March 20, 2009 **A-2009-004**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2009-004

Eastern Regional Integrated Health Authority

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records relating to the complaint, investigation, and suspension of the hospital privileges of a doctor employed by the Eastern Regional Integrated Health Authority ("Eastern Health"). Eastern Health relied on section 6(2) (in conjunction with section 8.1 of the *Evidence Act*) and the exceptions to disclosure set out in section 21 (solicitor-client privilege) and section 30(1) (personal Information) to deny access to information in a number of records. The Commissioner determined that section 8.1 of the *Evidence Act* did not operate in conjunction with section 6(2) of the *ATIPPA* and section 5(f) of the *Access to Information Regulations* to allow Eastern Health to deny access to any of the information in the responsive record. The Commissioner concluded that certain information was subject to solicitor-client privilege and Eastern Health was, therefore, entitled to refuse access to that information pursuant to section 21 of the *ATIPPA*. The Commissioner also found that certain information in the responsive record was personal information as defined in section 2(o) and Eastern Health was, as a result, obligated not to disclose that information in accordance with section 30(1) of the *ATIPPA*. The Commissioner recommended release of all information that had not previously been disclosed to the Applicant with the exception of the information protected from release by sections 21 and 30(1) and certain information which was not responsive to the Applicant's request.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(o), 6, 21, 30 and 64; *Evidence Act*, R.S.N.S. 1989, c. 154, s. 60; *Evidence Act*, R.S.N.L. 1990, c. E-16, s. 8.1; *Access to Information Regulations* (N.L. Reg. 11/07), s. 5; *Personal Health Information Act*, S.N.L. 2008, c. P-7.01, s. 58.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-004 and 2007-015; *Foley v. Cape Breton Regional Hospital* 1996 CanLII 1262 (N.S.S.C.); *Eastern Regional Integrated Health Authority v. Commission of Inquiry on Hormone Receptor Testing*, 2008 NLTD 27 (CanLII); *Solosky v. The Queen*, 1979 CanLII 9 (S.C.C.), [1980] 1 S.C.R. 821; *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General*), 2007 CarswellNfld. 338 (Nfld. T.D.); *Blank v. Canada (Minister of Justice)* (2004), 244 D.L.R. (4th) 80. (F.C.A.).

Other Resources Cited: Cameron, Honourable Margaret A. (Commissioner), *Commission of Inquiry on Hormone Receptor Testing*, St. John's: The Queen's Printer, 2009.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 19 July 2007 to the Eastern Regional Integrated Health Authority ("Eastern Health"), wherein he sought disclosure of records as follows:

> *All reports, briefing notes, e-mails, and blackberries from December 1st 2006 to July 18th 2007 regarding complaints, investigation, and suspension of hospital privileges of a* [*doctor*] *working for The Eastern Regional Health Authority.*

[2] Eastern Health responded to the Applicant's request in correspondence dated 16 August 2007 in which it denied access to the entire 307 pages of the responsive record on the basis of section 22 (Disclosure harmful to law enforcement) of the *ATIPPA*.

[3] In a Request for Review received in our Office on 7 September 2007 the Applicant asked for a review of the decision of Eastern Health with respect to his access request.

[4] During the informal resolution process Eastern Health abandoned its reliance on section 22 and agreed to release some of the information responsive to the Applicant's request. Eastern Health continued to deny access to certain other information, relying on sections 6(2), 21 and 30 of the *ATIPPA*.

[5] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 2 September 2008 the Applicant and Eastern Health were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process both parties were given the opportunity to provide written submissions to this Office pursuant to section 47.

II PUBLIC BODY'S SUBMISSION

[6] Eastern Health provided my Office with a written submission in correspondence dated 16 September 2008. In that submission, Eastern Health takes the position that section 6(2) of the *ATIPPA* is applicable to some of the responsive records. Section 6(2) provides that where access to a record is prohibited or restricted by a provision designated in a regulation, that provision will prevail over the *ATIPPA*. Eastern Health further states that section 5(f) of the *Access to Information Regulations* (N.L. Reg. 11/07) expressly subordinates the *ATIPPA* to the provision set out in Section 8.1 of the *Evidence Act*.

[7] Eastern Health continues its submission by stating:

> *Pursuant to section 8.1(2) of the Evidence Act, section 8.1 applies to a "peer review committee of a member" and a "quality assurance committee of a member", both as defined under the Hospital and Nursing Home Association Act. This is a reference to what is now the Health Care Association Act . . . and Eastern Health is a defined member pursuant to this statute.*
>
> *Section 8.1(3) of the Evidence Act states:*
>
> > *8.1(3) No report, statement, evaluation, recommendation memorandum, document or information, of, or made by, for or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding.*
>
> *"Legal proceeding" as defined in section 8.1(1) of the Evidence Act includes "an action, inquiry, arbitration, judicial inquiry or civil proceeding in which evidence may be given and also includes a proceeding before a board, commission or tribunal."*

[8] Eastern Health then states its position regarding some of the documents in the responsive record:

> *It is Eastern Health's position that peer review materials that are to be considered by internal tribunals, such as committees established pursuant to the Medical Staff Bylaws of Eastern Health's facilities for the purpose of conducting hearings respecting the conduct, privileges and appointment of medical staff members, are afforded the full protection provided by section 8.1(3).*

> *Further, quality assurance documents that are reported to the Regional Quality Council Committee of Eastern Health, which ultimately reports to the Board of Trustees, are also afforded the full protection provided by section 8.1(3).*

[9] Eastern Health continues its submission by referring to Report 2007-004 from this Office in which my predecessor discussed the interaction between section 8.1(3) of the *Evidence Act* and section 6(2) of the *ATIPPA*. Eastern Health is aware that in Report 2007-004 (involving Eastern Health) a finding was made that in order for section 8.1(3) to apply, the documentation or information at issue must be "of" or "made by, for or to a committee" as defined in section 8.1(2) and it must also be directly associated with a legal proceeding. Eastern Health points out that it did not at the time Report 2007-004 was released and, still does not, accept that finding in Report 2007-004.

[10] Eastern Health further states:

> *. . . section 8.1 of the Evidence Act does not merely create a privilege which allows a hospital to refuse production of quality assurance documents, rather it creates a mandatory prohibition of disclosure.*

[11] In its submission, Eastern Health discusses the reliance by my predecessor in Report 2007-004 on *Foley v. Cape Breton Regional Hospital* 1996 CanLII 1262 (N.S.S.C.) to decide that section 8.1 only becomes operative when there is an "existing legal proceeding." The *Foley* case dealt with section 60 of the Nova Scotia *Evidence Act*, which is similar to section 8.1 of our *Evidence Act*. Eastern Health offered the view that:

> *With respect, the 2007-004 Report failed to identify that s. 8.1 of the Evidence Act is not comparable to s. 60 of the Evidence Act (Nova Scotia). Rather, s. 60 of the Nova Scotia Evidence Act merely excuses a witness in legal proceedings from answering a question about a quality assurance or peer review document, whereas section 8.1 of the Newfoundland and Labrador Evidence Act provides that no peer review or quality assurance document "shall be disclosed in or in connection with a legal proceeding."*
>
> *In fact, s. 8.1 of the NL Evidence Act has a much broader scope than s. 60 of the Nova Scotia legislation. Section 8.1(3) relates to the disclosure of a peer review or quality assurance document "in or in connection with" a legal proceeding and not with the admissibility of such a document through a witness in a legal*

> *proceeding. Further, s. 8.1(3) applies "in* ***or in connection with*** *a legal proceeding" whereas s. 60(2) applies in particular "in any legal proceeding".*
>
> *Given the numerous differences between s. 8.1 of the Newfoundland and Labrador Evidence Act and s. 60 of the Nova Scotia Evidence Act, it is Eastern Health's position that a legal proceeding need not be qualified by the word "existing", and reliance upon Foley is not justified.*
>
> *In addition, even if it is ultimately determined that a legal proceeding must be "existing" in order to attract the Evidence Act exemption, it is also Eastern Health's position that the definition of "existing legal proceeding" is inclusive to the point that proceedings undertaken by internal tribunals, such as committees established pursuant to Medical Staff Bylaws for the purpose stated above are existing legal proceedings, and documents that are produced by or for such a tribunal therefore should be protected under s. 8.1(3) of the Evidence Act for all purposes.*
>
> *Furthermore, Eastern Health is also of the view that any investigation undertaken by the Office of the Information and Privacy Commissioner pursuant to s. 46 of ATIPPA is in itself a legal proceeding of the nature contemplated by s. 8.1 of the Evidence Act, and the same principles noted above will apply to peer review and quality assurance materials sought to be obtained thereunder.*
>
> [Emphasis in original]

[12] Eastern Health then proceeds to discuss how section 8.1 of the *Evidence Act* is applicable to various documents in the responsive record. Eastern Health first referred to a document entitled *Sentinel Event Report* found at pages 242-243 of the responsive record by saying:

> *In particular, pages 242-243 comprise a "Sentinel Event Report". All such reports are quality assurance documents that are reported to the Regional Quality Council Committee of Eastern Health, which ultimately reports to the Quality Committee of the Board of Trustees. In addition, legacy organizations were directed to abide by the by-laws, policies, and procedures of their respective legacy boards until replacement by-laws, policies, and procedures have been formally introduced by Eastern Health.*
>
> *Each of these former organizations had properly constituted quality assurance committees and peer review procedures in place at the time of amalgamation, and these committees and procedures therefore currently continue in place.*
>
> *As such, this document is of a nature contemplated for exemption by Section 8.1 of the Evidence Act.*

[13] Eastern Health then continues its submission by discussing the *Report on . . . Radiologist* found on pages 251-293 of the responsive record by stating:

> *With respect to pages 251-293, the excepted sections of the report contained therein are peer review documents. In particular, the peer review conducted respecting the Burin radiologist was performed pursuant to the Medical Staff Bylaws of Peninsula Care Corporation, one of Eastern Health's amalgamated organizations. These Medical Staff Bylaws remain in place.*
>
> *Pages 251-293 contain a report prepared for the Minister of Health, where he requested many documents, including the "result of the peer review process". As it is very clear that this report constitutes a "report . . . of, or made by a* [*peer review] committee . . ." as contemplated by Section 8.1(3) of the Evidence Act, then it is equally clear that the report to the Minister is therefore exempted from disclosure to the applicant. Further, as we previously explained, much of the information contained in the report is also personal information of the . . . radiologist.*

[14] Eastern Health concluded its submission on the *Sentinel Event Report* and the *Report on . . . Radiologist* by stating:

> *We are also familiar with Judge Dymond's recent Supreme Court decision entitled Eastern Regional Integrated Health Authority v. Commission of Inquiry on Hormone Receptor Testing, 2008 NLTD 27 (CanLII), and note that Judge Dymond states in his decision:*
>
> > *[125] It is clear that Reports that properly fit under s. 8.1, being proper Peer Review Committee reports and proper Quality Assurance Committee reports, which come from properly constituted bylaws passed by various corporations and accepted by trustees under the Health Care Association Act, RSNL 1990 c. H-8 are, and will continue to be, protected pursuant to s. 8.1 of the Evidence Act.*
>
> *Accordingly, with respect to the materials identified at pages 251-293 and at pages 242-243, we remain of the opinion that these are of a nature contemplated for exemption by section 8.1 of the Evidence Act.*

III APPLICANT'S SUBMISSION

[15] The Applicant did not provide a written submission.

IV DISCUSSION

[16] The issues to be decided are as follows:

1. Whether section 8.1 of the *Evidence Act* is applicable to any information in the responsive record;

2. Whether section 21 of the *ATIPPA* is applicable to any information in the responsive record; and

3. Whether section 30(1) of the *ATIPPA* is applicable to any information in the responsive record.

1. Is section 8.1 of the *Evidence Act* applicable to any information in the responsive record?

[17] Eastern Health takes the position that, pursuant to section 6(2) of the *ATIPPA*, section 8.1 of the *Evidence Act* is applicable to certain of the records responsive to the Applicant's request. Section 6 of the *ATIPPA* provides in part:

> *6. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.*
>
> *(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.*

[18] Eastern Health further submits that paragraph 5(f) of the *Access to Information Regulations* (N.L. Regulation 11/07) is applicable. Section 5 of that regulation provides as follows:

> *5. For the purpose of subsection 6(2) of the Act, the following provisions shall prevail notwithstanding another provision of the Act or a regulation made under the Act:*

(a) subsection 62(2) of the Adoption Act ;

(b) subsection 9(4) of the Aquaculture Act ;

(c) subsections 5(1) and (4) of the Aquaculture Regulations ;

(d) section 115 of the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act ;

(e) sections 67 to 70 of the Child, Youth and Family Services Act ;

(f) section 8.1 of the Evidence Act ;

(g) subsection 24(1) of the Fatalities Investigations Act ;

(h) subsection 5(1) of the Fish Inspection Act ;

(i) section 4 of the Fisheries Act ;

(j) sections 173, 174, 174.1 and 174.2 of the Highway Traffic Act ;

(k) section 18 of the Lobbyist Registration Act ;

(l) section 15 of the Mineral Act ;

(m) section 16 of the Mineral Holdings Impost Act ;

(n) section 15 of the Mining Act ;

(o) subsection 13(3) of the *Order of Newfoundland and Labrador Act* ;

(p) sections 153, 154 and 155 of the Petroleum Drilling Regulations ;

(q) sections 53 and 56 of the Petroleum Regulations ;

(r) sections 47 and 52 of the Royalty Regulations, 2003 ;

(s) section 12 and subsection 62(2) of the Schools Act, 1997 ;

(t) sections 19 and 20 of the Securities Act ;

(u) section 13 of the Statistics Agency Act ; and

(v) section 18 of the Workplace Health, Safety and Compensation Act .

[19] Section 8.1 of the *Evidence Act* provides as follows:

> *8.1 (1) In this section*
>
> *(a) "legal proceeding" includes an action, inquiry, arbitration, judicial inquiry or civil proceeding in which evidence may be given and also includes a proceeding before a board, commission or tribunal; and*
>
> *(b) "witness" includes a person who, in a legal proceeding*
>
> *(i) is examined orally for discovery,*
>
> *(ii) is cross examined on an affidavit made by that person,*
>
> *(iii) answers interrogatories,*
>
> *(iv) makes an affidavit as to documents, or*
>
> *(v) is called on to answer a question or produce a document, whether under oath or not.*
>
> *(2) This section applies to the following committees:*
>
> *(a) the Provincial Perinatal Committee,*
>
> *(b) a quality assurance committee of a member, as defined under the Hospital and Nursing Home Association Act , and*
>
> *(c) a peer review committee of a member, as defined under the Hospital and Nursing Home Association Act .*
>
> *(3) No report, statement, evaluation, recommendation, memorandum, document or information, of, or made by, for or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding.*
>
> *(4) Where a person appears as a witness in a legal proceeding, that person shall not be asked and shall not*
>
> *(a) answer a question in connection with proceedings of a committee set out in subsection (2); or*
>
> *(b) produce a report, evaluation, statement, memorandum, recommendation, document or information of, or made by, for or to, a committee to which this section applies.*

> *(5) Subsections (3) and (4) do not apply to original medical or hospital records pertaining to a person.*
>
> *(6) Where a person is a witness in a legal proceeding notwithstanding that he or she*
>
> *(a) is or has been a member of;*
>
> *(b) has participated in the activities of;*
>
> *(c) has made a report, evaluation, statement, memorandum or recommendation to; or*
>
> *(d) has provided information or a document to*
>
> *a committee set out in subsection (2) that person is not, subject to subsection (4), excused from answering a question or producing a document that he or she is otherwise bound to answer or produce.*

[20] It is the position of Eastern Health that the *Sentinel Event Report* found on pages 242-243 of the responsive record is a quality assurance document within the meaning of section 8.1 of the *Evidence Act* and that the *Report on . . . Radiologist* found on pages 251-293 of the responsive record is a peer review document within the meaning section 8.1 of the *Evidence Act.* Therefore, Eastern Health submits that both these documents are, in accordance with section 8.1(3) of the *Evidence Act*, a "document . . . of, or made by, for or to, a committee to which this section applies", that is, a quality assurance committee or a peer review committee. Accordingly, Eastern Health argues that section 8.1 is a provision which, pursuant to section 6(2) of the *ATIPPA* and section 5(f) of the *Access to Information Regulations,* "shall prevail over this Act or a regulation made under it."

[21] As Eastern Health has pointed out, my predecessor discussed section 8.1 of the *Evidence Act* in Report 2007-004. There, my predecessor stated at paragraph 58:

> *[58] It is clear that the application of section 8.1 of the Evidence Act requires the satisfaction of two conditions. First, the documentation or information at issue must be "of, or made by, for or to a committee" as defined in section 8.1(2). Second, it must be directly associated with a legal proceeding. I must determine, therefore, whether both of these conditions have been met with respect to the responsive record.*

[22] Accordingly, in this Report I must decide if the two conditions referred to by my predecessor have been met with respect to the two documents entitled *Sentinel Event Report* and the *Report on . . . Radiologist* or with respect to any other documents in the responsive record for which Eastern Health relies on section 8.1 of the *Evidence Act* to deny disclosure.

(a) Are the records associated with a legal proceeding?

[23] In Report 2007-004, my predecessor discussed the purpose of the *Evidence Act* and, in particular, section 8.1 of that *Act*. He stated at paragraph 71:

> *[71] A review of the provisions of the Evidence Act indicates that the Act deals with such matters as the admissibility of evidence, the competency and compellability of witnesses, and the examination of witnesses in a legal proceeding. This leads to the conclusion that section 8.1 becomes operative when there is an existing legal proceeding as defined in section 8.1(1)(a). Until there is an existing legal proceeding, the second condition cannot be satisfied.*

[24] In *Eastern Regional Integrated Health Authority v. Commission of Inquiry on Hormone Receptor Testing*, 2008 NLTD 27 (CanLII), Dymond J. commented on section 8.1 at paragraph 33:

> *[33] The Evidence Act, s. 8.1, prohibits a party to disclose in, or in connection with a legal proceeding, any reports, statements, evaluations, recommendations, memorandum, documents and information made by, for, or to a committee. S.8.1(4)(b) of the Evidence Act. A public inquiry is a legal proceeding within the* Act. Re: 8.1(1)(a).

[25] I agree with the positions stated by my predecessor and by Mr. Justice Dymond. Section 8.1 of the *Evidence Act* becomes operative when there is an existing legal proceeding and in that legal proceeding it operates to prohibit the disclosure of documents that are made by, for, or to a quality assurance committee or a peer review committee.

[26] In its submission Eastern Health states as follows:

> *. . . section 8.1 of the Evidence Act does not merely create a privilege which allows a hospital to refuse production of quality assurance documents, rather it creates a mandatory prohibition of disclosure.*
>
> [Emphasis added]

I would agree with Eastern Health that section 8.1 creates a mandatory prohibition against disclosure, but only in the manner described by Mr. Justice Dymond. That is, section 8.1 creates a mandatory prohibition against disclosing documents in relation to either a quality assurance committee or a peer review committee in a legal proceeding or in connection with that legal proceeding.

[27] Eastern Health takes the position that section 8.1 operates in relation to the Applicant's access request by virtue of section 6(2) of the *ATIPPA*, which provides:

> *(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.*
>
> [Emphasis added]

Eastern Health argues that paragraph (f) of section 5 of the *Access to Information Regulations* designates section 8.1 of the *Evidence Act* as a provision that prohibits, restricts or limits the right of access to a record and, therefore, that provision prevails over the *ATIPPA*. I am unable to accept this argument by Eastern Health for the reasons I will set out below.

[28] I agree with Eastern Health's position that section 8.1 is listed in section 5 of the *Access to Information Regulations* as a provision that is **intended** to prevail over the *ATIPPA*. However, section 8.1 does not prohibit, restrict or limit access to a record; it prohibits the disclosure of certain records in a legal proceeding or in connection with a legal proceeding. In that regard, section 8.1 is an anomaly in relation to the other provisions listed in section 5 of the *Access to Information Regulations*, which do prohibit, restrict or limit access to records. Some examples are:

1. Paragraph (a) of section 5 of the *Access to Information Regulations* refers to subsection 62(2) of the *Adoption Act*, which provides:

> *62(2) Notwithstanding the Access to Information and Protection of Privacy Act and the Privacy Act, the use of, disclosure of and access to information in records pertaining to adoptions,*

> *regardless of where the information or records are located shall be governed by this Act.*

2. Paragraph (b) of section 5 of the *Access to Information Regulations* refers to subsection 9(4) of the *Aquaculture Act*, which provides:

> *9(4) Notwithstanding subsection (3), information prescribed as confidential shall not be available to the public.*

3. Paragraph (s) of section 5 of the *Access to Information Regulations* lists section 12 and subsection 62(2) of the *Schools Act, 1997*. Subsection 62(2) provides:

> *62(2) Notwithstanding subsection (1), the minutes of a closed meeting shall not be available to the public.*

[29] The provisions listed in section 5 of the *Access to Information Regulations* (with the exception of 8.1 of the *Evidence Act*) provide that certain records or information are not to be disclosed, are not to be made available to the public or are to be kept confidential. In that regard, these provisions prohibit, restrict or limit access to records. Section 8.1, despite being listed in paragraph (f) of section 5 of the *Access to Information Regulations*, does not prohibit, restrict or limit access to records; it prohibits the disclosure of certain records in a legal proceeding or in connection with a legal proceeding.

[30] I note that the recently enacted (but not yet proclaimed into force) *Personal Health Information Act*, S.N.L. 2008, c. P-7.01 contains a provision dealing with quality assurance documents and peer review documents. Section 58 of that *Act* provides as follows:

> 58**.** *(1) A custodian shall refuse to permit an individual to examine or receive a copy of a record of his or her personal health information where*
>
> . . .
>
> *(c) the information was created or compiled for the purpose of*
>
> *(i) a committee referred to in subsection 8.1(2) of the Evidence Act ,*
>
> . . .

By making direct reference to the two committees, section 58 of the *Personal Health Information Act* clearly accomplishes the objective of denying access to information that was

created or compiled for the purpose of a quality assurance committee or a peer review committee. However, including a reference in paragraph (f) of section 5 of the *Access to Information Regulations* to the entire provision in section 8.1 of the *Evidence Act* does not accomplish the same objective. Rather, it achieves a somewhat narrower objective: prohibiting disclosure in a legal proceeding.

[31] In its submission, Eastern Health comments on the reliance by my predecessor in Report 2007-004 upon *Foley v. Cape Breton Regional Hospital* 1996 CanLII 7262 (N.S.S.C.). Eastern Health submits that there are a number of differences between section 8.1 of the *Evidence Act* and the comparable provision in section 60 of the Nova Scotia *Evidence Act* such that my predecessor was not justified in relying on *Foley* to support the proposition that the phrase "legal proceeding" in section 8.1 should be read as an "existing legal proceeding."

[32] In Report 2007-004, my predecessor discussed the *Foley* case at paragraphs 76 to 77 as follows:

> *[76] In Foley v. Cape Breton Regional Hospital, 1990 CanLII 7262 (NS S.C.), the Nova Scotia Supreme Court dealt with the applicability of section 60 of the Nova Scotia Evidence Act. Section 60 is comparable to section 8.1 of the Newfoundland and Labrador Evidence Act. In Foley, the Court was dealing with an access request under Nova Scotia's Freedom of Information and Protection of Privacy Act for a report prepared in relation to a review of incidents involving a number of patients. The hospital argued that the record should not be disclosed because it was a peer review document. In commenting on the applicability of section 60 of the Nova Scotia Evidence Act, McAdam J. stated:*
>
> > *It no longer appears to be in disputed* [sic] *that s. 60 is not applicable because, in the present circumstances, the request for access and the decision by the Board, do not involve processes within the definition of "legal proceeding" contained in s. 61(a), nor are we involved with a "witness" being asked, in the course of a legal proceeding, to answer questions or produce documents as provided in ss. (b). In the event there may later be such "legal proceedings" and persons are called as "witnesses" then, pursuant to s. 60(1)(b), it will be for determination at that time whether, and to what extent if any, the privilege in s. 60(2) will be applicable. In this regard, I make no finding in respect to the application of s. 60(2) on such a legal proceeding and on such an application.*

> *[77] I follow the reasoning of McAdam J. in Foley and find that there is no existing legal proceeding in which the responsive record may be ruled admissible or inadmissible. If there is a subsequent legal proceeding in which the responsive record may be relevant, then it will be for the judge in that forum to determine whether or not the documents comprising the responsive record are admissible or inadmissible under section 8.1. The issue in this Review is not whether the responsive record should or should not "be disclosed in or in connection with a legal proceeding." There is no existing legal proceeding. The issue on this Review is whether the responsive record should be disclosed to the Applicant under the ATIPPA.*

[33] My reading of paragraphs 76 to 77 of Report 2007-004 convinces me that my predecessor was relying on the reasoning in *Foley* only to the extent that both section 8.1 of our *Evidence Act* and section 60 of the Nova Scotia *Evidence Act* become operative when there is an existing legal proceeding. Therefore, any differences with respect to the scope of the two *Acts* have no bearing on the fact that both section 8.1 and section 60 only come into effect when there is an existing legal proceeding.

[34] Furthermore, it is my view that the position of my predecessor is supported by the previously cited comment by Dymond J. in *Eastern Regional Integrated Health Authority v. Commission of Inquiry on Hormone Receptor Testing* where he stated at paragraph 33:

> *[33] The Evidence Act, s. 8.1, prohibits a party to disclose in, or in connection with a legal proceeding, any reports, statements, evaluations, recommendations, memorandum, documents and information made by, for, or to a committee. S.8.1(4)(b) of the Evidence Act. A public inquiry is a legal proceeding within the* Act. Re: 8.1(1)(a).

The statement by Dymond J. is a clear reference to the fact that section 8.1 operates only when there is an existing legal proceeding.

[35] The operation of section 8.1 of the *Evidence Act* was recently discussed by Madame Justice Margaret Cameron in her report on the *Commission of Inquiry on Hormone Receptor Testing*, (St. John's: The Queen's Printer, 2009) on page 358:

> *Further, just because one can generally state that peer privilege exists in all provinces, it does not follow that the legislation is identical. One of the basic*

> *differences is whether the legislation creates a statutory privilege or a prohibition against disclosure. The first may be waived by the beneficiary; the second may not. Section 8.1 of the Evidence Act falls into the second category. It affords protection and imposes a protection, only in the context of a legal proceeding as defined in the Act. . . . Whether there are limitations outside the confines of a legal proceeding as defined in the Act depends on the meaning of "in connection with a legal proceeding." The earliest one could reasonably argue that a prohibition arises is on commencement of a legal proceeding. . . .*
>
> [Emphasis added]

[36] In conclusion, it is my determination that section 8.1 does not operate until there is an existing legal proceeding. In its submission, Eastern Health has put forth an alternate position should I make such a determination:

> *In addition, even if it is ultimately determined that a legal proceeding must be "existing" in order to attract the Evidence Act exemption, it is also Eastern Health's position that the definition of "existing legal proceeding" is inclusive to the point that proceedings undertaken by internal tribunals, such as committees established pursuant to Medical Staff Bylaws for the purpose stated above are existing legal proceedings, and documents that are produced by or for such a tribunal therefore should be protected under s. 8.1(3) of the Evidence Act for all purposes.*
>
> *Furthermore, Eastern Health is also of the view that any investigation undertaken by the Office of the Information and Privacy Commissioner pursuant to s. 46 of ATIPPA is in itself a legal proceeding of the nature contemplated by s. 8.1 of the Evidence Act, and the same principles noted above will apply to peer review and quality assurance materials sought to be obtained thereunder.*

[37] I will deal first with Eastern Health's position that the definition of "legal proceeding" in paragraph (a) of section 8.1(1) includes "proceedings undertaken by internal tribunals, such as committees established pursuant to Medical Staff Bylaws." If I am following the reasoning of Eastern Health correctly, then it is suggesting that proceedings of committees (such as peer review committees and quality assurance committees) are "legal proceedings" within the meaning of section 8.1 and, therefore, documents produced by or for the committees are protected by section 8.1(3). Would this not mean that the documents produced for or by the committees could not be reviewed by the committees because such documents, in the words of

section 8.1, “shall not be disclosed in or in connection with a legal proceeding”, the “legal proceeding” being those undertaken by the committees? This would result in the ludicrous outcome that a committee could not review documents prepared for it because section 8.1(3) prohibits it from having those documents disclosed during its proceeding. With the greatest of respect, I am of the view that section 8.1(3) was not enacted to bring about such a result.

[38] I have found that in order for section 8.1 to operate there must be an existing legal proceeding. The Applicant has made an access request to Eastern Health under the provisions of the *ATIPPA*. An access request is not a “legal proceeding” within the meaning of the *Evidence Act*. The Applicant is not a party to a legal proceeding with Eastern Health and is, therefore, not asking Eastern Health to disclose any reports or other documents in a legal proceeding or in connection with a legal proceeding. As such, section 8.1 of the *Evidence Act* has no applicability in relation to any of the records requested by the Applicant.

[39] Eastern Health has also submitted that any investigation by my Office upon a request for review pursuant to s. 46 of *ATIPPA* is in itself a legal proceeding of the nature contemplated by section 8.1 of the *Evidence Act*. It seems to me that this position advocates that section 8.1 would only apply to an access request after an applicant has been denied access to records by a public body and the applicant then requests a review of that decision of the public body by my Office. For all access requests prior to any appeal to my Office, therefore, section 8.1 of the *Evidence Act* could not be applicable and the applicant could not be denied access to reports in relation to quality assurance committees or peer review committees. However, this is exactly what Eastern Health has done: denied access. As a result, applying the reasoning of Eastern Health, an applicant would lose a right of access to records simply by appealing a decision to my Office thus bringing into operation section 8.1 of the *Evidence Act*. With the greatest of respect, in my opinion this line of reasoning by Eastern Health is illogical and I cannot accept it.

[40] Thus, it is my finding that the records entitled *Sentinel Event Report* and *Report on . . . Radiologist* are not associated with a legal proceeding, nor are any of the other documents in the responsive record.

(b) Are the records at issue "of, or made by, or for a committee" as defined in section 8.1(2)?

[41] As I have indicated, there are two conditions that must be met for section 8.1 of the *Evidence Act* to operate in relation to records. Having found that the records are not associated with a legal proceeding, I have determined that one of those conditions has not been met. As both of the conditions must be met for section 8.1 to be applicable, it will not be necessary for me to discuss whether the other condition requiring the documentation or information at issue to be "of, or made by, for or to a committee as defined in section 8.1(2)" has been met.

[42] Therefore, it is my determination that section 8.1 of the *Evidence Act* does not operate in relation to the Applicant's access request and it does not allow Eastern Health to deny the Applicant access to any of the records responsive to his request. I note here that Eastern Health has claimed the operation of section 8.1 (in accordance with section 6(2) of the *ATIPPA*) to deny the Applicant access to other records in addition the *Sentinel Event Report* found on pages 242-243 and the *Report on . . . Radiologist* found on pages 251-293. Thus, to be clear, it is also my finding that Eastern Health is not entitled to deny access to any of the information in the responsive record on the basis of section 8.1 of the *Evidence Act*.

2. Is Section 21 of the *ATIPPA* applicable to any information in the responsive record?

[43] Although Eastern Health has not referred to it in its submission, it has denied access to certain information in the responsive record on the basis of the exception set out in section 21 of the *ATIPPA*, which provides as follows:

> *21. The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege; or*
>
> *(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*

[44] My predecessor discussed the solicitor-client exception set out in section 21 in Report 2007-015 at paragraphs 40 to 47 as follows:

> *[40] The Supreme Court of Canada in Solosky goes on to affirm the three criteria necessary for solicitor-client privilege to exist. In a recent Supreme Court of Newfoundland and Labrador decision (Imperial Tobacco Company Ltd. v. Newfoundland and Labrador (Attorney General), 2007 NLTD 172), Chief Justice Green, in referring to Solosky, succinctly set out these criteria at paragraph 46:*
>
> > *[46] Generally, each communication must meet three criteria for the privilege to exist: (i) there must be 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 by the parties.*
>
> *[41] Mr. Justice Green also spoke specifically to the limitations of information protected by the privilege. At paragraphs 61 and 63 he commented as follows:*
>
> > *[61] The type of information protected is only that information that is necessary to achieve the purpose of the privilege, i.e., information that is "pertinent to the case" – the information platform, as it were – that the lawyer should have to be able to advise the client properly.*
> >
> > . . .
>
> *[47] On a similar note, the Federal Court of Appeal, in discussing the severability of a record that is subject to solicitor-client privilege, said that certain general information may be disclosed. In Blank v. Canada (Minister of Justice) (2004), 244 D.L.R. (4th) 80, Létourneau J.A. said at paragraph 66 that*
>
> > *[66] …general identifying information such as the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block can be severed and disclosed. As this Court pointed out in Blank, at paragraph 23, this kind of information enables the requester "to know that a communication occurred between certain persons at a certain time on a certain subject, but no more".*
>
> [Emphasis added]

[45] I adopt the principles set out by my predecessor in Report 2007-015 and will apply them in my discussion of the information for which Eastern Health has claimed the section 21 exception.

[46] Eastern Health has relied on the exception in section 21 to deny access to all the information found on pages 26 to 28 of the responsive record. Page 26 is an e-mail exchange between two employees of Eastern Health which makes reference to the sending of information to a lawyer, without any description of the information to be sent. I find that the e-mail exchange on page 26 is not a communication between a solicitor and a client. It is a communication between two employees of Eastern Health and, therefore, is not protected by solicitor-client privilege. Page 27 is a memorandum from an employee of Eastern Health to a lawyer that attaches an enclosure which is found on page 28. In relation to the memorandum on page 27, it is a communication between a solicitor and a client. However, it is only the lines that constitute the body of the memorandum that are protected by solicitor-client privilege, and these lines should not be disclosed. The names of the persons who sent and received the memorandum and the date of the memorandum are not part of the "information platform" referred to by Mr. Justice Green in *Imperial Tobacco* and are not, therefore, protected by solicitor-client privilege. Eastern Health is not, as a result, entitled to deny access to these three pieces of information. With regard to the enclosure found on page 28, it is part of the information "that the lawyer should have to be able to advise the client properly," and, as such, it is protected by solicitor-client privilege. Thus, Eastern Health is entitled to deny access to the enclosure on the basis of the exception set out in section 21.

[47] Eastern Health has relied on the exception in section 21 to deny access to the information in the fourth paragraph of a memorandum (found on page 75 of the responsive record) regarding a teleconference call between employees of Eastern Health that took place on 14 May 2007. I find that the information in this paragraph sets out a communication that took place between Eastern Health and its solicitor for the purpose of obtaining legal advice. Therefore, this information is protected by solicitor-client privilege and Eastern Health is entitled to deny access to it.

[48] Eastern Health has claimed the solicitor-client privilege exception in relation to information contained in the last sentence in the second last paragraph on page 81 of the responsive record.

The severed information is contained in a memorandum (on pages 80 to 81) regarding a teleconference call between employees of Eastern Health held on 4 June 2007. It is my determination that this information is not a communication between a solicitor and a client, rather it indicates that an Eastern Health employee has been directed to contact a particular lawyer. Consequently, this information is not protected by solicitor-client privilege and Eastern Health is not entitled to deny access to the information in this sentence on the basis of section 21 of the *ATIPPA*.

[49] Eastern Health claims the section 21 exception in relation to the third last paragraph of a memorandum (found on page 84 of the responsive record) regarding a teleconference call between employees of Eastern Health held on 8 June 2007. I find that this information does not contain a communication between a solicitor and a client. It contains instead information that indicates that a particular lawyer will be contacted. The information is not, therefore, protected by solicitor-client privilege and Eastern Health is not entitled to deny access on the basis of the exception in section 21.

[50] Eastern Health has also claimed the exception in section 21 in relation to an e-mail exchange between an employee of Eastern Health and a lawyer in private practice found on pages 93 to 94 of the responsive record. I find that this e-mail exchange is a communication between a solicitor and a client. However, it is my determination that the "information platform" in this exchange is contained in the body of the e-mail sent by the employee and it is the body that is protected by solicitor-client privilege. The remainder of the information on pages 93 and 94 represents what Mr. Justice Létourneau referred to in *Blank* as information that enables the Applicant "to know that a communication occurred between certain persons at a certain time on a certain subject, but no more." In relation to the response to the employee's e-mail sent by the lawyer, the information contained in it does not meet the criteria as set out in *Solosky* for solicitor-client privilege to exist. That response does not contain information "pertinent to the case," nor does it constitute a communication that entails the giving of legal advice. As such, the only information protected by solicitor-client privilege is that information in the body of the e-mail sent by the employee and it is only that information to which Eastern Health is entitled to deny access pursuant to section 21.

[51] Eastern Health has denied access to an e-mail found on page 205 of the responsive record on the basis of the exception in section 21. The e-mail was sent by an Eastern Health employee to three other Eastern Health employees and discusses providing material to a lawyer who was not a lawyer acting for Eastern Health. It is my determination that this e-mail is not a communication between a solicitor and a client and is, therefore, not protected by solicitor-client privilege. Thus, Eastern Health is not entitled to refuse disclosure of the e-mail on the basis of the section 21 exception. However, the name that is mentioned in the e-mail is personal information and should not be disclosed in accordance with section 30(1) of the *ATIPPA*.

[52] Eastern Health has refused access to an e-mail found on page 213 of the responsive record, relying on the solicitor-client privilege exception set out in section 21. The e-mail was sent by an employee of Eastern Health to four other employees of Eastern Health. The body of the e-mail refers to advice provided to Eastern Health by its solicitor and, therefore, is protected by solicitor-client privilege. As a result, Eastern Health is entitled pursuant to section 21 to deny access to the body of the e-mail. However, the name and contact information of the sender of the e-mail, the names of the recipients of the e-mail, the date of the e-mail and the subject line of the e-mail are not part of the advice provided by the lawyer and are not, therefore, subject to solicitor-client privilege and, as such, Eastern Health is not entitled to deny access to them on the basis of section 21.

[53] For convenience, I have highlighted on a copy of the records to be sent to Eastern Health the information that is subject to solicitor-client privilege and to which Eastern Health is, therefore, entitled to deny access on the basis of section 21 of the *ATIPPA*. I have also highlighted the name on page 205 which constitutes personal information and which is, therefore, protected from disclosure by section 30(1) of the *ATIPPA*.

3. Is section 30(1) of the *ATIPPA* applicable to any information in the responsive record?

[54] Eastern Health has denied access to certain information in the responsive record on the basis that it is personal information under section 30(1), which provides as follows:

30. (1) The head of a public body shall refuse to disclose personal information to an applicant.

[55] Personal information is defined in section 2(o) as follows:

> *(o) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, address or telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
>
> *(vi) information about the individual's health care status or history, including a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, criminal or employment status or history,*
>
> *(viii) the opinions of a person about the individual, and*
>
> *(ix) the individual's personal views or opinions;*

[56] Eastern Health has denied access to the following information in the responsive record on the basis of the exception in section 30(1):

(a) a name on page 2,

(b) a name and address on page 3,

(c) a name on page 4,

(d) a name as it appears twice on page 117,

(e) patient names and other information as it appears on page 118,

(f) the name of an individual and that individual's opinion as it appears on page 157,

(g) the name of an individual and an opinion about that individual as expressed by an employee of Eastern Health as it appears on page 170,

(h) a name as it appears on page 189,

(i) the name and employment history of an individual as it appears in paragraphs 1, 2, 3, and 6 of an e-mail appearing on page 244 of the responsive record,

(j) the name of an individual as it appears twice in a letter dated 22 May 2007 found on page 245 of the responsive record,

(k) the name of an individual as it appears in a letter dated 23 May 2007 found on page 246 of the responsive record,

(l) information contained in the last paragraph of a memorandum found on page 248 of the responsive record, and

(m) information contained in the *Report on . . . Radiologist* and its attachments found on pages 251 to 293 of the responsive record.

[57] Having reviewed the information for which Eastern Health claims the exception in section 30(1), it is my finding that the information referred to in items (a) to (l) of paragraph 56 constitutes personal information within the meaning of section 2(o) of the *ATIPPA* and, therefore, it must not be disclosed to the Applicant.

[58] In relation to the information referred to in item (m) in paragraph 56, which is contained in the *Report on . . . Radiologist*, I will discuss this information in detail.

[59] Pages 252 to 256 of the *Report on . . . Radiologist* contain a description of a "Recruitment Process." My review of these pages leads me to conclude that Eastern Health is entitled to deny access to personal information on these pages. This personal information contains the name of two individuals and information that constitutes the employment status and history of an individual within the meaning of paragraph (vii) of section 2(o) of the *ATIPPA*.

[60] Page 258 of the responsive record contains a "Physician Recruitment Agreement" entered into between Eastern Health and another party. This agreement contains the signature and personal e-mail address of an individual who signed it on behalf of the other party. The signature and e-mail address constitute the personal information of an identifiable individual pursuant to paragraph (i) of section 2(o) of the *ATIPPA* and should not be disclosed to the Applicant.

[61] Pages 260 to 261 contain the Minutes of the 10 October 2006 meeting of a Credentials Committee of Eastern Health. Eastern Health should, pursuant to section 30(1) of the *ATIPPA*,

deny access to the name of an individual that appears on page 260. The information found on page 261 from the top of that page extending to the notation reading "5. Other Business" is not responsive to the Applicant's request and should not be disclosed. I have also highlighted on the copy of the record provided to Eastern Health the information on page 261 that is not responsive to the Applicant's request.

[62] Page 263 of the responsive record is a document of a Credentials Committee of Eastern Health. A name which appears on that page constitutes personal information within the meaning of paragraph (i) of section 2(o) and should not be disclosed pursuant to section 30(1) of the *ATIPPA.*

[63] I have reviewed the information found on pages 264 to 286 of the responsive record and it is my finding that all of the information on these pages constitutes the personal information of an identifiable individual and its disclosure is prohibited by section 30(1) of the *ATIPPA.* As such, this information should not be disclosed to the Applicant.

[64] Pages 288 to 289 contain a letter dated 30 October 2006 from the College of Physicians and Surgeons of Newfoundland and Labrador. These two pages contain the names of identifiable individuals, the address of an identifiable individual, information about an individual's educational status and history, and information about an individual's employment history and status. These items of information constitute personal information within the meaning of section 2(o) of the *ATIPPA* and, as such, should not be disclosed to the Applicant.

[65] Page 291 of the responsive record contains a letter dated 22 February 2007 sent to an official of Eastern Health by another official of Eastern Health. The body of the letter contains information about the employment history of an identifiable individual and, therefore, it is personal information which should not be disclosed.

[66] Page 293 of the responsive record contains a letter dated 14 May 2007 sent by an official of Eastern Health to the Registrar of the College of Physicians and Surgeons of Newfoundland and Labrador. This letter includes the names of two identifiable individuals and information about

the employment history of an identifiable individual and, as such, contains personal information which should not be disclosed.

[67] For convenience, I have highlighted on a copy of the records to be enclosed with a copy of this Report the personal information found in the *Report on . . . Radiologist* that, pursuant to section 30(1), must not be disclosed to the Applicant.

V CONCLUSION

[68] I conclude that section 8.1 of the *Evidence Act* operates only in the context of a legal proceeding and that none of the records responsive to the Applicant's access request are associated with a legal proceeding within the meaning of section 8.1. Thus, I conclude that Eastern Health is not entitled to rely on section 8.1, through the operation of section 6(2) of the *ATIPPA* and section 5(f) of the *Access to Information Regulations*, to deny access to any of the information in the responsive record.

[69] I also conclude that certain information in the responsive record is subject to solicitor-client privilege and Eastern Health is, therefore, entitled to rely on section 21 of the *ATIPPA* to deny access to that information.

[70] In addition, I conclude that certain information in the responsive record constitutes personal information as defined in section 2(o) of the *ATIPPA* and, as a result, Eastern Health is obligated to deny access to that information in accordance with the mandatory exception to disclosure set out in section 30(1) of the *ATIPPA*.

[71] Therefore, I conclude that, in accordance with section 7(2) of the *ATIPPA*, it is reasonable to sever the information covered by section 21 and by section 30(1) (and that which is not responsive to the Applicant's request) from the responsive record but the Applicant has a right of access to the remainder of the information in the responsive record.

VI RECOMMENDATIONS

[72] Under the authority of section 49(1) of the *ATIPPA,* I hereby recommend that the Eastern Regional Integrated Health Authority release to the Applicant all information in the responsive record that has not previously been released to the Applicant with the exception of that information which I have indicated is protected from release by section 21 and section 30(1) and that information which I have indicated is not responsive to the Applicant's access request. I have highlighted, on a copy of the record to be sent to Eastern Health enclosed with this Report, the information that is protected from release by sections 21 and 30 and that which is not responsive to the Applicant's request.

[73] Under authority of section 50 of the *ATIPPA* I direct the head of the Eastern Regional Integrated Health Authority to write to this Office and the Applicant within 15 days after receiving this Report to indicate the final decision of the Eastern Regional Integrated Health Authority with respect to this Report.

[74] Please note that within 30 days of receiving a decision of the Eastern Regional Integrated Health Authority under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA.*

[75] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20th day of March 2009.

E.P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador