



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

**Report A-2019-004**  
**January 23, 2019**  
**Commissioner for Legislative Standards**  
**Corrected Report**  
**(Re-Issued January 24, 2019)**

**Summary:**

The Applicant was the subject of an investigation conducted by the Commissioner for Legislative Standards and sought a copy of the investigation records through an access to information request. The public body denied the request citing section 41(c) (records connected with the investigatory functions of a statutory office) and legal advice privilege (section 30). The Commissioner determined section 41(c) mandated withholding the records. Further, the Applicant was not an employee of the House of Assembly and therefore could not avail of the right of access to records relating to a workplace investigation as set out in section 33.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 9, 30, 33 and 41; [House of Assembly Accountability, Integrity and Administration Act](#), SNL 2007, c H-10.1, sections 2, 55 and 62.

**Authorities Relied On:**

Newfoundland and Labrador OIPC Report [A-2018-008](#)

## I BACKGROUND

[1] The Applicant made an access to information request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) to the Commissioner for Legislative Standards seeking:

*All unedited reports and documents produced by the [named law firm] before, during, and subsequent to the investigation of [named individual] as a result of allegations made by [named individuals]. By this writing, I waive my right to confidentiality and request that all information pertaining to me be released in their entirety and unredacted.*

[2] The Commissioner for Legislative Standards responded to the Applicant and advised that all records responsive to the request were excepted from disclosure, citing sections 30 (legal advice) and section 41 (disclosure of House of Assembly service and statutory office records).

[3] Following receipt of the final response from the Commissioner for Legislative Standards, the Applicant filed a complaint with this Office. As informal resolution was not successful, the complaint proceeded to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

## II COMPLAINANT’S POSITION

[4] The Complainant contends that section 41 does not apply as the Commissioner for Legislative Standards incorporated the responsive records into public reports and, as such, they are no longer subject to the exception. Further, the Complainant submits that the responsive records cannot qualify for solicitor and client privilege as the Commissioner for Legislative Standards retained the law firm to conduct an investigation rather than to provide legal advice.

[5] In the course of this investigation, the application of section 33 (information from a workplace investigation) also arose. Section 33(3) requires public bodies to disclose to an applicant, who is a complainant or respondent to a workplace investigation, all relevant

information created or gathered for the purposes of such an investigation. The Complainant argues that the investigation conducted by the Commissioner for Legislative Standards was a workplace investigation and the Complainant, as the subject of the investigation, is entitled to receive information created or gathered in the course of that investigation.

### III PUBLIC BODY'S POSITION

[6] In its final response to the Complainant, as well as in its submissions to this Office, the Commissioner for Legislative Standards stated that the responsive records were excepted from disclosure pursuant to sections 30 (legal advice) and 41 (disclosure of House of Assembly service and statutory office records).

[7] In response to whether section 33(3) requires disclosure of all relevant information created or gathered in the course of the investigation, the Commissioner for Legislative Standards states that the Complainant is not an “employee” and, as such, section 33 has no application to the matter. In support of this position, the Commissioner for Legislative Standards provided this Office with an opinion from the Clerk of the House of Assembly:

*MHAs are not considered employees. They are public office holders. They are governed by legislation and policies specific to them such as the House of Assembly Act, the House of Assembly Accountability, Integrity and Administration Act, and policies and directives of the Management Commission in addition to parliamentary conventions.*

### IV DECISION

#### Statutory Office Records

[8] Section 41(c) of the *ATIPPA, 2015* is a mandatory exception to disclosure and applies to records connected with the investigatory function of a statutory office. A public body cannot disclose such records nor does the public interest override at section 9 apply. Section 2(r) of the *House of Assembly Accountability, Integrity and Administration Act* defines the statutory bodies to which section 41 of the *ATIPPA, 2015* applies:

- (r) "statutory office" means the office and administrative staff directly serving the
- (i) Chief Electoral Officer,
  - (ii) Commissioner for Legislative Standards,
  - (iii) Child and Youth Advocate,
  - (iv) Information and Privacy Commissioner,
  - (v) Citizens' Representative,
  - (v.1) Seniors' Advocate, and
  - (vi) other offices of the House of Assembly, with the exception of the office of the Auditor General, that may be established under an Act; and

Accordingly, section 41 is applicable to the Commissioner for Legislative Standards. Further, the *House of Assembly Accountability, Integrity and Administration Act* charges the Commissioner for Legislative Standards with the conduct of inquiries into any alleged breaches of the House of Assembly's Code of Conduct.

[9] The Commissioner for Legislative Standards provided an affidavit detailing the nature of its investigation and the relationship with the law firm retained to conduct the investigation. The Commissioner for Legislative Standards established that he was exercising his investigatory functions and established the connection between the responsive records and his investigation.

[10] Given the connection with the investigatory function of a statutory office, the Commissioner for Legislative Standards is required by section 41 to refuse to disclose the records. That the records would have contributed to, and may be directly incorporated into, the report published by the Commissioner for Legislative Standards is irrelevant. All of the statutory bodies enumerated in section 2(r) of the *House of Assembly Accountability, Integrity and Administration Act* have the power to publish reports of their findings and recommendations. However, exercising that power does not, and cannot, negate the mandatory exception from disclosure in section 41(c) of the *ATIPPA, 2015*. As noted previously in our Report A-2018-008, the purpose of section 41 is to protect the integrity and confidentiality of a statutory office's investigatory activities and it is intentionally broad, requiring a public body to withhold records in their entirety.

## Workplace Investigations

[11] While section 41 is a mandatory exception to disclosure, section 33 creates a mandatory right of access in the context of a workplace investigation. However, based on the definition of a “workplace investigation” at section 33(1)(c) the conduct at issue must be that of an “employee”. The Commissioner for Legislative Standards and the Clerk of the House of Assembly deny that a Member of the House of Assembly is an “employee”. The language of the *House of Assembly Accountability, Integrity and Administration Act* supports the conclusion that a Member is not an employee, with a distinction made between the two roles throughout that Act, for example:

*55. (1) An employee or a member who reasonably believes that he or she has information that could show that a wrongdoing has been committed or is about to be committed may make a disclosure to his or her supervisor, the clerk, a member of the audit committee chosen under paragraph 23 (2)(b), or the investigator.*

*62. Where a supervisor, the speaker, the clerk or the investigator is of the opinion that it is necessary to further the purposes of this Part, he or she may, in accordance with the rules, arrange for legal advice to be provided to employees and members involved in a process or proceeding under this Part.*

(emphasis added)

[12] Furthermore, the definition of “employee” found in the *ATIPPA, 2015* is clear that an employee performs services “for the public body.”

*2. In this Act*

*(i) “employee”, in relation to a public body, includes a person retained under a contract to perform services for the public body.*

In this case, the person is a member elected by his constituents to represent them. He does not perform services “for” a public body. His relationship is to the electorate, who “hired” him through the electoral process, and they determine his tenure of employment.

## Legal Advice

[13] As noted above, the Commissioner for Legislative Standards also cited section 30 in its final response to the Complainant. Legal advice is a discretionary exception to disclosure that is subject to the public interest override. However, having already concluded that the responsive records are subject to section 41 and must be withheld by the Commissioner for Legislative Standards, it is not necessary to determine whether the legal advice exception applies or if the public interest in disclosure of the responsive records outweighs the reason for applying the legal advice exception.

## V CONCLUSIONS

[14] Given the connection of the responsive records to the investigatory function of the Commissioner for Legislative Standards, they are required to be withheld pursuant to section 41 of the *ATIPPA, 2015*.

[15] Further, a Member of the House of Assembly is not an “employee” and, accordingly, section 33 of the *ATIPPA, 2015* does not apply to require that access be granted.

## VI RECOMMENDATIONS

[16] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Commissioner for Legislative Standards continue to withhold the information that it had originally withheld from the Complainant in its final response.

[17] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the Commissioner for Legislative Standards 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.

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24<sup>th</sup> day of January, 2019.

Donovan Molloy, Q.C.  
Information and Privacy Commissioner  
Newfoundland and Labrador

## APPENDIX

Corrections made on January 24, 2019:

1. Paragraph 12 was deleted and replaced with the following:

[12] Furthermore, the definition of “employee” found in the *ATIPPA, 2015* is clear that an employee performs services “for the public body.”

*2. In this Act*

*(i) “employee”, in relation to a public body, includes a person retained under a contract to perform services for the public body.*

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