NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 19-208
Citation: 2019 NTIPC 25

File: 18-184-4
November 6, 2019

BACKGROUND

On January 11, 2018, the applicant made a request under the *Access to Information and Protection of Privacy Act* to the Department of Finance for access to records relating to a matter in which the applicant was involved with that Department. On July 19, 2018, Finance refused to disclose information to the applicant, relying on sections 14(1)(a) and (b), and 15(c), of the *Access to Information and Protection of Privacy Act* (Act) and on October 1st, 2018 the Applicant sought a review of the Department's decision in this matter. On October 25, 2018, my Office advised the applicant that a file had been opened to review the refusal to provide access to the requested records.

Of the three provisions cited in the Department's July 19, 2018 letter, the first two, summarized for present purposes, authorize a public body to refuse to disclose information that could reasonably be expected to reveal advice or recommendations, or internal government consultations or deliberations. Section 15(c) authorizes a public body to refuse to disclose "information in correspondence between an agent or lawyer of the Minister of Justice or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer."

A November 8, 2018 letter to my Office from the Department's Director, Shared Corporate Services, said this:

> As I indicated in my last letter, the Department of Finance severed 310 pages of records as they contained information exempted from disclosure under Sections 15(a) and 14(1)(a) and (b) of the *Access to Information and Protection of Privacy Act* (the *'Act'*). Please note then in our previous correspondence, I incorrectly cited s. 15(c) of the *Act*, when I should have cited s. 15(a) as the section under which exemptions from disclosure were made.

The letter also said the following:

> In applying this exception to access to the requested information, we considered the content of the information requested. Solicitor-client privilege is confidential communications between a lawyer and the client and the work product on the lawyer's file, and litigation privilege includes communications between a solicitor and third parties. Based on the assessment of the type of information requested and because solicitor client privilege applies, the Department cannot release the information requested.
>
> The Department of Justice Legal Division will not waive privilege and provide access to this information.[1]

I accept the Department's November 8, 2018 confirmation that it relied on section 15(a)—specifically, solicitor-client privilege—in refusing to disclose records.[2] I also note the May 30, 2019 letter to me from Brad Patzer, Director, Legal Division, of the Department of Justice, stating as follows: "As indicated in all of my previous correspondence, the records in question were not disclosed to the applicant as they [are] subject to solicitor client privilege, as contemplated by s. 15(c) of the Act." I therefore proceed on the basis that Department relies on section 15(a) of the Act, which authorizes a public body to withhold

[1] As I note below, the law is that only a client may waive privilege, not the lawyer.

[2] Other communications from the government to my Office, including the Department of Justice (Justice), referred to section 15(c), but in doing also so referred to "solicitor-client privilege". As noted above, I proceed on the basis that the references to section 15(c) were also made in error.

"information that is subject to any type of privilege available at law, including solicitor-client privilege". I also proceed on the basis that the Department claims only solicitor-client privilege, not litigation privilege or any other privilege available at law.

DISCUSSION AND RECOMMENDATIONS

Section 33(1) of the Act provides that, on a review of a public body's decision to refuse access, "the onus is on the head of the public body to establish that the applicant has no right of access to the record or part." This burden on the Department to establish that each record is privileged is consistent with the common law burden to establish solicitor client privilege, which rests on the person asserting the privilege.[3]

Before discussing whether the Department has established the privilege it claims, a brief review of the relevant law on solicitor-client privilege is helpful.

Solicitor-client privilege in Canadian law

General Principles

I begin by acknowledging that solicitor-client privilege is "a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law,"[4] which must be "as close to absolute as possible to ensure public confidence and retain relevance".[5]

Again, under the Act, the onus is on a public body claiming privilege to establish its existence; this is also the case at common law.[6] A public body asserting the privilege must establish that there is a communication between lawyer and client which entails the seeking or giving of legal advice and which is intended to be confidential by the parties. Each of these three elements must be established, by evidence, for a solicitor-client privilege claim

[3] *Solosky v. The Queen*, [1980] 1 SCR 821, 1979 CanLII 9 (SCC) [*Solosky*].
[4] *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 SCR 209, 2002 SCC 61 (CanLII), at paragraph 49.
[5] *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31 [*Pritchard*], at paragraph 18.
[6] *Solosky*.

to be established in law.[7] The scope of the privilege does not extend to situations "where legal advice is not sought or offered" or the communication "is not intended to be confidential".[8] Moreover, solicitor-client privilege "can only be claimed document by document, with each document being required to meet the criteria for the privilege."[9]

It must also be remembered that not everything a lawyer does is privileged. Solicitor-client privilege "does not apply to every communication between a solicitor and his client" and sometimes "confusion arises from a failure to distinguish between the rule of privilege and the principle of confidentiality."[10] As has been noted, "[s]ome lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case."[11]

While governments are entitled to the protection of solicitor-client privilege,[12] it is important when assessing government privilege claims to keep in mind that government lawyers are not always acting as legal advisers:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise but draws on departmental know-how. Advice given by lawyers on matters outside

---

[7] *Solosky*, at page 837, per Dickson J., as he then was.
[8] *Pritchard*, at paragraph 16. Also see *Solosky*, at page 835.
[9] *Ibid.* Also see *Gardner v. Viridis Energy Inc.*, 2013 BCSC 580 (CanLII), at paragraph 18: "A party asserting legal advice privilege must establish that privilege document by document by showing that each document is a communication between lawyer and client that involves seeking or giving legal advice and is intended to be confidential by the parties" (citing *Solosky*).
[10] *R. v. B.*, 1995 CanLII 2007 (BCSC), per Thackray J., as he then was, at paragraph 22.
[11] *Ibid.*
[12] *R. v. Campbell*, [1999] 1 SCR 565, 1999 CanLII 676 (SCC) [*Campbell*]. Also see *Pritchard*, at paragraph 19.

> the solicitor-client relationship is not protected. … Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.[13]

The Supreme Court returned to the last point at paragraph 20 of *Pritchard*:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered. …[14]

As has been noted,

> … a lawyer cannot hide behind a code of silence and claim privilege with respect to all communications. At the very least, the lawyer must adduce reasonable evidence ... from which the court can infer a solicitor-client relationship and solicitor-client privilege. To meet the criteria for the privilege, it is necessary to show that: there were communications between the lawyer and client; those communications entailed the seeking or giving of legal advice, and the advice was intended to be confidential by the parties.[15]

---

[13] *Campbell*, at paragraph 50.

[14] This has been recognized by the Supreme Court of the Northwest Territories: *Fullowka 1999*, at paragraph 46. Also see *Environmental Defence Canada v. Canada (Fisheries and Oceans)*, 2009 FC 131 (CanLII) [*Environmental Defence Canada*], per Layden-Stevenson J., as she then was. I also noted that in *Pritchard*, the Supreme Court of Canada emphasized that, where government lawyers are involved, whether or not the "privilege will attach depends on the nature of the relationship, the subject-matter of the advice, and the circumstances in which it is sought and rendered" (paragraph 23). The Federal Court of Appeal dismissed the government's appeal: *Canada (Fisheries and Oceans) v. Environmental Defence Canada*, 2009 FCA 136 (CanLII). Whether this is a case in which government lawyers have been involved in giving policy or other advice outside their legal responsibilities, as between a lawyer and client, is not necessarily relevant, but courts' observation must be kept in mind in cases where a public body claims privilege.

[15] *R. v. Morra*, 1991 CanLII 7303 (ONSC), at page 276.

Further, "it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected."[16] Similarly, facts contained in a communication may not be privileged.[17]

Before assessing the Department's privilege claim in light of these principles, I will briefly discuss its reliance on *Alberta (Information and Privacy Commissioner) v. University of Calgary*,[18] which the Department says prevents it from permitting me to inspect the disputed records.

Inspection of records and University of Calgary

Consistent with my Office's longstanding practice, more than once I asked the Department of Justice, which is representing the Department of Finance in this matter, to provide copies of the disputed records, to assist me in assessing the privilege claim by providing the allegedly privileged records for my review. Public bodies have for many years routinely done so. This is commendable, as it allows me to assess privilege claims independently, objectively and fairly, and to do so in a cost-effective and timely manner. As recently as 2017, for example, I issued a decision dealing with solicitor-client privilege where the government had, as always, provided me with the records over which it claimed solicitor-client privilege.[19] As my decision in that case makes clear, my ability to review the records enabled me to fully assess the governments privilege claim and uphold it. Despite the consistent, longstanding, practice of providing allegedly privileged records for my review, on this occasion the Department declined to do so. I return to this issue later.

Turning to the Department's reliance on *University of Calgary* in refusing to provide the records to me in this case, in my October 24, 2018 letter to the Department of Finance,

---

[16] *Solosky*, at page 502.
[17] See, for example, Donnell v. GJB Enterprises Inc., 2012 BCCA 135 (CanLII), at paragraph 59. Also see British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner), 2019 BCSC 1132 (CanLII), at paragraph 40.
[18] [2016] 2 SCR 555, 2016 SCC 53 (CanLII) [*University of Calgary*].
[19] *Northwest Territories (Public Body) (Re)*, 2017 CanLII 73303 (NWT IPC) [*Northwest Territories*].

I said that, "[i]n order to assist me in my review, I would ask that you provide me with a copy of all records identified as being responsive to the access request". I did not purport to compel production of those records. Similarly, my March 18, 2019 letter to counsel to the Department referred in passing to the authority, under section 34(1) of the Act, to compel production of records,[20] but did not require production under section 34(1).

In a December 14, 2018 letter, the Department cited *University of Calgary* as support for its position that "records subject to solicitor-client privilege cannot be disclosed to either the Applicant or to you in your capacity as the Information and Privacy Commissioner". That letter concluded by saying that, "given the reasoning of the SCC in *Alberta* [*University of Calgary*], and the language in section 34(1) of the *ATIPPA*, we are unable to disclose records that are subject to solicitor-client privilege."[21]

With respect, *University of Calgary* does not support the Department's position that it is prevented from providing records to me. That case dealt only with the narrow question of whether the language of section 56(2) Alberta's *Freedom of Information and Protection of Privacy Act* is explicit enough to authorize Alberta's Information and Privacy Commissioner to compel a public body to provide allegedly privileged records for review. The majority of the Supreme Court held that the Alberta provision is not sufficiently clear to permit allegedly privileged records to be compelled for review.

For the sake of completeness, I should mention that my March 18, 2019 letter referred to the *University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)*.[22] In that decision, the Saskatchewan Court of Appeal interpreted the Saskatchewan equivalent to section 56(2) of the Alberta freedom of information legislation, which is identical to our section 15(a). The Department's April 30, 2019 letter to me

[20] The validity of the Department's assertion that section 34(1) does authorize my office to compel product of allegedly privileged records is for another day.
[21] That section authorizes me to require the production and examination of any record despite any "privilege available at law".
[22] 2018 SKCA 34 (CanLII) [*University of Saskatchewan*].

acknowledged that *University of Saskatchewan* distinguishes *University of Calgary*, but relied on the former of the two for the proposition that allegedly privileged documents should only be provided "if (a) there was a reasonable basis to question the claim of privilege[23] and (b) the respondent failed to respond to [a] request for an index of documents or affidavit of documents". The Department's letter went on to say this:

> Here, as in *University of Saskatchewan*, it has been clear throughout that there were legal proceedings between the GNWT and [the applicant], strongly suggesting that at least some of the documents requested by him would fall under solicitor client privilege. In addition, there is no argument by [the applicant] that we have inappropriately asserted a claim of solicitor client privilege.[24]

Because neither the reasoning nor the outcome in *University of Calgary* support the Department's position, that decision in no way prevented the Department from permitting me to inspect the records to determine if they are, as the Department alleges, protected by solicitor-client privilege.[25]

Before assessing the merits of the privilege claim, I must express my regret about the Department's refusal to provide the disputed records for my review.

In my March 18, 2019 letter to the Department, I expressed surprise that, "after more than

---

[23] If the Court of Appeal in *University of Saskatchewan* intended to suggest that an access applicant has some onus to show that a public body's privilege claim is not properly made, I must respectfully disagree. I see no such onus at common law or under the Act—the public body claiming the privilege must prove it, not just assert it.

[24] This statement was the Department's first effort to provide me with more than an assertion of privilege, with reference to section 15(a) of the Act. For clarity, noting my comment in the preceding footnote, I reject the Department's suggestion that the applicant has any onus to show that the Department inappropriately asserted solicitor client privilege.

[25] I note here that section 56 of the Act imposes a duty of confidentiality on me respecting information protected by solicitor-client privilege, while section 57 provides that I cannot be compelled to give evidence in any other proceeding about information that I acquire in performing my duties. There is also the fact that section 32 provides that a "review must be conducted in private". Moreover, any concern about waiver of privilege can be addressed by expressly reserving privilege when a public body delivers records to me. In addition, the principles applicable to waiver, which focus on whether fairness requires a finding of waiver, would surely lead to a decision that there has been no waiver in such circumstances. See, for example, *S. & K. Processors Ltd. Campbell Ave. Herring Producers Ltd.*, 45 BCLR 218, 1983 CanLII 407 (BCSC), per McLachlin J., as she then was.

20 years, the Department of Justice has decided not to allow me access to the those records for which solicitor/client privilege has been claimed to allow me to verify that records are, in fact, subject to section 15(a)", noting that "I have never before been denied access to the records." (I return to this letter below.)

The effective functioning of the system of independent review that the Legislature has established in the Act to a material degree depends on my Office being able to appropriately review disputed records. This is also true where solicitor client privilege is claimed. My ability to independently and efficiently verify the government's assertion of privilege maintains public trust and confidence in access to information in the Northwest Territories.

As noted earlier, for over 20 years government departments, including the Department of Justice, have routinely provided allegedly privileged records for my review, thus enabling timely and cost-effective resolution of disputes over privilege. There has never been any concern about this, and the practice has worked very well. In that light, I strongly encourage the territorial government—and all other public bodies—to continue to support timely and cost-effective resolution of privilege claims by providing records for my review.

What evidence is necessary to establish solicitor-client privilege?

My March 18, 2019 letter to the Department proposed that it "provide me with an affidavit listing each record for which solicitor client privilege is claimed and indicating, for each record" the following information: [26]

a) the date of the record,

[26] This is consistent with the case law in civil litigation. See, for example, *University of Saskatchewan*, at paragraphs 75-76 and 83. I should also emphasize that my suggestion about the content of the affidavit I invited did not, of course, purport to restrict what evidence should or could be provided to support the privilege claim. That question is always determined based on whatever evidence a public body chooses to advance in light of the law on solicitor-client privilege. I also note that the kind of evidence contemplated by my March 18, 2019 letter is consistent with decisions in the Supreme Court of the Northwest Territories. See, for example, *Fullowka v. Royal Oak Mines Inc.*, 1999 CanLII 4504 (NWT SC), at paragraph 116.

b) a brief description of the record,
c) with whom it originated and to whom it was directed,
d) the topic of discussion in the record,
e) the number of pages of each record,
f) if the record is an email chain, a confirmation that the entire record is subject to solicitor/client privilege and that there are no parts of the record which fall outside of the solicitor/client privilege,
g) confirmation that the client (the Department of Finance) has identified for each specific record that it is not prepared to waive the privilege attached so as to allow it to be disclosed to the Applicant and the considerations (both for and against) that went into the decision to refuse disclosure, keeping in mind that section 15(a) is discretionary and discretion must be visibly exercised.

The last point arose from the fact that only a client may waive solicitor-client privilege; a client's lawyer cannot.[27] This is why my letter suggested there may need to be an affidavit from the client, the Department of Finance (not the Department of Justice, which is the legal advisor).

The above elements of evidence mentioned in my March 19, 2019 letter reflect my understanding of what is required to establish solicitor-client privilege at common law, with the cases usually arising in the civil litigation context. While the relevance of that law in access to information cases appears self-evident, its usefulness in reviews like this was acknowledged in *University of Calgary*.

That case involved an access to information appeal before the Office of the Information and Privacy Commissioner of Alberta. The majority in *University of Calgary* concluded that, because the public body's evidence on privilege complied with the practice in civil litigation in Alberta at the time, the adjudicator ought not to have attempted to compel production of

[27] See, for example, *Fullowka v. Royal Oak Mines Inc.*, 1998 CanLII 5226 (NWTSC), at paragraph 35.

the records. Cromwell J. dissented but concurred in the result. He noted that the Information and Privacy Commissioner had conceded that the claim of privilege had complied with the requirements of Alberta civil litigation practice in place at the time and therefore concluded that the adjudicator erred in attempting to compel the records for inspection. Abella J., differing on the standard of review but concurring in the result, also noted that the University had provided sufficient justification for its solicitor-client privilege claim, particularly in light of the law and practice applicable in the civil litigation context in Alberta.[28]

From this I conclude that the Supreme Court of Canada considered civil litigation case law to be relevant in access to information adjudications in which solicitor-client privilege is asserted.[29] This view was also recently adopted by the Office of the Information and Privacy Commissioner for British Columbia in *BC Attorney General (Re)*, in which the adjudicator concluded, at paragraph 29, that University of Calgary and University of Saskatchewan, "stand for the principle that if a public body properly asserts solicitor client privilege, i.e., in the same manner required in civil procedure and nothing else in the evidence or argument indicates that the claim of privilege is invalid, then the public body's assertion is sufficient to meet its burden of proof."

[28] *University of Calgary*, at paragraph 70 (Cote J., for the majority) and Cromwell J. (at paragraph 130) and Abella J. (paragraph 137).

[29] I am aware that, in *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2017 ABQB 109 (CanLII), affirmed: 2018 ABCA 114, the Court of Queen's Bench of Alberta expressed the view, at paras 18-20, that the above-quoted passages from *University of Calgary* address only to what is required to *assert* privilege, not what is also necessary to *prove* privilege. With deference, I do not read *University of Calgary* that way. In her majority reasons, at paragraph 70, Cote J. noted civil litigation practice standards and stated that "[n]o evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue." Cromwell J. said this at paragraph 127: "[I]t was, in my view, a reviewable error for the Commissioner's delegate to impose a more onerous standard on the University in relation to its assertion of privilege than that applicable in civil litigation before the courts. This conclusion is reinforced by the fact that the evidence filed with the Commissioner met the three-part test set out in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821."

What evidence is needed to support a claim of solicitor-client privilege? I have already noted the kinds of evidence that my March 18, 2019 letter suggested would assist. Those evidentiary elements are consistent with what courts expect to see.[30] For example, the Alberta Court of Appeal, in interpreting what evidence is required to establish privilege claims in civil litigation said this:

> … [A] party must provide more information in describing a record subject to a privilege claim than merely parroting the nature of the various privileges … in an abstract, incomplete manner, untethered to any specific record. It would be ironic, indeed, if the Rules were interpreted so as to allow a party not to provide at least a brief description of records where that description is most required. After all, these are the records that another party is not entitled to examine unless it successfully challenges the privilege claim.[31]

As the Alberta Court of Appeal said in *ShawCor*, "[p]rivilege protects the integrity of the adversarial system and shields parties from damage to legitimate interests and relationships",[32] but a party to litigation who seeks to withhold documents from disclosure to the other party must still prove its claim of privilege.

Consistent with this, I have kept in mind the fact that, as the Department has affirmed, there is, or

---

[30] *British Columbia (Attorney General) (Re)*, 2019 BCIPC 23 (CanLII) [*BC Attorney General*]. The same conclusion is stated in *British Columbia (Attorney General) (Re)*, 2018 BCIPC 21 (CanLII).In saying this, I am aware that, as regards civil litigation in the Supreme Court of the Northwest Territories, Rule 226(2) of the *Rules of Court of the Supreme Court of the Northwest Territories* deals with privilege claims in this language: "(2) Where, on an application under sub-rule (1), privilege is claimed in respect of a document, the Court may inspect the document for the purpose of deciding the validity of the claim for privilege and consider all relevant evidence adduced that tends to establish or destroy the claim for privilege." This clearly contemplates that the Supreme Court will consider "all relevant evidence" but does not require inspection of allegedly privileged in all cases. If sufficient "relevant evidence" is provided, the Supreme Court may find that the privilege has been made out. This is the approach I have taken here, *i.e.*, to afford the Department an opportunity, not having provided the records to me, to provide evidence to back up its assertion of privilege.

[31] *Canadian Natural Resources Limited v ShawCor Ltd.*, 2014 ABCA 289 (CanLII) [*ShawCor*], at para 72. I also note that, in British Columbia, Rule 7-1(7) of the *Supreme Court Rules*, BC Reg 168/2009, requires an adequate description of documents for which privilege is claimed: "The nature of any document for which privilege from production is claimed must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege."

[32] *ShawCor*, at para 72.

has been, litigation under way between the applicant and the territorial government. This is part of the context for my review, but the existence of litigation, or some other kind of legal dispute, is not determinative of the Department's privilege claim.[33] The Department must still establish that its claim of solicitor-client privilege is valid, in this case through affidavit or other evidence sufficient to make out that claim. The cases make it clear that solicitor-client privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege.

Whether the Department has done so depends on the totality of the evidence before me. For reasons given below, I conclude that the Department has not met its burden.

Assessment of the Department's evidence on privilege

Because I have not been able to review the records, I only have the Department's evidence on the privilege issue. The Department has submitted an affidavit sworn May 31, 2019 by its Director of Legal Services, Brad Patzer. He deposes that he is licensed to practice law in the Northwest Territories and "was the lawyer providing legal advice to" the territorial government and its officials, "and had carriage and responsibility of this file" (paragraph 1).[34] His evidence is also that, since 2014, the Department's Legal Division has been providing legal advice relating to termination of the applicant's employment, and related issues (paragraph 3).

Regarding the applicant's access to information request to the Department of Finance, Brad Patzer deposes as follows, at paragraph 4:

> … I had an opportunity to review the documents subject to the information request and identified all correspondence and legal advice that were [*sic*] subject to solicitor-client privilege.

As noted in the Patzer affidavit, on April 30, 2019 the Department provided me with an index to the privileged records for which privileged is being claimed, as noted in the Patzer affidavit:

---

[33] I underscore here that, as noted earlier, the Department has on several occasions confirmed it is relying on solicitor-client privilege, not litigation privilege or any other privilege under the law of evidence.

[34] The affidavit does not specify what the "file" was or is. As noted below, various records appear to be about a range of matters, which may all relate to the applicant but are not clearly connected to a single matter or file. This makes it difficult to assess the Department's evidence on privilege.

> 9. Attached hereto and marked as Exhibit “A” to my affidavit, is the index of the solicitor-client privileged documents that I confirm are correspondence and legal advice between legal division and various GNWT officials relating to the Litigation.

This amounts to a statement of his opinion on the very issue that is before me for decision. If I were to accept this, without more, I would be improperly delegating my responsibility to assess and adjudicate privilege claims to the very departments claiming it.

The Federal Court of Canada confronted a similar situation in *Environmental Defence Canada v. Canada (Fisheries and Oceans)*.[35] An official with the federal government department deposed that the redacted portions of the document in question “reflected the legal advice obtained from counsel”, adding that he “expected these communications between the DOJ counsel and the DFO officials to be and to remain confidential.”[36] The Court noted that these statements tracked the wording of the elements of solicitor-client privilege and said this:

> [21] Whether solicitor-client privilege is properly claimed is a substantive issue to be determined by the court: *Goodis*. If I were to accept paragraphs four and five of Mr. Ahluwalia’s affidavit as conclusive, I would be abdicating my judicial responsibility to determine the substantive issue. That is not to say that Mr. Ahluwalia’s evidence is to be disregarded. Rather, it is a question of the weight that ought to be assigned to it.

The Court concluded that the government “has fallen short of this standard and has failed to

---

[35] 2009 FC 878 (CanLII) [*Environmental Defence Canada*].
[36] *Environmental Defence Canada*, at paragraph 19.

provide the information required for a proper assessment."[37]

My task is to decide whether, in addition to Brad Patzer's opinion that all of the listed records are privileged in their entirety, there is sufficient evidence to establish the necessary elements of solicitor-client privilege.

The index of documents appended to the affidavit[38] is, to say the least, terse as the following examples illustrate:

- Line 1 refers to an "email string" and lists five individuals as parties, one of whom is the deponent, Brad Patzer. Regarding the circumstances surrounding this communication, the index simply states that the email string's "subject" is "Record of Employment".
- The record at line 3, which lists six individuals on the email string (including Brad Patzer) is described solely as "Please Review: Email for [applicant's name]".
- Line 6 is an email between Brad Patzer and another individual, the subject of which is "FW: [applicant's name] – Application".
- At line 8, an email between Brad Patzer and another individual has the subject "FW: [applicant's name] – reference check".
- Line 13 refers to an email that has four parties listed, including Brad Patzer, the subject of which is "FW: Open Issues".
- The subject of the record at line 16 is "RE: Ultimate Removal – Proof of Move".
- The subject of the record at line 19 is "FW: PeopleSoft Delegation".
- The subject of the email at line 35 is "RE: Access Request – [applicant's name]".
- Line 36 records an email between Brad Patzer and another individual with the subject "RE: [applicant's name] Agreement".
- At line 43 there is a 2014 email string among six individuals, including Brad

[37] *Environmental Defence Canada*, at paragraph 24.
[38] As the affidavit notes, at paragraph 8, this index was included in the Department's April 30, 2019 letter to me.

Patzer—and, according to the index, the applicant—that is described as “RE: Upcoming End of Current Employment – Yellowknife – M”. (I return to this record below.)

- Line 82 is an email string among seven individuals, one of whom is Brad Patzer, with the subject “FW: Termination Agreement response – [applicant’s initials].

Other records in the index have the same subjects as stated above. Most of the emails have the applicant’s name as the sole stated subject.

Again, not everything a lawyer does is privileged. Only confidential communications between lawyer and client related to the seeking or giving of legal advice are privileged. In the public sector context, it is necessary to ascertain whether a lawyer is engaged as a lawyer, and in relation to the seeking or provision of legal advice, as opposed to nonlegal activities. The fact that a lawyer is included in communications is not sufficient to cloak those communications with privilege unless the necessary elements of solicitor client privilege are also present. In the civil context, certainly, facts and actions are ordinarily not privileged.[39]

In this case, the affidavit identifies each record by date and identifies the “parties” to each email or email string. The affidavit refers to “various GNWT officials” but, apart from Brad Patzer, I do not know who the other individuals are or what they do, *i.e.*, the affidavit is silent on their job titles and functions and says nothing about their role in the “file” to which the affidavit alludes. Nor does it say anything about their roles in relation to the listed correspondence or the confidential seeking or giving of legal advice. The affidavit is silent as to who the author of each email was, for example. In the case of emails marked as “FW:”, it is reasonable to infer that at some point someone forwarded an email to someone else, but I have been given no details about this, including whether Brad Patzer or another lawyer was merely a recipient of a forwarded email that someone else might have created for some

[39] See, for example, *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135 (CanLII). In the criminal law context, sees *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860.

reason, including a reason not related to the giving or seeking of legal advice.

I also note that Brad Patzer's evidence is that the listed records "are correspondence and legal advice between legal division and various GNWT officials relating to the Litigation." This separates "correspondence" from "legal advice" without differentiating between the two. Nor does the affidavit provide evidence that each item of "correspondence" is confidential, what the purpose is of each piece of "correspondence", or which of them might contain or relate to the seeking or giving of "legal advice".

In essence, therefore, I am left with Brad Patzer's statement of his own opinion that, having reviewed all of the documents, they are all entirely protected by solicitor-client privilege. Even if I treat this as evidence in relation to each specific record, *i.e.*, evidence that each and every record falls within the privilege, I am left in effect with his blanket assertion of privilege without sufficient evidence to support that perspective. The descriptions of the documents, and such evidence as I have about the surrounding circumstances, are not sufficient to differentiate between communications that are privileged and those which may not be.

The challenge is, for example, illustrated by the fact that some of the stated subjects seem to suggest, at least on the surface, that some of the emails forwarded to or among various parties, including Brad Patzer, were apparently about subjects that may not necessarily relate to the seeking or giving of legal advice. For example, an email that has been forwarded on such subjects as "proof of move", "upcoming end of current employment" and "reference checks" might (or might not) be about employment, or human resources, matters without any relationship to seeking or giving legal advice.[40] The fact that Brad Patzer was a recipient, or possibly a sender, of emails on these topics does not, as the above principles confirm, suffice on its own to establish privilege.

[40] This observation is even more forceful in the case of emails that are only described as being about the applicant by name.

This is not to suggest that, because of the subject descriptions that have been chosen, the related emails are definitively not privileged. I just cannot ascertain, record by record, which are privileged, and which are not. I conclude that the evidence provided to me through Brad Patzer's affidavit is insufficient to establish, on the necessary balance of probabilities, that the necessary elements of solicitor client privilege have been proven in relation to each record over which that privilege is claimed. The evidence adduced by the Department does not meet its burden to establish the privilege it has claimed and make the appropriate recommendation below.

Proof of exercise of discretion by the Department of Finance

As noted earlier, the Department of Finance—the public body whose decision is actually under review here—indicated in its November 8, 2018 letter to me that the "Department of Justice Legal Division will not waive privilege and provide access to this information". As also noted earlier, at common law only a client can waive privilege. Under the Act, a discretionary exemption from disclosure such as section 15(a) may only be exercised by the public body that received the request and made the decision on disclosure. I am not aware on what basis the Department of Finance purported to delegate its discretion to the Department of Justice or permit the Department of Justice to exercise a client's rights in respect of privilege. At all events, if I had concluded that solicitor client privilege had been established, I would have remitted the matter to the Department of Finance to consider the exercise of its discretion under section 15(a).[41]

Severing of records

Further, if I had concluded that solicitor client privilege had been established here, I would note that section 5(2) of the Act requires public bodies to redact only the information that is protected by one or more of the exemptions and release the remainder. This applies to privilege records, as is the case in the civil litigation context. It may be the case that entire

[41] This is an issue that I raised in my communications with the Department of Justice, but I did not receive any submissions or evidence on this point.

records are privileged, but there is no evidence that the Department of Finance has considered this.[42]

A passing observation about the importance of providing records to my office

As already noted, the territorial government has for the past 20 years, without fail, readily provided my office with records over which it claims solicitor-client privilege. This is the first time a public body has refused to do so. Its decision has implications worth underscoring.

A key objective in creating expert statutory tribunals is to provide expert, timely and cost-effective resolution of such disputes without burdening the courts' dockets unless an appeal or judicial review application is launched. For this reason, the Legislature, like other Canadian legislatures, created the position of Information and Privacy Commissioner to review and adjudicate public body decisions to refuse to disclose information, including where a solicitor-client privilege claim is made.

My office has been successfully performing this function for decades. We resolve most requests for review—including those involving privilege claims—through expert, timely and cost-effective investigations. We do so in many cases without needing to issue decisions such as this. This avoids the significant cost and delay for all concerned.

[42] This is also an issue that I brought to the attention of the Department of Justice in correspondence.

In privilege cases, as in others, my office's ability to review records facilitates the timely and cost-effective resolution of privilege claims. A public body's refusal to disclose records without, as in this case, otherwise satisfying its burden under the Act, unnecessarily imposes costs and delay on all involved.

Nor are there plausible concerns that my office will disclose privileged records inappropriately. This has never happened during an investigation since we ensure that all records, notably allegedly privileged records, are kept secure in our premises. Further, where we conduct a review hearing, section 31(1) requires that it be private, which is consistent with section 56, which imposes on my office a duty to keep confidential all information that we acquire in discharging our duties, including information that is alleged to be privileged.

On completing a review my office does not disclose records that we have recommended be disclosed. That is the role of the public body.[43]

The government's repeated refusal to co-operate with my office ignores the significant protections for allegedly privileged records afforded by my office's consistent policy and practices and, significantly, by the Act. Failure to provide records jeopardizes the timely and cost-effective resolution of disputes and risks, as in this case, government failing to make its case for privilege, when my review of the disputed records in principle could have led to a different outcome.

With these observations in mind, I urge the Department and all other public bodies to resume, except in the clearest cases, the decades-old practice of providing records over which privilege is claimed. This is an area in which I firmly believe that "co-operation should be the rule and litigation the exception."[44] To reassure public bodies about our practices, I intend soon to issue a policy to guide practices in this area. That policy will ensure that my

[43] Section 37 of the Act.
[44] *British Columbia (Auditor General) v. British Columbia (Attorney General)*, 2013 BCSC 98 (CanLII), per Bauman CJSC (now CJBC), at paragraph 151.

office will ask for records only where it is necessary to do so in order determine whether the privilege claim is well-founded.[45]

CONCLUSION

Having found that the Department of Finance has not met its burden under the Act to establish that section 15(a) of the *Access to Information and Protection of Privacy Act* authorizes it to refuse to disclose the requested records, I **recommend** that the Department of Finance disclose the entirety of all of those records that it is withheld under that provision.

Elaine Keenan Bengts
Information and Privacy Commissioner

[45] In many cases it will not be necessary for my office to see records. For example, if my office is satisfied, based on a public body's written representation that a disputed record is a legal opinion given to a public body by its lawyer, my office is highly unlikely to need to see the record itself during the investigation.