our Office to determine whether the exception applies.
- [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] Treasury Board Secretariat takes the position that pursuant to a decision of the Supreme Court it is not obliged to provide to our Office records for which solicitor-client privilege is claimed.
- [7] TBS further submits that its description and explanation of the redactions in its submissions is sufficient to meet the burden of proof that section 30 applies.

COMPLAINANT'S POSITION

[8] The Complainant requested that all of the withheld information be provided to him, but did not provide additional submissions.

ISSUES

[9] Whether Treasury Board Secretariat has met the burden, under section 43 of *ATIPPA, 2015*, of proving that section 29 of the Act applies to information withheld from the Complainant.

[10] Whether Treasury Board Secretariat has met the burden, under section 43 of *ATIPPA, 2015*, of proving that section 30 of the Act applies to information withheld from the Complainant.

DECISION

Section 29

[11] Section 29(1)(a) of *ATIPPA, 2015* the provision claimed by TBS, reads as follows:

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;

[12] TBS applied this provision to withhold a very few passages in an email. On review, those passages clearly constitute advice from one public servant to another, and in our view are therefore appropriately withheld.

Section 30

[13] Section 30 of *ATIPPA, 2015* reads as follows:

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.*

(2) *The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.*

[14] In *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, the Supreme Court of Newfoundland and Labrador held 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.

[15] The position of this Office on the issues surrounding the application of section 30, and the refusal by some public bodies to provide to our Office for review records for which that exception has been claimed, has been explained in a number of recent reports, including Reports A-2022-010, A-2022-011, and A-2022-019. It may be summarized as follows.

[16] Without having a copy of the records to review, it is very difficult for our Office to provide meaningful oversight pursuant to section 3 of the *Act*. Where a public body refuses to provide our Office with records subject to a claim of solicitor-client privilege, we must assess the alternative evidence provided on a case-by-case basis. As the above-noted court decision is currently under appeal, we have adopted the civil law evidentiary standard to determine whether the public body has met the burden of proof at section 43. That requires, as stated in Report A-2022-010, 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.

[17] In the present case, TBS declined to provide either an affidavit or a detailed list of the withheld records with a description of each record. Instead, in its submissions it claims that it has conducted a line-by-line review of the records, and that what it has withheld is an email thread between TBS representatives and a Department of Justice and Public Safety solicitor assigned to TBS, seeking legal advice.

[18] In our view, this is not enough. First, three of the four redacted pages were withheld in their entirety. TBS does not specifically state what those pages are, or further describe them. While they are contained in a 131-page package of records that are mostly email correspondence, the package also contains draft and final versions of letters, and other kinds of documents. We therefore have no evidence (such as letterhead, email headers, subject lines, etc.) to allow us to know what those fully-withheld pages are and that they are indeed emails.

[19] One page is partially redacted. It is an email, but there is no evidence that any of the sender or recipients of that message, or the preceding or following messages, is a solicitor. The government telephone directory lists some of those named individuals as being departmental human resources specialists. It does not list the other names at all. In its submissions, TBS does not name any of those individuals and, in particular, does not identify the solicitor.

[20] The subject line of that one email message is “[Applicant’s Name] – Revised Documents.” That, unfortunately, provides no further assistance. If the withheld information is part of a continuum of communication that elsewhere involves a solicitor and client, there is no way for

us to verify it and the public body has provided no assertion, evidence or anything else to explain why this information would be privileged.

[21] TBS further stated that “...the JPS solicitor was clearly acting in her capacity as the solicitor for TBS, the TBS representatives were seeking legal advice from the solicitor, and that request was intended to be confidential.” Those, of course, represent the three parts of the classic test for solicitor-client privilege. However, the assertions of the Department are not evidence, and there is no other evidence on which our Office can independently confirm that the records meet the test.

[22] TBS further states that “The applicability of section 30 was confirmed by a solicitor within the JPS Civil division.” The Department however, does not provide us with that opinion, or identify the solicitor in question.

[23] As we stated recently in Report A-2022-010:

[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).

[24] Our conclusion is that the submission provided by TBS is simply a somewhat more sophisticated version of “trust us”. It still falls short of providing sufficient evidence to enable our Office to conclude that TBS has met the burden of proof under section 43 of the Act that the exception in section 30 applies.

[25] The important difference between such assertions, even of legal counsel, and evidence which can be tested was recently addressed by the Court in a decision in *Lewisporte (Town) v. Newfoundland and Labrador (Information and Privacy Commissioner)*:

[41] Members of the bar are officers of the Court, and take an oath of that office upon their call to the bar. As a result, lawyers are honour-bound to be forthright in their representations to the Court. However, I am not satisfied that this is a sufficient safeguard to ensure the integrity of the information on which the Court bases decisions. Submissions to a court, often called argument, are

typically partisan and persuasive presentations of information. They are an important part of advocacy but they do not have the same assurances of reliability and trustworthiness as information given as evidence, either on the stand or by affidavit. First, the circumstances of the communications are different. There is a solemnity and formality to the taking of evidence that helps ensure its integrity. Second, lawyers cannot be cross-examined on their submissions. Cross-examination is an effective tool for testing reliability and credibility. Even the possibility that one may be cross-examined on information likely enhances its accuracy.

[26] The Act requires that unless a public body has sufficiently discharged its burden of proof to establish, on balance of probabilities, that an exception to access justifies withholding information, then that information must be disclosed in response to an access request. Therefore we have no choice but to recommend that the information be disclosed.

RECOMMENDATIONS

[27] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that Treasury Board Secretariat:

1. continue to withhold from the Complainant the information redacted on the basis of sections 29, 31 and 40;
2. disclose to the Complainant the information redacted on the basis of section 30.

[28] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Treasury Board Secretariat 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.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of March, 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador