



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-009

April 30, 2019

Eastern Regional Health Authority

Summary: The Complainant made a request to Eastern Health for records relating to an issue between himself and Eastern Health. Some of the information received was redacted on the basis of section 30 of the *ATIPPA, 2015* (legal advice). The Commissioner found that solicitor-client privilege applied to the redacted information and recommended that Eastern Health continue to withhold the information.

Statutes Cited: [Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c.A-1.2, s.30(1).

Authorities Relied On: [Newfoundland and Labrador \(Information and Privacy Commissioner\) v. Eastern Regional Integrated Health Authority](#), 2015 NLTD(G) 183; [Bank of Montreal v. Tortora](#), 2010 BCSC 1430; [Iggillis Holdings v. Canada \(National Revenue\)](#), 2018 FCA 51.

I BACKGROUND

- [1] The Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015* (“the *ATIPPA, 2015*” or “the Act”) to the Eastern Regional Health Authority (“Eastern Health”) for records relating to an issue that had arisen between himself and Eastern Health. Among the records provided to him was a one-page document entitled “Executive Summary”. On that document was a sentence approximately two lines long, beginning with the words “Lastly, Eastern Health has received a legal opinion on this matter....” The remainder of the sentence was redacted on the basis of section 30 of the *ATIPPA, 2015* (legal advice).
- [2] The Complainant filed a complaint with our Office asking that the above redaction be removed and the remainder of the sentence disclosed to him. As an informal resolution could not be reached, the complaint proceeded to formal investigation in accordance with section 44 of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [3] Eastern Health submits that solicitor-client privilege extends to the redacted passage in question, because it contains a summary of the legal advice provided to Eastern Health by its solicitor.
- [4] Eastern Health further submits that because the document containing the redacted passage was a communication discussing legal advice between two employees within the Eastern Health organization, the privilege extends to cover it.
- [5] Finally, Eastern Health submits that the privilege was not waived when the summary was communicated to an official of the provincial government, because of the common interest between them. Therefore Eastern Health argues that is entitled to withhold the redacted passage.

III COMPLAINANT'S POSITION

[6] The Complainant submits that neither the author of the document in question, nor its intended recipient, are solicitors, and that the document was not written to provide legal advice. Therefore solicitor-client privilege cannot be claimed.

IV DECISION

[7] The single issue in this matter is whether the passage in question has been properly redacted by Eastern Health on the basis of section 30(1), which reads:

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.

[8] The necessary elements of a valid claim of privilege were set out by Justice Orsborn of the Supreme Court of Newfoundland and Labrador in [*Newfoundland and Labrador \(Information and Privacy Commissioner\) v. Eastern Regional Integrated Health Authority*](#):

i) 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.

[9] The passage in question refers to a legal opinion. Eastern Health takes the position that the passage is covered by solicitor-client privilege, because to disclose it would reveal legal advice provided to it by its solicitor. Our Office has received and reviewed a legal opinion sent to Eastern Health by its solicitors, which addresses the matter at issue between Eastern Health and the Complainant, and which is the subject of the “Executive Summary” document. I conclude that the legal opinion itself clearly meets the three criteria listed above, and therefore is protected by solicitor-client privilege.

[10] If the original opinion is protected, then in my view the passage in question must also be protected. On inspection, it is clear that the redacted portion of the record is a summary restatement of the advice contained in the opinion. It contains the essence of the legal advice provided by the solicitor to the client. Therefore its content is equally covered by solicitor-client privilege.

[11] The Complainant argues that because the “Executive Summary” was written by an employee of Eastern Health, and was attached to an e-mail from the writer to another employee of Eastern Health, it cannot be protected, because it was not a communication between a solicitor and the client. However, it is a well-established principle that solicitor-client privilege is not limited to the initial recipient of the solicitor’s legal advice. The privilege will extend to communications between employees which transmit, or comment on, privileged communications with lawyers. For example, in [Bank of Montreal v. Tortora](#) the court stated:

[11] Nor is solicitor-client privilege limited merely to the initial recipient of the solicitor’s legal advice and opinion.

[12] The privilege will extend to documents between employees which transmit or comment on privileged communications with lawyers. The privilege will also extend to include communications between employees advising of communications from lawyer to client (Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General), [1988] O.J. No. 1090 (Ont. S.C.J.).

[12] As Justice Orsborn in the [Eastern Health](#) decision put it:

“...whether the privilege attaches to any particular communication depends on the nature of the relationship, the subject matter of the communication and advice and the surrounding context and circumstances.”

In the present case it is clear that the e-mail to which the “Executive Summary” was attached was a communication between officials of Eastern Health, both of whom can reasonably be considered to represent the organization, and who were dealing with the issue about which the legal advice was given. That communication contained, in summary, the legal advice obtained from the solicitor. The privilege covering the original legal opinion extends to the summary, to protect the legal advice from being disclosed.

[13] Finally, there is the issue of whether the privilege has been waived because the e-mail between the two employees of Eastern Health, to which the “Executive Summary” was attached, was copied to a senior official of the provincial government. In some circumstances, solicitor-client privilege is considered to have been waived if the legal advice is made public or otherwise communicated to a third party, especially if the third party is adverse in interest.

[14] However, solicitor-client privilege is not waived if the legal advice is communicated to persons who share a common interest in the matter to which the advice applies. As the court in [*Iggillis Holdings v. Canada \(National Revenue\)*](#) stated:

Based on the decisions of the courts in Alberta and British Columbia, solicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.

[15] Eastern Health has explained, and I accept, that for issues such as those discussed in the “Executive Summary” Eastern Health does not make major decisions or take action without consultation with the government. It was therefore necessary for Eastern Health to communicate the legal advice as part of that consultation. I conclude that Eastern Health and the provincial government are parties with a sufficient common interest in the issues addressed by the legal advice, and therefore the privilege was not waived when the summary of the legal advice was communicated to the government official.

[16] I have concluded that there was a legal opinion to which solicitor-client privilege applies; that the privilege extends to the redacted passage in question, because it contains a summary of the legal advice and was a communication between two employees of the Eastern Health organization; and that the privilege was not waived when the summary was communicated to

the provincial government official. Therefore Eastern Health is entitled to withhold the redacted passage.

VI RECOMMENDATIONS

[17] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Eastern Regional Health Authority continue to withhold the records which it previously refused to provide to the Complainant.

[18] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Eastern Regional Health Authority must give written notice of his or her decision with respect to the above recommendation to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30th day of April 2019.



Victoria Woodworth-Lynas
Information and Privacy Commissioner (A)
Newfoundland and Labrador