



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-019

August 21, 2019

Department of Justice and Public Safety

Summary:

The Department of Justice and Public Safety received a request for information relating to the disposition of an environmental complaint. The Department's response to the Applicant withheld information on the basis of sections 29 (advice and recommendations), 30 (solicitor-client privilege), 31(g) (prosecutorial discretion) and 40 (personal privacy). During the complaint investigation the Commissioner requested copies of the responsive records for review, but the Department refused to provide records that it claimed were subject to solicitor-client privilege, and also refused to provide a sufficient description of those records. The Commissioner concluded that in the absence of evidence to support the claim of privilege the Department had not met the statutory burden of proving that the exception applied, and therefore recommended that the records be disclosed.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1,2, ss. 29, 30, 31, 40, 43, 97, 100.
[Freedom of Information and Protection of Privacy Act](#), RSA 2000, c. F-25.

Authorities Relied On: [Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act](#), Queen's Printer, St. John's, NL, 2015; [Alberta \(Information and Privacy Commissioner\) v. University of Calgary](#), 2016 SCC 53 (CanLII); OIPC Reports [A-2013-004](#); [A-2014-006](#).

[Hansard, April 23, 2015](#), Queen's Printer, St. John's, NL, 2015.

I BACKGROUND

- [1] The Department of Justice and Public Safety (“JPS” or “the Department”) received a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) for records related to the government’s disposition of a complaint about environmental violations that the Applicant had previously made.
- [2] JPS issued a final response to the Applicant, in which much of the approximately 130 pages that it considered responsive were withheld on the basis of exceptions to access in *ATIPPA, 2015*: sections 29 (advice and recommendations), 30(1)(a) and (b) (solicitor-client privilege or legal opinions provided by a law officer of the Crown), 31(g) (information related to the exercise of prosecutorial discretion) or 40 (unreasonable invasion of personal privacy). The Applicant filed a complaint with this Office, asking that the redactions be reviewed. The complaint was forwarded to JPS on May 17, 2019.
- [3] JPS responded to our notification of the complaint with a reply dated June 3, 2019, explaining at length its interpretation of the several exceptions noted above, and the way in which each exception applied to information in the records at issue. This reply helpfully included reference to legal authorities, including some Reports from this Office, in support of its interpretations.
- [4] The notification of complaint from this Office had included a request that JPS provide a complete copy of the records responsive to the request. However, in its reply, the Department stated that:
- ...an audit copy of the records has been provided, however, information that was withheld as legal advice remains redacted and will not be provided. In cases where entire pages were withheld as legal advice, the pages have not been included.*
- The reply gave no reason for declining to provide a complete copy of the records to our Office.
- [5] On June 6, 2019 our Office sent JPS a request for clarification. It noted that we are aware of section 97(5)(a) of the *ATIPPA, 2015* which provides that:

(5) *The head of a public body may require the commissioner to examine the original record at a site determined by the head where*

(a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;

[6] Our Office advised that if the Department had a reasonable basis for such concerns, we would be willing to go to its office to review the records.

[7] JPS replied to the request for clarification on June 11, 2019. It advised that the information withheld from our Office were communications covered by solicitor-client privilege, that the privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal, and that the Department was not willing to waive the privilege.

[8] Our Office responded to the Department, stating that in our view the legal authority cited by the Department, arising out of an Alberta case, was not applicable to this matter, because of significant differences in the legislation; that the *ATIPPA, 2015* states that section 97(5) is the only limitation possible on a public body's obligation to provide this Office with records; that the Act explicitly provides that solicitor-client privilege or litigation privilege of records is not affected by production to the Commissioner, so there is no question of waiver; and that the description of the records provided, while helpful, was not sufficiently detailed to meet the statutory burden of proof.

[9] However, our Office advised that in the present case, in order to provide an alternate means of resolving this difference with the Department, we would be prepared to accept for review an affidavit describing the records, from someone who is knowledgeable about the *ATIPPA, 2015* and experienced in the access to information field, and who has reviewed all of the records.

[10] On June 12, 2019 the Department replied with a statement containing a more detailed explanation of its position. However, it failed to respond to the proposal from this Office that it provide an affidavit. Therefore on June 20, 2019 our Office replied to JPS, summarizing our position on the differences between the *ATIPPA, 2015* and the Alberta statute, and

summarizing the legislative history, context and background in this province, in order to explain why the position of this Office continues to be that public bodies are required by the Act to provide this Office with copies of solicitor-client records for review. Our Office also explicitly asked the Department to consider and respond to the affidavit proposal, and asked whether it needed an extension of the time for informal resolution of the complaint in order to do so.

[11] The response from JPS on July 2, 2019 simply stated that it was not necessary to extend the time for informal resolution of the complaint. The response did not mention the affidavit proposal. Our Office therefore notified the parties on July 3, 2019 that the complaint had been referred to formal investigation, and requested that they provide any further submissions by July 18, 2019.

II JUSTICE AND PUBLIC SAFETY'S POSITION

[12] The Department made no submissions in response to the notification of formal investigation. In its earlier correspondence during the informal resolution stage, the Department took the position that:

- the information withheld was communications covered by solicitor-client privilege, that the privilege cannot be set aside by inference but only by clear, explicit and unequivocal legislative language, and that the Department was not willing to waive the privilege;
- in accordance with the SCC decision cited, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, the language in *ATIPPA, 2015* is not sufficiently explicit and unequivocal that solicitor-client privilege has been abrogated;
- even if there was under *ATIPPA, 2015* clear and unambiguous legislative intent to require production of solicitor-client privileged records, the OIPC would be required to exercise discretion in requiring production, and do so only when it is

required to fairly decide the issues, and where there is some evidence or argument made to suggest that the privilege has been falsely claimed.

III COMPLAINANT'S POSITION

[13] The Complainant did not provide submissions on the legal issues involved in this matter. Rather, the complaint emphasized the necessity of transparency by government in how it dealt with (and ultimately decided not to pursue) a citizen's complaint, to ensure that it was dealt with in accordance with the legislation.

IV DECISION

[14] There are two issues to be dealt with in this Report, which may be stated as follows:

1. Does the *ATIPPA, 2015* require a public body to produce to the Commissioner records that are relevant to an investigation?
2. If the *Act* requires production, what is the effect of section 43 of the *ATIPPA, 2015* (burden of proof) on a public body's failure to produce records to the Commissioner?

1. The Requirement to Produce

[15] On the first issue, the position of this Office is that the *Act* explicitly requires that records requested by the Commissioner must be provided. Section 97 states:

97. (1) This section and section 98 apply to a record notwithstanding

(a) paragraph 5 (1)(c), (d), (e), (f), (g), (h) or (i);

(b) subsection 7 (2);

(c) another Act or regulation; or

(d) a privilege under the law of evidence.

(2) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the Public Inquiries Act, 2006.

(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.

(4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

(5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where

- (a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;*
- (b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or*
- (c) it is not practicable to make a copy of the record.*

(6) The head of a public body shall not place a condition on the ability of the commissioner to access or examine a record required under this section, other than that provided in subsection (5).

[16] In summary, sections 97(3) and 97(4) empower the Commissioner to require, and oblige a public body to produce, within 10 business days, any record that the Commissioner considers relevant to an investigation.

[17] The Office of the Information and Privacy Commissioner is the oversight agency that provides independent review of decisions made by public bodies under the Act. The requirement in section 97 that records be produced to this Office for review is central to the Commissioner's oversight role. Without being able to examine responsive records that have been withheld from applicants, our Office cannot assess the legitimacy of the exception claimed and make a recommendation whether or not to disclose.

[18] In the earliest version of the *Access to Information and Protection of Privacy Act*, up until June 2012, this power to examine responsive records was at times disputed. In 2012, the amendments to the Act, known as *Bill 29*, included a provision that explicitly prevented the Commissioner from examining records to which solicitor-client privilege was claimed to apply. This issue was thoroughly discussed during the statutory review of the Act which followed.

[19] In its Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act*, on p. 232, the Independent Statutory Review Committee explained:

As is noted elsewhere in this report, the Committee found no justification for the changes made by Bill 29 that prevented the Commissioner from asking to review documents in respect of which solicitor-client privilege is claimed, or documents certified to be official Cabinet records. In fact, all the evidence before the Committee demonstrates the appropriateness of the Commissioner's being able to see the documents that will enable his office to make a determination as to whether the requested records can or cannot be released because of solicitor-client privilege or status as official Cabinet documents.

For those and other reasons, the Committee concludes that any limitation on the Commissioner's power to require production of records for his examination in the course of an investigation should be strictly limited to certain of those to which the Act does not apply.

[20] Section 97(1)(d) makes it clear that the requirement to produce records to the Commissioner applies notwithstanding a privilege under the law of evidence. It is our position that "a privilege under the law of evidence" in the *ATIPPA, 2015* includes solicitor-client privilege. This is evident from the inclusion, in section 97(5) above, of a provision taking into account reasonable concerns about the security of a solicitor-client record, and the inclusion of section 97(6) confirming that there can be no other conditions, other than section 97(5), placed on the ability of the Commissioner to access a record.

[21] Further, section 100 of the Act makes it clear that solicitor-client privilege is not affected by production to the Commissioner – in other words, providing such records to this Office for review does not constitute a waiver of the privilege. This provision would be redundant if public bodies were not required, by section 97, to provide solicitor-client records to the Commissioner.

[22] These provisions were added by the Review Committee as part of its explicit recommendation that the Commissioner's power to review solicitor-client records be restored:

The Committee recommends that:

22. The revised Act contain a provision similar to existing section 21 respecting solicitor-client privilege.

23. The Act have no restriction on the right of the Commissioner to require production of any record for which solicitor-client privilege has been claimed and the Commissioner considers relevant to an investigation of a complaint.

24. The Act provide that the solicitor-client privilege of the record produced to the Commissioner shall not be affected by disclosure to the Commissioner pursuant to the Act.

25. The Act not contain any limitation on the right of a person refused access to a record, on the basis that the record is subject to solicitor-client privilege, to complain to the Commissioner about that refusal.

...

28. The Act contain provisions prohibiting the imposition, by any public body, of conditions of any kind on access by the Office of the Information and Privacy Commissioner to a requested record for which solicitor-client privilege has been claimed, other than a requirement, where there is a reasonable basis for concern about the security of the record, that the head of the public body may require the Office of the Information and Privacy Commissioner official to attend at a site determined by the head of the public body to view the record.

...

(Review Committee Report, p. 108)

[23] During the subsequent debates in the House of Assembly, the Deputy Premier and Minister Responsible for the Office of Public Engagement, Steve Kent, in speaking on behalf of the government on second reading of the new legislation, also explicitly stated:

The Commissioner plays a fundamental role in the administration of the Access to Information and Protection of Privacy Act. This bill strengthens the role of the Office of the Information and Privacy Commissioner as an advocate for access to information and protection of personal information. Specifically, the bill increases the powers of the Information and Privacy Commissioner to include responsibility for approving extensions of time for ATIPP requests and the power to review various types of records including Cabinet records,

solicitor-client privilege records, and other records in the custody or under the control of the public body.

(Hansard, April 23, 2015)

[24] The new legislation had in fact been drafted by the Review Committee, and became the bill that, with minor amendments not relevant to this issue, was passed unanimously by the legislature.

[25] The Department of Justice and Public Safety has recently taken the position that a 2016 Supreme Court of Canada decision (*Alberta (Information and Privacy Commissioner) v. University of Calgary*) has limited the powers of the Commissioner in this province. Our view is that it has not done so.

[26] The Supreme Court of Canada in that case dealt with the limits on the powers of the Alberta Commissioner under that legislation (*Freedom of Information and Protection of Privacy Act*) to review records claimed to be subject to solicitor-client privilege. The OIPC reviewed the decision and on November 27, 2016 sent a notice to all coordinators of our position regarding review of solicitor-client records by the NL OIPC following that case. Below is the text of that notice, which summarily explains our position:

The position of the OIPC is that records claimed by public bodies to be subject to solicitor-client privilege must continue to be produced for review by the OIPC. This is based on a number of factors, including:

- *ATIPPA, 2015 contains specific provisions respecting the Commissioner's authority to review records where there has been a claim of solicitor-client privilege. These provisions are absent from the Alberta's legislation;*
- *the 'Wells' Committee clearly and unambiguously stated that it is necessary for the Commissioner to be able to compel production of and conduct reviews of records in the course of a complaint investigation where there is a claim of solicitor-client privilege. In doing so it included additional provisions in its draft bill to fulfil and operationalize this intention. These are absent from Alberta's legislation (in particular, section 100 of ATIPPA, 2015);*
- *the Province fully adopted the recommendations of the 'Wells' Committee, including the draft legislation in its report. The additional provisions in the ATIPPA, 2015, which are not included in the Alberta's legislation, provide*

clarity regarding the Commissioner's powers and authorities pursuant to ATIPPA, 2015 and affirms the specific intent of the legislature to require public bodies to make solicitor-client privileged material available to the Commissioner for review.

[27] Since the coming into force of the *ATIPPA, 2015* other government departments have consistently provided to our Office for review records for which solicitor-client privilege was claimed. This is the first occasion on which this Office has been called upon to address the question in a Report. For the reasons summarized in the paragraphs above, we are not persuaded by the arguments put forward by the Department, and therefore we re-affirm the position that records, including those for which solicitor-client privilege is claimed, must be produced to this Office for review.

2. Failure to Produce Records and the Burden of Proof

[28] The responsibility for demonstrating that a public body has the right to withhold information from an applicant lies with the public body. Section 43(1) of the Act provides:

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.

[29] The burden of proof must be met on a balance of probabilities – that is, the public body must show that it is more likely than not that the information withheld falls within the claimed exception to access. To meet that test, there must be clear and convincing evidence in support of the claim – an unsupported assertion is not enough. (See Report A-2014-006.)

The Alternative to Production

[30] Our Office acknowledges that it might not always be necessary to have such records produced for review, if the public body were to provide sufficient other evidence to substantiate its claim. The level of detail required to meet the burden of proof will vary, depending on the nature of the records in a given case. An insufficiently detailed description of the records, however, may not provide enough information to meet the burden of proof. The burden of proof remains on the public body at all times. A public body therefore runs the risk

that, if it fails either to provide the records or to adequately describe them in an affidavit, it will not succeed in meeting the required burden of proof.

[31] The *ATIPPA, 2015* requires that a person who makes an access to information request has the right to be provided with all of the records requested, subject only to the application of any exceptions that have been proven to apply. If the burden of proof is not met, then all of the requested records must be provided to the applicant.

[32] In the present case, therefore, as a courtesy to the public body, and in line with the practice in other jurisdictions which do have restrictions on the requirement to produce records, our Office offered the Department an alternative: to provide us with an affidavit, with a sufficiently detailed description of the records to satisfy us that the exception applied. The Department did not respond. Therefore our Office had to proceed with its investigation based on the information available to us.

[33] The Department, in its letter of June 3, 2019 to our Office, had stated that the nature of the records requested made it likely that a significant portion of the records would be withheld as legal advice. The Department asserted that those withheld records involved communications between JPS and its clients in other departments, relating to the environmental complaint file. However, there was no additional description of any of those records.

[34] Some additional evidence might have been gleaned from the final response letter from JPS to the Applicant, dated April 30, 2019, which included a chart enumerating the pages that had been withheld in their entirety, and stating the sections of the *Act* relied upon to withhold them. Those records withheld in their entirety amounted to approximately 40 pages of the 131 pages considered by JPS to be responsive to the request. The descriptions in the chart, however, did not assist us, because they are not actually descriptions of the records, but are merely the headings of the *ATIPPA, 2015* provisions claimed, such as “information protected by solicitor-client privilege” or “legal opinions provided by a law officer of the crown.”

[35] The descriptions provided to our Office therefore are not detailed enough to constitute “clear and convincing evidence” that the records are covered by solicitor-client privilege. Without either having adequate descriptions of the records in an affidavit, or having the records themselves produced to this Office for review, we cannot conclude that the burden of proof required by section 43 of the Act has been met.

[36] The same is true for most of the redactions in the remaining 90 pages of records that were produced to this Office. In the normal process, a public body provides to this Office what is called an “audit copy” of the records, in which pages or passages that were blacked out in the records disclosed to the applicant, are simply highlighted, so that our Office can determine whether the redactions are appropriate. In the present case, in the records provided to our Office, all passages for which solicitor-client privilege has been claimed remain completely blacked out. It is impossible for the reviewer to determine, from the context and the surrounding passages, whether the blacked-out passages actually contain legal advice or otherwise fall within the solicitor-client privilege exception. Therefore we cannot conclude that the burden of proof has been met.

[37] In some cases the Department has alternatively claimed additional exceptions for the same blacked-out passage, such as section 29 (advice and recommendations) or section 31 (prosecutorial discretion). Obviously, without being able to see the redacted information, it is no more possible for us to determine the validity of such claims than it is to assess claims of solicitor-client privilege. Therefore the burden of proof has not been met in such cases.

[38] Finally, there are some passages for which exceptions other than section 30 have been claimed, and which are simply highlighted in the copy of the record provided to our Office. Those include redactions claiming only section 29, section 31 (prosecutorial discretion) or section 40 (unreasonable invasion of personal privacy). In all of those cases, which our Office has been able to review, we have concluded that the redactions have been appropriately made. Therefore the Department can continue to withhold that information.

[39] For the above reasons, while we have concluded that the Department of Justice and Public Safety is entitled to continue to withhold some information, we have concluded that it has not

met the burden of proof under section 43 to withhold the information for which section 30 has been claimed.

V CONCLUSION

[40] As stated in paragraph 19 above, the Statutory Review Committee was clear in its conclusion that the Commissioner should have the power to review all records for which exceptions are claimed, including solicitor-client privilege. This power was incorporated into the provisions of the *ATIPPA, 2015*.

[41] The Office of the Information and Privacy Commissioner is the oversight body provided for in section 3 of the *ATIPPA, 2015*:

3. (1) *The purpose of this Act is to facilitate democracy through*
 - (a) *ensuring that citizens have the information required to participate meaningfully in the democratic process;*
 - (b) *increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and*
 - (c) *protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.*
- (2) *The purpose is to be achieved by*
 - (a) *giving the public a right of access to records;*
 - (b) *giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
 - (c) *specifying the limited exceptions to the rights of access and correction that are necessary to*
 - (i) *preserve the ability of government to function efficiently as a cabinet government in a parliamentary democracy,*
 - (ii) *accommodate established and accepted rights and privileges of others, and*
 - (iii) *protect from harm the confidential proprietary and other rights of third parties;*
 - (d) *providing that some discretionary exceptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception;*
 - (e) *preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
 - (f) *providing for an oversight agency that*

- (i) is an advocate for access to information and protection of privacy,*
 - (ii) facilitates timely and user friendly application of this Act,*
 - (iii) provides independent review of decisions made by public bodies under this Act,*
 - (iv) provides independent investigation of privacy complaints,*
 - (v) makes recommendations to government and to public bodies as to actions they might take to better achieve the objectives of this Act, and*
 - (vi) educates the public and public bodies on all aspects of this Act.*
- (3) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[42] The statutory duty of this Office is to uphold the Act, by facilitating timely and user-friendly application of the Act, and providing independent review of decisions made by public bodies under the Act, including (upon receipt of a complaint from an applicant) the review of records withheld by public bodies to which statutory exceptions are claimed to apply. The significance of recommending disclosure of records over which there has been a claim of solicitor-client privilege (although unproven) is not lost on us. This Office appreciates that solicitor-client privilege is a fundamental principle of Canadian law which must be safeguarded and held in the highest regard. That said, the legislature, by inserting the specific provisions in the *ATIPPA, 2015* as recommended by the Statutory Review Committee, has clearly empowered the Commissioner during the investigation of a complaint to review records where there is a claim of solicitor-client privilege, and in so doing, has identified this review as a crucial function of the Commissioner's mandate in order to realize the purposes of the Act as outlined in section 3. The Department of Justice and Public Safety, by refusing to produce records for review, is frustrating this process, in contradiction to the requirements of the Act as explained and drafted by the Review Committee, as passed by the legislature, and as endorsed by the then-Minister responsible for the Act in the legislature.

[43] This Office does not often find itself in the position where it must recommend disclosure of records that it has not examined. However, this Office is bound by the Act, and regretfully, due to the failure of JPS to discharge its burden of proof, I have no option under the Act but to recommend that the withheld records be disclosed to the Applicant.

VI RECOMMENDATIONS

[44] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend:

- (a) that the Department continue to withhold the information originally withheld from the Applicant solely under sections 29, 31 or 40 of the *Act*;
- (b) that the Department disclose to the Applicant all of the records and other information withheld from the Applicant under section 30 of the *Act*.

[45] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Justice and Public Safety 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.

[46] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of August, 2019.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador