

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Report 99-10
March 8, 1999
Review File: PC8138

A. BACKGROUND

On October 31st, 1997, the Applicant made an application under the *Access to Information and Protection of Privacy Act* (the "Act") to the Department of the Executive requesting a copy of the "Wallace Report", a report prepared by Brian Wallace for the Government of the Northwest Territories in late 1995 in relation to the proposal process for the granting of a contract for fuel supply and delivery in the eastern Arctic.

On February 27th, 1998, Gerald Sutton, Director of Policy and Planning for the Department of Justice replied to the Applicant's request, denying access to the document in question and claiming the following exemptions under the Act:

- a. The document is subject to Solicitor/client privilege (s. 15);
- b. The document constitutes a Executive Council confidence, including "advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board (s 13);
- c. The disclosure of the document could reasonably be expected to reveal
 - i) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,
 - ii) consultations or deliberations involving officers or employees of a public body or a member of the Executive Council;

- i) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of the Northwest Territories or a public body (s 14)

The Applicant referred the matter to this office for Review by letter of March 17, 1998. I asked for and received further submissions on the issues from the Department of Justice, who also provided me with a copy of the document in question and certain background documents. The Applicant was provided with a copy of the submissions (though not the documents) and was invited to provide submissions in reply. This invitation was provided several times but no further material was provided by the Applicant.

It is to be noted that, pursuant to section 33 of the Act, the onus in these circumstances is on the head of the public body to establish that the Applicant has no right of access to the record or part of the record.

B. RECORD AT ISSUE:

The record at issue is a report prepared by Mr. Brian Wallace, a lawyer with the private law firm of Lawson Lundell. It appears from the correspondence I was provided with that the document was initiated by a request by Don Morin, then Minister of Public Works and Services to the then Premier, Nellie Cournoyea, for a review regarding the process associated with a Request for Proposals on the Eastern Arctic Fuel Supply and Delivery Contracts. The review was directed by the Premier and was overseen by a working group headed by the Deputy Minister of Finance. There is reference at several points to the hiring of qualified legal expertise to undertake the review and prepare a report. The Report itself is a 19 page document (plus appendices) which has seven sections as follows:

- a) Terms of Reference
- b) Review Process
- c) Facts;

- d) The Concerns;
- e) Issues;
- f) Conclusions; and
- g) Recommendations.

In the covering letter to the government which accompanied his report, Mr. Wallace indicates that he understood that the report and the recommendations may be made public. The "Recommendation" section of the report, or at least the actual recommendations, were made public by the Government in a Press Release dated November 22nd, 1995.

C. THE ISSUES

The issues in this review are three-fold:

1. Is this report protected from disclosure by solicitor/client privilege? (Section 15 (a))
2. Is this report protected from disclosure by reason of the fact that it constitutes advice, a proposal, a request for directions, recommendation, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board? (Section 13 (1)(a))
3. Is this report protected from disclosure by reason of the fact that disclosure would reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council? (Section 14(1))

D. THE POSITION OF THE PARTIES

The primary argument put forward by the Department of Justice is that the report constitutes solicitor client privilege and is, therefore, exempt from disclosure. They argue that the report is "a legal opinion prepared by an eminent lawyer at the request of the Premier".

They also argue that the document also falls under Section 13 of the Act which requires that the head of a public body refuse to disclose information that would reveal a confidence of the Executive Council, including "advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board".

Finally, they suggest that under Section 14 of the Act, the head of the public body has discretion to exempt information pertaining to analyses and recommendations made to a member of the Executive Council, deliberations involving employees of a public body or a member of the Executive Council, and positions, plans, etc. relating to contractual or other negotiations.

The Applicant has not provided me with any detailed submissions.

E. DISCUSSION

1. Section 15 - Solicitor Client Privilege.

Section 15(a) of the *Access to Information and Protection of Privacy Act* provides as follows:

The head of a public body may refuse to disclose to an applicant

- a) information that is subject to any type of privilege available at law, including solicitor/client privilege;

I do not share the Department of Justice's opinion that the mere fact that this document was prepared by a lawyer makes it subject to lawyer/client privilege. The concept of solicitor/client confidence is a historical one. It refers to a rule which has developed over the centuries which provides that communications between a lawyer and his or her client in the course of a professional relationship, whether or not in contemplation of litigation, are protected from disclosure outside of that relationship, except with the consent of the client. As noted in "Government Information, Access

and Privacy":

The purpose of the rule is to facilitate full and frank consideration discussion of the circumstances on which legal advice is sought, so that the advice maybe informed and effectual, and to facilitate the preparation of a case for trial.

Government Information, Access and Privacy, Colin H.H. McNairn and Christopher D. Woodbury, Carswell Thompson Professional Publishing, p. 3-37

That having been said, it is not every communication with a lawyer that will attract the privilege. In the case of *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* [1995] B.C.J. No. 2594, Justice Thackery set out the following test for determining whether a matter is protected by solicitor/client privilege:

To establish solicitor-client privilege three criteria must be established. One, the communication must be between solicitor and client.....

Two, the parties intended the communication to be confidential.....

Third, the communication entails the seeking or giving of legal advice. It is the purpose of the communication that is relevant. If the purpose of the communications was simply to obtain information as to a matter of fact, the communications would not be privileged. However, if the purpose was to obtain legal advice then the privilege attaches even if the communication entails no more than the passing of factual information.

Here the first and the third tests are, I think, met. The communication was between a lawyer and a client and the purpose of the communication was to provide advice of a legal nature. The remaining question is whether there was an intention that the report would be confidential. Keeping in mind that the onus in this case is on the public body to show that the information should not be released to the public, I do not feel that there is sufficient material before me to find that the communication was intended to be confidential. The only real evidence I have on this issue is Mr. Wallace's covering letter which accompanied the report when presented to the government, in which he clearly states his understanding that the report may be made public. This, to my

mind, suggests that it was not intended to be confidential as between the parties. For this reason, I would be inclined to conclude that the report is not protected by solicitor/client privilege.

If I am wrong in this conclusion, and the report is protected by solicitor/client privilege, I have to consider whether that privilege has been waived by the government in this case. They have provided the press with a summary of the conclusions of the report and the entire section of the report entitled "Recommendations". Does this constitute a waiver of the solicitor/client privilege?

As set out in the case of *Stevens v. Canada (Privy Council)* (1997), 144 D.L.R. 553, :

The principle of waiver as a result of disclosure to a third party has been stated by Manes and Silver in *Solicitor-client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 207:

In essence, where the client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged.

That having been said, the waiver of privilege with respect to part of a document does not necessarily translate into a general waiver of the solicitor/client privilege.

In the same case, Justice Rothstein discusses whether the intentional disclosure of part of a privileged document has the effect of a general waiver with respect to all of the privileged document. He refers to the case of *S & K Processors Ltd. V. Campbell Ave. Hening Producers Ltd.* (1983) 35 CPC 146 @ 764 in which McLachlin, J. (as she then was), stated:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication.

Justice Rothstein goes on to hold, however, that unless the partial waiver of privilege causes unfairness between the parties or misleads and applicant or a court, a partial waiver will not necessarily translate into a full waiver of solicitor/client privilege. On appeal, the Federal Court of Appeal accepted this analysis. As the present case is not one involving court action, the question of unfairness is difficult to assess. I am satisfied, however, having read the entire report in question that there is nothing misleading in the disclosure of the recommendations without allowing access to the whole of the document. If this document were protected by solicitor client privilege, therefore, the partial waiver would not, in this case, constitute a waiver of privilege for the entire report.

Assuming that the document is protected by solicitor/client privilege, it is necessary also to consider whether the government in this case has properly used its discretion in refusing to release the balance of the Wallace Report. Section 15 gives the head of the public body the discretion to disclose information or not if it is protected by solicitor/ client privilege. In my view, this puts some onus on the public body to consider, in good faith, whether the privilege should be waived. As pointed out in *Stevens v. Canada, supra*,

a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity.

There is no evidence before me that the public body in this case has given any consideration to the possibility of waiving privilege in this case. Quite the opposite, in a letter to me from Gerald Sutton on behalf of the public body in response to my

request to outline the considerations taken into account when exercising the discretion, he states that

"the Department of Justice's interpretation of the solicitor-client privilege is that while the exemption under the Act is described as "discretionary", the government need only establish that the discretion was exercised"

With respect, I disagree. Section 1 of the *Access to Information and Protection of Privacy Act* states that the purpose of the Act is to "make public bodies more accountable to the public". If the government truly intends to live by the commitments made in this legislation, it must do more than give lip service to it. Where discretion is given, it must be exercised with the purposes of the Act in mind and it must be seen to have been exercised on that basis. To simply say that the discretion has been exercised is not sufficient. What issues have been considered when exercising the discretion? Is there a pending court case or the threat of litigation? If there is possibility of litigation, have the limitation periods passed? The mere possibility of political fallout would not be a sufficient reason to refuse to waive the privilege in light of the clear purposes of the Act.

In this case I have been given nothing to lead me to believe that there was any consideration given to the waiver of the "solicitor/client" privilege.

2. Section 13 - Cabinet Confidences

The public body also relies on section 13(1)(a) of the Act which reads as follows:

The head of a public body shall refuse to disclose to an applicant information that would reveal a confidence of the Executive Council, including

- a) advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board

A couple of things should be noted about this exemption. Firstly, it is mandatory. If this document is, in fact, a confidence of the Executive Council, the public body **shall** refuse to disclose it. Secondly, in order to qualify for this exemption, the document must have been prepared for presentation to the Executive Council (the Financial Management Board does not factor in this review).

Was this document prepared for presentation to the Executive Council? There is nothing to suggest that this is the case. One must look at the circumstances surrounding the preparation and use of the report. The report was requested by the Minister of Public Works and Services. It was authorized by the Premier and the report was directed to the Ministry of Finance, which had been given the task of developing the terms of reference and hiring a consultant to do the report. In the press release following the government's receipt of the report there is nothing to suggest that the report was given cabinet review. Rather, it states that "Premier Nellie Cournoyea said today that she is accepting the recommendation...".

The purpose of the exemption for cabinet confidences is to ensure active and open debate in cabinet deliberations. As noted by Alberta's Information and Privacy Commissioner in *Alberta (Treasury) and Alberta (Community Development)*, Order 97-010;

As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of the collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government.

I cannot say that there is anything before me to suggest that the report was considered by the cabinet or that the Premier's decision to accept the recommendation in the report was made as a result of cabinet deliberations. Without more, I cannot conclude that this was a cabinet confidence such as to attract the mandatory protection of Section 13 of the Act.

1. Section 14 - Advice from Officials - Section 14 of the Act provides that:

The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal:

- b) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;
- c) consultations or deliberations involving
 - ii) a member of the Executive Council
- d) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of the Northwest Territories or a public body, or considerations that relate to those negotiations.

Subsection (2) of the Act goes on to say:

Subsection (1) does not apply to information that:

- e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;
...or

My review of the circumstances and of the report itself suggests that this section of the Act does apply to the report. The report clearly constituted advice and recommendations made to a member of the Executive Council and the release of the report would reveal that advice. It should be noted that, in this case, the recommendations themselves have already been made public and have been acted on. In many jurisdictions in Canada, the fact that recommendations have been acted on erases the exemption. That does not appear to be the case in our legislation.

Unless subsection (2) applies, therefore, a discretionary exemption applies to the release of the information. The only one of the enumerated conditions which would take the report out of the protection of section 14 is subsection (e) outlined above.

Is the balance of the report the result of "background research" undertaken in connection with the formulation of a policy proposal? Having read the report, I do not believe that it can be classified as background "research". It contains background information and an indication of the factual basis upon which the advice and recommendations were made. However, it does not contain "research" in the context that I believe is intended by the section. In my opinion, therefore, section 14 applies to give the public body a discretionary exemption from disclosure of the information under the Act.

As discussed above, however, the discretion is one that must be exercised and be seen to be exercised on reasonable grounds. What were the considerations that went into the exercise of the discretion? Have the passage of time and the implementation of the recommendations contained in the report eliminated the need for further secrecy? I would restate my opinion that the possibility of political fallout as a result of the release of the information would not be a reasonable exercise of the discretion in light of the purposes and intention of the *Access to Information and Protection of Privacy Act*.

E. SUMMARY AND RECOMMENDATIONS

In summary, it is my finding and recommendation that:

- a) The Wallace Report is not protected from disclosure by solicitor/client privilege;
- b) If I am wrong in this, and the document is, in fact, protected by solicitor client privilege, there has been no general waiver of that privilege by the publication of the "Recommendations" portion of the report;
- c) If the document is protected by solicitor/client privilege, the public body has not properly exercised its discretion to waive that privilege and must provide the Applicant with a statement indicating the matters considered in exercising the discretion;

- d) The exercise of discretion must be done with the purposes of the *Access to Information and Protection of Privacy Act* in mind and must be reasonable.
- e) The Wallace Report is not protected from disclosure as being a cabinet confidence;
- e) The discretionary exemption provided by section 14 of the Act applies to the Wallace Report as it is advice and recommendations made to a member of the Executive Council.
- f) The discretion afforded to the public body by section 14 has not yet been properly exercised and the public body must provide the Applicant with a statement indicating the matters considered in exercising the discretion.
- g) The exercise of discretion must be done with the purposes of the *Access to Information and Protection of Privacy Act* in mind and must be reasonable.

Elaine Keenan Bengts
Information and Privacy Commissioner