

**Report of Findings: 19/20-AP-001**  
***Right to Information and Protection of Privacy Act***  
**Department of Public Safety**

**September 25, 2020**

**Note:** 2019 amendments to New Brunswick legislation transferred the responsibility for the access and privacy mandates from the Office of the Integrity Commissioner to the Office of the Ombud for New Brunswick.

**Summary:** On January 3, 2019, the Applicant made an access request to the Department of Public Safety for any and all documents related to an administrative hold that was placed against it by the Department. The Department responded by granting partial access to the requested information, explaining that some information was being withheld under s. 21(1) (unreasonable invasion of third party privacy) and s. 27(a) (legal privilege). The Applicant was not satisfied with the Department's response and filed a complaint with this Office.

All the issues raised in the complaint were successfully resolved, except for the question of whether the Department properly relied on the s. 27(a) exception to refuse access to information that it claimed fell within the scope of solicitor-client privilege. The Department declined to provide these records for our review, as is its right to do under s. 70(1) of the *Act*. As this was the case, and as the Department has the burden of proof to show that the Applicant has no right of access to this information, the Ombud asked the Department to provide a list of these records with sufficient detail to enable this Office to assess the claim of solicitor-client privilege. The Department provided some basic information about the records; however, the Ombud found that this was not sufficient to support the claim of privilege and the Department failed to meet its statutory burden of proof. As such, the Ombud recommended disclosure of these records.

**Statutes Considered:** [Right to Information and Protection of Privacy Act](#), SNB, c. R-10.6, ss. 27(a), 70(1), 84(1).

**Authorities relied on:** [Newfoundland and Labrador \(Justice and Public Safety\) \(Re\)](#), 2019 CanLII 80273 (NL IPC).



## I INTRODUCTION

1. On January 3, 2019, the Applicant made an access request to the Department of Public Safety (“the Department”) for any and all documents related to an administrative hold that was placed against it by the Department. The timeframe of the request was January 1, 2018 to January 2, 2019.
2. The Department responded by letter dated January 31, 2019, granting partial access to the requested information and explaining that some information was being withheld under s. 21(1) (unreasonable invasion of third party privacy) and s. 27(a) (legal privilege).
3. The Applicant was not satisfied with the Department’s response and filed a complaint with this Office.
4. Through the informal resolution and formal investigation processes, the majority of the issues raised in this complaint were successfully resolved, with the exception of the question of the Applicant’s access rights to the records for which the Department claimed solicitor-client privilege under s. 27(a) of the Act. The Department declined to provide these records for our review, as is its right to do so under s. 70(1) of the Act. As this was the case, this Office asked the Department to provide a list of these records with some additional details to substantiate the Department’s claim of solicitor-client privilege, as the burden of proof is on the Department to show that the Applicant has no right of access, as per s. 84(1) of the Act.
5. The Department provided this Office with basic details about the records for which it was claiming solicitor-client privilege. Specifically, the Department provided the number of pages of records and explanations that they involved communications with the Office of the Attorney General for the purpose of seeking and receiving legal advice. The Department declined to provide this Office with further details, including the dates of these communications, the names of the officials involved with these communications, and the general subject matter on which the Department was seeking and receiving legal advice. As a result, I am unable to verify with confidence that the records at issue are subject to solicitor-client privilege or that Department has met its burden of proof to demonstrate that the Applicant has no right of access to these records.
6. As this issue could not be resolved either during the informal resolution or the formal investigation process under s. 68(3) of the Act, I am concluding this matter with this Report of Findings.

## II ISSUE

7. The sole remaining issue in this matter is the question of whether the Applicant has a right of access to the information over which the Department has claimed solicitor-client privilege, in keeping with the exception to disclosure under s. 27(a) of the Act.

## III BURDEN OF PROOF

8. Under s. 84(1) of the *Right to Information and Protection of Privacy Act*, the burden is on the public body to prove that the Applicant has no right of access to all or part of a relevant record:

84(1) In any proceeding under this Act, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.

9. This means that the public body has the responsibility to demonstrate that it has the right to withhold information from an applicant.
10. To meet the burden of proof, a public body must provide evidence to support that the information at issue falls within the scope of the claimed exception. Unsupported or mere assertions are not sufficient to satisfy the burden of proof.

## IV ASSESSING CLAIMS OF SOLICITOR-CLIENT PRIVILEGE DURING A COMPLAINT INVESTIGATION

11. The Act grants me a broad authority to require production of records that I deem relevant to an investigation, as per s. 70:

70(1) With the exception of Executive Council confidences and any document that contains information that is subject to solicitor-client privilege, the Ombud may require any record in the custody or under the control of a public body that the Ombud considers relevant an investigation to be produced to the Ombud and may examine any information in a record, including personal information.

12. The only information I am not authorized to require a public body to produce for my review are records over which a claim of Cabinet confidences or solicitor-client privilege is asserted by the public body.
13. In this case, the Department is claiming that a number of records fall within the scope of solicitor-client privilege and thus the s. 27(a) exception.

14. As such, my powers to compel production of these records are restricted by s. 70(1) of the Act. While the Department could have opted to provide these records for review of its own accord, I have no authority to require their production. This poses a challenge to this Office's ability to fully investigate whether access rights were respected. The public body has the burden of proof to demonstrate that there is no right of access but is also not required to provide the records at issue to this Office for an independent review.
15. This is not the first time a public body has refused to provide records over which a claim of Cabinet confidences or solicitor-client privilege has been raised in the context of an access complaint investigation. Restrictions on this Office's authority to compel production of these kinds of records has been in place since the Act came into effect in 2010.
16. When public bodies first declined to provide records to this Office for review during access complaint investigations, we developed an alternative process in which we instead ask that the public body provide a list of the records that it claims falls under the Cabinet confidences exception (s. 17) or solicitor-client privilege (s. 27), with sufficient detail to enable us to assess the validity of the public body's reliance on the claimed exception(s) to disclosure.
17. Specifically, we ask public bodies to provide the following details when a claim of solicitor-client privilege is raised and they decline to provide the records at issue for our review:
  - the date;
  - the type of record (report, letter, email, etc.);
  - the sender(s) and/or author(s) of the record(s);
  - the recipient(s);
  - the general subject matter of the record(s).
18. The intent behind this approach is to allow us to gain a general understanding of the nature of the record, the timeframe in which it was created and/or sent, and whether it is reasonable to expect in the overall circumstances that it relates to the seeking and providing of legal advice in relation to a particular issue or matter, without the need to review the actual contents of the advice sought or provided. Sometimes these details are sufficient to substantiate a public body's claim of solicitor-client privilege. Where they are not, we ask the public body to provide further details.
19. This is intended to be a balanced approach that allows our Office to fulfill its role as the statutory oversight body in conducting independent reviews of public bodies' decisions on access rights under

the Act, while protecting the confidentiality of information that may be subject to a claim of solicitor-client privilege or Cabinet confidences.

20. This approach is similar to those adopted by my colleagues in other Canadian jurisdictions where the public institutions they oversee are hesitant or unwilling to provide the actual records for the purposes of the oversight body reviewing claims of solicitor-client privilege.
21. I take this opportunity to note that New Brunswick is currently the only jurisdiction in Canada that has imposed a statutory restriction on the access oversight body's powers to compel production of information to which a claim of solicitor-client privilege has been raised. Despite this, the production of records that may contain solicitor-client privileged information to my colleagues in other Canadian jurisdictions has been the subject of many court challenges over the past several years.
22. This issue arose last year in Newfoundland and Labrador, when the Information and Privacy Commissioner was tasked with investigating an access complaint under the *Access to Information and Protection of Privacy Act, 2015* involving records over which the public body claimed solicitor-client privilege.<sup>1</sup>
23. Under the current access legislation in Newfoundland and Labrador, there are no restrictions on the Commissioner's authority to require production of records during an investigation. Despite this, during that investigation, the public body in this case refused to provide the Commissioner's Office with the records over which it was claiming solicitor-client privilege. The Commissioner's Office, without agreeing that it did not have the authority to compel production, offered to provide the public body an alternative means of assessing the validity of the claim of solicitor-client privilege: "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."<sup>2</sup>
24. While the public body in that case provided the Commissioner's Office with an assertion that the records in question involved communications between the public body and its clients in other departments on the general subject of the access request (in that case, an environmental complaint file), it did not provide the level of detail as requested by the Commissioner's Office. The Commissioner found that he had no choice but to conclude the investigation of that matter with the information before him and ultimately decided that the public body had not met its burden of proof.

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<sup>1</sup> *Newfoundland and Labrador (Justice and Public Safety) (Re)*, 2019 CanLII 80273 (NL IPC).

<sup>2</sup> *Ibid.*, at para. 9.

25. As a result, the Commissioner recommended disclosure of the records for which the public body had claimed solicitor-client privilege. The matter has been referred to the court.
26. I will now address the question of the Applicant's access rights to the requested information.

## V DECISION

### Section 27: Legal privilege

27. Section 27(a) of the Act states:

27 Subject to paragraph 4(b) and section 22.1, the head of a public body may refuse to disclose to an applicant

(a) information that is subject to solicitor-client privilege...

28. The purpose of this exception is to recognize and protect the privileged communications that take place between solicitors and their clients when legal advice is sought.
29. As s. 27(a) is a discretionary exception to disclosure, during a complaint investigation, a public body must demonstrate the following to substantiate a decision to refuse access under this provision:
- that the information in question constitutes solicitor-client privileged information, and
  - that the public body exercised its discretion in deciding to refuse access based on relevant factors.
30. As s. 84(1) of the Act places the burden of proof on the public body to show that the Applicant has no right of access, public bodies relying on this exception must be prepared to present substantiating evidence to this Office as to why the exception reasonably applies to the withheld information.
31. The fact that a communication took place between an employee of a public body and a lawyer is not on its own sufficient evidence to substantiate a claim of solicitor-client privilege. There needs to be evidence of a solicitor-client relationship and that the communication between the parties was for the purpose of seeking and/or receiving legal advice.
32. While communications between solicitors and their clients are nearly always considered confidential, the client is the owner of the privilege and can choose to waive it. This is reflected in the fact that this exception is a discretionary, rather than a mandatory, exception to disclosure.

33. In the present case, the Department has declined to waive its privilege and maintains its position that the records at issue fall within the scope of the s. 27(a) exception.
34. As the Department declined to provide the records at issue for our review, we asked the Department to, in the alternative, to provide details about these records, including the date of each record, the author(s) or sender(s), the recipient(s), and the general subject matter of each record.
35. The Department informed us that the records at issue consist of 23 pages of emails between Department officials and legal counsel with the Office of the Attorney General, as well as additional records on which the Department sought legal advice, including 13 pages of draft documents and a document that the Applicant had provided to the Department.
36. The Department declined to provide this Office with any further details about these records.
37. Without knowing further details about the records at issue, including who the officials involved these communications are, the dates, and the general reason for these communications, it is impossible for me to find that these records are subject to solicitor-client privilege. The context of communications is key to determining whether solicitor-client privilege has been raised. Without being permitted to review the records at issue themselves, I can only rely on substantiating details about the records that public bodies provide this Office.
38. Where the public body declines to provide sufficient substantiating details as to why it is of the view that solicitor-client privilege applies, it fails to meet its burden of proof.
39. Our office examined the other records that were provided by the Department during the investigation of this complaint to see if they provided any further context. We are aware that a Department official was in communication with a lawyer at the Office of the Attorney General in late 2018 on a matter related to the subject matter of the request. This suggests that the Department may well have engaged the services of the Office of the Attorney General to provide legal advice on other matters over the course of the timeframe specified in the Applicant's request; however, the information provided by the Department is not sufficient to demonstrate that the records that the Department declined to provide for our review or to provide additional substantiating details, are covered by solicitor-client privilege.
40. Without having received adequate descriptions of the records from the Department as requested or having reviewed the records at issue, I cannot find that the Department has met its burden of proof to substantiate that they fall within the scope of the s. 27(a) exception.

41. This leaves me, as the oversight body responsible for providing an independent review of public body decisions on access rights under the *Act*, little choice but to recommend disclosure of information that I have not reviewed and about which I have been provided few details.
42. Solicitor-client privilege is a fundamental principle in Canadian law that protects communications between lawyers and their clients, and as such, must be respected and upheld to the fullest extent. However, its mere assertion cannot be sufficient to allow a public body to escape even cursory oversight.
43. The Legislative Assembly in establishing the role of our Office in providing oversight and guidance did so with both the explicit and implicit understanding that our office was to be entrusted with review of many documents which would not be subject to release. It rigorously established confidentiality requirements for our work. It established offenses for failure to disclose fully to our Office. It limited the powers of our Office so that our reports do not have the force of legal orders, but provide non-binding guidance and advice only.
44. Through acknowledging both the underlying rationale of the *Act* and the specific powers and limitations it creates, our office has always in the past been able to satisfy itself that there was a good faith claim of privilege. On multiple occasions, we have been able in co-operation with the public body to recognize and respect the confidentiality of solicitor-client privilege in the discharge our statutory responsibilities. Regrettably, in this case the public body refuses to provide any evidence on which their claim of solicitor-client privilege can be assessed.
45. As the Department failed to meet its burden of proof with respect to the records at issue, I have no option under the *Act* but to recommend that they be disclosed to the Applicant.

## V RECOMMENDATION

46. Based on the above findings, I recommend under s. 73(1)(a)(i)(A) of the *Right to Information and Protection of Privacy Act* that the Department disclose the records that it previously withheld in full under s. 27(a) to the Applicant.
47. As set out in s. 74 of the *Right to Information and Protection of Privacy Act*, the head of the public body must give written notice of its decision with respect to these recommendations to the Applicant and this Office within 20 business days of receipt of this Report of Findings.



This Report issued in Fredericton, New Brunswick this 25<sup>th</sup> day of September 2020.



Charles Murray  
Acting Ombud for the Province of New Brunswick