



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-004

January 24, 2024

Department of Justice and Public Safety

Summary:

The Complainant made an access to information request to the Department of Justice and Public Safety for records relating to proposed amendments to *ATIPPA, 2015*. The Department responded by providing several hundred pages of responsive records, but withheld over 2,500 pages using the cabinet confidences exception as justification and cited sections 29, 30, 31, 34, 35, and 40 to support various redactions throughout the provided records. In response, the Complainant filed a complaint with this Office alleging the Department applied the exceptions invalidly and failed to meet its duty to assist. In its response to this Office, the Department withheld some information within the cabinet records from this Office, stating it would create a conflict of interest as we are an advocate on the issues related to *ATIPPA, 2015*. After review of the submissions and responsive records, the Commissioner concluded the Department met its burden of proving its claim of cabinet confidences, but recommended release of some information withheld pursuant to sections 29 and 35.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 27, 29, 30, 31, 34, 35, 43 and 97.

Authorities Relied On:

NL OIPC Reports [A-2023-027](#), [A-2022-014](#), [A-2019-020](#), [A-2023-039](#), [A-2023-048](#), [A-2022-001](#), [A-2023-017](#), [A-2023-030](#)

The OIPC's [Practice Bulletin on Reasonable Search](#)

Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner) [2023 NLCA 27](#)

BACKGROUND

- [1] On February 20, 2023 the Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* to the Department of Justice and Public Safety for the following:

All records pertaining to the statutory review of the ATIPPA, 2015 that were made, sent, or received following the submission of the Final Report of the ATIPPA Statutory Review Committee 2020 (the Honourable David B. Orsborn) in June 2021, including documents regarding the scheduling of the consideration of the proposed amendments in the ATIPPA, 2015 by the House of Assembly

- [2] On October 19, 2023, the Department responded to the access request and provided the Complainant 691 pages of responsive records with information withheld from the Complainant pursuant to sections 27, 29, 30, 31, 34, 35 and 40 of *ATIPPA, 2015*. Of note, a total of 2,572 pages were withheld from the Complainant as cabinet records pursuant to section 27.
- [3] On October 23, 2023, the Complainant filed a complaint with this Office, alleging the Department applied exceptions “invalidly” and also alleged the Department failed to meet its duty to assist as required by section 13 of *ATIPPA, 2015*. The Complainant did not provide detailed submissions on this matter but did reference in an email to the Department that they believe there is a public interest in releasing the cabinet records.
- [4] The Department provided two sets of records to this Office in response to this complaint: Part 1 (743 pages) and Part 2 (2,572 pages), the latter of which consists entirely of records over which the Department has withheld pursuant to section 27 (cabinet confidences). The Department provided this Office with an audit copy of both sets of records with most – but not all – redactions removed. The decision to withhold some of the responsive records from this Office’s review is discussed below. The records were accompanied by a detailed 15-page submission in response to this complaint.
- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

ISSUES

- [6] The issues to be addressed in this Report are as follows:
1. Did the Department fulfill its duty to assist as required by section 13 of *ATIPPA, 2015*?
 2. Despite some records being unavailable for review, has the Department met the burden of proving that sections 27 and 30 apply to the responsive records?
 3. Has the Department met the burden of proving that redactions made pursuant to sections 29, 31, 34, 35, and 40 of *ATIPPA, 2015* were correctly applied to the responsive records?

DECISION

Relevant Legislation

- [7] The relevant sections of *ATIPPA, 2015* read as follows:
- 13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*
- ...
- 27. (1) In this section, "cabinet record" means*
- ...
- (h) a record created during the process of developing or preparing a submission for the Cabinet; and*
- (i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).*
- ...
- (2) The head of a public body shall refuse to disclose to an applicant*
- (a) a cabinet record; or*
- (b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.*
- (3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.*

...

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*

...

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.*

...

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

...

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

...

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

(a) *harm the conduct by the government of the province of relations between that government and the following or their agencies:*

(i) *the government of Canada or a province,*

...

(b) *reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*

...

35. (1) *The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*

...

(c) *plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public*

...

43. (1) *On an investigation of a complaint from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*

...

97. (3) *The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.*

Section 13 - Reasonable Search and the Duty to Assist

[8] A public body’s duty to conduct a reasonable search for records responsive to an access to information request is found in section 13 of *ATIPPA, 2015*, quoted above. As noted in our recent Report [A-2023-027](#), the standard applied to a search is “reasonableness, not perfection.” As it is difficult to prove a negative, *ATIPPA, 2015* does not require a public body to prove with absolute certainty that records do not exist.

[9] In this Office’s [Practice Bulletin on Reasonable Search](#), a reasonable search is defined as “one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request.” To assess whether a public body has fulfilled its duty to conduct a reasonable search, a public body must provide information on what steps it took in conducting its search.

[10] In the case at hand, given the high volume of responsive records, the Department sought and received several extensions from the OIPC to process the access request. The final extension granted was to October 19, 2023 and the request was processed within this timeframe. The Department also reached out to the Complainant early to discuss the request wording, kept the Complainant apprised of time extensions and responded to their various questions.

[11] The Department’s submissions described the specific steps the Department took in processing the request. The coordinator in this case conducted a detailed search of electronic and paper records of a wide range of individuals at the Department, much of which was done independently with assistance from the Office of the Chief Information Officer and the Records

Centre. For electronic records, the search term “ATIPP” was used with a combination of various terms. This request involved a very high volume of records, and clearly involved a significant amount of work.

- [12] As noted in this Office’s [Practice Bulletin](#), “complainants must establish the existence of a reasonable suspicion that a public body is withholding a record, or has not undertaken an adequate search for a record.” In the case at hand, no evidence has been provided to suggest the Department conducted an inadequate search and this Office is satisfied, based on the information provided, that the duty to assist was met.

Sections 27 and 30 – Cabinet Confidences and Privileged Records

- [13] From the outset, it is important to note that various portions of the responsive records which are claimed to be cabinet records were withheld from the OIPC. This is obviously a departure from standard practice and also non-compliant with the Commissioner’s production powers as set out in section 97 of *ATIPPA, 2015*. Indeed, in Report [A-2022-014](#), this Office stated that in order to fulfill its statutory oversight duties, it is essential that it be provided with all responsive records, including those over which section 27 is claimed. The question therefore in this case is whether the Department has met its burden of proving the Complainant has no right to the records under section 43 despite some information being withheld from the OIPC. It should be noted that the Department did provide a chart describing the information withheld from the OIPC.

- [14] The Department states the cabinet records in question are related to recommended amendments to *ATIPPA, 2015* and as the Commissioner works within the statutory framework of *ATIPPA, 2015*, the OIPC is a key stakeholder in any proposed amendments. To reveal analysis and rationale behind recommendations made to Cabinet in this context would place the OIPC in a conflict of interest with its advocacy role, the Department states. OIPC does not agree that, as a general principle, there is a conflict of interest between its advocacy role and its ability to review a public body’s analysis of that policy advice. This would suggest that OIPC has a material interest in its own advice. This is not the case: OIPC advice is given to public bodies as the result of our legislative mandate to provide that advice and we respect a public

body's authority to take that advice or not. We do recognize, of course, that revealing such analysis to us may be awkward. Moreover, we acknowledge that it may be contrary to the spirit of exceptions such as those for policy advice (section 29) or cabinet confidences (section 27) if the exposure of such candid views to us prevented them from being expressed. That said, there is no legal basis for an alleged conflict of interest, or for the potential impact of disclosure on policy advice, for a public body to withhold records from our Office for review. However, in this particular instance, the Department has taken considerable efforts to meet its burden of proof in a manner other than full disclosure of the records to this Office. In these specific circumstances, we can accept that these efforts are sufficient to meet the public body's burden of proof.

[15] The Department has withheld a total of 2,572 pages from the Complainant as cabinet records. It states it consulted with the Clerk of the Executive Council on the records who confirmed section 27 was correctly applied to the records and that the public interest did not outweigh the purpose of the exception. We have reviewed those records which have been provided and are satisfied that the withheld records fall within the definitions of cabinet records in section 27(1) of *ATIPPA, 2015*.

[16] The Department has relied primarily on section 27(1)(h) which defines a cabinet record as "a record created during the process of developing or preparing a submission for Cabinet". This is a broad definition. The Department also used, albeit more sparingly, 27(1)(b) – draft legislation, 27(1)(c) – memorandums, 27(1)(e) – agenda/minutes, and 27(1)(i) in Part 1 of the records. With respect to the analysis/rationales withheld from this Office, we can confirm that this was done minimally, and from our review it is clear that the records are cabinet records, even with the analysis or rationale removed.

[17] The records contained in Part 2 consist of charts, papers, emails, letters, draft bills, presentations and more, all relating to the cabinet decision-making process on proposed amendments to *ATIPPA, 2015*. After review of the package of cabinet records contained in Part 2, we are satisfied the records withheld fall within the definitions of cabinet records as per section 27(1) of *ATIPPA, 2015*. As such, we agree that section 27(2) applies to the entirety of Part 2 of the responsive records.

[18] With respect to the claim of legal privilege, the records withheld under section 30 were also not provided to the OIPC for review. In *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, [2023 NLCA 27](#), our Court of Appeal determined the Commissioner has no authority under *ATIPPA, 2015* to compel disclosure of records to which a public body has claimed solicitor-client privilege applies. Nonetheless, the burden of proof under section 43(1) is still on the public body to demonstrate, on a balance of probabilities, that an applicant has no right to access to a record.

[19] Report [A-2023-039](#) is a recent example where this Office accepted a sworn affidavit from the public body solicitor to discharge the burden of proof. In that case, while the affidavit did not contain dates or the names of individuals the solicitor was communicating with, it did provide brief descriptions of pages over which section 30 was claimed.

[20] The Department relied mostly on section 30(1)(a) but also section 30(1)(b) to cover some instances where advice was given by legislative counsel. These are detailed in the provided chart. The Department cites [2023 NLCA 27](#) for the proposition that if a public body meets the three elements of legal advice then it has met its burden of proving the requestor has no right to the records. As noted in [A-2022-010](#), the elements of a valid claim of solicitor-client privilege are as follows:

- 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.*

[21] In the case at hand, there is sufficient evidence that on a balance of probabilities the above elements are met as it relates to the withheld records. The Department states it consulted with a departmental solicitor and legislative drafter who confirmed the applicability of section 30. Additionally the Assistant Deputy Minister, and the Deputy Minister – both of whom are practicing solicitors according to the Department – were consulted in processing this request.

[22] The Department also provided this Office with a chart containing details of the records over which privilege is claimed. The provided chart contains brief descriptions of the records redacted and the pages withheld, page numbers, record type, and names of both recipients and senders. While not a sworn affidavit, the chart in my view contains more information than contained in the affidavit referenced in [A-2023-039](#) and is sufficient to discharge the Department's burden under section 43.

[23] Therefore, after reviewing the Department's submissions and the provided chart detailing the privileged records, we are satisfied the Department has met its burden of proving the withheld records fall under the application of section 30. We would therefore recommend the Department maintain its position on the records over which privilege is claimed.

Sections 29 and 35 – Policy Advice and Disclosure Harmful to Economic Interests

[24] In many cases, sections 29 and 35 were applied along with section 27 to Part 2 of the responsive records and an analysis is therefore not necessary. The following is an analysis of various exceptions applied to Part 1 of the responsive records.

[25] As noted in recent Report [A-2023-048](#), section 29 is a discretionary exception to access intended to provide protection for public servants to freely engage in discussions and debates and otherwise provide opinions, advice, and recommendations on policy matters. The application of redactions for policy advice must also be reasonable.

[26] Section 35 of *ATIPPA, 2015* is an exception to access for information where disclosure would be "harmful to the financial or economic interests of a public body". Subsection (c) includes "plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public". While on its face, this section could potentially apply to the records at hand, in my view the Department has applied this section too broadly.

[27] In [A-2019-020](#), this Office had accepted the definition of "administration of a public body" to mean, "all aspects of a public body's internal management [...] that are necessary to support the delivery of programs and services." In that Report, this Office accepted that

financial operations and contract management fall squarely within the meaning of administration of a public body as outlined in section 35(1)(c). We found that section 35 “requires a reasonable expectation that release of the records would disclose plans developed for the purpose of contractual negotiations.”

[28] In a more recent report, [A-2022-001](#), a public body used section 35(1)(c) to redact a single letter regarding cost-cutting measures that had not yet been implemented. In that case, this Office agreed the letter fell within the section and therefore the public body had the discretion to withhold it. In the context of the above-noted text and *ATIPPA, 2015* as a whole, this section is about internal operations, not policy reform.

[29] Pages 714, 715, 718, and 730 of Part 1 were removed in their entirety from the response package to the Complainant using section 35(1)(c). These records include letters between Deputy Ministers on recommendations to *ATIPPA, 2015* along with some emails. Some references to a cabinet submission are redacted on the withheld pages pursuant to section 27(1)(i) which allows redactions to portions “of a record which contains information about the contents” of a cabinet record.

[30] After review of these records, we are not satisfied that section 35 applies to these pages. Thus, these pages, less the redacted references to the cabinet submission, should be released.

[31] Pages 712, 713, 716, 717, 729, and 731 were withheld in their entirety with section 35(1)(c) alone cited as justification. Having found that section 35 does not apply, they should be released.

[32] Given the nature of the initial access request, the responsive records contain a significant amount of information and analysis regarding proposed amendments to *ATIPPA, 2015*. For example, within the records provided to the Complainant is a 110-page report (pages 437-546 or Part 1) entitled “ATIPP Office review of 2020 ATIPPA Review Committee recommendations”. Both section 29(1)(a) and 35(1)(c) are cited as justification for redactions made throughout, including four pages removed entirely.

[33] After review of the above-mentioned report, it is my view that all of the redactions contain “advice, proposals, recommendations, analyses or policy options” as set out in section 29. We are similarly satisfied that most of the remaining information in Part 1 withheld on the basis of section 29 is policy advice that the Department has the discretion to withhold. However, there is some information which we do not find to be policy advice, discussed below.

[34] On page 669, a document containing key messages about ATIPPA review contains a list of “some key recommendations” from Justice Orsborn, some of which were redacted pursuant to section 29. These come from a document in the public domain and it is unclear why the redactions were made. The two redacted items should be released.

[35] Finally, on pages 687, 690, 693, 696, 699, and 702, words describing the timing and the nature of the Justice Orsborn’s review of *ATIPPA, 2015* were redacted from copies of a memorandum using section 29 as justification. This is innocuous and factual information that should be disclosed.

Sections 31, 34, and 40 – Disclosure Harmful to Law Enforcement, Intergovernmental Relations and Personal Privacy

[36] The Department withheld limited information using section 31 as justification. In Report [A-2023-017](#), a simple reference to a specific computer program used by the government was redacted using section 31(1)(l). In that case it was found that section 31 is not applicable to such information as the exception only applies to information that could “reasonably be used to reveal security arrangements”.

[37] In Report [A-2023-030](#), which the Department cited in its submissions, the public body redacted references to an internal piece of equipment, its location, and associated email address. This Office agreed with the application of this section over such information as it was in keeping with the language of the section.

[38] In this case, a pathway in a government shared drive and an email address associated with the Department’s records database were redacted on pages 288, 391, and 394 with section 31(1)(l) cited as justification. Upon review of these records, we believe this information

fits within the wording of section 31 and thus it was within the Department's discretion to withhold.

[39] The Department has cited section 34 to redact information on page 464 of Part 1 relating to how other provinces' oversight offices handle claims of solicitor-client privilege. The Department states this information was provided by a Federal-Provincial-Territorial (FPT) Committee to the ATIPP Office in confidence and disclosing the provided information could negatively impact the government's relationship with FPT counterparts. The information contains a mix of information provided by other provincial, federal, and territorial governments with respect to disclosure of solicitor-client information to their respective information and privacy commissioners and analysis. We are satisfied with the Department's application of section 34 to this information.

[40] Section 40, a mandatory exception related to the protection of personal information, was also used in a limited fashion throughout the records to redact information such as leave status, references to sickness, pay information and personal comments. After review of the records, it is my view that redactions made pursuant to this section were made reasonably and appropriately.

RECOMMENDATIONS

[41] The Department has met its burden of proving that sections 27 and 30 apply to the records as claimed and has met its duty to assist under *ATIPPA, 2015*. However I recommend the Department provide the following to the complainant within 10 business days of receiving this Report:

- Pages 714, 715, 718, and 730 of Part 1 of the Responsive Records, less the information redacted pursuant to section 27(1)(i);
- Pages 712, 713, 716, 729 and 731 of Part 1 of the Responsive Records, in full;
- The above-noted information redacted on pages 669, 687, 690, 693, 696, 699, and 702.

[42] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department 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.

[43] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24th day of January 2024.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador